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ERRATA.

323 § 1130—2nd line of foot note: "friend" should read "fund".

434 § 1781—16th line of foot note: "foreclosure" should read "for sale".

249 § 728—Next to the last line of the 2nd paragraph: "his" should read "this".

684 § 3192—Insert "to" after subject in the 2nd line.

760 § 3519—Sub. 5, 9th line: "proportioned" should read "apportioned".

937 § 4624—The number of the first cross reference section should read "4585".

578 § 2327—Change the cross reference numbers to §§ 1875-1884.

1471 § 7426—3rd line of foot note: §§ 1790-1794 should read §§ 1780-1784 and in the 4th line § 1790 should read § 1780.

1472 § 7427—3rd line of foot note: § 1795 should read §1785 and in the 4th line § 1793 should read § 1783.

1473 § 7433—3rd line of foot note: § 1792 should read § 1782.

After §§ 1780-1887 were numbered the numbers were changed and possibly the change was not noted in all the foot notes: §§ 1780-1813 were originally §§ 1790-1823; §§ 1814-1833 were originally §§ 1826-1845; §§ 1834-1847 were originally §§ 1850-1863; §§1848-1859 were originally §§ 1870-1881; §§ 1875-1887 were originally §§1900-1914.

The 2nd line of § 8390 should read: fully, and maliciously commits any trespass by either.

UTAH STATE PROPERTY

THE

COMPILED LAWS

OF THE

STATE OF UTAH

1917

Compiled, annotated, and published by authority
of an act of the Legislature by

ALLEN T. SANFORD,
RICHARD B. THURMAN,
Compilation Commissioners.

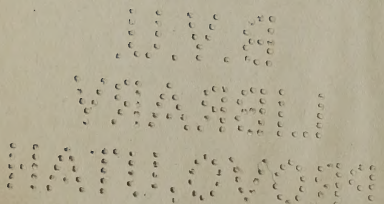
UTAH STATE PROPERTY

Together with the Constitution of the United States,
the Constitution of the State of Utah, the
Enabling Act, and the Naturalization
Laws and Regulations.

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PREFACE

This compilation, which includes all of the laws of Utah of a general or permanent nature now in force, was made by authority of Chapters 6 and 110 of the Session Laws of 1917, which provide that it may be cited or referred to as the Compiled Laws of Utah, 1917.

In arrangement, style, and printing it follows closely the Compiled Laws of 1907. To confine the work to one volume the printed page was lengthened. The sections were renumbered, with the old numbers in parentheses immediately following, and between chapters and titles a few numbers were skipped to permit the insertion of new sections that may be adopted without disarranging the number scheme of the entire volume.

The history of acts that have stood without amendment during the last decade was brought down from the compilation of 1907, and the history of new enactments and amendments was added to legislation since then.

The commission had no power to revise, their authority being confined to the correction of references, typographical errors, obvious errors in grammar and punctuation, the omission and displacement of words, and to the designation of statute sections, boards, officers, places, and things.

The system of annotation used in the 1907 compilation was adopted for the present volume. In a few instances where a case cites a statute and no particular construction is placed thereon, the title of the case was placed after the sections so cited. In some instances the annotations may go somewhat beyond the scope of statutory construction.

The Constitution of the United States and its amendments, the Constitution of Utah and its amendments, the Enabling Act, and the Naturalization Laws and Rules are separately indexed, but reference to them is made in the general index.

Care was exercised to achieve typographical excellence, and credit is due F. Eugene Morris, C. Otis Wilson, and Charles M. Hecker, who did the proofreading. Valuable assistance in compiling, annotating, and indexing the volume was rendered by Aaron Myers.

ALLEN T. SANFORD,

RICHARD B. THURMAN,

Compilation Commissioners.

CERTIFICATE OF AUTHENTICATION

STATE OF UTAH,
Office of Secretary of State, } ss.

I, Harden Bennion, Secretary of State of the State of Utah, do hereby certify that Allen T. Sanford and Richard B. Thurman are the duly appointed, qualified, and acting commissioners to compile and annotate the laws of the State of Utah, and to supervise the printing of said laws, and that the laws contained in this volume are officially published.



IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Great Seal of the State of Utah.

Done at my office this 12th day of February, A. D. 1917.

HARDEN BENNION,
Secretary of State.

We, the undersigned, Allen T. Sanford and Richard B. Thurman, commissioners appointed to compile and annotate the laws of the State of Utah and to supervise the printing of said laws, do hereby certify that the printed sections of the Compiled Laws of the State of Utah, 1917, as published in this volume, are prepared in conformity with "An act providing for the revision, annotation, and printing of the Laws of Utah, and creating a compilation commission, appointment of commissioners, and making an appropriation therefor," approved February 10, 1917, and the act amending section 4 of said act, approved March 16, 1917, and that the same are a full, true, and correct copy of the laws of Utah in force January 1, 1918.

IN WITNESS WHEREOF WE HAVE HEREUNTO set our hands this 6th day of April, A. D. 1918.

ALLEN T. SANFORD,
RICHARD B. THURMAN,
Compilation Commissioners.

UTAH STATE PROPERTY

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CONSTITUTION

OF THE

UNITED STATES OF AMERICA

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE. I.

Section. 1. All legislative Powers therein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section. 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York

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Note. The text of the constitution and amendments thereto, printed in this volume, was furnished by the department of state at Washington and is a literal print of the original documents on file.

six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section. 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

Amended, Art. 17 amendments.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Section. 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

Section. 5. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Section. 6. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time, and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Section. 7. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two-thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approvd by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Section. 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and Punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Section. 9. The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but

a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

Section. 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United Sates; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another state, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

ARTICLE. II.

Section. 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and

of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

Amended, Art. 12 amendments.

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

Section. 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section. 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Section. 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

ARTICLE. III.

Section. 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section. 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State Claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall

have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section. 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

ARTICLE. IV.

Section. 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section. 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Section. 3. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section. 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

ARTICLE. V.

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and

fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of it's equal Suffrage in the Senate.

ARTICLE. VI.

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

ARTICLE. VII.

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

The Word, "the," being interlined between the seventh and eight Lines of the first Page, The Word "Thirty" being partly written on an Erazure in the fifteenth Line of the first Page, The Words "is tried" being interlined between the thirty second and thirty third Lines of the first Page and the Word "the" being interlined between the forty third and forty fourth Lines of the second Page.

Attest William Jackson Secretary

done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth In witness whereof We have hereunto subscribed our Names,

G° Washington Presidt
and deputy from Virginia

New Hampshire	John Langdon Nicholas Gilman
Massachusetts	Nathaniel Gorham Rufus King
Connecticut	Wm Saml Johnson Roger Sherman
New York	Alexander Hamilton
New Jersey	Wil: Livingston David Brearley Wm Paterson Jona: Dayton

Pensylvania	B Franklin Thomas Mifflin Rob[T] Morris Geo. Clymer Tho[S] FitzSimons Jared Ingersoll James Wilson Gouv Morris
Delaware	Geo: Read Gunning Bedford jun John Dickinson Richard Bassett Jaco: Broom
Maryland	James M[C]Henry Dan of S[T] Tho[S] Jenifer Dan[L] Carroll
Virginia	John Blair— James Madison Jr.
North Carolina	W[M] Blount Rich[D] Dobbs Spaight. Hu Williamson
South Carolina	J. Rutledge Charles Cotesworth Pinckney Charles Pinckney Pierce Butler.
Georgia	William Few Abr Baldwin

In Convention Monday September 17[th] 1787.

Present

The States of

New Hampshire, Massachusetts, Connecticut, M[r] Hamilton from New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia. Resolved,

That the preceeding Constitution be laid before the United States in Congress assembled, and that it is the Opinion of this Convention, that it should afterwards be submitted to a Convention of Delegates, chosen in each State by the People thereof, under the Recommendation of its Legislature, for their Assent and Ratification; and that each Convention assenting to, and ratifying the Same, should give Notice thereof to the United States in Congress assembled.

Resolved, That it is the Opinion of this Convention, that as soon as the Conventions of nine States shall have ratified this Constitution, the United States in Congress assembled should fix a Day on which Electors should be appointed by the States which shall have ratified the same, and a Day on which the Electors should assemble to vote for the President, and the Time

and Place for commencing Proceedings under this Constitution. That after such Publication the Electors, should be appointed, and the Senators and Representatives elected: That the Electors should meet on the Day fixed for the Election of the President, and should transmit their Votes certified, signed, sealed and directed, as the Constitution requires, to the Secretary of the United States in Congress assembled, that the Senators and Representatives should convene at the Time and Place assigned; that the Senators should appoint a President of the Senate, for the sole Purpose of receiving, opening and counting the Votes for President; and, that after he shall be chosen, the Congress, together with the President, should, without Delay, proceed to execute this Constitution.

By the Unanimous Order of the Convention

G° WASHINGTON Presidt

W. JACKSON Secretary.

AMENDMENTS TO THE CONSTITUTION

Congress of the United States,
begun and held at the City of New-York, on
Wednesday the fourth of March, one thousand seven hundred and eighty nine.

THE Conventions of a number of the States, having at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the Government, will best ensure the benificent ends of its institution:

RESOLVED by the Senate and House of Representatives of the United States of America, in Congress assembled, two thirds of both Houses concurring, that the following Articles be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States, all or any of which Articles, when ratified by three fourths of the said Legislatures, to be valid to all intents and purposes, as part of the said Constitution; viz[t]

ARTICLES in addition to, and Amendment of the Constitution of the United States of America, proposed by Congress, and ratified by the Legislatures of the several States, pursuant to the fifth Article of the Original Constitution.

Article the first.....After the first enumeration required by the first Article of the Constitution, there shall be one Representative for every thirty thousand, until the number shall amount to one hundred, after which, the proportion shall be so regulated by Congress, that there shall be not less than one hundred Representatives, nor less than one Representative for every forty thousand persons, until the number of Representatives shall amount to two hundred, after which the proportion shall be so regulated by Congress, that there shall not be less than two hundred Representatives, nor more than one Representatives for every fifty thousand persons.*

Article the second.....No law, varying the compensation for the services of the senators and Representatives, shall take effect, until an election of Representatives shall have intervened.*

[ARTICLE I.]

Article the third.....Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

*The first two amendments here appearing were not adopted. The ten following were ratified, and the ratifications were communicated by the President to Congress, from time to time, as the several States notified him of their action. They now stand as the first ten amendments to the Constitution.

[ARTICLE II.]

Article the fourth.....A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

[ARTICLE III.]

Article the fifth.....No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

[ARTICLE IV.]

Article the sixth.....The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[ARTICLE V.]

Article the seventh.....No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

[ARTICLE VI.]

Article the eighth.....In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

[ARTICLE VII.]

Article the ninth.....In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to rules of the common law.

[ARTICLE VIII.]

Article the tenth.....Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

[ARTICLE IX.]

Article the eleventh.....The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

[ARTICLE X.]

Article the twelfth.....The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

FREDERICK AUGUSTUS MUHLENBERG Speaker
of the House of Representatives.
JOHN ADAMS, Vice-President of the United States,
and President of the Senate.

Attest,
JOHN BECKLEY, Clerk of the House of Representatives.
SAM. A. OTIS Secretary of the Senate.

Third

Congress of the United States:

At the First session,

Begun and held at the City of Philadelphia, in the State of Pennsylvania, on Monday the Second of December one thousand seven hundred and n nety-three.

Resolved by the Senate and House of Representatives of the United States of America, in Congress assembled, two thirds of both Houses concurring, that the following Article be proposed to the Legislatures of the several States, as an amendment to the Constitution of the United States; which when raified by three-fourths of the said Legislature shall be valid as part of the said Constitution, viz:

[ARTICLE XI.]

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

FREDERICK AUGUSTUS MUHLENBERG Speaker
of the House of Representatives.

JOHN ADAMS, { Vice President of the United States and President of the Senate.

ATTEST, { JOHN BECKLEY,.....Clerk of the House of Representatives.
SAM. A. OTIS Secretary of the Senate.*

*The eleventh amendment was declared by the President, in a message to Congress dated January 8, 1798, to have been ratified by three-fourths of the States.

EIGHTH CONGRESS OF THE UNITED STATES;

AT THE FIRST SESSION,

Begun and held at the city of Washington, in the territory of Columbia, on Monday, the seventeenth of October, one thousand eight hundred and three.

Resolved by the Senate and House of Representatives of the United States of America, in Congress assembled, Two thirds of both houses concurring, that in lieu of the third paragraph of the first section of the second article of the constitution of the United States, the following be proposed as an amendment to the constitution of the United States, which when ratified by three-fourths of the legislatures of the several states, shall be valid to all intents and purposes, as part of the said constitution, to wit:

[ARTICLE XII.]

The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.—The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no

person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

NATHL MACON Speaker of the House of Representatives.
A. BURR Vice-President of the United States, and
President of the Senate.

Attest—

JOHN BECKLEY.—Clerk of the House of Representatives.
SAM: A. OTIS Secretary of the Senate.*

Thirty-Eighth Congress of the United States of America

At the—Second—Session,

Begun and held at the City of Washington, on Monday, the fifth—day of December, one thousand eight hundred and sixty-four.

A RESOLUTION

Submitting to the legislatures of the several States a proposition to amend the Constitution of the United States.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, (two-thirds of both houses concurring), That the following article be proposed to the legislatures of the several States as an amendment to the constitution of the United States, which, when ratified by three-fourths of said Legislatures, shall be valid, to all intents and purposes, as part of the said Constitution, namely:

*The twelfth amendment, proposed in lieu of the original third paragraph of section I of Article II, was declared in a proclamation of the Secretary of State, dated September 25, 1804, to have been ratified by three fourths of the States.

ARTICLE XIII.

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section. 2. Congress shall have power to enforce this article by appropriate legislation.

SCHUYLER COLFAX
Speaker of the House of Representatives.
H. HAMLIN
Vice President of the United States,
and President of the Senate.

Approved, February 1, 1865.

ABRAHAM LINCOLN

[INDORSEMENT.]

I certify that this Resolution did originate in the Senate

J. W. FORNEY
Secretary*

*The thirteenth amendment was declared in a proclamation of the Secretary of State, dated December 18, 1865, to have been ratified by twenty-seven of the thirty-six States.

Thirty-ninth Congress of the United States, at the first session, begun and held at the City of Washington, in the District of Columbia, on Monday the fourth day of December, one thousand eight hundred and sixty-five.

Joint Resolution proposing an amendment to the Constitution of the United States.

Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled, (two-thirds of both Houses concurring,) That the following article be proposed to the legislatures of the several States as an amendment to the Constitution of the United States, which, when ratified by three-fourths of said legislatures, shall be valid as part of the Constitution, namely:

ARTICLE XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties

for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

SCHUYLER COLFAX
Speaker of the House of Representatives.
LA FAYETTE S. FOSTER,
President of the Senate pro tempore.

Attest.
EDWD MCPHERSON,
Clerk of the House of Representatives.
J. W. FORNEY,
Secretary of the Senate.*

Fortieth Congress of the United States of America;

At the third Session.

Begun and held at the city of Washington, on Monday, the seventh day of December, one thousand eight hundred and sixty-eight.

A RESOLUTION

Proposing an amendment to the Constitution of the United States.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, (two-thirds of both Houses concurring) That the following article be proposed to the legislatures of the several States as an amendment to the Constitution of the United States, which, when ratified by three-fourths of said legislatures shall be valid as part of the Constitution, namely:

ARTICLE XV.

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude—

Section 2. The Congress shall have power to enforce this article by appropriate legislation—

SCHUYLER COLFAX,
Speaker of the House of Representatives.
B. F. WADE
President of the Senate pro tempore.

*The fourteenth amendment being declared by a concurrent resolution of Congress, adopted July 21, 1868, to have been ratified by "three-fourths and more of the several States of the Union," the Secretary of State was required duly to promulgate the text. He accordingly issued a proclamation, dated July 28, 1868, declaring the proposed amendment to have been ratified by thirty of the thirty-six States.

Attest:
EDW[D] M[C]PHERSON
Clerk of House of Representatives.
GEO. C. GORHAM
Secy. of Senate U. S.*

Sixty-first Congress of the United States of America;

At the First Session,

Begun and held at the City of Washington on Monday, the fifteenth day of March, one thousand nine hundred and nine.

JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which, when ratified by the legislatures of three-fourths of the several States, shall be valid to all intents and purposes as a part of the Constitution:

ARTICLE XVI.

"The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."

J. G. CANNON
Speaker of the House of Representatives.
J. S. SHERMAN
Vice-President of the United States and
President of the Senate.

Attest:
A. MCDOWELL,
Clerk of the House of Representatives.
CHARLES G. BENNETT,
Secretary,
By HENRY H. GILFRY,
Chief Clerk.

(Indorsement.)
I certify that this Joint Resolution originated in the Senate.

CHARLES G. BENNETT,
Secretary.
By HENRY H. GILFRY,
Chief Clerk.†

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*The fifteenth amendment was declared in a proclamation of the Secretary of State, dated March 30, 1869, to have been ratified by twenty-nine of the thirty-seven States.

†The sixteenth amendment was declared in a proclamation of the Secretary of State, dated February 25, 1913, to have been ratified by thirty-eight of the forty-eight States. Utah rejected this amendment.

Sixty-second Congress of the United States of America;

At the Second Session,

Begun and held at the City of Washington on Monday, the fourth day of December, one thousand nine hundred and eleven.

JOINT RESOLUTION

Proposing an amendment to the Constitution providing that Senators shall be elected by the people of the several States.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That in lieu of the first paragraph of section three of Article 1 of the Constitution of the United States, and in lieu of so much of paragraph two of the same section as relates to the filling of vacancies, the following be proposed as an amendment to the Constitution, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the States:

ARTICLE XVII.

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

CHAMP CLARK,
Speaker of the House of Representatives.
J. S. SHERMAN,
Vice President of the United States and
President of the Senate.

(Indorsement.)

I certify that this Joint Resolution originated in the House of Representatives.

SOUTH TRIMBLE,
Clerk.*

*The Seventeenth amendment was declared in a proclamation of the Secretary of State, dated May 31, 1913, to have been ratified by thirty-six of the forty-eight States. Utah did not ratify this amendment.

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ENABLING ACT

AN ACT to enable the people of Utah to form a Constitution and State Government, and to be admitted into the Union on an equal footing with the Original States.

Formation of state authorized. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the inhabitants of all that part of the area of the United States now constituting the territory of Utah, as at present described, may become the state of Utah, as hereinafter provided.

SEC. 2. **[Convention. Electors. Delegates. Apportionment. Election.]** That all male citizens of the United States over the age of twenty-one years who have resided in said territory for one year next prior to such election are hereby authorized to vote for and choose delegates to form a convention in said territory. Such delegates shall possess the qualifications of such electors; and the aforesaid convention shall consist of one hundred and seven delegates, apportioned among the several counties within the limits of the proposed state as follows: Beaver county, two delegates; Box Elder county, four delegates; Cache county, eight delegates; Davis county, three delegates; Emery county, three delegates; Garfield county, one delegate; Grand county, one delegate; Iron county, one delegate; Juab county, three delegates; Kane county, one delegate; Millard county, two delegates; Morgan county, one delegate; Piute county, one delegate; Rich county, one delegate; Salt Lake county, twenty-nine delegates, thus apportioned, to-wit: Salt Lake City, first precinct, four delegates; second precinct, six delegates; third precinct, five delegates; fourth precinct, three delegates; fifth precinct, three delegates; all other precincts in said county outside of Salt Lake City, eight delegates; San Juan county, one delegate; San Pete county, seven delegates; Sevier county, three delegates; Summit county, four delegates; Tooele county, two delegates; Uintah county, one delegate; Utah county, twelve delegates; Wasatch county, two delegates; Washington county, two delegates; Wayne county, one delegate, and Weber county, eleven delegates; and the governor of said territory shall, on the first day of August, eighteen hundred and ninety-four, issue a proclamation ordering an election of the delegates aforesaid in said territory, to be held on the Tuesday next after the first Monday in November following. The board of commissioners known as the Utah Commission is hereby authorized and required to cause a new and complete registration of voters of said territory to be made under the provisions of the laws of the United States and said territory, except that the oath required for registration under said laws shall be so modified as to test the qualifications of the electors as prescribed in this act, such new registration to be made as nearly conformable with the provisions of such laws as may be; and such election for delegates shall be conducted, the returns made, the result ascertained, and the certificate of persons elected to such convention issued in the same manner as is prescribed by the laws of said territory regulating elections therein of members of the legislature. Persons possessing the qualifications entitling them to vote for delegates under this act shall be entitled to vote on the ratification or rejection of the constitution, under such rules or regulations as said convention may prescribe, not in conflict with this act.

Under the enabling act, women are not entitled to vote on the ratification or rejection of the constitution; nor are they entitled to vote at the election of state officers to take place on the same day as the constitutional election; nor does the enabling act confer on the people of the territory power to fix the qualifications of electors for state officers.
Anderson v. Tyree, 12 U. 129; 42 P. 201.

SEC. 3. **[Meeting of convention. Ordinance to be incorporated in constitution.]** That the delegates to the convention thus elected shall meet at the seat of government of said territory on the first Monday in March, eighteen hundred and ninety-five, and, after organization, shall declare on behalf of the people of said proposed state that they adopt the constitution

of the United States, whereupon the said convention shall be, and is hereby, authorized to form a constitution and state government for said proposed state.

The constitution shall be republican in form, and make no distinction in civil or political rights on account of race or color, except as to Indians not taxed, and not to be repugnant to the Constitution of the United States and the principles of the Declaration of Independence. And said convention shall provide by ordinance irrevocable without the consent of the United States and the people of said state—

First. That perfect toleration of religious sentiment shall be secured, and that no inhabitant of said state shall ever be molested in person or property on account of his or her mode of religious worship; *provided,* that polygamous or plural marriages are forever prohibited.

Second. That the people inhabiting said proposed state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof; and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States; that the lands belonging to citizens of the United States residing without the said state shall never be taxed at a higher rate than the lands belonging to residents thereof; that no taxes shall be imposed by the state on lands or property therein belonging to or which may hereafter be purchased by the United States or reserved for its use; but nothing herein, or in the ordinance herein provided for, shall preclude the said state from taxing, as other lands are taxed, any lands owned or held by any Indian who has severed his tribal relations and has obtained from the United States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of congress containing a provision exempting the lands thus granted from taxation; but said ordinance shall provide that all such lands shall be exempt from taxation by said state so long and to such extent as such act of congress may prescribe.

Third. That the debts and liabilities of said territory, under authority of the legislative assembly thereof, shall be assumed and paid by said state.

Fourth. That provision shall be made for the establishment and maintenance of a system of public schools, which shall be open to all the children of said state and free from sectarian control.

Irrevocable ordinance, Con. art. 3.
U. S. property exempted from taxation, Con. art. 3; art. 13, sec. 3.
Liabilities of territory assumed, Con. art. 3; art. 24, sec. 4.
System of public schools provided, Con. art. 3; art. 10, sec. 1.
Provision for submitting constitution to people, Con. art. 24, sec. 14.

SEC. 4. **[Vote on constitution. Canvass. Proclamation. Admission.]** That in case a constitution and state government shall be formed in compliance with the provisions of this act, the convention forming the same shall provide by ordinance for submitting said constitution to the people of said state for its ratification or rejection, at an election to be held on the Tuesday next after the first Monday in November, eighteen hundred and ninety-five, at which election the qualified voters of said proposed state shall vote directly for or against the proposed constitution, and for or against any provisions separately submitted. The return of said election shall be made to the said Utah Commission, who shall cause the same to be canvassed, and if a majority of the votes cast on that question shall be for the constitution, shall certify the result to the president of the United States, together with a statement of the votes cast thereon, and upon separate articles or propositions, and a copy of said constitution, articles, proposition, and ordinances. And if the constitution and government of said proposed state are republican in form, and if all the provisions of this act have been complied with in the formation

thereof, it shall be the duty of the president of the United States to issue his proclamation announcing the result of said election, and thereupon the proposed state of Utah shall be deemed admitted by congress into the Union, under and by virtue of this act, on an equal footing with the original states, from and after the date of said proclamation.

Women not entitled to vote at first election. Anderson v. Tyree, 12 U. 129; 42 P. 201.

SEC. 5. **[Congressman. Time of election of state officers. Territorial officers to continue.]** That until the next general census, or until otherwise provided by law, said state shall be entitled to one representative in the house of representatives of the United States, which representative in the Fifty-fourth congress, together with the governor and other officers provided for in said constitution, may be elected on the same day of the election for the adoption of the constitution; and until said state officers are elected and qualified under the provisions of the constitution, and the state is admitted into the Union, the territorial officers shall continue to discharge the duties of the respective offices in said territory.

Provision for continuance of territorial officers, Con. art. 24, sec. 10.

SEC. 6. **[Land grant for common schools.]** That upon the admission of said state into the Union, sections numbered two, sixteen, thirty-two, and thirty-six in every township of said proposed state, and where such sections, or any parts thereof, have been sold or otherwise disposed of by or under the authority of any act of congress, other lands equivalent thereto, in legal subdivisions of not less than one quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said state for the support of common schools, such indemnity lands to be selected within said state in such manner as the legislature may provide, with the approval of the secretary of the interior; *provided,* that the second, sixteenth, thirty-second, and thirty-sixth sections embraced in permanent reservations for national purposes shall not, at any time, be subject to the grants nor to the indemnity provisions of this act, nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants or to the indemnity provisions of this act until the reservation shall have been extinguished and such lands be restored to and become a part of the public domain.

Public school fund, Con. art. 10, secs. 3, 5, 7; art. 20.

Act of Congress of May 3, 1902, makes the provisions of an act of Congress approved Feb. 28, 1891 (26 stat. 796) applicable to the state of Utah with reference to the selection of indemnity school lands.

Lands known to be valuable for mineral at time state right attaches do not pass to the state.

U. S. v. Sweet, United States Supreme Court, Jan. 28, 1917.

SEC. 7. **[Land grant for public buildings.]** That upon the admission of said state into the Union, in accordance with the provisions of this act, one hundred sections of the unappropriated lands within said state to be selected and located in legal subdivisions, as provided in section six of this act, shall be and are hereby granted to said state for the purpose of erecting public buildings at the capital of said state when permanently located, for legislative, executive, and judicial purposes.

SEC. 8. **[Land grant to university and agricultural college. Permanent fund.]** That lands to the extent of two townships in quantity, authorized by the third section of the act of February twenty-one, eighteen hundred and fifty-five, to be reserved for the establishment of the University of Utah, are hereby granted to the state of Utah for university purposes, to be held and used in accordance with the provisions of this section; and any portions of said lands that may not have been selected by said territory may be selected by said state. That in addition to the above, one hundred and ten thousand acres of land, to be selected and located as provided in the foregoing section of this act, and including all saline lands in said state, are hereby granted to said state, for the use of said university, and two hundred thousand acres for the use of an agricultural college therein. That the proceeds of the sale of said lands, or any portion thereof, shall constitute permanent funds, to be safely

invested and held by said state, and the income thereof to be used exclusively for the purposes of such university and agricultural college, respectively.

University and agricultural college funds, Con. art. 10, sec. 5; art. 20, sec. 1.
Proceeds derived from the sale of university lands are governed entirely by this section.
State v. Candland, 36 U. 406, 104 P. 285.

Only such saline lands as should be selected as a part of the other lands granted and not specifically located were granted to the state of Utah, under this section.
Montello Salt Co. v. State, 221 U. S. 452.

SEC. 9. **[Five per cent of sales of public lands granted to schools.]** That five per centum of the proceeds of the sales of public lands lying within said state, which shall be sold by the United States subsequent to the admission of said state into the Union, after deducting all the expenses incident to the same, shall be paid to the said state, to be used as a permanent fund, the interest of which only shall be expended for the support of the common schools within said state.

SEC. 10. **[Permanent school fund. Lands granted not subject to entry under laws of U. S.]** That the proceeds of lands herein granted for educational purposes, except as hereinafter otherwise provided, shall constitute a permanent school fund, the interest of which only shall be expended for the support of said schools, and such land shall not be subject to pre-emption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be surveyed for school purposes only.

Perpetual educational funds, Con. art. 10, secs. 3, 5, 7; art. 20, sec. 1.

This section does not apply to proceeds derived from sale of university lands.
State v. Candland, 36 U. 406, 104 P. 285.

SEC. 11. **[Schools, colleges, and university must remain under state control.]** The schools, colleges, and university provided for in this act shall forever remain under the exclusive control of said state, and no part of the proceeds arising from the sale or disposal of any lands herein granted for educational purposes, or of the income thereof, shall be used for the support of any sectarian or denominational school, college, or university.

State control of schools, Con. art. 3; art. 10, sec. 1.
Funds perpetuated to uses for which granted, Con. art. 10, secs. 3, 5, 7; art. 20; sec. 1.

State prohibited from granting aid to sectarian schools, Con. art. 1, sec. 4; art. 10, sec. 13.

SEC. 12. **[Other land grants. Enumeration. Penitentiary granted.]** That in lieu of the grant of land for purposes of internal improvement made to new states by the eighth section of the act of September fourth, eighteen hundred and forty-one, which section is hereby repealed as to said state, and in lieu of any claim or demand by the state of Utah under the act of September twenty-eighth, eighteen hundred and fifty, and section twenty-four hundred and seventy-nine of the Revised Statutes, making a grant of swamp and overflowed lands to certain states, which grant, it is hereby declared, is not extended to said state of Utah, the following grants of land are hereby made to said state, for the purposes indicated, namely:

For the establishment of permanent water reservoirs for irrigating purposes, five hundred thousand acres; for the establishment and maintenance of an insane asylum, one hundred thousand acres; for the establishment and maintenance of a school of mines in connection with the University, one hundred thousand acres; for the establishment and maintenance of a deaf and dumb asylum, one hundred thousand acres; for the establishment and maintenance of a reform school, one hundred thousand acres; for establishment and maintenance of state normal schools, one hundred thousand acres; for the establishment and maintenance of an institution for the blind, one hundred thousand acres; for a miners' hospital for disabled miners, fifty thousand acres. The United States penitentiary near Salt Lake City and all lands and appurtenances connected therewith and set apart and reserved therefor are hereby granted to the state of Utah.

The said state of Utah shall not be entitled to any further or other grants of land for any purpose than as expressly provided in this act; and the lands granted by this section shall be held, appropriated, and disposed of exclusively

for the purposes herein mentioned, in such manner as the legislature of the state may provide.

Land grants held for purposes prescribed, Con. art. 10, secs. 3, 5, 7; art. 20, sec. 1.

Sec. 13. **[Selection of lands granted.]** That all land granted in quantity or as indemnity by this act shall be selected, under the direction of the secretary of the interior, from the unappropriated public lands of the United States within the limits of the said state of Utah.

Sec. 14. **[U. S. district and circuit courts. U. S. attorney and marshal. Term of court. Jurors.]** That the state of Utah shall constitute one judicial district, which shall be called the district of Utah, and the circuit and district courts thereof shall be held at the capital of this state for the time being. The judge of said district shall receive a yearly salary of five thousand dollars, payable monthly, and shall reside in his district. There shall be appointed clerks of said courts, who shall keep their offices at the capital of said state. There shall be appointed for said district one district judge, one United States attorney, and one United States marshal. The regular terms of said courts shall be held at the place aforesaid on the first Monday in April and the first Monday in November of each year. For judicial purposes, the district of Utah shall be attached to the eighth judicial circuit, and only one grand jury and one petit jury shall be summoned in both of said courts.

Sec. 15. **[Powers, jurisdiction, and duties of U. S. courts and judges.]** That the circuit and district courts for the district of Utah and the judges thereof, respectively, shall possess the same powers and jurisdiction and perform the same duties possessed and required to be performed by the other circuit and district courts and judges of the United States, and shall be governed by the same laws and regulations.

Sec. 16. **[Duties of U. S. marshal, attorney, and other officers. Fees and compensation.]** That the marshal, district attorney, and clerks of the circuit and district courts of the said district of Utah, and all other officers and other persons performing duty in the administration of justice therein, shall severally possess the powers and perform the duties lawfully possessed and required to be performed by similar officers in other districts of the United States, and shall, for the services they may perform, receive the same fees and compensation allowed by law to other similar officers and persons performing similar duties.

Sec. 17. **[Transfer of causes. Appeals. Succession to territorial courts.]** That the convention herein provided for shall have the power to provide, by ordinance, for the transfer of actions, cases, proceedings, and matters pending in the supreme or district courts of the territory of Utah at the time of the admission of the said state into the Union to such courts as shall be established under the constitution to be thus formed, or to the circuit or district court of the United States for the district of Utah: and no indictment, action, or proceeding shall abate by reason of any change in the courts, but shall be proceeded with in the state or United States courts according to the laws thereof, respectively. That all cases of appeal or writ of error heretofore prosecuted and now pending in the supreme court of the United States upon any record from the supreme court of said territory, or that may hereafter lawfully be prosecuted upon any record from said court, may be heard and determined by said supreme court of the United States; and the mandate of execution or of further proceedings shall be directed by the supreme court of the United States to the circuit or district court hereby established within the said state from or to the supreme court of such state, as the nature of the case may require. And the circuit, district, and state courts herein named shall, respectively, be the successors of the supreme court of the territory as to all such cases arising within the limits embraced within the jurisdiction of such courts, respectively, with full power to proceed with the same, and award mesne or final process therein; and that from all judgments and decrees of the supreme court of the territory, mentioned in this act, in any case arising

within the limits of the proposed state prior to admission, the parties to such judgment shall have the same right to prosecute appeals and writs of error to the supreme court of the United States as they shall have had by the law prior to the admission of said state into the Union.

Transfer of causes, etc., provided, Con. art. 24, secs. 6-9.

SEC. 18. **[Appropriation for convention.]** That the sum of thirty thousand dollars, or so much thereof as may be necessary, is hereby appropriated out of any money in the treasury not otherwise appropriated to said territory for defraying the expenses of said convention and for the payment of the members thereof, under the same rules and regulations and at the same rates as are now provided by law for the payment of the territorial legislature.

SEC. 19. **[Election of state officers. Representative. U. S. senators. State government. Territorial and U. S. laws.]** That the constitutional convention may, by ordinance, provide for the election of officers for a full state government, including members of the legislature and representative in the fifty-fourth congress, at the time for the election for the ratification or rejection of the constitution; but the said state government shall remain in abeyance until the state shall be admitted into the Union as proposed by this act. In case the constitution of said state shall be ratified by the people, but not otherwise, the legislature thereof may assemble, organize, and elect two senators of the United States in the manner now prescribed by the laws of the United States; and the governor and secretary of state of the proposed state shall certify the election of the senators and representative in the manner required by law, and when such state is admitted into the Union, as provided in this act, the senators and representatives shall be entitled to be admitted to seats in congress, and to all rights and privileges of senators and representatives of other states in the congress of the United States; and the state government formed in pursuance of said constitution, as provided by the constitutional convention, shall proceed to exercise all the functions of state officers; and all laws in force made by said territory at the time of its admission into the Union shall be in force in said state, except as modified or changed by this act or by the constitution of the state; and the laws of the United States shall have the same force and effect within the said state as elsewhere within the United States.

Election of state officers provided for, Con. art. 24, secs. 11, 12.
Territorial laws continued in force, Con. art. 24, sec. 2.

SEC. 20. **[Repealing clause.]** That all acts or parts of acts in conflict with the provisions of this act, whether passed by the legislature of said territory or by congress, are hereby repealed.

Approved, July 16, 1894.

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CONSTITUTION

OF THE

STATE OF UTAH

PREAMBLE.

Grateful to Almighty God for life and liberty, we, the people of Utah, in order to secure and perpetuate the principles of free government, do ordain and establish this

CONSTITUTION.

ARTICLE I.

DECLARATION OF RIGHTS.

SECTION 1. **[Inherent and inalienable rights.]** All men have the inherent and inalienable right to enjoy and defend their lives and liberties; to acquire, possess and protect property; to worship according to the dictates of their consciences; to assemble peaceably, protest against wrongs, and petition for redress of grievances; to communicate freely their thoughts and opinions, being responsible for the abuse of that right.

Toleration of religious sentiment, art 1, sec. 4; art. 3, sec. 1; Enabling Act. sec. 3.
Religious or partisan qualifications in schools forbidden, art 10, sec. 12.
Freedom of speech, art. 1, sec. 15.
Decisions as to due process of law, art 1, sec. 7.
Decisions on exercise of the police power, Note to art 6, sec. 1.
Obligation of contracts not to be impaired, art. 1, sec 18.
Private property shall not be taken or damaged for public use, without just compensation, art. 1, sec 22, and note.
Vaccination may be required of children as a condition of attending public school.
State v. Board of Ed. of S. L. City, 21 U. 401; 60 P. 1013. But see § 2763.

The right to take property by devise or descent is not a natural right, but one allowed by law. Inheritance tax valid.
Dixon v. Ricketts, 26 U. 215; 72 P. 947.
A statute restricting sale of merchandise in bulk, except upon notice, etc., is unconstitutional as an unwarranted interference with the right of property.
Block v. Schwartz, 27 U. 387; 76 P. 22.
The state has the right to absolutely prohibit the sale of intoxicating liquors.
State v. Briggs, 46 W. 288; 146 P. 261.
The act prohibiting the possession or sale of intoxdicating liquors, §§ 3341-3375, is not violative of this section.
State v. Certain Intox. Liquors, 50 U. —; 172 P. 1050.

SEC. 2. **[All political power inherent in the people.]** All political power is inherent in the people; and all free governments are founded on their authority for their equal protection and benefit, and they have the right to alter or reform their government as the public welfare may require.

A statute which allows an attorney's fee to a successful lien claimant does not give to all the equal protection of the law and is unconstitutional.
Brubaker v. Bennett, 19 U. 401; 57 P. 170.
A statute allowing an attorney's fee to a mortgagor in an action to compel cancellation of mortgage, if successful, denies to the mortgagee the equal protection of the law and is unconstitutional.
Openshaw v. Young, 24 U. 426; 68 P. 138.

SEC. 3. **[Utah inseparable from the Union.]** The State of Utah is an

Note.—The text of the constitution of Utah is a literal print of the original on file, except as to the black-letter lines preceding sections and inclosed in brackets.
The constitution was adopted Nov 5, 1895, by a vote of 31,305 to 7,687. The proclamation of the president of the United States announcing the result of such election and admitting the state to the union was issued Jan. 4, 1896. The inauguration of state officers took place Jan. 6, 1896.

inseparable part of the Federal Union and the Constitution of the United States is the supreme law of the land.

The constitution of the United States printed in the first part of this volume.

SEC. 4. **[Religious liberty.]** The rights of conscience shall never be infringed. The State shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; no religious test shall be required as a qualification for any office of public trust or for any vote at any election; nor shall any person be incompetent as a witness or juror on account of religious belief or the absence thereof. There shall be no union of Church and State, nor shall any church dominate the State or interfere with its functions. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or for the support of any ecclesiastical establishment. No property qualification shall be required of any person to vote or hold office, except as provided in this Constitution.

Toleration of religious sentiment, art. 1, sec. 1; art. 3, sec. 1; Enabling Act, sec. 3.

Religious or partisan qualifications in schools forbidden, art 10, sec. 12.

Public money not to be appropriated to sectarian establishments, art. 10, sec. 13; Enabling Act, sec. 3.

Property qualifications, when required of voter, art. 4, sec. 7; art. 14, sec. 3.

Qualifications of voter at general election, art. 4, secs. 2, 6.

One charged with polygamy will not be permitted to show that polygamous marriage is a part of his religious belief.

U. S. v. Reynolds, 1 U. 226; affirmed 98 U. S. 145.

U. S. v. Miles, 2 U. 19; affirmed 103 U. S. 304.

SEC. 5. **[Habeas corpus.]** The privilege of the writ of *habeas corpus* shall not be suspended, unless, in case of rebellion or invasion, the public safety requires it.

Habeas corpus, general provisions, §§ 1069-1095.

SEC. 6. **[Right to bear arms.]** The people have the right to bear arms for their security and defense, but the Legislature may regulate the exercise of this right by law.

SEC. 7. **[Due process of law.]** No person shall be deprived of life, liberty or property, without due process of law.

Due course of law, art. 1, sec. 11.

Decisions as to valid exercise of police power. Note to art. 6, sec. 1.

Private property not to be taken for public use without compensation, art. 1, sec. 22.

Obligation of contracts not to be impaired, art. 1, sec. 18, and note.

The private household goods of a criminal cannot be deemed to be affected by the crimes and misconduct of the owner, and such property cannot be destroyed or taken, except by due process of law.

Conway v. Clinton, 1 U. 215.

A lot entered under the townsite act cannot be sold by an administrator to pay debts, or otherwise taken from the heirs, except by due process of law in a proceeding to which the heirs are parties.

Cain Heirs v. Young, 1 U. 361.

A city ordinance providing for dog tax and the killing of unregistered dogs, is due process of law. Dogs are property.

Jenkins v. Ballantyne, 8 U. 245; 30 P. 760.

The highway act making owners of sheep, cattle, etc., liable for damage to roads is due process of law.

Brimm v. Jones, 11 U. 200; 39 P. 825.

The medical act of 1892, requiring examination and payment of fee before practicing medicine, is due process of law.

People v. Hasbrouck, 11 U. 291; 39 P. 918.

Eight hour law for underground miners is due process of law; employer legally convicted for violation.

Holden v. Harvey, 14 U. 71; 46 P. 756; affirmed 169 U. S. 366.

State v. Holden, 14 U. 96; 46 P. 1105.

Necessarily, the procedure of raising and lowering of assessed valuation of property for purposes of taxation, differs from judicial procedure, but it has always been considered due process of law.

State v. Armstrong, 19 U. 117; 50 P. 1076.

The term "due process of law," was borrowed from constitution of U. S. and is held applicable to the states. It is held to guarantee no particular form of procedure, but the very substance of individual right to life, liberty and property.

In re McKee, 19 U. 231; 57 P. 23.

A proceeding by information instead of by indictment of a grand jury, is due process of law.

In re Maxwell, 19 U. 495; 57 P. 412; affirmed 176 U. S. 581.

State v. Imlay, 22 U. 156; 61 P. 557.

All persons, residents and non-residents, are equally subject to the remedial law when found within the state.

Steed v. Harvey, 18 U. 367; 54 P. 1011.

For a municipality to assume control of a private water system and to levy taxes on land of owners thereof to maintain it, is to deprive them of property without due process of law.

Fisher v. Bountiful City, 21 U. 29; 59 P. 520.

Unjust and illegal discrimination between persons, in taxation, and the denial of equal justice are within the prohibition of the constitution of this state and of the United States. Cache county sheep ordinance invalid.

Matthews v. Jensen, 21 U. 207; 61 P. 303.

Sunday barber bill is due process of law.

State v. Sopher, 25 U. 318; 71 P. 482

A statute restricting sale of merchandise in bulk, except upon notice, etc., is unconstitutional, as an unwarranted interference with the right of property.

Block v. Schwartz, 27 U. 387; 76 P. 22.

Providing for closing of stores at certain hour, violates this section of the Constitution.

Saville v. Corless, 46 U. 495; 151 P. 51.

Drainage act of 1905 (C. L. 1907, sec. 760-779,) held unconstitutional.

Argyle et al. v. Johnson, 39 U. 500; 118 P. 487.

Does not make county liable for services of an attorney appointed by court to defend an indigent accused.

Pardee v. Salt Lake County, 39 U. 482; 118 P. 122.

Sections 3501-3555, authorizing creation of irrigation districts and providing for the taxing of property therein and the bonding of the

district is not invalid, as any land owner has opportunity to be heard on objections to including his land within the proposed district.
Lundberg v. Green River Irrig. Dist. et al., 40 U. 83; 119 P. 1039.
Horn v. Shaffer, 47 U. 55; 151 P. 555.
An act requiring a land owner to secure a bond from a contractor making improvements or the owner to be personally liable to material men or labor does not deprive him of due process of law.
Rio Grande Lbr. Co., v. Darke, 50 Utah —; 167 P. 241.
The act prohibiting the possession or sale of intoxicating liquors, §§ 3341-3375, is not violative to this section.
State v. Certain Intox. Liquors, 50 U. —; 172 P. 1050.

SEC. 8. **[Offenses bailable.]** All prisoners shall be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption strong.

Provisions as to bail, §§ 4623-4627, 4983-5010.
Rights of accused persons, art. 1, sec. 12, and note.

SEC. 9. **[Excessive bail and fines. Cruel punishments.]** Excessive bail shall not be required; excessive fines shall not be imposed; nor shall cruel and unusual punishments be inflicted. Persons arrested or imprisoned shall not be treated with unnecessary rigor.

SEC. 10. **[Trial by jury.]** In capital cases the right of trial by jury shall remain inviolate. In courts of general jurisdiction, except in capital cases, a jury shall consist of eight jurors. In courts of inferior jurisdiction a jury shall consist of four jurors. In criminal cases the verdict shall be unanimous. In civil cases three-fourths of the jurors may find a verdict. A jury in civil cases shall be waived unless demanded.

Jury waived unless demanded, §§ 6782, 6827.
Right to bail, art. 1, secs. 8, 9.
Rights of accused person, art. 1, sec. 12.
Criminal prosecutions begun and crimes committed before statehood, art. 24, secs. 1, 6.
Under territorial law, a defendant charged with felony was entitled to be tried by twelve jurors; held, in the following cases, that for any felony less than capital, committed before statehood, he could be tried afterwards by a jury of eight, and that this did not deprive him of a constitutional right. (Reversed, 170 U. S., 343.)
State v. Bates, 14 U. 293; 47 P. 78.
State v. Carrington, 15 U. 480; 50 P. 526.
State v. Thompson, 15 U. 488; 50 P. 409.
In re James McKee, 19 U. 231; 57 P. 23.
State v. Bates, 22 U. 65; 61 P. 905.
The Thompson case (supra) was appealed to the supreme court of the U. S., and it was there held that, as to a felony committed before statehood, the defendant was entitled under the Con. of U. S., to a trial by twelve jurors.
Thompson v. Utah, 170 U. S. 343.
Following the decision of the U. S. supreme court in the Thompson case; held that, as to offenses committed before statehood, territorial laws were continued in force, so as to enable a defendant to be tried by twelve jurors.
State v. Hart, 19 U. 438; 57 P. 415.
A jury for trial of one accused of a felony committed since statehood may lawfully consist of eight jurors.
In re Maxwell, 19 U. 495; 57 P. 412; affirmed 176 U. S. 581.
State v. Imlay, 22 U. 156; 61 P. 557.
Sec. 6782 providing how and when a jury may be demanded is in harmony with the provisions of this section.
Nichols v. Cherry, 22 U. 1; 60 P. 1103.
Gibson v. McGurrin, 37 U. 158; 106 P. 669.
Davis v. D. & R. G., 45 U. 1; 142 P. 705.
Where information is sufficient to sustain a verdict of murder in the first degree, and the accused being tried in a court of general jurisdiction, was entitled to a jury of twelve.
State v. Campbell, 24 U. 103; 66 P. 771.
The court may call a jury on its own motion although both parties waive a jury trial.
Ogden Valley Trout & Resort Co. v. Lewis, 41 U. 183; 125 P. 687.

SEC. 11. **[Courts open. Redress of injuries.]** All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

Due process of law, art. 1, sec. 7.
This section does not prevent abatement of an action for malicious personal injury where the wrong-doer died immediately after the injury.
Brown v. Wightman, 47 U. 26; 151 P. 366.
The state may reserve to itself the sole right to bring actions for the dissolution of building and loan associations, hence this section is a limitation in the granting of power prohibiting any restrctions upon the common law right of access to the court but not enlarging that right.
Union Savings & Inv. Co., v. Dist. Court, 44 U. 397; 140 P. 221.

SEC. 12. **[Rights of accused persons.]** In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights

herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

Actions must be tried in county where they arise, art. 8, sec. 5, and note.

Appeals, art. 8, sec. 9, and note.

Appeal to district court, decision final, when, art. 8, sec. 9, and note.

Right to bail, art. 1, secs. 8, 9.

Twice in jeopardy, §§ 8520, 8522, 8555, 8652, 8653, 8905, 9350, 4515, 4588; decisions on twice in jeopardy. Note to § 8555.

Defendant could be tried again for murder in the first degree, after the verdict of guilty of murder in the second degree has been set aside on his own motion.

State v. Kessler, 15 U. 142; 49 P. 293.

The acts of congress defining "adultery," and prescribing punishment therefor, in the territories, as a crime against the United States, were not exclusive of territorial legislation on the same subject, and did not prevent the territorial legislature from punishing by statute the same act as an offense against the territorial government and its laws, and an offender could be punished under both.

State v. Norman, 16 U. 457; 52 P. 986.

An order of the trial court permitting witness to turn her back to accused and directing the removal of defendant so far that he could neither see nor hear the witness nor see the jury, denied defendant a constitutional right and prevented him from having a fair trial.

State v. Mannion, 19 U. 505; 57 P. 542.

Sec. 9207 is not inconsistent with this section, nor art. 8, sec. 9, and gives a defendant the right to move for a new trial upon facts discovered after judgment and to appeal from an order refusing to set aside the judgment and grant a new trial.

State v. Morgan, 23 U. 212; 64 P. 356.

The right of an accused under this section, to a "speedy public trial by an impartial jury," cannot be defeated by reason of the want of any legislative remedy for a wrong inflicted during a criminal trial, as the court will resort to the common law if it affords a remedy, and if not, courts by virtue of their inherent power and their duty in criminal cases to guard the rights of persons, will, if possible, devise new remedies.

State v. Morgan, 23 U. 212; 64 P. 356.

An accused is not denied a speedy public trial because an information was not filed for thirty days; there being good cause shown.

State v. Reynolds, 24 U. 29; 66 P. 614.

Sec. 8553, sub. 4, providing that the deposition of a witness taken before the committing magistrate may be used in the trial in certain cases, is constitutional.

State v. King, 24 U. 482; 68 P. 418.

Defendant in a homicide case may waive right to object to view by jury, and right to accompany them.

State v. Mortensen, 26 U. 312; 73 P. 562.

Defendant in homicide case may waive presence of witness and admit his testimony as if present.

Id.

Where defendant is also the witness, he need not personally make the objection and claim his privilege from questions asked respecting the commission of other crimes by him, on the ground that such questions are incriminating, but may claim his immunity through his counsel. (People v. Larson, 10 U. 143 disapproved.)

State v. Shockley, 29 U. 25; 80 P. 865.

Where a jury was empaneled and sworn to try accused and the cause was dismissed after the evidence was all introduced, he was thereby placed in jeopardy, and cannot be tried again for the crime charged in the information, or any other offense included therein.

State v. Hows, 31 U. 168; 87 P. 163.

Laws, 1905, p. 182, creating juvenile courts, with jurisdiction to provide for custody of "delinquent children," as defined by it, not being a criminal law, but having for its object the surrounding of such children with proper environments, violates no constitutional provisions because not providing for trial by jury, for arraignment, plea, etc.; nor because of the manner of trial and examination, and that the child is required to be a witness.

Mill v. Brown, 31 U. 473; 88 P. 609.

Law of 1905, providing for punishment by juvenile court of parents of delinquent children is unconstitutional, as denying right of legal trial.

Id.

Section 9277, authorizing the admission in a criminal case of testimony taken at a former trial where the witness is dead or beyond the jurisdiction of the court does not conflict with this section.

State v. Green, 38 U. 389; 115 P. 181.

State v. Inlow, 44 U. 485; 141 P. 530.

Where accused appealing from a conviction has not shown himself impecunious and obtained the right to prosecute the appeal as a poor person, he is liable on affirmance for costs of printing briefs on appeal, though not for fees otherwise payable to the clerk.

Salt Lake City v. Robinson, 39 U. 260; 116 P. 442.

Does not make county liable for services of an attorney appointed by court to defend an indigent accused.

Pardee v. Salt Lake County, 39 U. 482; 118 P. 122.

SEC. 13. **[Prosecution by information or indictment. Grand jury.]** Offenses heretofore required to be prosecuted by indictment, shall be prosecuted by information after examination and commitment by a magistrate, unless the examination be waived by the accused with the consent of the State, or by indictment, with or without such examination and commitment. The grand jury shall consist of seven persons, five of whom must concur to find an indictment; but no grand jury shall be drawn or summoned unless in the opinion of the judge of the district, public interest demands it.

Prosecutions conducted in the name of "The State of Utah," art. 8, sec. 18.

What courts may hold preliminary examination in case of felony, art. 8, sec. 21.

See note to § 8779.

Under this constitutional provision and under chap. 23, Laws 1896, (§§ 8828-8831), a magistrate has authority to examine and commit a prisoner charged with commission of an offense to answer the charge in proper court.

State v. Pierpont, 16 U. 476; 52 P. 992.

An accused has the right, with the consent of the state, to waive examination before committing magistrate; and if none was had and he goes to trial without objection, the examination will be presumed to have been waived, and after trial he will be precluded from insisting on the objection.

State v. Norman, 16 U. 457; 52 P. 986.

Provisions of this section are not ex post facto as to offenses committed before constitution went into effect, and are not in conflict with constitution of U. S. (Contrary doctrine adopted in State v. Rock, 20

U. 38; 57 P. 532, following Thompson v. Utah, 170 U. S. 343.)
State v. Carrington, 15 U. 480; 50 P. 526.
State v. Bates, 14 U. 293; 47 P. 78.
A person charged with committing an offense prior to statehood had a constitutional right under the laws of congress and the territorial laws then in effect, to be prosecuted only upon indictment presented by a grand jury; and he may not be prosecuted by way of information.
State v. Rock, 20 U. 38; 57 P. 532.
The laws of the territory of Utah, with reference to grand jurors, empowering them to act, inquire into offenses and find indictments, are still in force in this state as to offenses committed prior to its admission January 4, 1896.
Id.
The prosecution and conviction of a person by information filed by county attorney in accordance with the statutes, this section, and Con. art. 8, sec. 21, do not abridge the privileges or immunities of such person, as a citizen of the U. S., under the fourteenth amendment.
In re Maxwell, 19 U. 495; 57 P. 412; affirmed 176 U. S. 581.
State v. Imlay, 22 U. 156; 61 P. 557.
The information must be for the offense charged in the complaint or one included therein; it cannot be for a different one, and right to a preliminary hearing for the crime charged in the complaint or one included therein is essential.
State v. Pay, 45 U. 411; 146 P. 300.
State v. Hoben, 36 U. 186; 102 P. 1000.
State v. Sheffield, 45 U. 426; 146 P. 306.
State v. Jensen, 34 U. 166; 96 P. 1085.
Where the commiting magistrate files a transcript of his proceedings on which an information is filed and the accused is arraigned and pleads to the merits and enters on the tral, he waives the right to a preliminary examination or any irregularities thereunder.
State v. Gustaldi, 41 U. 63; 123 P. 897.
Where the accused, with the consent of the State, waived the preliminary examination, he necessarily waived the magistrates' hearing any testimony as to the charge against him, so there was no testimony to be heard or to be reduced to writing.
State v. Mewhinney, 43 U. 135; 134 P. 632.

SEC. 14. **[Unreasonable searches forbidden. Issuance of warrant.]** The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized.

SEC. 15. **[Freedom of speech and of the press. Libel.]** No law shall be passed to abridge or restrain the freedom of speech or of the press. In all criminal prosecutions for libel the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.

Freedom of speech, art. 1, sec. 1; art. 6, sec. 8.

SEC. 16. **[No imprisonment for debt. Exception.]** There shall be no imprisonment for debt except in cases of absconding debtors.

Arrest of absconding debtors, §§ 6630-6664.

SEC. 17. **[Elections to be free. Soldiers voting.]** All elections shall be free, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage. Soldiers, in time of war, may vote at their post of duty, in or out of the State, under regulations to be prescribed by law.

SEC. 18. **[Attainder. Ex post facto laws. Impairing contracts.]** No bill of attainder, ex post facto law, or law impairing the obligation of contracts shall be passed.

Obligation of public debts heretofore contracted not to be impaired, art. 14, sec. 7.
The law is not ex post facto which prescribes that an accused shall be tried by eight jurors for an offense committed before statehood. (Reversed, 170 U. S. 343.)
State v. Thompson, 15 U. 488; 50 P. 409.
The law is ex post facto, as to offenses committed before statehood, which prescribes that such offenses may be prosecuted by information instead of by indictment. (Following Thompson case, 170 U. S. 343.)
State v. Rock, 20 U. 38; 57 P. 532.
Constitution as well as statutes should act prospectively, unless it clearly appears that they shall act retrospectively.
Mercur M. Co. v. Spry, 16 U. 222; 52 P. 382.
Any change or limitation of a remedy which does not abridge the right, does not impair the obligation of contracts. Exemption law applies to debts already contracted.
Kirkman v. Bird, 22 U. 100; 61 P. 338.
Folsom v. Asper, 25 U. 299; 71 P. 315.
The bar of the statute of limitations may be waived unless pleaded; but until it is waived by some act of the party in whose favor it has accrued, the right to interpose it as a defense exists, and, having once accrued, it becomes a vested right, which cannot be taken away by legislative enactment.
Ireland v. McIntosh, 22 U. 296; 61 P. 901.
A statute authorizing majority stockholders to amend articles of incorporation against the consent of the minority, so as to make nonassessable full-paid capital stock assessable and subject to sale for such assessment, affects the contractual relations of the stockholders among themselves, and is an impairment of the obligation of a contract, within the prohibition of the federal constitution.
Garey v. St. Joe M. Co., 32 U. 497; 91 P. 369.

SEC. 19. **[Treason defined. Proof.]** Treason against the State shall consist only in levying war against it, or in adhering to its enemies or in giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act.

SEC. 20. **[Military subordinate to the civil power.]** The military shall be in strict subordination to the civil power, and no soldier in time of peace, shall be quartered in any house without the consent of the owner; nor in time of war except in a manner to be prescribed by law.

SEC. 21. **[Slavery forbidden.]** Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within this State.

SEC. 22. **[Private property for public use.]** Private property shall not be taken or damaged for public use without just compensation.

Right to acquire, possess and protect property, art. 1, sec 1, and note

Property not to be taken without due process of law, art 1, sec. 7, and note.

This section is a limitation on legislative authority and embraces all kinds of private property, including money; and a municipality has no power to collect a tax upon property or business situated so that it cannot receive any benefit from it. (Overruled in Kimball v. Grantsville, 19 U. 368; 57 P. 1.)

Kaysville City v. Ellison, 18 U. 163; 55 P. 386.

People v. Daniels, 6 U. 288; 22 P. 159.

Ellison v. Linford, 7 U. 166; 25 P. 744.

This section not a limitation on taxing power of state, but on the exercise of power of eminent domain. Same provision in amendments to Con. of U. S., art 5, held, a restriction upon legislative functions of federal government, not of a state government.

Kimball v. Grantsville City, 19 U. 368; 57 P. 1.

For a municipality to assume control of a private water system and to levy taxes on land of owners thereof to maintain it, is to deprive them of property without due process of law.

Fisher v. Bountiful City, 21 U. 29; 59 P. 520.

Bartholomew v. Fayette Irr. Co., 31 U. 1; 86 P. 481.

Sec. 7339, providing that plaintiff may enter into possession of property in condemnation proceedings, upon filing sufficient bond, is not in conflict with provisions of this section.

Salt Lake City etc. Co. v. S. L. C. et al., 24 U 282; 67 P. 791.

A city council cannot authorize a permanent switch track, for a private business only, along a street and across a sidewalk, from a steam railroad in the street, to the detriment of people residing on the street and to the damage of their abutting property; the streets being dedicated to public use.

Cereghino v. O. S. L. R. R. Co., 26 U. 467; 73 P. 634.

Property is taken for a public use, within the provision of the constitution declaring that private property shall not be taken for public use without just compensation, when the taking is for a use that will promote the public interest, and will tend to develop the resources of the state. In this case a right of way for an irrigation ditch.

Nash v. Clark, 27 U. 158; 75 P. 371; affirmed 198 U. S. 361.

For a city to repudiate contract of leasing its water system after lessee has expended large sums of money thereon, would be taking of private property for public use without just compensation.

Ogden City v. Waterworks & Irr. Co., 28 U. 25; 76 P. 1069.

Any substantial interference with private property, by which owner's right to its use and enjoyment is abridged or destroyed, is a taking within provisions of this section.

Stockdale v. Railroad, 28 U. 201; 77 P. 849.

A party, whose property is about to be damaged in a substantial degree for public use, is given same remedies as would be accorded him if his property were actually appropriated for public use.

Stockdale v. Railroad, 28 U. 201; 77 P. 849.

Eminent domain law of 1898, as amended allowing right for mining purposes, etc., is constitutional.

Highland Boy G. M. Co. v. Strickley, 28 U. 215; 78 P. 296; affirmed 200 U. S. 525.

Where a street grade was established but not carried into effect, and thereafter buildings were erected, the city was liable for damages resulting from a new change of grade. The fact that the improvements were made before the constitution was enacted does not relieve liability.

Kimball v. S. L. City, 32 U. 253; 90 P. 395.

Hempstead v. S. L. City, 32 U. 261; 90 P. 397.

Felt v. S. L. City, 32 U. 275; 90 P. 402.

The owner of property entered upon and appropriated to public use without compliance with the provisions of the statutes may waive the tort and sue for compensation

Salt Lake Inv. Co. v. O. S. L. R. Co., 46 U. 203; 148 P. 439.

The irrigation district act, §§ 3501-3555, does not contemplate taking property without compensation.

Ferry v. Corinne, 48 U. 1; 156 P. 921.

Moody v. Millard County, etc., 48 U. 11; 156 P. 924.

An abutting owner is entitled to recover damages to her property, by the construction and operation of a railroad in a public street in front thereof, by which ingress and egress is impeded and the use of the property otherwise affected.

Morris v. O. S. L. R. R. Co., 36 U. 18; 102 P. 629.

The court may in proper cases, where both legal and equitable remedies are given, limit the complaining party to his legal remedy.

Lewis v. Pingree Natl. Bank, 47 U. 35; 151 P. 558.

Except for the provisions of this section an action would not lie against a railroad company for mere consequential injury to real property from the smoke, cinders and jar of passing trains where the road was carefully and properly built and operated.

O'Neill v. San Pedro, etc. R. R. Co., 38 U. 475; 114 P. 127.

Cited in Pardee v. Salt Lake County, 39 U. 482; 118 P. 122, and Coalter v. Salt Lake City, 40 U. 293; 120 P. 851.

The right of an abutting owner to recover for damages caused by change of street grade is given by this section and not by § 700 Compiled Laws 1917.

Webber v. Salt Lake City, 40 U. 221; 120 P. 503.

The interference with religious services by the annoyance of the noise from the rightful operation of a railroad and train yards near a church does not give the religious society a right of action for damages under this section.

22nd Corporation of Church v. O. S. L. R. Co., 36 U. 238; 103 P. 243

C. L. 1917, sec. 3467, providing that where any person or corporation desires to convey water for a beneficial purpose and an existing canal can be enlarged to convey the same, such person or corporation may enlarge such canal by compensating the owner thereof for any damage caused by the enlargement, is constitutional.

Salt Lake City v. East Jordan Irrig. Co., 40 U. 126; 121 P. 592.

The owner of realty damaged by the erection of a viaduct of a railroad, though erected as required by city ordinance, is entitled to compensation for such damages.

Cook v. Salt Lake City, 48 U. 58; 157 P. 643.

A city cannot make an initial grade of a street which damages plaintiffs' adjoining property without compensating them for it.

Richards v. Salt Lake City, 49 U. 28; 161 P. 680.

Where a city to make a street more convenient for travel has lawfully established the grade and the owner after its establishment, but before it is physically carried

into effect, improves his property without regard to the grade he cannot recover damages against the city, if it afterwards in grading the street to conform to the established grade interferes with the convenient use of his abutting property.
Gray v. Salt Lake City, 44 U. 204; 138 P. 1177.

SEC. 23. **[Irrevocable franchises forbidden.]** No law shall be passed granting irrevocably any franchise, privilege or immunity.

SEC. 24. **[Uniform operation of laws.]** All laws of a general nature shall have uniform operation.

If general law applicable, special forbidden, art. 6, sec. 26.
Decisions as to special laws. Note to art. 6, sec. 26.
Sec. 1176, R. S. 1898, as amended by laws 1899, chap. 47, relating to county fruit tree inspectors, is in violation of this section of the constitution, and void.
State v. Standford, 24 U. 148; 66 P. 1061.

Sec. 4465, providing for annual poll tax of $2.00 to be collected and expended in cities is constitutional, being within the police powers.
Salt Lake City v. Wilson, 46 U. 60; 148 P. 1104.

SEC. 25. **[Rights retained by people.]** This enumeration of rights shall not be construed to impair or deny others retained by the people.

SEC. 26. **[Provisions mandatory and prohibitory.]** The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise.

Decisions on constitutional construction. Note to art. 6, sec. 1.
The limitations contained in art. 6, secs. 14, 22, 24, and in art. 7, sec. 8, respecting the enactment of laws are mandatory and binding upon the legislature. The mandatory provisions of the constitution are conclusive upon all departments of government.
Ritchie v. Richards, 14 U. 345; 47 P. 670.
The provisions of art. 6, sec. 22 of the constitution, providing that "no law shall be revised or amended by reference to its title only; but the act as revised, shall be reenacted and published at length," are restrictive and mandatory, and when an act or section is revised or amended, the same must be complete within itself, so that when published as revised or amended it will contain all the law upon the subject, embraced in the act or secton. (Modified in Mill v. Brown, 31 U. 473; 88 P. 609, and in Marioneaux v. Cutler, 32 U. 475; 91 P. 355.)
State v. Beddo, 22 U. 432; 63 P. 96.
The provisions of art. 5, sec. 1, are mandatory.
Ellison v. Barnes, 23 U. 183; 63 P. 899.
The provisions of art. 12, sec. 9, taken with § 946, are mandatory and prohibitory, and a foreign corporation that has not complied with the statute, cannot enforce its contracts in the courts of this state. (Vacated on rehearing, 30 U. 135; 83 P. 734, and contrary doctrine adopted.)
Booth v. Weigand, 28 U. 372; 79 P. 570.
The court in construing the constitution must harmonize conflicting provisions and give to each its proper effect so far as possible under the rules of construction.
Blackrock Copper M. & M. Co. v. Tingey, 34 U. 369; 98 P. 180.

SEC. 27. **[Fundamental rights.]** Frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government.

ARTICLE II.

STATE BOUNDARIES.

SECTION 1. **[State boundaries.]** The boundaries of the State of Utah shall be as follows:

Beginning at a point formed by the intersection of the thirty-second degree of longitude west from Washington with the thirty-seventh degree of north latitude; thence due west along said thirty-seventh degree of north latitude to the intersection of the same with the thirty-seventh degree of longitude west from Washington; thence due north along said thirty-seventh degree of west longitude to the intersection of the same with the forty-second degree of north latitude; thence due east along said forty-second degree of north latitude to the intersection of the same with the thirty-fourth degree of longitude west from Washington; thence due south along said thirty-fourth degree of west longitude to the intersection of the same with the forty-first degree of north latitude; thence due east along said forty-first degree of north latitude to the intersection of the same with the thirty-second degree of longitude west from Washington; thence due south along said thirty-second degree of west longitude to the place of beginning.

ARTICLE III.

ORDINANCE.

The following ordinance shall be irrevocable without the consent of the United States and the people of this State:

[Religious toleration. Polygamy forbidden.] First:—Perfect toleration of religious sentiment is guaranteed. No inhabitant of this State shall ever be molested in person or property on account of his or her mode of religious worship; but polygamous or plural marriages are forever prohibited.

Cited in Rohwer v. District Court, 41 U. 279; 125 P. 671.

[Right to public domain disclaimed. Taxation of lands. Exemptions.] Second:—The people inhabiting this State do affirm and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries hereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes, and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States. The lands belonging to citizens of the United States, residing without this State shall never be taxed at a higher rate than the lands belonging to residents of this State; nor shall taxes be imposed by this State on lands or property herein, belonging to or which may hereafter be purchased by the United States or reserved for its use; but nothing in this ordinance shall preclude this State from taxing, as other lands are taxed, any lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States or from any person, by patent or other grant, a title thereto, save and except such lands as have been or may be granted to any Indian or Indians under any act of Congress, containing a provision exempting the lands thus granted from taxation, which last mentioned lands shall be exempt from taxation so long, and to such extent, as is or may be provided in the act of Congress granting the same.

[Territorial debts assumed.] Third:—All debts and liabilities of the Territory of Utah, incurred by authority of the Legislative Assembly thereof, are hereby assumed and shall be paid by this State.

Services rendered during 1895 under session laws of 1892, p. 47, creating the bureau of statistics, became an obligation of the state under art. 3, sub. 3, of the Con.
State, ex rel. Bache v. Richards, 15 U. 477; 49 P. 532.

[Free, non-sectarian schools.] Fourth:—The Legislature shall make laws for the establishment and maintenance of a system of public schools, which shall be open to all the children of the State and be free from sectarian control.

Toleration of religious sentiment, art. 1, secs. 1, 4.
Law punishing polygamy declared in force, art. 24, sec. 2.
The Enabling Act, sec. 3, prescribed this ordinance. U. S. property exempted from taxation, art. 13, sec. 3.
Where no attempt was made on the part of the board of health to compel vaccination, but during the emergency an option was given the pupil who was liable to convey the disease into the schools, to be vaccinated or remain away from the schools until the danger from smallpox was past, the order is justified under the police power inherent in the state and such power is delegated by statute.
State v. Board Ed. S. L. City, 21 U. 401; 60 P. 1013. But see § 2763.

ARTICLE IV.

ELECTIONS AND RIGHT OF SUFFRAGE.

SECTION 1. **[Equal political rights.]** The rights of citizens of the State of Utah to vote and hold office shall not be denied or abridged on account of sex. Both male and female citizens of this State shall enjoy equally all civil, political and religious rights and privileges.

Religious or partisan qualifications forbidden, art. 10, sec. 12.
While suffrage is a privilege rather than a right, all regulations upon the subject must be reasonable and uniform, and a law providing that all male voters shall be taxpayers without imposing the same conditions upon female voters is void and of no effect.
Lyman v. Martin, 2 U. 136.
Sec. 4465, providing an annual poll tax, is not violative of this section, though the poll tax is imposed only on men.
Salt Lake City v. Wilson, 46 U. 60; 148 P. 1104.

SEC. 2. **[Qualifications to vote.]** Every citizen of the United States, of the age of twenty-one years and upwards, who shall have been a citizen for ninety days, and shall have resided in the State or Territory one year, in the

county four months, and in the precinct sixty days next preceding any election, shall be entitled to vote at such election except as herein otherwise provided.

Male citizens entitled to vote on constitution and at first election, art. 24, sec. 11.
Property qualifications required in certain cases, art. 1, sec. 4; art. 4, sec. 7; art. 14, sec. 3.
Idiots, etc., disqualified, art. 4, sec. 6.

SEC. 3. **[Electors: immunity from arrest.]** In all cases except those of treason, felony or breach of the peace, electors shall be privileged from arrest on the days of election, during their attendance at elections, and going to and returning therefrom.

SEC. 4. **[Id. From military duty.]** No elector shall be obliged to perform militia duty on the day of election except in time of war or public danger.

SEC. 5. **[Electors to be citizens of U. S.]** No person shall be deemed a qualified elector of this State unless such person be a citizen of the United States.

General qualifications of voter, art. 4, sec. 2.

SEC. 6. **[Certain criminals, etc., ineligible to vote.]** No idiot, insane person or person convicted of treason, or crime against the elective franchise, unless restored to civil rights, shall be permitted to vote at any election, or be eligible to hold office in this State.

Using public money unlawfully disqualifies voter to hold office, art. 13, sec. 8.

SEC. 7. **[Property qualification forbidden, when.]** Except in elections levying a special tax or creating indebtedness, no property qualification shall be required for any person to vote or hold office.

Property qualification, when required of voter, art. 1, sec. 4; art. 14, sec. 3.
Qualifications to vote, art 4, sec. 2.

SEC. 8. **[Ballot to be secret.]** All elections shall be by secret ballot. Nothing in this section shall be construed to prevent the use of any machine or mechanical contrivance for the purpose of receiving and registering the votes cast at any election: Provided, That secrecy in voting be preserved.

A provision of law for the marking and identification of ballots by numbering them is void, being in contravention of this section, requiring that all elections shall be by secret ballot.
Ritchie v. Richards, 14 U. 345; 47 P. 670.
Secrecy of the ballot guaranteed hereby does not require perfect but only approximate secrecy, where printed ballots are used the numbering of ballots by election officers in good faith without corrupt intent and without improper influence on election does not vitiate the election.
Hardy et al. v. Beaver City et al., 41 U. 80; 125 P. 679.

SEC. 9. **[Elections, when held. Terms begin, when.]** All general elections, except for municipal and school officers, shall be held on the Tuesday next following the first Monday in November of the year in which the election is held. Special elections may be held as provided by law. The terms of all officers elected at any general election, shall commence on the first Monday in January next following the date of their election. Municipal and School officers shall be elected at such time as may be provided by law.

Time of holding first general state election, art. 24, sec. 14.
A territorial law authorizing a city council to appoint the city attorney is not repugnant to this section.
Whipple v. Henderson, 13 U. 484; 45 P. 274.

SEC. 10. **[Oath of office.]** All officers made elective or appointive by this Constitution or by the laws made in pursuance thereof, before entering upon the duties of their respective offices, shall take and subscribe the following oath or affirmation: "I do solemnly swear (or affirm) that I will support, obey and defend the Constitution of the United States and the Constitution of this State and that I will discharge the duties of my office with fidelity. ["]

ARTICLE V.

DISTRIBUTION OF POWERS.

SECTION 1. **[Three departments of government.]** The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no person charged

with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted.

U. S. officials disqualified from holding office under state, art. 7, sec. 23.

Officers disqualified as legislators, art. 6, sec. 6.

Powers of legislative department, art. 6, sec. 1; executive, art. 7; judicial, art. 8.

The courts have power to declare any act of the government in any of the departments, which violates the constitution, to be utterly void; and, in exercising this function in regard to an act of the legislature, they do not trench upon the domain of the legislative department.

Ritchie v. Richards, 14 U. 345; 47 P. 670.

When the court construes the law, and holds that it has a certain effect, and bases its judgment upon it, the legislature cannot declare that the law as to that case has any other effect than that declared by the court.

In re Handley's Estate, 15 U. 212; 49 P. 829.

Courts have no jurisdiction to try and determine contests for seats in the legislature, as each house is the judge of the election and qualification of its members. Powers conferred upon one department of government are forbidden to be exercised by any other department of government.

Ellison v. Barnes, 23 U. 183; 63 P. 899.

The extents of the territorial limits of a municipality being a matter of legislative discretion, the exercise of such discretion is not subject of judicial revision.

Kimball v. Grantsville City, 19 U. 368; 57 P. 1. (Overruling Kaysville v. Ellison, 18 U. 163; 55 P. 386.)

Section 6844 is not unconstitutional as imposing judicial functions on ministerial officers.

Utah Assoc. Credit Men v. Bowman, 38 U. 326; 113 P. 63.

The legislature can declare that certain facts shall be prima facie, presumptive, not conclusive, evidence of another and substantive fact essential to conviction when they have some fair relation to or connection with such other fact.

State v. Potello, 40 U. 56; 119 P. 1023.

The supreme court cannot declare any conduct a crime, no matter how morally reprehensible, where it is not declared to be such by the legislature.

State v. Johnson, 44 U. 18; 137 P. 632.

The indeterminate sentence act §§ 9162-9164 does not violate provisions of this section.

Mutart v. Pratt, 50 U. —; 170 P. 67.

ARTICLE VI.

LEGISLATIVE DEPARTMENT.

SECTION 1. **[Power vested in senate, house and people.]** The Legislative power of the State shall be vested:

1. In a Senate and House of Representatives which shall be designated the Legislature of the State of Utah.

2. In the people of the State of Utah, as hereinafter stated:

The legal voters or such fractional part thereof, of the State of Utah as may be provided by law, under such conditions and in such manner and within such time as may be provided by law, may initiate any desired legislation and cause the same to be submitted to a vote of the people for approval or rejection, or may require any law passed by the Legislature (except those laws passed by a two-thirds vote of the members elected to each house of the Legislature) to be submitted to the voters of the State before such law shall take effect.

The legal voters, or such fractional part thereof, as may be provided by law, of any legal subdivision of the State, under such conditions and in such manner and within such time as may be provided by law, may initiate any desired legislation and cause the same to be submitted to a vote of the people of said legal subdivision for approval or rejection, or may require any law or ordinance passed by the law-making body of said legal subdivision to be submitted to the voters thereof before such law or ordinance shall take effect. [As amended Nov. 6, 1900.]

The section in its original form is placed in the appendix to the constitution.

Amended Nov. 6, 1900, to provide for legislation by initiative and referendum.

No one of the three departments of government shall exercise any functions pertaining to another department, art. 5, sec. 1.

Due process of law, decisions on. Note to art. 1, sec. 7.

Passage and repeal of laws, art. 6, sec. 22, and note.

Bill to contain but one subject, art. 6, sec. 22.

Decisions holding certain laws to be special. Note to art. 6, sec. 26.

LEGISLATIVE POWERS GENERALLY:

The courts have power to declare any act of the government in any of the departments, which violates the constitution, to be utterly void; and, in exercising this function, in regard to an act of the legislature, they do not trench upon the domain of the legislative department.

Ritchie v. Richards, 14 U. 345; 47 P. 670.

When the court construes the law, and holds that it has a certain effect, and bases its judgment upon it, the legislature cannot declare that the law as to that case has any other effect than that declared by the court.

In re Handley's Estate, 15 U. 212; 49 P. 829.

The powers of the national government are those delegated, while the powers of the state government embrace such as are not forbidden.

Holden v. Hardy, 14 U. 71; 46 P. 756.

The law making power cannot validate void judgments.

In re Christiansen, 17 U. 412; 53 P. 1003.

A moral obligation of the state may be converted into a legal one by the legislature.

Thoreson v. State, 21 U. 187; 60 P. 982.

Civ. Federation v. S. L. County, 22 U. 6; 61 P. 222.

The legislature is the law making body, and the only limits upon its power are those set by the constitution. If it enacts a law within its authority the courts have no right to arrest its execution.

Kimball v. Grantsville, 19 U. 368, 409, 410; 57 P. 1, 10.

Nichols v. Cherry, 22 U. 1; 60 P. 1103.

State v. Lewis, 26 U. 120; 72 P. 388.

State v. S. L. City, 23 U. 13; 64 P. 460.

A legislative enactment will be presumed constitutional until the contrary is shown; and the courts will resolve a reasonable doubt in favor of constitutionality.

People v. Ritchie, 12 U. 180; 42 P. 209.

State v. Holden, 14 U. 71; 46 P. 756.

State v. Tingey, 24 U. 225; 67 P. 33.

Young v. S. L. City, 24 U. 321; 67 P. 1066.

State v. Sopher, 25 U. 318; 71 P. 482.

State v. Lewis, 26 U. 120; 72 P. 388.

Highland Boy G. M. Co. v. Strickley, 28 U. 215; 78 P. 296; affirmed 200 U. S. 525.

Marioneaux v. Cutler, 32 U. 475; 91 P. 355.

Where a portion of an act is unconstitutional and the remaining portion can be upheld, it will be done.

Ritchie v. Richards, 14 U. 345; 47 P. 670.

Eureka City v. Wilson, 15 U. 67; 48 P. 150.

State v. Beddo, 22 U. 432; 63 P. 96.

Utah S. & T. Co. v. Diamond C. & C. Co., 26 U. 299; 73 P. 524.

Sec. 6782, providing how, when and where a jury may be demanded is a valid exercise of legislative power.

State v. Cherry, 22 U. 1; 60 P. 1103.

Law of 1903, providing for four judges in third district within power of legislature.

State v. Lewis, 26 U. 120; 72 P. 388.

The legislature has the inherent power to authorize a municipality to issue bonds for its indebtedness; Con. art. 14, sec. 4, limits but does not confer such power.

State v. City Council, 23 U. 13; 64 P. 460.

Secs. 771 et seq., C. L. 1917, providing method for disconnecting land from a city in certain cases, not unconstitutional as delegating legislative power to court and commissioners.

Young v. Salt Lake City, 24 U. 321; 67 P. 1066.

Statutes imposing inheritance taxes have been uniformly held constitutional.

Dixon v. Ricketts, 26 U. 215; 72 P. 947.

A statute restricting sale of merchandise in bulk, except upon notice, etc., is unconstitutional as an unwarranted interference with the right of property.

Block v. Schwartz, 27 U. 387; 76 P. 22.

Legislature, in its power to amend laws relating to corporations, is not authorized to impair any vested rights. Allowing any number of stockholders less than all to amend articles so as to assess non-assessable stock is unconstitutional.

Garey v. St. Joe M. Co., 32 U. 497; 91 P. 369.

POLICE POWERS:

Eight hour law a valid exercise of the police power of the state.

Short v. Bullion-Beck M. Co., 20 U. 29; 57 P. 720.

Medical bill of 1892 a valid exercise of the police power of the state.

People v. Hasbrouck, 11 U. 291; 39 P. 918.

The court will not hold that an act is not within the police power of the state unless it is so clearly without as to remove every reasonable doubt that it is.

State v. Holden, 14 U. 71; 46 P. 756; affirmed 169 U. S. 366.

Law authorizing compulsory vaccination of school children is a valid exercise of the police power.

State v. Board of Ed. of S. L. City, 21 U. 401; 60 P. 1013.

Sunday barber law a proper exercise of police power of state.

State v. Sopher, 25 U. 318; 71 P. 482.

INTERPRETATION OF CONSTITUTION:

Constitutions are not to be interpreted alone by their words, abstractly considered, but by their words read in the light of the conditions and necessities in which the provisions originated, and in view of the purpose sought to be attained and secured.

State v. City Council, 23 U. 13; 64 P. 460.

Proceedings of constitutional convention consulted to aid interpretation.

State v. Norman, 16 U. 457; 52 P. 986; see also decisions on "place of trial," note to art. 8, sec. 9.

Richardson v. Treasure Hill M. Co., 23 U. 366; 65 P. 74.

The meaning and intent of a constitutional provision must be gleaned from the context of the instrument. As a general rule, punctuation is no part of an enactment.

Id.

Where one word has been erroneously used in a constitution, statute or other written instrument for another, and the context affords the means of correction, the proper word will be deemed substituted.

White v. R. G. W. Ry. Co., 25 U. 346; 71 P. 593.

Where the legislature has construed a constitutional provision, such construction should be followed by the courts, if it can be done without doing violence to the fair meaning of the words used in order to support the constitutionality of the statute.

State v. Tingey, 24 U. 225; 67 P. 33.

State v. Reynolds, 24 U. 29; 66 P. 614.

In construing a proviso in a constitution, it should be confined to the antecedent next preceding it, unless a contrary intention clearly appears.

State v. Quayle, 26 U. 26; 71 P. 1060.

In construing a constitutional provision, the intention of the framers must prevail, whatever language may have been employed to express it.

State v. Eldredge, 27 U. 477; 76 P. 337.

In construing a particular section of a constitutional provision, the court may refer to any other section or provision to ascertain the object, purpose and intention of the framers in adopting the section.

Id.

DELEGATION OF POWERS:

An act providing that any county or precinct may by a vote declare in favor of the fencing of farms and allowing animals to run at large is not a delegation of legislative power.

Peterson v. Peterson, 42 U. 270; 130 P. 241.

Chap. 107, Laws 1917, delegating to a city the power to create a municipal court by ordinance is unconstitutional, in that it delegates the power to create such courts to city authorities

State ex rel Shields v. Barker, 50 U. ——, 167 P. 262.

SEC. 2. **[Time of regular sessions.]** Regular Sessions of the Legislature shall be held bi-ennially at the seat of government; and, except the first session thereof shall begin on the second Monday in January next after the election of members of the House of Representatives.

SEC. 3. **[Members, how and when chosen.]** The members of the House of Representatives, after the first election, shall be chosen by the qualified electors of the respective representative districts, on the first Tuesday after the first Monday in November, 1896, and bi-ennially thereafter. Their term of office shall be two years, from the first day of January next after their election.

Number of representatives, districts, art. 9, secs. 3, 4.

SEC. 4. **[Senators, how and when chosen.]** The senators shall be chosen by the qualified electors of the respective senatorial districts, at the same times and places as members of the House of Representatives, and their term of office shall be four years from the first day of January next after their election: Provided, That the senators elected in 1896 shall be divided by lot into two classes as nearly equal as may be; seats of senators of the first class shall be vacated at the expiration of two years, and those of the second class at the expiration of four years; so that one-half, as nearly as possible, shall be chosen bi-ennially thereafter. In case of increase in the number of senators, they shall be annexed by lot to one or the other of the two classes, so as to keep them as nearly equal as practicable.

Number of senators, districts, art. 9, secs. 3, 4.

SEC. 5. **[Who eligible as legislator.]** No person shall be eligible to the office of senator or representative, who is not a citizen of the United States, twenty-five years of age, a qualified voter in the district from which he is chosen, a resident for three years of the State, and for one year of the district from which he is elected.

SEC. 6. **[Who ineligible.]** No person holding any public office of profit or trust under authority of the United States, or of this State, shall be a member of the Legislature: Provided, That appointments in the State Militia, and the offices of notary public, justice of the peace, United States commissioner, and postmaster of the fourth class, shall not, within the meaning of this section, be considered offices of profit or trust.

Officers disqualified to hold state offices, art. 7, sec. 23.

SEC. 7. **[Ineligibility of member to office created, etc.]** No member of the Legislature, during the term for which he was elected, shall be appointed or elected to any civil office of profit under this State, which shall have been created, or the emoluments of which shall have been increased, during the term for which he was elected.

SEC. 8. **[Privilege from arrest.]** Members of the Legislature, in all cases except treason, felony or breach of the peace, shall be privileged from arrest during each session of the Legislature, for fifteen days next preceding each session, and in returning therefrom; and for words used in any speech or debate in either house, they shall not be questioned in any other place.

Freedom of speech, art. 1, secs. 1, 15.

SEC. 9. **[Compensation of members.]** The members of the Legislature shall receive such *per diem* and mileage as the Legislature may provide, not exceeding four dollars per day, and ten cents per mile for the distance necessarily traveled going to and returning from the place of meeting on the most usual route, and they shall receive no other pay or perquisite.

Compensation at special sessions, art. 6, sec. 16.

SEC. 10. **[Each house to judge of election, etc., of its members. Expulsion.]** Each house shall be the judge of the election and qualifications of its members, and may punish them for disorderly conduct, and with the concurrence of two-thirds of all the members elected, expel a member for cause.

No one of the three departments of government shall exercise any functions pertaining to another department, art. 5, sec. 1.

Each house of the legislature is the judge of the election and qualification of its members, and courts have no jurisdiction to try and determine contests for seats in the legislature except where contestant fraudulently deprived of certificate.
Ellison v. Barnes, 23 U. 183; 63 P. 899.

SEC. 11. **[Majority is quorum. Attendance compelled.]** A majority of the members of each house shall constitute a quorum to transact business, but a smaller number may adjourn from day to day, and may compel the attendance of absent members in such manner and under such penalties as each house may prescribe.

SEC. 12. **[Rules. Choosing officers.]** Each house shall determine the rules of its proceedings, and choose its own officers and employees.

SEC. 13. **[Elections to fill vacancies.]** The governor shall issue writs of election to fill vacancies that may occur in either house of the Legislature.

SEC. 14. **[Journals. Yeas and nays.]** Each house shall keep a journal of its proceedings, which, except in case of executive sessions, shall be published, and the yeas and nays on any question, at the request of five members of such house, shall be entered upon the journal.

This section is mandatory, Ritchie v. Richards, 14 U. 345; 47 P. 670.

SEC. 15. **[Sessions to be public. Adjournments.]** All sessions of the Legislature, except those of the Senate while sitting in executive session, shall be public; and neither house, without the consent of the other, shall adjourn for more than three days, nor to any other place than that in which it may be holding session.

When governor may adjourn, art. 7, sec. 7.

SEC. 16. **[Duration of sessions.]** No regular session of the Legislature (except the first, which may sit ninety days) shall exceed sixty days, except in cases of impeachment. No special session shall exceed thirty days, and in such special session, or when a regular session of the Legislature trying cases of impeachment exceeds sixty days, the members shall receive for compensation only the usual *per diem* and mileage.

Governor may call special session, art. 7, sec. 6.

SEC. 17. **[Impeachment by house.]** The House of Representatives shall have the sole power of impeachment, but in order to impeach, two-thirds of all the members elected must vote therefor.

SEC. 18. **[Id. Trial by senate.]** All impeachments shall be tried by the Senate, and senators, when sitting for that purpose, shall take oath or make affirmation to do justice according to the law and the evidence. When the Governor is on trial the Chief Justice of the Supreme Court shall preside. No person shall be convicted without the concurrence of two-thirds of the senators elected.

Senate a court of impeachment, art. 8, sec. 1.

Removal from office otherwise than by impeachment §§ 8625-8640.

SEC. 19. **[Id. Judgment. Prosecution by law.]** The Governor and other State and Judicial officers, except justices of the peace, shall be liable to impeachment for high crimes, misdemeanors, or malfeasance in office; but judgment in such cases shall extend only to removal from office, and disqualification to hold any office of honor, trust or profit in the State. The party, whether convicted or acquitted, shall, nevertheless, be liable to prosecution, trial and punishment according to law.

SEC. 20. **[Id. Service of articles.]** No person shall be tried on impeachment, unless he shall have been served with a copy of the articles thereof, at least ten days before the trial, and after such service he shall not exercise the duties of his office until he shall have been acquitted.

SEC. 21. **[Removal of officers.]** All officers not liable to impeachment shall be removed for any of the offenses specified in this article in such manner as may be provided by law.

Removal of judges, procedure, art. 8, sec. 11.

Under this section, providing that removals of officers for misconduct might be made "in such manner as may be provided by law," the legislature was authorized to pass § 8640 providing for removal proceedings at the instance of a private person, notwithstanding Con. art. 8, sec. 18, providing that prosecutions shall be in the name of "the state of Utah."

Skeen v. Paine, 32 U. 295; 90 P. 440.

SEC. 22. **[Enacting clause. Passage and amendments of law.]** The enacting clause of every law shall be, "Be it enacted by the Legislature of the State of Utah." Except such laws as may be passed by the vote of the electors as provided in subdivision 2 section 1 of this article, and such laws shall begin as follows, "Be it enacted by the people of the State of Utah." No bill or Joint Resolution shall be passed, except with the assent of the majority of all members elected to each house of the Legislature, and after it has been read three times. The vote upon the final passage of all bills shall be by yeas and nays; and no law shall be revised or amended by reference to its title only; but the act as revised, or section as amended, shall be re-enacted and published at length. [As amended Nov. 6, 1900.]

The section in its original form is placed in the appendix to the constitution.

Amended Nov. 6, 1900, to provide for legislation by initiative and referendum.

Action of governor upon bills, art. 7, sec. 8.

Where it affirmatively appears upon the legislative journals or either of them, that in passing an act the legislature disregarded a mandatory provision of the constitution, the court is justified in holding the act unconstitutional and void; but where journals are merely silent as to the subject matter under investigation, the court will presume that the legislature acted in accordance with its delegated power. (Zane, C. J., holding that a law duly signed, approved and filed, is conclusive evidence of its passage under a constitution which does not require the yeas and nays to be entered on the journal.)

Ritchie v. Richards, 14 U. 345; 47 P. 670.

The provisions of art. 6, sec. 22 of the constitution, providing that "no law shall be revised or amended by reference to its title only; but the act as revised, shall be reenacted and published at length," are restrictive and mandatory, and when an act or a section is revised or amended the same must be complete within itself, so that when published and revised or amended it will contain all the law upon the subject embraced in the act or section. (Modified in Mill v. Brown, 31 U. 473; 88 P. 609, and in Marioneaux v. Cutler, 32 U. 475; 91 P. 355.)

State v. Beddo, 22 U. 432; 63 P. 96.

State v. Morey, 23 U. 273; 64 P. 764.

Connors v. Pratt, 38 U. 258; 112 P. 399.

When a portion of an act is unconstitutional and such portion can be rejected and the remaining portion is properly indicated by the title and forms a complete enactment in itself, such portion must be sustained.

State v. Beddo, 22 U. 432; 63 P. 96.

State v. Morey, 23 U. 273; 64 P. 764.

While repeals by implication are not favored, still the intention of the lawmaker must prevail; and where the former law is repugnant to the spirit and intention apparent from the later law, the former is repealed to the extent of such repugnancy.

Judge v. Spencer, 15 U. 242; 48 P. 1097.

Laws of 1905, chap. 117, p. 182, creating juvenile courts in cities of the first and second classes, being an independent and complete act in itself, not purporting to amend any other act, is not an amending act, within the provision of the constitution as to the title of such acts, though incidentally it affects some older laws. (State v. Beddo, 22 U. 432; 63 P. 96, distinguished.)

Mill v. Brown, 31 U. 473; 88 P. 609.

A later act, covering part or all of the provisions of a former act, does not necessarily repeal such former act, the rule being that, if by fair and reasonable interpretation, acts which are seemingly contradictory, may be enforced and made operative and harmonious, without obscurity or conflict, both will be upheld, and the later will be regarded as repealing the former by construction or intendment.

University v. Richards, 20 U. 457; 59 P. 96.

If a statute is impliedly repealed by a later one on account of repugnancy or inconsistency between the two, the repeal will be measured by the extent of the conflict or inconsistency between the acts, and if any part of the earlier act can stand as not superseded or affected by the later, that part will not be held repealed by the later.

Nelden v. Clark, 20 U. 382; 59 P. 524.

The law providing for a board of public works and prescribing its duties and powers impliedly repealed the statutes placing those duties and powers on the mayor and council.

Id.

Laws 1903, chap. 86, p. 71, entitled, "An act fixing the salaries of district judges," and fixing such salary at $4,000 and expressly providing that no mileage or expenses should be allowed, though containing no express provisions for repeal, repealed by implication § 5075, declaring that district judges should receive mileage at the rate of eight cents for each mile actually and necessarily traveled in the performance of their official duties. (Approving Mill v. Brown, 31 U. 473; 88 P. 609, which case modified State v. Beddo, 22 U. 432; 63 P. 96.)

Marioneaux v. Cutler, 32 U. 475; 91 P. 355.

This section is not applicable to municipal ordinances.

Salt Lake City v. Howe, 37 U. 176; 106 P. 705.

SEC. 23. **[Bill to contain only one subject.]** Except general appropriation bills, and bills for the codification and general revision of laws, no bill shall be passed containing more than one subject, which shall be clearly expressed in its title.

The title: "An act relating to and making sundry provisions concerning elections" limits its subject to elections, and is sufficiently definite; but provisions of such act relating to the filling of vacancies in certain offices by appointment are invalid under this section.

Ritchie v. Richards, 14 U. 345; 47 P. 670.

This section is mandatory.

Id.

The constitutional provision limiting bills to one subject, and requiring it to be clearly expressed in the title, is a wholesome and salutary law, that should receive a reasonable interpretation and be rigidly enforced; that legislators and the public may be informed of the purpose of pending bills, and that surreptitious, incongruous and inconsiderate laws may be prevented.

In re Monk, 16 U. 100; 50 P. 810.

The title of the mining law of 1897, p 57, held sufficient to cover subject matter.

Id.

Sec. 23, chap. 107 (1901), relating to custody by clerks of city courts of files, papers, etc., of city justices of the peace whose terms of office had expired, is not void as being a subject not clearly expressed in the title.

Nystrom v. Clark, 27 U. 186; 75 P. 378.

Laws 1903, chap. 86, p. 71, entitled, "An act fixing the salaries of district judges," and providing that no mileage or expenses should be allowed, was not objectionable for the reason that the subject of the act was not clearly expressed in the title; nor is it unconstitutional on the grounds that the act treats of more than one subject, because it contained a provision cutting off mileage and expenses; though the title might properly be clearer.

Marioneaux v. Cutler, 32 U. 475; 91 P. 355.

This section is not applicable to municipal ordinances.

Salt Lake City v. Howe, 37 U. 176; 106 P. 705.

In so far as this provision applies to amendatory acts it should be liberally construed, so as to guard against the real evil which it was intended to meet.

State ex rel Edler v. Edwards, 34 U. 13; 95 P. 367.

Any one or more sections of the code may be amended by simply stating in the title of the amendatory act that it is to amend the sections designated and all sections the subject matter of which are germane or related to each other may be included in one amendatory act.

State ex rel Edler v. Edwards, 34 U. 13; 95 P. 367.

A section of the code related to "the state board of equalization, its duties and organization," and also dealt with their salaries. An amendatory statute increased the salaries of the members of the board, and also contained a provision requiring the board to inspect and examine annually all property it is required to assess. The provision for inspection in the amendatory

statute being immaterial, did not render the statute objectionable as embracing a plurality of subjects.

State ex rel Edler v. Edwards, 34 U. 13; 95 P. 367.

The indeterminate sentence act, §§ 9162-9164 does not violate this section.

Mutart v. Pratt, 50 U. ——; 170 P. 67.

An act for the regulation of the practice of medicine and surgery, and providing for the repeal of certain statutes for the regulation of the practice of medicine and surgery, prescribing the qualifications to practice, requiring a license to practice, and making it unlawful to practice without one, creating a board of medical examiners, and prescribing its duties and powers, was not violative of this section.

State v. Erickson, 47 U. 452; 154 P. 948.

Sec. 4500, authorizing the deposit of public funds in banks, at interest, and providing for the payment of the cost of official bond furnished by public treasurer from interest collected on public funds, held sufficient within this section.

Naylor v. Crabbe, 45 U. 617; 148 P. 359.

The act relating to bastardy and providing for security for the support of illegitimate children does not contain more than one subject.

State v. Hammond, 46 U. 249; 148 P. 420.

The act relating to supervision of highways and the road poll tax does not offend this section.

Salt Lake City v. Wilson, 46 U. 60; 148 P. 1104.

Sec. 1459 providing for election of justice's of the peace and constables in cities of the first class and authorizing appointment of a clerk and deputy clerks for justice's court, by board of county commissioners, is not forbidden by this section.

Martineau v. Crabbe, 46 U. 327; 150 P. 301.

SEC. 24. **[Presiding officers to sign bills.]** The presiding officer of each house, in the presence of the house over which he presides, shall sign all bills and joint resolutions passed by the Legislature, after their titles have been publicly read immediately before signing, and the fact of such signing shall be entered upon the journal.

This section is mandatory, Ritchie v. Richards, 14 U. 345; 47 P. 670.

SEC. 25. **[When acts take effect.]** All acts shall be officially published, and no act shall take effect until so published, nor until sixty days after the adjournment of the session at which it passed, unless the Legislature by a vote of two-thirds of all the members elected to each house, shall otherwise direct.

Under the provisions of this section, "unless the legislature by a vote of two-thirds of all the members shall otherwise direct," the conjunction "unless" was intended to modify both of the clauses preceding it, and where it was provided that a statute should take effect upon approval it became operative immediately on approval without previous publication.

State v. Reynolds, 24 U. 29; 66 P. 614.

SEC. 26. **[Enumeration of private laws forbidden.]** The Legislature is prohibited from enacting any private or special laws in the following cases:

1. Granting divorce.
2. Changing the names of persons or places, or constituting one person the heir-at-law of another.
3. Locating or changing county seats.
4. Regulating the jurisdiction and duties of Justices of the Peace.

Sec. 1459 permitting county commissioners to appoint a clerk and deputy for justices in cities of certain classes not unconstitutional.

Martineau v. Crabbe, 46 U. 327; 150 P. 301.

An act providing for justice's court in precincts coextensive with cities of the first class, one justice's court in each precinct coextensive with cities of from 15,000 to 40,000 population, etc., and providing for payment of salaries of justices instead of compensation by fees, is not unconstitutional.

Martineau v. Crabbe, 46 U. 327; 150 P. 301.

5. Punishing crimes and misdemeanors.
6. Regulating the practice of courts of justice.
7. Providing for a change of venue in civil or criminal actions.
8. Assessing and collecting taxes.
9. Regulating the interest on money.
10. Changing the law of descent or succession.
11. Regulating county and township affairs.
12. Incorporating cities, towns or villages; changing or amending the charter of any city, town or village; laying out, opening, vacating or altering town plats, highways, streets, wards, alleys or public grounds.
13. Providing for sale or mortgage of real estate belonging to minors or others under disability.
14. Authorizing persons to keep ferries across streams within the State.
15. Remitting fines, penalties or forfeitures.
16. Granting to an individual, association or corporation any privilege, immunity or franchise.
17. Providing for the management of common schools.
18. Creating, increasing or decreasing fees, percentages or allowances

of public officers during the term for which said officers are elected or appointed.

The Legislature may repeal any existing special law relating to the foregoing subdivisions.

In all cases where a general law can be applicable, no special law shall be enacted.

Nothing in this section shall be construed to deny or restrict the power of the legislature to establish and regulate the compensation and fees of county and township officers; to establish and regulate the rates of freight, passage, toll and charges of railroads, toll roads, ditch, flume and tunnel companies, incorporated under the laws of the State or doing business therein.

Location and relocation of county seats, art. 11, sec. 2.

General municipal incorporation act shall be passed, art. 11, sec. 5.

Laws of general nature have uniform application, art. 1, sec. 24.

Law establishing maximum freight rates to be passed, art. 12, secs. 12, 15.

Uniform system of county government to be provided, art. 11, sec. 4.

A statute which allows an attorney's fee to a successful lien claimant is a special law and unconstitutional.

Brubaker v. Bennett, 19 U. 401; 57 P. 170.

A statute allowing an attorney's fee to a mortgagor in an action to compel cancellation of a mortgage, if successful, is a special law and unconstitutional.

Openshaw v. Young, 24 U. 426; 68 P. 138.

Chap. 106, Laws 1901, limiting jurisdiction of justices of the peace in cities of the first class in civil controveries involving less than $10, is a special law and is unconstitutional.

Love v. Liddle, 26 U. 62; 72 P. 185.

Under Con. art. 8, sec. 8, the legislature may restrict jurisdiction of justices of the peace by general law, but not prescribe jurisdiction in particular localities different from that exercised in the state at large.

Id.

Failure to make provision for costs where defendant is successful may make a law a special one.

Skeen v. Chambers, 31 U. 36; 86 P. 493.

Laws of 1905, chap. 117, p. 182, creating juvenile courts in cities of the first and second classes, with exclusive jurisdiction within their limits over juvenile offenders, is not special legislation.

Mill v. Brown, 31 U. 473; 88 P. 609.

Laws 1903, chap. 52, p. 48, authorizing appeals from judgments in the district court on appeal from a city court, when the judgment of the district court exceeds $100, exclusive of costs, is not violative of the constitutional provision prohibiting a special law where a general law is applicable.

Garcia v. Free, 31 U. 389; 88 P. 30.

This section is not violated by an act providing for the establishment of detention homes by county commissioners, and that counties may recover from municipalities for the support and maintenance of delinquent children from such cities.

Salt Lake County v. Salt Lake City, 42 U. 548; 134 P. 560.

An act providing that any county or precinct by a vote at a special election might declare in favor of fencing farms and allowing animals to run at large is not objectionable as lacking uniformity of operation.

Peterson v. Peterson, 42 U. 270; 130 P. 241

A provision that the taxes for school purposes in cities of the first and second classes having a valuation of twenty millions or more shall not exceed a certain per cent is invalid since the classification of cities was unreasonable.

Board of Education v. Hunter, 48 U. 373; 159 P. 1018.

Board of Education v. Hanchett, 50 U. ——; 167 P. 686.

SEC. 27. **[Legislature cannot release certain debts.]** The Legislature shall have no power to release or extinguish, in whole or in part, the indebtedness, liability or obligation of any corporation or person to the state, or to any municipal corporation therein.

State not to assume debt of county, city, etc., art. 14, sec. 6.

SEC. 28. **[Lotteries forbidden.]** The Legislature shall not authorize any game of chance, lottery or gift enterprise under any pretense or for any purpose.

There is nothing in the constitution to prevent the legislature from conferring power upon cities to suppress all forms of gambling; and the legislature cannot legalize any form of gambling whatever.

Salt Lake City v. Doran, 42 U. 413; 131 P. 636.

SEC. 29. **[Municipal powers not to be delegated.]** The Legislature shall not delegate to any special commission, private corporation or association, any power to make, supervise or interfere with any municipal improvement, money, property or effects, whether held in trust or otherwise, to levy taxes, to select a capitol site, or to perform any municipal functions.

The legislature is prohibited from providing for the appointment and control of county officers by state officers; salaries to be paid by counties.

State v. Standford, 24 U. 148; 66 P. 1061.

Secs. 771 et seq., providing for disconnecting land from a city not in violation of this section.

Young v. Salt Lake City, 24 U. 321; 67 P. 1066.

This section is not violated by an act providing for the establishment of detention homes by the county commissioners, and that counties may recover from municipalities for the support and maintenance of delinquent children from such cities.

Salt Lake County v. Salt Lake City, 42 U. 553; 134 P. 560.

SEC. 30. **[Extra compensation to officers and contractors forbidden.]** The Legislature shall have no power to grant, or authorize any county or municipal authority to grant, any extra compensation, fee or allowance to any public officer, agent, servant or contractor, after service has been rendered

or a contract has been entered into and performed in whole or in part, nor pay or authorize the payment of any claim hereafter created against the State, or any county or municipality of the State, under any agreement or contract made without authority of law: Provided, That this section shall not apply to claims incurred by public officers in the execution of the laws of the State.

Chap. 30, Laws 1897, authorizing counties to refund moneys advanced by citizens to aid counties to enforce the laws, is not in violation of this section.
Civic Federation v. S. L. County, 22 U. 6; 61 P. 222.

A moral obligation of the state may be converted into a legal obligation by the legislature.
Thoreson v. State, 21 U. 187; 60 P. 982.
Civic Fed. v. S. L. County, 22 U. 6; 61 P. 222.

SEC. 31. **[Lending public credit forbidden.]** The Legislature shall not authorize the State, or any county, city, town, township, district or other political subdivision of the State to lend its credit or subscribe to stock or bonds in aid of any railroad, telegraph or other private individual or corporate enterprise or undertaking.

ARTICLE VII.

EXECUTIVE.

SECTION 1. **[Executive department. Terms, residence, and duties of officers.]** The Executive Department shall consist of Governor, Secretary of State, State Auditor, State Treasurer, Attorney General, and Superintendent of Public Instruction, each of whom shall hold his office for four years, beginning on the first Monday of January next after his election, except that the terms of office of those elected at the first election shall begin when the State shall be admitted into the Union, and shall end on the first Monday in January, A. D. 1901. The officers of the Executive Department, during their terms of office, shall reside at the seat of government, where they shall keep the public records, books and papers. They shall perform such duties as are prescribed by this Constitution and as may be prescribed by law.

First election for state officers, art. 24, secs. 11, 12.

SEC. 2. **[Election. Tie: legislature to elect.]** The officers provided for in section one of this article, shall be elected by the qualified electors of the State at the time and place of voting for members of the Legislature, and the persons respectively having the highest number of votes cast for the office voted for shall be elected; but if two or more shall have an equal and the highest number of votes for any one of said offices, the two houses of the Legislature, at its next regular session, shall elect forthwith by joint ballot one of such persons for said office.

Tie vote for district judge at first election, how decided, art. 24, sec. 13.

SEC. 3. **[Qualifications of governor, etc.]** No person shall be eligible to the office of Governor or Secretary of State unless he shall have attained the age of thirty years at the time of his election, nor to the office of Attorney-General unless he shall have attained the age of twenty-five years at the time of his election, and have been admitted to practice in the Supreme Court of the Territory or of the State of Utah, nor unless he shall be in good standing at the bar at the time of his election. No person shall be eligible to any of the offices provided for in section one of this article, unless at the time of his election he shall be a qualified elector, and shall have been a resident citizen of the State or Territory for five years next preceding his election. The State Auditor and State Treasurer shall be ineligible to election as their own successors.

SEC. 4. **[Governor commander-in-chief.]** The Governor shall be Commander-in-Chief of the military forces of the State, except when they shall be called into the service of the United States. He shall have power to call out the militia to execute the laws, to suppress insurrection, or to repel invasion.

SEC. 5. **[Duties of governor.]** The Governor shall see that the laws are faithfully executed; he shall transact all executive business with the officers

of the government, civil and military, and may require information in writing from the officers of the Executive Department, and from the officers and managers of State Institutions upon any subject relating to the condition, management, and expenses of their respective offices and institutions, and at any time when the Legislative Assembly is not in session, may, if he deem it necessary, appoint a committee to investigate and report to him upon the condition of any executive office or State Institution. He shall communicate by message the condition of the State to the Legislature at every regular session, and recommend such measures as he may deem expedient.

SEC. 6. **[Id. May convene extra session.]** On extraordinary occasions, the Governor may convene the Legislature by proclamation, in which shall be stated the purpose for which the Legislature is to be convened, and it shall transact no legislative business except that for which it was especially convened, or such other legislative business as the Governor may call to its attention while in session. The Legislature, however, may provide for the expenses of the session and other matters incidental thereto. The Governor may also by proclamation convene the Senate in extraordinary session for the transaction of executive business.

Special session, art. 6, sec. 16.

SEC. 7. **[Id. May adjourn legislature, when.]** In case of a disagreement between the two houses of the Legislature at any special session, with respect to the time of adjournment, the Governor shall have power to adjourn the Legislature to such time as he may think proper: Provided, it be not beyond the time fixed for the convening of the next Legislature.

Adjournment of legislature, art. 6, sec. 15.

SEC. 8. **[Bills presented to governor. Veto. Appropriation bills.]** Every bill passed by the Legislature, before it becomes a law, shall be presented to the Governor; if he approve, he shall sign it, and thereupon it shall become a law; but if he do not approve, he shall return it with his objections to the house in which it originated, which house shall enter the objections at large upon its journal and proceed to reconsider the bill. If, after such reconsideration, it again passes both houses by a yea and nay vote of two-thirds of the members elected to each house, it shall become a law, notwithstanding the Governor's objections. If any bill be not returned within five days after it shall have been presented to him, (Sunday, and the day on which he received it excepted,) the same shall be a law in like manner as if he had signed it, unless the Legislature by its final adjournment prevent such return, in which case it shall be filed with his objections in the office of the Secretary of State within ten days after such adjournment (Sundays excepted) or become a law. If any bill presented to the Governor contain several items of appropriations of money, he may object to one or more such items, while approving other portions of the bill; in such case he shall append to the bill at the time of signing it, a statement of the item or items which he declines to approve, together with his reasons therefor, and such item or items shall not take effect unless passed over the Governor's objection as in this section provided.

Passage of bills by legislature, art. 6, secs. 22-24.

The limitations and restrictions of this section are mandatory upon the legislature and conclusive upon all departments of the state government.
Ritchie v. Richards, 14 U. 345; 47 P. 670.

SEC. 9. **[Governor may fill certain vacancies.]** When any State or district office shall become vacant, and no mode is provided by the Constitution and laws for filling such vacancy, the Governor shall have the power to fill the same by granting a commission, which shall expire at the next election, and upon qualification of the person elected to such office.

General election, art. 4, sec. 9.

Special election for member of legislature, art. 6, sec. 13.

SEC. 10. **[Governor's appointive power. Vacancies.]** The Governor shall nominate, and by and with the consent of the Senate, appoint all State and district officers whose offices are established by this Constitution, or which may be created by law, and whose appointment or election is not otherwise provided for. If, during the recess of the Senate, a vacancy occur in any

State or district office, the Governor shall appoint some fit person to discharge the duties thereof until the next meeting of the Senate, when he shall nominate some person to fill such office. If the office of justice of the supreme or district court, Secretary of State, State Auditor, State Treasurer, Attorney-General or Superintendent of Public Instruction be vacated by death, resignation or otherwise, it shall be the duty of the Governor to fill the same by appointment, and the appointee shall hold his office until his successor shall be elected and qualified, as may be by law provided.

The term of office of a district judge appointed in 1896 to fill a vacancy caused by the resignation of a judge whose term extended until January, 1901, expired upon the qualification of his successor elected in November, 1896.
Ritchie v. Richards, 14 U. 345; 47 P. 670.

The governor alone may appoint during a recess of the legislature.
People v. Hasbrouck, 11 U. 291; 39 P. 918.

SEC. 11. **[Vacancy in office of governor.]** In case of the death of the Governor, or his impeachment, removal from office, inability to discharge the duties of his office, resignation, or absence from the State, the powers and duties of said office shall devolve upon the Secretary of State, until the disability shall cease, or until the next general election, when the vacancy shall be filled by election. If, during a vacancy in the office of Governor, the Secretary of State resign, die or become incapable of performing the duties of the office, or be displaced, or be absent from the State, the President *pro tempore* of the senate, shall act as Governor until the vacancy be filled or the disability cease. While performing the duties of the Governor as in this section provided, the Secretary of State, or the President *pro tempore* of the Senate, as the case may be, except in cases of temporary disability, or absence from the State, shall be entitled to the salary and emoluments of the Governor.

SEC. 12. **[Board of pardons. Respites and reprieves.]** Until otherwise provided by law, the Governor, Justices of the Supreme Court and Attorney-General shall constitute a Board of Pardons, a majority of whom, including the Governor, upon such conditions, and with such limitations and restrictions as they deem proper, may remit fines and forfeitures, commute punishments, and grant pardons after convictions, in all cases except treason and impeachments, subject to such regulations as may be provided by law, relative to the manner of applying for pardons; but no fine or forfeiture shall be remitted, and no commutation or pardon granted, except after a full hearing before the Board, in open session, after previous notice of the time and place of such hearing has been given. The proceedings and decisions of the Board, with the reasons therefor in each case, together with the dissent of any member who may disagree, shall be reduced to writing, and filed, with all papers used upon the hearing, in the office of the Secretary of State.

The Governor shall have power to grant respites or reprieves in all cases of convictions for offenses against the State, except treason or conviction on impeachment; but such respites or reprieves shall not extend beyond the next session of the Board of Pardons; and such Board, at such session, shall continue or determine such respite or reprieve, or they may commute the punishment, or pardon the offense as herein provided. In case of conviction for treason, the Governor shall have the power to suspend execution of the sentence, until the case shall be reported to the Legislature at its next regular session, when the Legislature shall either pardon, or commute the sentence, or direct its execution; he shall communicate to the Legislature at each regular session, each case of remission of fine or forfeiture, reprieve, commutation or pardon granted since the last previous report, stating the name of the convict, the crime for which he was convicted, the sentence and its date, the date of remission, commutation, pardon or reprieve, with the reasons for granting the same, and the objections, if any, of any member of the Board made thereto.

Sec. 2251, R. S. 1898, providing for a board of corrections which is given the power to commute sentences is void, because in conflict with this section of the Con. which creates board of pardons.
State v. State Board of Corrections, 16 U. 478; 52 P. 1090.

SEC. 13. **[State prison commissioners. Board of examiners.]** Until otherwise provided by law, the Governor, Secretary of State and Attorney-General shall constitute a Board of State Prison Commissioners, which Board shall have such supervision of all matters connected with the State Prison as may be provided by law. They shall, also, constitute a Board of Examiners, with power to examine all claims against the State except salaries or compensation of officers fixed by law, and perform such other duties as may be prescribed by law; and no claim against the State, except for salaries and compensation of officers fixed by law, shall be passed upon by the Legislature without having been considered and acted upon by the said Board of Examiners.

The provisions of this section do not prohibit the passage of a law such as § 2501, creating a legal obligation on the part of the state out of which was a mere moral obligation, without such obligation having been first considered and acted upon by the state board of examiners. (On rehearing of 19 U. 18; 57 P. 175.)

Thoreson v. State Board Examiners, 21 U. 187; 60 P. 982.

A claim by a court stenographer for mileage was a claim for compensation fixed by contract, not by law.

State ex rel Davis v. Edwards, 33 U. 243; 93 P. 720.

This section is an inhibition upon the maintenance of an action directly against the state, although it does not prohibit actions against state agencies, or even the board of examiners.

Wilkinson v. State, 42 U. 483; 134 P. 626.

SEC. 14. **[Insane asylum commissioners.]** Until otherwise provided by law, the Governor, State Treasurer and State Auditor shall constitute a Board of Insane Asylum Commissioners. Said Board shall have such supervision of all matters connected with the State Insane Asylum as may be provided by law.

SEC. 15. **[Reform school commissioners.]** Until otherwise provided by law, the Governor, Attorney-General and Superintendent of Public Instruction shall constitute a Board of Reform School Commissioners. Said Board shall have such supervision of all matters connected with the State Reform School as may be provided by law.

SEC. 16. **[Duties of secretary of state.]** The Secretary of State shall keep a record of the official acts of the Legislature and Executive Department of the State, and, when required, shall lay the same and all matters relative thereto before either branch of the Legislature, and shall perform such other duties as may be provided by law.

SEC. 17. **[Duties of auditor and treasurer.]** The Auditor shall be Auditor of Public Accounts, and the Treasurer shall be the custodian of public moneys, and each shall perform such other duties as may be provided by law.

SEC. 18. **[Duties of attorney general.]** The Attorney-General shall be the legal adviser of the State Officers, and shall perform such other duties as may be provided by law.

SEC. 19. **[Superintendent of public instruction.]** The Superintendent of Public Instruction shall perform such duties as may be provided by law.

Member of state board of education; control of schools, art. 10, sec. 8.

SEC. 20. **[Compensation of state officers.]** The Governor, Secretary of State, Auditor, Treasurer, Attorney-General, Superintendent of Public Instruction and such other State and district officers as may be provided for by law, shall receive for their services quarterly, a compensation as fixed by law, which shall not be diminished or increased so as to affect the salary of any officer during his term, or the term next ensuing after the adoption of this Constitution, unless a vacancy occur, in which case the successor of the former incumbent shall receive only such salary as may be provided by law at the time of his election or appointment. The compensation of the officers provided for by this article, until otherwise provided by law, is fixed as follows:

Governor, Two Thousand Dollars per annum.
Secretary of State, Two Thousand Dollars per annum.
State Auditor, Fifteen Hundred Dollars per annum.
State Treasurer, One Thousand Dollars per annum.
Attorney-General, Fifteen Hundred Dollars per annum.

Superintendent of Public Instruction, Fifteen Hundred dollars per annum.

The compensation for said officers as prescribed in this section, and in all laws enacted pursuant to this Constitution, shall be in full for all services rendered by said officers, respectively, in any official capacity or employment during their respective terms of office. No such officers shall receive for the performance of any official duty any fee for his own use, but all fees fixed by law for the performance by either of them of any official duty, shall be collected in advance and deposited with the State Treasurer quarterly to the credit of the State. The Legislature may provide for the payment of actual and necessary expenses of said officers while traveling in the State in the performance of official duty.

Salaries of state officers as at present fixed, §§ 5071 et seq.

State, county, and other officers to be paid fixed salaries and to account for fees, art. 21, secs. 1, 2.

Increase of salary of governor by legislature during term of first governor not unconstitutional; the words, "provided by law," construed to mean, "provided by statute."

State v. Tingey, 24 U. 225; 67 P. 33.

SEC. 21. **[Grants and commissions.]** All grants and commissions shall be in the name and by the authority of the State of Utah, sealed with the Great Seal of the State, signed by the Governor, and countersigned by the Secretary of State.

SEC. 22. **[The great seal.]** There shall be a seal of the State, which shall be kept by the Secretary of State, and used by him officially. Said seal shall be called "The Great Seal of the State of Utah." The present seal of the Territory of Utah shall be the seal of the State until otherwise provided by law.

SEC. 23. **[U. S. officials ineligible. Governor not eligible for senate.]** No person, while holding any office under the United States' government, shall hold any office under the State government of Utah, and the Governor shall not be eligible for election to the Senate of the United States during the term for which he shall have been elected Governor.

Officers disqualified from holding other offices, art. 5, sec. 1; art. 6, sec. 6.

ARTICLE VIII.

JUDICIAL DEPARTMENT.

SECT[I]ON 1. **[Judicial powers, how vested.]** The Judicial power of the State shall be vested in the Senate sitting as a court of impeachment, in a supreme court, in district courts, in justices of the peace, and such other courts inferior to the Supreme Court as may be established by law.

Power of senate in impeachment, art. 6, sec. 18.

No one of the three departments of government shall exercise any functions pertaining to another department, art. 5, sec. 1.

As the office of city justice of the peace is not among the offices established by the constitution, but is purely statutory, the act abolishing it in certain cities was within the power conferred on the legislature by this section.

State v. Howell, 26 U. 53; 72 P. 187.

Under the provisions of this section, justices of the peace constitute one distinct class of judicial officers.

Love v. Liddle, 26 U. 62; 72 P. 185.

Under the provisions of this section it was within the authority of the legislature to provide for a municipal court in certain cities.

State v. Howell, 26 U. 53; 72 P. 187.

The legislature had authority to create city courts, and to give them power to hold preliminary examinations.

State v. Shockley, 29 U. 25; 80 P. 865.

Law of 1905, establishing juvenile courts, is not unconstitutional because conferring on them jurisdiction and powers previously exercised by the district courts.

Mill v. Brown, 31 U. 473; 88 P. 609.

Cited in: Lundberg v. Green River Irrig. Dist. et al., 40 U. 83; 119 P. 1039.

Judgments of the juvenile courts have the same effect as those of any other court, and cannot be collaterally attacked.

Salt Lake County v. Salt Lake City, 42 U. 548; 134 P. 560.

Chap. 107, Laws 1917, delegating to a city the power to create a municipal court by ordinance is a violation of this section, in that it delegates the power to create such courts to city authorities.

State ex rel Shields v. Barker, 50 U. ——; 167 P. 262.

SEC. 2. **[Supreme court, how constituted. Terms.]** The Supreme Court shall consist of three judges; but after the year A. D. 1905, the Legislature may increase the number thereof to five. A majority of the judges constituting the court shall be necessary to form a quorum or render a decision. If a justice of the Supreme Court shall be disqualified from sitting in a cause

before said court, the remaining judges shall call a district judge to sit with them on the hearing of such cause. The Judges of the Supreme Court shall be elected by the electors of the State at large. The term of office of the Judges of the Supreme Court, excepting as in this article otherwise provided, shall be six years. The Judges of the Supreme Court, immediately after the first election under this Constitution, shall be selected by lot, so that one shall hold office for the term of three years, one for the term of five years, and one for the term of seven years. The lots shall be drawn by the Judges of the Supreme Court, who, for that purpose, shall assemble at the seat of government; and they shall cause the result thereof to be certified by the Secretary of State, and filed in his office. The judge having the shortest term to serve, not holding his office by appointment or election to fill a vacancy, shall be the Chief Justice, and shall preside at all terms of the Supreme Court, and in case of his absence, the judge, having in like manner, the next shortest term, shall preside in his stead.

Term of office may be extended, art. 8, sec. 24.

First election, art. 24, secs. 11, 12.

SEC. 3. **[Id. Qualifications of judges.]** Every Judge of the Supreme Court shall be at least thirty years of age, and, before his election, shall be a member of the bar, learned in the law, and a resident of the Territory or State of Utah for five years next preceding his election.

SEC. 4. **[Id. Jurisdiction. Terms.]** The Supreme Court shall have original jurisdiction to issue writs of *mandamus, certiorari,* prohibition, *quo warranto* and *habeas corpus.* Each of the justices shall have power to issue writs of habeas corpus, to any part of the State, upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself or the Supreme Court, or before any district court or judge thereof in the State. In other cases the Supreme Court Shall have appellate jurisdiction only, and power to issue writs necessary and proper for the exercise of that jurisdiction. The Supreme Court shall hold at least three terms every year and shall sit at the capital of the State.

District courts may issue same writs, art. 8, sec. 7.

Suspension of writ of habeas corpus, art. 1, sec. 5.

Appellate jurisdiction, art. 8, sec. 9, and note.

Supreme court may reverse, affirm or modify judgment; may direct trial court to correct findings and enter judgment thereon, etc., § 6995, and note.

Mandamus—jurisdiction, procedure, decisions, §§ 7390-7402, and notes.

Certiorari—jurisdiction, procedure, decisions, §§ 7376-7386, and notes.

Prohibition—jurisdiction, procedure, decisions, §§ 7407-7410, and notes.

Quo warranto—jurisdiction, procedure, decisions, §§ 7357-7371, and notes.

The supreme court is the exclusive judge of its own jurisdiction.

First Nat. Bank v. Lewis, 13 U. 507; 45 P. 890.

The writs herein provided for cannot be enlarged or abridged by the legislature; nor can it enlarge their functions.

State ex rel Robinson v. Durand, 36 U. 93; 104 P. 760.

The supreme court and not a justice thereof is authorized to issue writs of certiorari. (Sec. 7377, C. L. 1917, conferring such power on a justice must give way to the constitution.)

Robinson v. District Court, 38 U. 378; 113 P. 1026.

SEC. 5. **[District courts, how constituted. Terms. Jurisdiction. Judge pro tempore.]** The State shall be divided into seven judicial districts, for each of which, at least one, and not exceeding three judges, shall be chosen by the qualified electors thereof. The term of office of the district judges shall be four years. Except that the District Judges elected at the first election shall serve until the first Monday in January, A. D. 1901, and until their successors shall have qualified. Until otherwise provided by law, a district court at the county seat of each county shall be held at least four times a year. All civil and criminal business arising in any county, must be tried in such county, unless a change of venue be taken, in such cases as may be provided by law. Each judge of a District Court shall be at least twenty-five years of age, a member of the bar, learned in the law, a resident of the Territory or State of Utah three years next preceding his election, and shall reside in the district for which he shall be elected. Any District Judge may hold a District Court in any county at the request of the judge of the district, and upon a request of the Governor, it shall be his duty to do so. Any cause in the District Court may be tried by a judge *pro tempore,* who must be a member of

the bar, sworn to try the cause, and agreed upon by the parties, or their attorneys of record.

Defendant entitled to trial by jury of the county or district in which offense committed, art. 1, sec. 12, and note.

Term of office may be extended, art. 8, sec. 24.

Judicial districts how constituted, art. 8, sec. 16.

This section is prospective in its operation, and does not apply to actions pending when the constitution was adopted.

Jungk v. Holbrook, 15 U. 198; 49 P. 305.

The provisions of this section dividing the state into seven judicial districts and providing the number of judges thereof, were designed to have force and effect at the time of the adoption of the constitution and "until otherwise provided by law."

State ex rel. v. Lewis, 26 U. 120; 72 P. 388.

Section 6973 providing that a judge may settle and sign a bill of exceptions after he ceases to be judge, is not in violation of the provisions of this section, limiting the term of office of district judges to four years.

Larkin v. Saltair Beach Co., 30 U. 86; 83 P. 686.

PLACE OF TRIAL:

Under the practice prior to statehood, a plaintiff might bring his action in any district in the territory and have it tried there, unless the defendant demanded a change of venue; but, under the constitution, "all civil and criminal business arising in any county must be tried in such county unless a change of venue be taken in such cases as may be provided by law," it is the fundamental right of every defendant to an action in this state to have the same commenced and tried within the county where the acts are alleged to have occurred, subject to a change of venue in such cases as may be provided by law.

Konold v. R. G. W. Ry. Co., 16 U. 151; 51 P. 256.

Where action is begun in the wrong county, the court is without jurisdiction even to order a change of venue. The only power the court has is to dismiss; the objection that the court has no jurisdiction cannot be waived.

R. S. 1898, §§ 2930, 2932, 2933, and sub. 1 of § 2934, are in conflict with this constitutional provision and therefore void.

Id.

The doctrine announced in the Konold case was applied in the following cases:

Campbell v. R. G. Ry., 16 U. 346; 52 P. 594.

Des. Irr. Co. v. McIntyre, 16 U. 398; 52 P. 628.

Mosby v. Gisborn, 17 U. 257; 54 P. 121.

Brown v. Bach, 17 U. 435; 53 P. 991.

Condon v. Leipsiger, 17 U. 498; 55 P. 82.

Steed v. Harvey, 18 U. 367; 54 P. 1011.

Overland M. Co. v. McMaster, 19 U. 177; 56 P. 977.

Woodward v. Edmunds, 20 U. 118; 57 P. 848.

Hecla M. Co. v. Gisborn, 21 U. 68; 59 P. 518.

Conant v. Deep Cr. Irr. Co., 23 U. 627; 66 P. 188.

The Konold doctrine was impliedly overruled in the White case, in which the court held that the constitutional provision is so "indefinite and general as to render it necessary in each case in which the venue is made an issue to resort to the common law in order to determine whether the venue has been properly laid." Also held that defendant had waived its right to object to the venue.

White v. R. G. W. Ry. Co., 25 U. 346; 71 P. 593.

Fields v. Daisy Co., 26 U. 373; 73 P. 521.

In Gibbs v. Gibbs, the Konold case and those following it were expressly overruled; held, that "the term, all civil and criminal business" as used in art. 8, sec. 5, of the constitution, does not change the common law practice in respect to venue in either civil or criminal actions, but is simply an announcement of the common law upon that subject; that the word "business" is used in "the sense of causes of action"; and that the constitution, art. 8, sec. 7, vests district courts "with original jurisdiction," and the district court of Millard county had jurisdiction of the subject matter of this action; and the defendant waived all objections to the venue by appearing without objection. The clause of the constitution "being for the benefit of defendants," is therefore a right which may be waived.

Gibbs v. Gibbs, 26 U. 382; 73 P. 641.

Sec. 6538, does not conflict with the provisions of this section of the constitution; consequently the foreclosure proceedings should have been commenced where the property is situate. Following Gibbs v. Gibbs.

Sherman v. Droubay, 27 U. 47; 74 P. 348.

Secs. 6525-6535, fixing place of trial in civil actions, and § 6532, providing that if the county in which the action is brought is not the proper county, it may be tried therein unless defendant, when he appears, demands trial in the proper county, are not in violation of the provisions of this section of the Con. Objection to venue may be waived.

Snyder v. Pike, 30 U. 102; 83 P. 692.

The provisions of this section that "all civil and criminal business arising in any county must be tried in such county" unless a change of venue be taken as provided by law, neither grants nor limits the jurisdiction of the courts, but prohibits a change of venue, except as provided by law. Word "business" defined.

Sanipoli v. P. V. Coal Co., 31 U. 114; 86 P. 865.

Continental Ins Co. v. Jones, 31 U. 403; 88 P. 229.

Transitory tort action may be commenced and tried in county of defendant's residence. Id.

Where a transitory cause of action arises in another state, plaintiff has the right, in absence of a local statute, fixing the place of trial, to bring his suit in any county of this state in which he may find the defendant.

Steed v. Harvey, 18 U. 367; 54 P. 1011.

The right of action for wrongful death provided by R. S. Wyoming, is transitory and may be maintained in the courts of another state having jurisdiction of such matters, and having acquired jurisdiction of the parties.

Utah S. & T. Co. v. Diamond C. & C. Co., 26 U. 299; 73 P. 524.

In re Lowham's Est., 30 U. 436; 85 P. 445.

Where plaintiff's intestate sustained injury through the negligence of defendant in one county and died from effects of such injury in another county, the cause of action may be said to have arisen in either county, and, under the common law, an action for death was maintainable in either county.

White v. R. G. W. Ry. Co., 25 U. 346; 71 P. 593.

Action for tort properly begun in county of defendant's residence.

Hoggan v. Cahoon, 26 U. 444; 73 P. 512.

Transitory actions arising without the state to be tried in county of defendant's residence, under law of 1903, unless he waives the right.

Farnsworth v. U. P. Coal Co., 32 U. 112; 89 P. 74.

Stone v. U. P. Ry. Co., 32 U. 185; 89 P. 715, 723.

The provisions of the eminent domain statute § 7335, that all proceedings must be brought in the county in which the property is situated, are not in conflict with the provisions of this section, so as to preclude a telegraph company from bringing an action to condemn a railroad's right of way which extends through several counties, for construction of its lines in one of such counties.

Postal Tel. Co. v. O. S. L., 23 U. 474; 65 P. 735.

Obligors on a bond who were sued in county other than that of their residence,

waived the right to remove by entering a demurrer to jurisdiction.

Continental L. Ins. Co. v. Jones, 31 U. 403; 88 P. 229.

SEC. 6. **[Id. Legislature may change districts.]** The Legislature may change the limits of any judicial district, or increase or decrease the number of districts, or the judges thereof. No alteration or increase shall have the effect of removing a judge from office. In every additional district established, a judge shall be elected by the electors thereof, and his term of office shall continue as provided in section five of this article.

The provisions of this section were designed to have force and effect at the time of the adoption of the constitution and until otherwise provided by law.

State, ex rel. v. Lewis, 26 U. 120; 72 P. 388.

SEC. 7. **[Jurisdiction of district courts.]** The District Court shall have original jurisdiction in all matters civil and criminal, not excepted in this Constitution, and not prohibited by law; appellate jurisdiction from all inferior courts and tribunals, and a supervisory control of the same. The District Courts or any judge thereof, shall have power to issue writs of *habeas corpus, mandamus,* injunction, *quo warranto, certiorari,* prohibition and other writs necessary to carry into effect their orders, judgments and decrees, and to give them a general control over inferior courts and tribunals within their respective jurisdictions.

Appeals from justices' courts, art. 8, sec. 9, and note.

Consent cannot confer jurisdiction. Note to § 1667.

Decisions on jurisdiction and on place of trial. Notes to art. 8, secs. 5, 9; and to § 1667.

Original jurisdiction of supreme court, art. 8, sec. 4.

Suspesion of writ of habeas corpus, art. 1, sec. 5.

Mandamus—jurisdiction, procedure, decisions, §§ 7390-7403, and notes.

Certiorari—jurisdiction, procedure, decisions, §§ 7376-7386, and notes.

Prohibition—jurisdiction, procedure, decisions, §§ 7407-7410, and notes.

Quo warranto—jurisdiction, procedure, decisions, §§ 7354-7371, and notes.

Law and equity in same action, art. 8, sec. 19.

Where actions shall be commenced, art. 8, sec. 5, and note.

District courts have no original jurisdiction of an offense involving the violation of a city ordinance, and where record does not show how the case came into the district court, the appeal will be dismissed.

Spanish Fork v. Thomas, 4 U. 485; 11 P. 667.

The intent to abolish probate courts is clearly shown by the provisions of this section.

State v. McNally, 13 U. 25; 43 P. 920.

Under the provision of the constitution, district courts have original jurisdiction in all matters civil and criminal not excepted in the constitution or prohibited by law.

Davidson v. Hunter, 22 U. 117; 61 P. 556.

The district court of a county in which plaintiff resided for statutory period had jurisdiction of the subject matter of an action for divorce for adultery committed in another county.

Gibbs v. Gibbs, 26 U. 382; 73 P. 641.

The jurisdiction of the district court, conferred by this section, is the power to pass on the subject matter of the controversy, without reference to whether it has jurisdiction of a particular case.

Gibbs v. Gibbs, 26 U. 382; 73 P. 641.

Snyder v. Pike, 30 U. 102; 83 P. 692.

Where the terms of court are fixed at stated periods, and the court fails to convene at that time, and by reason thereof is not legally in session, the parties to the action cannot, by agreement, confer jurisdiction.

Myers v. East Bench I. Co., 32 U. 215; 89 P. 1005.

The writs herein provided for cannot be enlarged or abridged by the legislature; nor can it enlarge their functions.

State ex rel Robinson v. Durand, 36 U. 93; 104 P. 760.

An action to foreclose a chattel mortgage, may be started in a county where the note is payable though the property is in, and the defendants reside in, another county.

Emerson, Brantingham Imp. Co. v. Giles, 52 U. —; 173 P. —.

SEC. 8. **[Justices of the peace. Jurisdiction, etc.]** The Legislature shall determine the number of justices of the peace to be elected, and shall fix by law their powers, duties and compensation. The jurisdiction of justices of the peace shall be as now provided by law, but the Legislature may restrict the same.

Justices receive fees in full compensation, except city justices, art. 21, secs. 1, 2.

Under the provisions of this section the legislature may restrict jurisdiction of justices of the peace by general law, but not prescribe jurisdiction in particular localities different from that exercised in the state at large.

Love v. Liddle, 26 U. 62; 72 P. 185.

Sec. 1780 is not an enlargement of the jurisdiction of a justice of the peace as it stood at the time the constitution was adopted. This section of the Con. had reference to the law then in force and to its construction.

Briscoe v. Rich, 20 U. 349; 58 P. 837.

A statute providing for a change of place of trial on the affidavit of defendant, averring nonresidence and making such affidavit conclusive on the parties and the justice is not in violation of this section.

State ex rel Gallagher v. Third Dist. Court, 36 U. 68; 104 P. 750.

SEC. 9. **[Appeals from district court: record, etc. From justices' courts.]** From all final judgments of the district courts, there shall be a right of appeal to the Supreme Court. The appeal shall be upon the record made in the court below, and under such regulations as may be provided by law. In equity cases the appeal may be on questions of both law and fact; in cases at law the appeal shall be on questions of law alone. Appeals shall also lie from the final orders and decrees of the Court in the administration of decedent estates, and

in cases of guardianship, as shall be provided by law. Appeals shall also lie from the final judgment of justices of the peace in civil and criminal cases to the District Courts on both questions of law and fact, with such limitations and restrictions as shall be provided by law; and the decision of the District Courts on such appeals shall be final, except in cases involving the validity or constitutionality of a statute.

Right to appeal in all criminal cases, art. 1, sec. 12.

Law and equity administered in same action, art. 8, sec. 19.

Control of district courts over inferior courts, art. 8, sec. 7.

Decisions on appeals generally. Note to § 6994.

Supreme court may reverse, affirm or modify judgment; may direct trial court to correct findings and enter judgment thereon, etc., § 6995 and note.

Record on appeal, how constituted, § 6992 and note to § 6994.

No appeal lies from judgment of district court in substantial compliance with mandate of appellate court.

Krantz v. R. G. W. Ry., 13 U. 1; 43 P. 623.

First Nat. Bank of Hailey v. Lewis, 13 U. 507; 45 P. 890.

People's B. Assn. v. Fowble, 18 U. 206; 55 P. 57.

Under provision of this section that appeal shall be on record made in court below, and under §§ 6969, 6973, and supreme court rule 25, the supreme court cannot allow amendments to be made to a bill of exceptions after it has been signed, and allowed by the trial judge.

Boyle v. U. P. Ry. Co., 25 U. 420; 71 P. 988.

The legislature may provide that poor persons may appeal by filing an affidavit in forma pauperis.

Eddington v. Union Portland Cement Co., 42 U. 274; 130 P. 243.

A declaration by the statute or constitution that the right of appeal shall be given in certain cases denies by implication the right of appeal in all other cases.

State v. Olsen, 39 U. 177; 115 P. 968.

APPEAL FROM FINAL JUDGMENTS:

While there is no express declaration that appeals will not lie from judgments other than final judgments, yet, under this section and art. 8, sec. 4, appeals will lie only from final judgments of district courts. A final judgment is a judgment that disposes of the case as to all parties, and finally disposes of the subject matter of the litigation on the merits. An appeal from an order pendente lite is not an appeal from a final judgment.

North Point Canal Co. v. Utah & S. L. Canal Co., 14 U. 155; 46 P. 824.

The expression allowing a right of appeal from final judgments, held to include the negative proposition that an appeal will lie from no other.

Id.

Eastman v. Gurrey, 14 U. 169; 46 P. 828.

The policy of the law is to discourage unnecessary appeals.

Id.

Final judgment means a judgment that has terminated the litigation between the parties in the court rendering it.

Watson v. Mayberry, 15 U. 265; 49 P. 479.

Bear R. Co. v. Hanley, 15 U. 506; 50 P. 611.

A judgment to be final, must dispose of the case as to all parties, and finally dispose of the subject matter of the litigation on the merits of the case.

Standard S. Laundry v. Dole, 20 U. 469; 58 P. 1109.

An order appointing a receiver is a final judgment and appealable. (Distinguished in Popp v. Daisy M. Co., 22 U. 457; 63 P. 185.)

Ogden City v. Bear Lake Co., 16 U. 440; 52 P. 697.

An order appointing a receiver to take charge of property is not a final judgment and not appealable. (Distinguishing Ogden v. Bear Lake Co., 16 U. 440; 52 P. 697.)

Popp v. Daisy M. Co., 22 U. 457; 63 P. 185.

Order requiring payment of receiver's compensation and other expenses from funds in receiver's hands is a final judgment.

Ogden City v. Bear R. Irr. Co., 18 U. 279; 55 P. 385.

Orders overruling motion to strike cost bill and to strike judgment from the files not final.

Welsh v. Lambert, 18 U. 1; 54 P. 975.

Order of trial court allowing substitution of attorneys is a final judgment.

Sandberg v. Victor M. Co., 18 U. 66; 55 P. 74.

Order of trial court that attorneys had no lien on a judgment for costs advanced and that judgment for costs be offset, is a final judgment.

Victor M. Co. v. Bank Rep., 18 U. 87; 55 p. 72.

Order for an accounting is not a final judgment.

Standard S. Laundry Co. v. Dole, 20 U. 469; 58 P. 1109.

Order discharging one accused for crime for want of jurisdiction is a final judgment.

State v. Booth, 21 U. 88; 59 P. 553.

State v. McKenna, 24 U. 317; 67 P. 815.

A judgment of dismissal, discharging a prisoner, after plea to the jurisdiction is a final judgment, and, under provisions of this section, an appeal lies on behalf of the state to the supreme court.

State v. Booth, 21 U. 88; 59 P. 553.

An order refusing to confirm a sale of decedent's personal property is a final order.

In re Auerbach's Estate, Wilson v. Meyer, 23 U. 529; 65 P. 488.

An order directing executor to sell real estate is not a final order.

Park v. Furman, 26 U. 50; 72 P. 2.

An order denying a motion to correct a judgment is not a final judgment from which a separate appeal may be taken.

Cullen v. Harris, 27 U. 4; 73 P. 1048.

Order quashing summons without dismissing action, not a final judgment.

Honerine M. M. & S. Co. v. Tallerday Pipe Co., 30 U. 449; 85 P. 626.

Where demurrer is sustained and action dismissed, the judgment is final.

Cont. L. Ins. Co. v. Jones, 31 U. 403; 88 P. 229.

An order dissolving an attachment is appealable.

Bristol v. Brent, 35 U. 213; 99 P. 1000.

An interlocutory decree of divorce is appealable.

Parsons v. Parsons, 40 U. 602; 122 P. 907.

An order denying a removal of executor is appealable.

Farnsworth v. Hatch, 47 U. 62; 151 P. 537.

After final judgment in original action an order setting aside and releasing a garnishment was final and appealable.

Hewlett Bros. v. Mallott, 39 U. 357; 117 P. 68.

A judgment of non-suit is final and appealable.

Robinson v. S. L. City, 37 U. 520; 109 P. 818.

A decree ordering a defendant to deliver to administratrix property real and personal conveyed to him by the intestate and account to her for the interest he may have collected on the notes, etc., was a final judgment.

Wheelwright v. Roman, 50 U. ——; 165 P. 513.

Where a judgment in condemnation proceedings denies condemnation of a substantial part of the land desired, plaintiff may appeal therefrom without waiting until damages are assessed.

Ketchum Coal Co. v. Pleasant Valley Coal Co., 50 U. ——; 168 P. 86.

A judgment is not final while a motion for new trial made within time is undisposed of.

Everett v. Jones, 32 U. 489; 91 P. 360.

The test of finality for the purpose of an appeal is not necessarily whether the whole

matter involved in the action is concluded but whether the particular proceeding or action is terminated by the judgment.

Winnovich v. Emery, 33 U. 345; 93 P. 988.

Where the supreme court has remanded a case where the findings are defective with instructions to make findings on all the issues and to enter judgment thereon an appeal may be taken from the judgment so rendered.

Utah Assoc. of Credit Men v. Home Fire Ins. Co. of Utah, 36 U. 20; 102 P. 632.

A judgment is final when it terminates the action or proceeding, regardless of whether the rights of the parties as to the subject matter have been adjudicated.

State v. 3rd. Dist. Co., 36 U. 223; 102 P. 868.

An appeal will lie from an order of the trial court denying the petition of the wife for an award of alimony filed long after she had secured a decree of divorce.

Cody v. Cody, 47 U. 456; 154 P. 952.

Order refusing or granting motion for new trial not a final judgment and an appeal does not lie therefrom; for the purpose of an appeal, judgment does not become final until motion for new trial has been disposed of.

Eastman v. Gurrey, 14 U. 169; 46 P. 828.

Mader v. Taylor R. A. Co., 15 U. 161; 49 P. 255.

White v. Pease, 15 U. 170; 49 P. 416.

Watson v. Mayberry, 15 U. 265; 49 P. 479.

Bear R. Co. v. Hanley, 15 U. 506; 50 P. 611.

Bacon v. Thornton, 16 U. 138; 51 P. 153.

Stoll v. Daly M. Co., 19 U. 271; 57 P. 295.

Snow v. Rich, 22 U. 123; 61 P. 336.

Felt v. Cook, 31 U. 299; 87 P. 1092.

Everett v. Jones, 32 U. 489; 91 P. 360.

Candland v. Mellen, 46 U. 519; 151 P. 341.

REVIEW IN CASES AT LAW:

Under the provisions of this section of the constitution, in cases at law, whether tried before the court or before a jury, the appellate court can only examine the evidence so far as may be necessary to determine questions of law, and has nothing to do with the sufficiency of the evidence to justify the findings or judgment, unless there is no competent evidence to support them.

The jury, or the court when a law action is tried without a jury, is the exclusive judge of the credilibity of the witnesses and of the weight of the evidence.

Whittaker v. Ferguson, 16 U. 240; 51 P. 980.

Johnson v. Meaghr, 14 U. 426; 47 P. 861.

Anderson v. Daly M. Co., 15 U. 22; 49 P. 126.

Mader v. Taylor R. A. Co., 15 U. 161; 49 P. 255.

Nelson v. S. P. Co., 15 U. 325; 49 P. 644.

Mangum v. Bullion B. M. Co., 15 U. 534; 50 P. 834.

State v. McCune, 16 U. 170; 51 P. 818.

Bellville Pump Works v. Saunders, 16 U. 234; 52 P. 282.

Connor v. Raddon, 16 U. 418; 52 P. 764.

Stoll v. Daly M. Co., 19 U. 271; 57 P. 295.

Thompson v. Whitney, 20 U. 1; 57 P. 429.

Larson v. Onesite, 21 U. 38; 59 P. 234.

Ewell v. Joe Bowers M. Co., 23 U. 192; 64 P. 367.

Strickley v. Hill, 22 U. 257; 62 P. 893.

Fissure M. Co. v. Old Susan M. Co., 22 U. 438; 63 P. 587.

Hill v. S. P. Co., 23 U. 94; 63 P. 814.

Wild v. U. P. Ry. Co., 23 U. 265; 63 P. 886.

Watson v. Butterfield M. Co., 24 U. 222; 66 P. 1067.

Annie L. M. Co. v. Ross M. Co., 25 U. 176; 70 P. 465.

Garr v. Cranney, 25 U. 193; 70 P. 853.

Turnbow v. Beckstead, 25 U. 468; 71 P. 1062.

Burt v. Utah L. & P. Co., 26 U. 157; 72 P. 497.

Copley v. U. P. Ry. Co., 26 U. 361; 73 P. 517.

Jensen v. McCornick, 26 U. 142; 72 P. 630.

Clark v. Ducheneau, 26 U. 97; 72 P. 331.

Monmouth Pottery Co. v. White, 27 U. 236; 75 P. 622.

Bullion B. Co. v. Eureka Hill, 27 U. 417; 76 P. 19.

Gisborn v. Milner, 28 U. 438; 79 P. 556.

Utah S. & T. Co. v. Bamberger, 29 U. 370; 81 P. 887.

Smith Table Co. v. Madsen, 30 U. 297; 84 P. 885.

Hoggan v. Cahoon, 31 U. 172; 87 P. 164.

Rogers v. R. G. W. Ry., 32 U. 367; 90 P. 1075.

Brown v. Salt Lake City, 33 U. 222; 93 P. 570.

Ephraim Milling & Elevator Co. v. City of Ephraim, 49 U. 71; 161 P. 1124.

Musgrave v. Studebaker Bros., 48 U. 410; 160 P. 116.

Hirsh v. Ogden Fur. & Car. Co., 48 U. 434; 160 P. 283.

Scott v. Austin, 47 U. 248; 152 P. 1178.

Boyd v. Topham, 47 U. 224; 152 P. 1185.

Witherow v. Mystic Toilers, 49 U. 177; 161 P. 1126.

Horn v. Dudley, 17 U. 25; 151 P. 362.

Stephens Ranch & L. S. Co. v. U. P. R. Co., 48 U. 528; 161 P. 459.

Utah Lake Irr. Co. v. Jensen, 49 U. 19; 161 P. 677.

Holland-Cook Mfg. Co. v. Con. Wagon & M. Co., 49 U. 43; 161 P. 929.

Hunt v. Moran, 46 U. 388; 150 P. 953.

Brostron v. Lynch-Cannon Eng. Co., 44 U. 397; 140 P. 221.

Boroughs v. Peterson, 39 U. 11; 114 P. 758.

Henker v. Lindsay, 34 U. 298; 97 P. 329.

Fee v. National Bank of Republic, 27 U. 28; 106 P. 517.

California P. B. & L. Co. v. Wasatch Orchard Co., 39 U. 325; 117 P. 35.

Beesley v. Boardman, 50 U. ——; 166 P. 991.

Harris v. Ogden Steam Laundry, 39 U. 436; 117 P. 700.

Burt v. Stringfellow, 48 U. 330; 159 P. 527.

Grosteit v. Miller, 48 U. 511; 160 P. 769.

Lindsay L. & L. S. Co. v. Smart L. & L. S. Co., 43 U. 544; 137 P. 837.

Gaines v. Ogden R. T. Co., 44 U. 512; 141 P. 110.

Martindale v. O. S. L. R. Co., 48 U. 464; 160 P. 275.

Halverson v. Walker, 38 U. 264; 112 P. 804.

Little v. Herzinger, 34 U. 337; 97 P. 639.

McCarrick v. Lenox M. Co., 49 U. 353; 164 P. 478.

Connell v. O. S. L. R. Co., 50 U. ——; 168 P. 337.

In determining the sufficiency of evidence to support a verdict, the appellate court will do it in the light most favorable to the successful party.

Little v. Gorman, 39 U. 63; 114 P. 321.

Lewis v. R. G. W. Ry. Co., 40 U. 483; 123 P. 97.

Where a case has been fairly submitted and the verdict fairly rendered, it will not be interfered with, unless manifest wrong or injustice has been done, or the verdict is plainly not warranted by the evidence.

Pugmire v. O. S. L. R. Co., 33 U. 27; 92 P. 762.

That the jury were not willing to believe all that the plaintiff claimed with respect to the injury sued for and the consequences thereof, does not prove that their finding that she sustained some injury was not well founded, especially after the approval of their verdict by the lower court.

Anderson v. S. L. & O. R. Co., 35 U. 509; 101 P. 579.

Where all the evidence is not in the record, its sufficiency cannot be reviewed.

Bowman v. Ogden City, 33 U. 196; 93 P. 561.

Where the evidence is without conflict and no conflicting inferences are permissible, or where all the evidence with the inferences lacks an essential element of the case or defense, the question what the verdict should be is one of law, but the court will not weigh the evidence to determine whether certain facts are established.

Law v. Smith, 34 U. 394; 98 P. 300.

The supreme court cannot determine what, if any, weight should be given to the evidence of a particular witness.

Harris v. Ogden Steam Laundry, 39 U. 436; 117 P. 700.

Where in related cases the verdict of the

jury and the findings of the court on the same issue were in direct conflict, they must be considered as entirely independent, and inasmuch as there was evidence to support both conclusions, the supreme court cannot interfere with either.

Board of Education v. Wright-Osborne, 49 U. 453; 164 P. 1040.

The weight of negative testimony of witnesses as to giving warning signals ordinarily is for the jury; but when physical conditions and attending circumstances render it highly improbable that they could hear, the rule is otherwise.

Russell v. Watkins, 49 U. 598; 164 P. 867.

Although the court erred in sustaining defendant's objections to questions propounded to their witness by plaintiff on cross-examination as to his previous statements made to plaintiff, in view of all the testimony for plaintiff and the jury's special findings that plaintiff might have slipped on account of snow on her shoe, the error was harmless.

Connell v. O. S. L. R. Co., 50 U. ——; 168 P. 337.

Findings of fact of referee on conflicting evidence held conclusive on appeal, notwithstanding inconsistencies in the testimony of the witnesses of one party; this going only to the weight of evidence and credibility of the witnesses.

Eureka H. M. Co. v. Bullion Beck & C. M. Co., 32 U. 236; 90 P. 157.

A will contest is an action at law, and, on appeal, the supreme court will not weigh conflicting evidence, nor pass upon the credibility of witnesses.

Miller v. Livingston, 31 U. 415; 88 P. 338.

The question of damages is one for the jury and the supreme court cannot interfere if there is any legitimate evidence in the record to sustain the verdict.

Mangum v. Bullion B. M. Co., 15 U. 534; 50 P. 834.

Murray v. City Ry. Co., 16 U. 356; 52 P. 596.

Harrington v. Eureka H. M. Co., 17 U. 300; 53 P. 737.

Croco v. O. S. L. R. R. Co., 18 U. 311; 54 P. 985.

Kennedy v. O. S. L. R. R. Co., 18 U. 325; 54 P. 988.

Marti v. Am. S. & R. Co., 23 U. 52; 63 P. 184.

Budd v. S. L. City Ry. Co., 23 U. 515; 65 P. 486.

Braegger v. O. S. L. R. R. Co., 24 U. 391; 68 P. 140.

Palmquist v. Mine & S. S. Co., 25 U. 257; 70 P. 994.

Corbett v. O. S. L. R. R. Co., 25 U. 449; 71 P. 1065.

Burt v. Utah L. & P. Co., 26 U. 157; 72 P. 497.

O. S. L. R. R. Co. v. Russell, 27 U. 457; 76 P. 345.

Nichols v. O. S. L. R. R. Co., 28 U. 319; 78 P. 866.

Jensen v. D. & R. G. Ry. Co., 44 U. 100; 138 P. 1185.

The Supreme Court is precluded by the finding of the jury from weighing the evidence or passing upon the effect that should be given to any particular statement or kind of evidence produced at the trial.

Shay v. U. P. R. R. Co., 47 U. 252; 153 P. 31.

Where the evidence does not disclose any legal liability on the part of the defendant, the verdict will be set aside.

Marti v. Am. S. & R. Co., 23 U. 52; 63 P. 184.

Christensen v. R. G. W. Ry. Co,, 27 U. 132; 74 P. 876.

Smith v. Cent. Eureka M. Co., 27 U. 307; 75 P. 749.

Roth v. Eccles, 28 U. 456; 79 P. 918.

Dunn v. O. S. L. R. R. Co., 28 U. 478; 80 P. 311.

Pulos v. D. & R. G., 37 U. 238; 107 P. 241.

Where there is no substantial evidence to support a verdict, the question becomes one of law, and it becomes the duty of the supreme court to set aside the judgment.

San Pedro R. Co. v. Board of Ed., 31 U. 305; 90 P. 565.

Russell v. Watkins, 49 U. 598; 164 P. 867.

Action at law; reversed. Evidence examined and held to be insufficient to establish the negligence alleged in the complaint; held further, that the evidence conclusively shows that the injury to plaintiff was due to dangers, the risks of which were assumed by her.

Richards v. Ogden Steam Laundry, 32 U. 423; 91 P. 267.

Appellate court will not interfere with the verdict of a jury in a criminal case if there is any evidence to support it.

State v. Endsley, 19 U. 478; 57 P. 430.

State v. Clark, 27 U. 55; 74 P. 119.

State v. LaChall, 28 U. 80; 77 P. 3.

Where there is no evidence to sustain a verdict in a criminal case, it is error to submit the case to the jury.

State v. Gordon, 28 U. 15; 76 P. 882.

State v. Hutchings, 30 U. 319; 84 P. 893.

Where there is no evidence to support the findings, the judgment will be set aside.

Walley v. Deseret Nat. Bank, 14 U. 305; 47 P. 147.

Eastman v. Gurrey, 15 U. 410; 49 P. 310.

Coates v. Metcalf, 29 U. 209; 81 P. 900.

Stevens v. Rogers, 16 U. 105; 51 P. 216.

Action on contract for money due; trial before the court: Evidence examined and found to be sufficient to support findings and findings to support judgment.

Hatch v. Gorlinski, 31 U. 446; 88 P. 406.

REVIEW IN EQUITY CASES:

The court in an equity case may go behind the findings and decree of the trial court, consider all the evidence, decide on which side the preponderance thereof is, ascertain whether or not the proof justifies the findings and decree, and modify or set aside the findings or decree. In the following cases the decrees were either modified or set aside.

Clawson v. Wallace, 16 U. 300; 52 P. 9.

Ensign v. Fisher, 14 U. 477; 47 P. 950.

North Pt. C. I. Co. v. Utah & S. L. C. Co., 16 U. 246; 52 P. 168.

Lisonbee v. Monroe Irr. Co., 18 U. 343; 54 P. 1009.

Stevens Imp. Co. v. S. Ogden Co., 20 U. 267; 58 P. 843.

Schroeder v. Pratt, 21 U. 176; 60 P. 512.

Copper Globe M. Co. v. Allman, 23 U. 410; 64 P. 1019.

Stover v. Stover, 24 U. 92; 66 P. 766.

Anderson v. Anderson, 24 U. 497; 68 P. 319.

Herriman Irr. Co. v. Keel, 25 U. 96; 69 P. 719.

Lost Cr. Irr. Co. v. Rex, 26 U. 485; 73 P. 660.

Whitmore v. Utah F. Co., 26 U. 488; 73 P. 764.

Nephi Irr. Co. v. Vickers, 29 U. 315; 81 P. 144.

Tuckfield v. Crager, 29 U. 472; 82 P. 860.

Rutan v. Huck, 30 U. 217; 83 P. 833.

S. L. Inv. Co. v. Fox, 32 U. 301; 90 P. 564.

Jones v. Bonanza M. Co., 32 U. 440; 91 P. 273.

Waddell v. Waddell, 36 U. 435; 104 P. 743.

In equity cases the applelate court will not disturb the findings of the trial court, except for clear oversight or mistake. Following cases were affirmed:

McKay v. Farr, 15 U. 261; 49 P. 649.

Hague v. Nephi Irr. Co., 16 U. 421; 52 P. 765.

Silver City M. Co. v. Lowry, 19 U. 334; 57 P. 11.

Center Cr. Irr. Co. v. Thomas, 19 U. 360; 57 P. 30.

McCornick v. Mangum, 20 U. 17; 57 P. 428.

Klopenstine v. Hays, 20 U. 45; 57 P. 712.

West Pt. Irr. Co. v. Moroni Irr. Co., 21 U. 229; 61 P. 16.

Miller v. Livingston, 22 U. 174; 61 P. 569.

Cavanaugh v. Salisbury, 22 U. 465; 63 P. 39.

Elliott v. Whitmore, 23 U. 342; 65 P. 70.

Bunker Hill M. Co. v. Pascoe, 24 U. 60; 66 P. 574.

Murray Hill M. Co. v. Havenor, 24 U. 73; 66 P. 762.

Wilson v. Cunningham, 24 U. 167; 67 P. 118.

Harter v. Sorensen, 24 U. 342; 67 P. 1062.

Gorringe v. Read, 24 U. 455; 68 P. 147.

Promontory Co. v. Argile, 28 U. 398; 79 P. 47.

Grand Central M. Co. v. Mammoth M. Co., 29 U. 490; 83 P. 648.

Red Wing M. Co. v. Clays, 30 U. 242; 83 P. 841.

Roberts v. Braffet, 33 U. 51; 92 P. 789.

Under the constitution appellant may invoke the judgment of the supreme court on the facts and the law; and where findings are clearly against the evidence, or when the supreme court is satisfied that the correctness

of the findings has been overcome by the record, the supreme court must make or direct findings according to the evidence and the law applicable.

Utah Comr. Svgs. Bank v. Fox, 44 U. 323; 140 P. 660.

In equity cases the findings of the trial court will prevail unless it clearly appears from the record that they are against the weight of the evidence.

Mayer v. Flynn, 46 U. 598; 150 P. 962.

Findings on conflicting evidence will not be disturbed.

Jorgensen v. Gessell Pressed Brick Co., 45 U. 31; 141 P. 460.

In equity cases the parties have the right to invoke the judgment of the supreme court upon the facts, as well as upon the law.

Mayer v. Flynn, 46 U. 598; 150 P. 962.

The Supreme Court in an equity case cannot interfere with the court's findings of fact where the evidence on the controlling question is not only in sharp conflict, but justifies findings of the court.

Beesley v. Boardman, 50 U. ——; 166 P. 991.

On appeal in an equity case, the Supreme Court has power to review the testimony to determine the facts and the equities of the parties, though its views conflict with the trial court's findings.

Lake Shore Duck Club v. Lake View Duck Club, 50 U. —; 166 P. 309.

Findings on conflicting evidence in an equity case will not necessarily be approved by the appellate court, since, under the constitution, it is the duty of that court to determine whether the findings were called for by the evidence.

Campbell v. Gowans, 35 U. 268; 100 P. 397.

Where there is conflict in the evidence, the Supreme Court will hesitate to set aside findings or direct different findings to be made.

Folsom v. Fernstrom, 43 U. 432; 134 P. 1021.

In an equity case, the appellate court is not bound by facts not supported by the evidence, and is bound by the undisputed evidence.

Crosby v. Anderson, 49 U. 167; 162 P. 75.

In an equity case, where there is sufficient evidence to support the findings, the appellate court will not review it.

Plant v. Ritter, 47 U. 506; 155 P. 426.

The appellate court is restricted to the issues made below and the only question before it on appeal from the findings of fact is the sufficiency of the evidence to support them; where the findings of the court below as to facts are supported by substantial evidence, the appelate court will not interfere, although the evidence would have supported a contrary finding.

Wolf v. Gray, 48 U. 239; 158 P. 788.

APPEALS FROM JUSTICES' COURTS:

Appeals lie from the district courts of the late territory in cases appealed from justices' courts, even when such appeals are perfected after statehood.

Hodgson v. U. P. Ry. Co., 14 U. 381; 46 P. 270.

An appeal lies to the supreme court to determine the validity and constitutionality of a city ordinance, as well as of statutes.

City of Eureka v. Wilson, 15 U. 53; 48 P. 41.

Ogden City v. Bell Tel. Co., 17 U. 66; 53 P. 985.

But on such appeal the supreme court will consider no other questions.

Id.

Under the provisions of this section, the decisions of the district court in causes appealed from justices' courts are final, except in cases involving the validity or constitutionality of a statute.

Post v. Foot, 18 U. 235; 54 P. 975.

State v. Olsen, 18 U. 484; 56 P. 22.

Where questions are raised in justices' courts which on appeal could be finally determined by a district court, but instead of appealing, a remedy is sought by prohibition, the determination of the district court on the writ is final and will not be reviewed on appeal.

Overland M. Co. v. McMaster, 19 U. 177; 56 P. 977.

The judgment of the district court in cases appealed from justices' courts, is not reviewable by appeal, except in cases involving the constitutionality of a statute; nor will it be reviewed by certiorari, except in cases where district court has acted without, or has exceeded its jurisdiction. (Distinguishing Hanson v. Anderson, 21 U. 286; 61 P. 219; Crooks v. Dist. Court, 21 U. 98; 59 P. 529, and Smith v. Dist. Court, 24 U. 164; 66 P. 1065.)

O. S. L. v. Dist. Court, 30 U. 371; 85 P. 360.

Since the action of the district court on appeal from a justice's court is final, and cannot be reviewed on appeal nor by certiorari, the remedy is by mandamus where the court erroneously dismisses the appeal, for its act is a refusal to proceed further, so that, if contrary to law, the court may be required to proceed in accordance therewith

Hoffman v. Lewis, 31 U. 179; 87 P. 167.

Con. art. 8, sec. 9, authorizing an appeal from all final judgments of the district courts to the supreme court, is applicable only to final judgments in actions originally begun in the district court.

McCashland v. Keogh, 31 U. 1a; 88 P. 680.

Garcia v. Free, 31 U. 389; 88 P. 30.

Under law of 1903, p. 48, on appeal from city court, where the judgment of the district court does not exceed $100, no appeal lies to the supreme court.

Id.

The jurisdiction of a district court of an appeal from a justice's court must be determined with regard to the law at the time of the appeal.

State v. Third Dist. Court, 32 U. 418; 91 P. 133.

SEC. 10. **[County attorneys. Election, term, etc.]** A County Attorney shall be elected by the qualified voters of each county who shall hold his office for a term of two years. The powers and duties of County Attorneys, and such other attorneys for the State as the Legislature may provide, shall be prescribed by law. In all cases where the attorney for any county, or for the State, fails or refuses to attend and prosecute according to law, the court shall have power to appoint an attorney *pro tempore*.

This section does not authorize the court to appoint an attorney to defend an indigent accused.

Pardee v. Salt Lake County, 39 U. 482; 118 P. 122.

SEC. 11. **[Removal of judges from office.]** Judges may be removed from office by the concurrent vote of both houses of the Legislature, each voting separately; but two-thirds of the members to which each house may be entitled must concur in such vote. The vote shall be determined by yeas and nays, and the names of the members voting for or against a judge, together with the cause or causes of removal, shall be entered on the journal of each house. The judge against whom the house may be about to proceed shall receive notice thereof, accompanied with a copy of the cause alleged

for his removal, at least ten days before the day on which either house of the Legislature shall act thereon.

Impeachment of officers, art. 6, secs. 17-20.

SEC. 12. **[Judges' salaries to remain fixed.]** The Judges of the Supreme and District Courts shall receive at stated times compensation for their services, which shall not be increased or diminished during the time for which they are elected.

Salaries of judges, art. 8, sec. 20; increased in 1903, §§ 5072, 5073.

SEC. 13. **[Disqualification of judges.]** Except by consent of all the parties, no judge of the supreme or inferior courts shall preside in the trial of any cause where either of the parties shall be connected with him by affinity or consanguinity within the degree of first cousin, or in which he may have been of counsel, or in the trial of which he may have presided in any inferior court.

SEC. 14. **[Clerks of courts. Reporter.]** The Supreme Court shall appoint a clerk, and a reporter of its decisions, who shall hold their offices during the pleasure of the Court. Until otherwise provided, County Clerks shall be *ex officio* clerks of the District Courts in and for their respective counties, and shall perform such other duties as may be provided by law.

SEC. 15. **[Judges shall not appoint relatives to office.]** No person related to any judge of any court by affinity or consanguinity within the degree of first cousin, shall be appointed by such court or judge to, or employed by such court or judge in any office or duty in any court of which such judge may be a member.

SEC. 16. **[Judicial districts, how constituted.]** Until otherwise provided by law, the Judicial Districts of the State shall be constituted as follows:

First District:—The Counties of Cache, Box Elder and Rich.

Second District:—The Counties of Weber, Morgan and Davis.

Third District:—The Counties of Summit, Salt Lake and Tooele, in which there shall be elected three district judges.

Fourth District:—The Counties of Utah, Wasatch and Uintah.

Fifth District:—The Counties of Juab, Millard, Beaver, Iron and Washington.

Sixth District:—The Counties of Sevier, Piute, Wayne, Garfield and Kane.

Seventh District:—The Counties of San Pete, Carbon, Emery, Grand and San Juan.

Seven judicial districts, art 8, sec. 5.

By Governor's proclamations, Aug. 13, 1914, Duchesne County was added to the Fourth Judicial District and Nov. 16, 1917, Daggett County was added to the Second Judicial District.

Districts may be changed, art. 8, sec. 6.

SEC. 17. **[Courts of record.]** The Supreme and District Courts shall be courts of record, and each shall have a seal.

Seal, art. 24, sec. 8.

SEC. 18. **[Style of process: "The State of Utah."]** The style of all process shall be, "The State of Utah," and all prosecutions shall be conducted in the name and by the authority of the same.

A proceeding for removal of a public officer under § 4580 is civil, not criminal, and the accusation need not be in name of State of Utah, as provided by this section.

Skeen v. Craig, 31 U. 20; 86 P. 487.

SEC. 19. **[But one form of civil action.]** There shall be but one form of civil action, and law and equity may be administered in the same action.

Appeals in law and equity cases respectively, art. 8, sec. 9.

An equitable estoppel may be pleaded as a defense in a legal action for dower.

Hilton v. Sloan, 37 U. 359; 108 P. 689.

It is intended to permit parties to dispose of all questions whether legal or equitable in one and the same action.

Naylor v. Jensen, 38 U. 310; 113 P. 73.

Courts may administer relief according to the nature of case set out and may not dismiss an action at law on the ground that relief should have been sought in equity.

Morgan v. Childs-Cole & Co., 41 U. 562; 128 P. 521.

An equitable right of an assignee of part of a claim maybe enforced in a civil action.

National Union Fire Ins. Co. v. D. & R. G. Co., 44 U. 26; 137 P. 653.

In a proper case a personal judgment may be rendered in an action to foreclose a mechanic's lien.

Volker-Scowcroft Lbr. Co. v. Vance, 36 U. 348; 103 P. 970.

In a condemnation action, title to the property involved may be determined.

Ketchum Coal Co. v. District Court, 48 U. 342; 159 P. 737.

SEC. 20. **[Salary of judges.]** Until otherwise provided by law, the sala-

ries of supreme and district judges, shall be three thousand dollars per annum, and mileage, payable quarterly out of the State treasury.

Salaries not to be increased, etc., during term, art. 8, sec. 12; increased in 1903, §§ 5072, 5073.

SEC. 21. **[Judges to be conservators of peace.]** Judges of the Supreme Court, District Courts, and justices of the peace, shall be conservators of the peace, and may hold preliminary examinations in cases of felony.

Preliminary examination, waiver, art. 1, sec. 13.

The prosecution and conviction of a person by information filed by county attorney in accordance with the statutes, this section and art. 1, sec. 13, does not abridge the privileges or immunities of such person as a citizen of U. S. under the fourteenth amendment.

In re Maxwell, 19 U. 495; 57 P. 412; affirmed 176 U. S. 581.

State v. Imlay, 22 U. 156; 61 P. 557.

The legislature had authority to create city courts, and to give them power to hold preliminary examinations.

State v. Shockley, 29 U. 25; 80 P. 865.

Legislature may not provide that all preliminary hearings shall be heard by the justices of the peace.

Martineau v. Crabbe, 46 U. 335; 150 P. 301.

SEC. 22. **[Judges to report defects in laws.]** District Judges may, at any time, report defects and omissions in the law to the Supreme Court, and the Supreme Court, on or before the first day of December of each year, shall report in writing to the Governor any seeming defect or omission in the law.

SEC. 23. **[Publication of decisions.]** The Legislature may provide for the publication of decisions and opinions of the Supreme Court, but all decisions shall be free to publishers.

SEC. 24. **[Effect of extending judges' terms.]** The terms of office of Supreme and District Judges may be extended by law, but such extension shall not affect the term for which any judge was elected.

SEC. 25. **[Decisions of supreme court to be in writing.]** When a judgment or decree is reversed, modified or affirmed by the Supreme Court, the reasons therefor shall be stated concisely in writing, signed by the judges concurring, filed in the office of the Clerk of the Supreme Court, and preserved with a record of the case. Any judge dissenting therefrom, may give the reasons of his dissent in writing over his signature.

SEC. 26. **[Id. Court to prepare syllabus.]** It shall be the duty of the court to prepare a syllabus of all the points adjudicated in each case, which shall be concurred in by a majority of the judges thereof, and it shall be prefixed to the published reports of the case.

SEC. 27. **[Judge forfeits office by absence.]** Any judicial officer who shall absent himself from the State or district for more than ninety consecutive days, shall be deemed to have forfeited his office: Provided, That in case of extreme necessity, the Governor may extend the leave of absence to such time as the necessity therefor shall exist.

ARTICLE IX.

CONGRESSIONAL AND LEGISLATIVE APPORTIONMENT.

SECTION 1. **[Election of congressman.]** One Representative in the Congress of the United States shall be elected from the State at large on the Tuesday next after the first Monday in November, A. D. 1895, and thereafter at such times and places, and in such manner as may be prescribed by law. When a new apportionment shall be made by Congress, the Legislature shall divide the State into congressional districts accordingly.

First election of representative, art. 24, sec. 12.

SEC. 2. **[Decennial census to be taken.]** The Legislature shall provide by law for an enumeration of the inhabitants of the State, A. D. 1905, and every tenth year thereafter, and at the session next following such enumeration, and also at the session next following an enumeration made by the authority of the United States, shall revise and adjust the apportionment for senators and representatives on the basis of such enumeration according to ratios to be fixed by law.

SEC. 3. **[Number of members of legislature.]** The Senate shall consist of eighteen members, and the House of Representatives of forty-five members.

The Legislature may increase the number of senators and representatives, but the senators shall never exceed thirty in number and the number of representatives shall never be less than twice nor greater than three times the number of senators.

Election of legislators, terms, etc., art. 6, secs. 3-6.

SEC. 4. **[Senatorial districts, how formed.]** When more than one county shall constitute a senatorial district, such counties shall be contiguous, and no county shall be divided in the formation of such districts unless such county contains sufficient population within itself to form two or more districts, nor shall a part of any county be united with any other county in forming any district.

REPRESENTATIVE DISTRICTS.

Until otherwise provided by law, representatives shall be apportioned among the several counties of the State as follows: Provided, That in any future apportionment made by the Legislature, each county shall be entitled to at least one representative.

The County of Box Elder shall constitute the First Representative District, and be entitled to one representative.

The County of Cache shall constitute the Second Representative District, and be entitled to three representatives.

The County of Rich shall constitute the Third Representative District, and be entitled to one representative.

The County of Weber shall constitute the Fourth Representative District, and be entitled to four representatives.

The County of Morgan shall constitute the Fifth Representative District, and be entitled to one representative.

The County of Davis shall constitute the Sixth Representative District, and be entitled to one representative.

The County of Tooele shall constitute the Seventh Representatvie District, and be entitled to one representative.

The County of Salt Lake shall constitute the Eighth Representative District, and be entitled to ten representatives.

The county of Summit shall constitute the Ninth Representative District, and be entitled to one representative.

The County of Wasatch shall constitute the Tenth Representative District, and be entitled to one representative.

The County of Utah shall constitute the Eleventh Representative District, and be entitled to four representatives.

The County of Uintah shall constitute the Twelfth Representative District, and be entitled to one representative.

The County of Juab shall constitute the Thirteenth Representative District, and be entitled to one representative.

The County of San Pete shall constitute the Fourteenth Representative District, and be entitled to two representatives.

The County of Carbon shall constitute the Fifteenth Representative District, and be entitled to one representative.

The County of Emery shall constitute the Sixteenth Representative District, and be entitled to one representative.

The County of Grand shall constitute the Seventeenth Representative District, and be entitled to one representative.

The County of Sevier shall constitute the Eighteenth Representative District, and be entitled to one representative.

The County of Millard shall constitute the Nineteenth Representative District, and be entitled to one representative.

The County of Beaver shall constitute the Twentieth Representative District, and be entitled to one representative.

The County of Piute shall constitute the Twenty-first Representative District, and be entitled to one representative.

The County of Wayne shall constitute the Twenty-second Representative District, and be entitled to one representative.

The County of Garfield shall constitute the Twenty-third Representative District, and be entitled to one representative.

The County of Iron shall constitute the Twenty-fourth Representative District, and be entitled to one representative.

The County of Washington shall constitute the Twenty-fifth Representative District, and be entitled to one representative.

The County of Kane shall constitute the Twenty-sixth Representative District, and be entitled to one representative.

The County of San Juan shall constitute the Twenty-seventh Representative District, and be entitled to one representative.

Additional districts, § 2267.

SENATORIAL DISTRICTS.

Until otherwise provided by law, the Senatorial Districts shall be constituted and numbered as follows:

The Counties of Box Elder and Tooele shall constitute the First District, and be entitled to one Senator.

The County of Cache shall constitute the Second District, and be entitled to one Senator.

The Counties of Rich, Morgan and Davis shall constitute the Third District, and be entitled to one Senator.

The County of Weber shall constitute the Fourth District, and be entitled to two Senators.

The Counties of Summit and Wasatch shall constitute the Fifth District, and be entitled to one Senator.

The County of Salt Lake shall constitute the Sixth District, and be entitled to five Senators.

The County of Utah shall constitute the Seventh District, and be entitled to two Senators.

The Counties of Juab and Millard shall constitute the Eighth District, and be entitled to one Senator.

The County of San Pete shall constitute the Ninth District, and be entitled to one Senator.

The Counties of Sevier, Wayne, Piute, and Garfield shall constitute the Tenth District, and be entitled to one Senator.

The Counties of Beaver, Iron, Washington, and Kane shall constitute the Eleventh District, and be entitled to one Senator.

The Counties of Emery, Carbon, Uintah, Grand, and San Juan shall constitute the Twelfth District, and be entitled to one Senator.

ARTICLE X.

EDUCATION.

SECTION 1. **[Free non-sectarian schools.]** The Legislature shall provide for the establishment and maintenance of a uniform system of public schools, which shall be open to all children of the State, and be free from sectarian control.

Educational funds not to be used for denominational schools, etc., Enabling Act, sec. 11.
Similar section, art. 3, sec. 4.
Schools to remain under control of state, Enabling Act, sec. 11.
Religious or partisan qualifications forbidden, art. 10, sec. 12.

SEC. 2. **[Public school system, maintenance.]** The public school system shall include kindergarten schools; common schools, consisting of primary and grammar grades; high schools, an agricultural college; a university; and such other schools as the Legislature may establish. The common schools shall be free. The other departments of the system shall be supported as provided by law. [Amended Nov. 6, 1906; Nov. 8, 1910.]

The section in its original form placed in the appendix to the constitution. Amended Nov. 6, 1906, to empower the legislautre to authorize the use of state school funds to assist in supporting high schools.

Amended Nov. 8, 1910, by omitting all special provisions concerning High schools.

SEC. 3. **[State school fund, interest distributed.]** The proceeds of all lands that have been or may be granted by the United States to this State, for the support of the common schools; the proceeds of all property that may accrue to the State by escheat or forfeiture; all unclaimed shares and dividends of any corporation incorporated under the laws of this State; the proceeds of the sale of timber, mineral or other property from school and State lands, other than those granted for specific purposes; and five per centum of the net proceeds of the sale of public lands lying within the State, which shall be sold by the United States, subsequent to the admission of this State into the Union, shall be and remain a perpetual fund, to be called the State School Fund, the interest of which only, together with such other means as the Legislature may provide, shall be distributed among the several school districts according to the school population residing therein. Provided, that all funds derived from any State tax for high schools shall be apportioned among the several cities and school districts according to the attendance at the high schools therein; but no city or district shall be entitled to any part of the fund derived from the State tax for high schools unless the high school therein is maintained upon the standard and for the period during the year that may be fixed by the State Board of Education. [Amended Nov. 8, 1910.]

Lands granted, funds, etc., Enabling Act, secs. 6-12.

Perpetual educational funds, art. 10, secs. 5, 7, 10; art. 19, sec. 3; art. 20; sec. 1.

Amended November 8, 1910, by adding the proviso clause. Section in original form placed in appendix to Constitution.

SEC. 4. **[University and agricultural college located. Rights, etc.]** The location and establishment by existing laws of the University of Utah, and the Agricultural College are hereby confirmed, and all the rights, immunities, franchises and endowments heretofore granted or conferred, are hereby perpetuated unto said University and Agricultural College respectively.

SEC. 5. **[Proceeds of land grants to constitute permanent funds.]** The proceeds of the sale of lands reserved by an Act of Congress, approved February 21st, 1855, for the establishment of the University of Utah, and of all the lands granted by an Act of Congress, approved July 16th, 1894, shall constitute permanent funds, to be safely invested and held by the State; and the income thereof shall be used exclusively for the support and maintenance of the different institutions and colleges, respectively, in accordance with the requirements and conditions of said Acts of Congress.

Land grants, conditions, etc., Enabling Act, secs. 6-13.

Funds perpetuated and guaranteed, art. 10; secs. 3, 7, 10; art. 19, sec. 3; art. 20, sec. 1.

SEC. 6. **[Separate control of city schools.]** In cities of the first and second class, the public school system shall be controlled by the Board of Education of such cities, separate and apart from the counties in which said cities are located. [As amended Nov. 6, 1900.]

Section in its original form placed in the appendix to the constitution.

Amended Nov. 6, 1900, by omitting the words "maintained and."

High schools in cities, art. 10, sec. 2.

This section (prior to amendment of Nov. 6, 1900) means that the board of education shall bear the expense to keep up, supply what is needed, maintain and control the public school system therein, and certain provisions of law providing for the collection of a school tax within Salt Lake City, and the subtraction of a part of such fund for county school purposes is invalid, being repugnant to this section.

Merrill v. Spencer, 14 U. 273; 46 P. 1096.

SEC. 7. **[School funds guaranteed by state.]** All public School Funds shall be guaranteed by the State against loss or diversion.

See notes to sec. 5, ante.

SEC. 8. **[State board of education.]** The general control and supervision of the Public School System shall be vested in a State Board of Education, consisting of the Superintendent of Public Instruction, and such other persons as the Legislature may provide.

SEC. 9. **[Text books.]** Neither the Legislature nor the State Board of Education shall have power to prescribe text books to be used in the common schools.

SEC. 10. **[Institutions for deaf, dumb, and blind. Property. Fund.]** Institutions for the deaf and Dumb, and for the Blind, are hereby established. All property belonging to the School for the Deaf and Dumb, heretofore connected with the University of Utah, shall be transferred to said Institution for the Deaf and Dumb. All the proceeds of the lands granted by the United States, for the support of a Deaf and Dumb Asylum, and for an Institution for the Blind, shall be a perpetual fund for the maintenance of said Institutions. It shall be a trust fund, the principal of which shall remain inviolate, guaranteed by the state against loss by diversion.

Land grants, conditions, etc., Enabling Act, secs. 6-13.

Funds perpetuated and guaranteed, art. 10, secs. 3, 5, 7; art. 19, sec. 3; art. 20, sec. 1.

SEC. 11. **[Metric system.]** The Metric System shall be taught in the public schools of the State.

SEC. 12. **[No religious or partisan tests in schools.]** Neither religious nor partisan test or qualification shall be required of any person, as a condition of admission, as teacher or student, into any public educational institution of the State.

Toleration of religious sentiment, art. 1, secs. 1, 4; art. 3, sec. 1.

Schools to be free from sectarian control, art. 3, sec. 4; art. 10, sec. 1; Enabling Act, sec. 11.

SEC. 13. **[Public aid to church schools forbidden.]** Neither the Legislature nor any county, city, town, school district or other public corporation, shall make any appropriation to aid in the support of any school, seminary, academy, college, university or other institution, controlled in whole, or in part, by any church, sect or denomination whatever.

Proceeds of land grants not to be used for denominational schools, Enabling Act. sec. 11.

Public support of sectarian establishment forbidden, art. 1, sec. 4.

ARTICLE XI.

COUNTIES, CITIES AND TOWNS.

SECTION 1. **[Existing counties, precincts, etc., recognized.]** The several counties of the Territory of Utah, existing at the time of the adoption of this Constitution, are hereby recognized as legal subdivisions of this State, and the precincts, and school districts, now existing in said counties, as legal subdivisions thereof, and they shall so continue until changed by law in pursuance of this article.

SEC. 2. **[Removals of county seats.]** No County Seat shall be removed unless two-thirds of the qualified electors of the county, voting on the proposition at a general election, shall vote in favor of such removal, and two-thirds of the votes cast on the proposition shall be required to re-locate a county seat. A proposition of removal shall not be submitted in the same county more than once in four years.

Special law removing county seat forbidden, art. 6, sec. 26.

SEC. 3. **[Changing county lines.]** No territory shall be stricken from any county unless a majority of the voters living in such territory, as well as of the county to which it is to be annexed, shall vote therefor, and then only under such conditions as may be prescribed by general law.

Where a boundary line had not been definitely fixed and established a legislative enactment establishing the boundary line does not come within purview of this section.

Barton v. San Pete County, 49 U. 188; 162 P. 611.

SEC. 4. **[Uniform county government.]** The Legislature shall establish a system of County government, which shall be uniform throughout the State, and by general laws shall provide for precinct and township organizations.

Special law regulating county and township affairs forbidden, art. 6, sec. 26.

Laws of 1899, p. 71, relating to appointment and control of fruit tree inspectors is not uniform.

State v. Standford, 24 U. 148; 66 P. 1061.

An act providing for detention homes and allowing counties to recover a reasonable sum from municipalities for the maintenance of delinquent children from such cities does not violate this section; nor is the law in violation of art. 6, sec. 26, sub-secs. 8, 11, and 18, one of the governmental duties of the state.

Salt Lake City v. Salt Lake Co., 42 U. 548; 134 P. 560.

SEC. 5. **[Special municipal charters forbidden.]** Corporations for municipal purposes shall not be created by special laws; the Legislature, by general laws, shall provide for the incorporation, organization, and classification of cities and towns in proportion to population; which laws may be altered, amended or repealed.

Special laws incorporating cities or towns, or amending charters, forbidden, art. 6, sec. 26.

The legislature may delegate to a municipality power to pass ordinances.

City of Eureka v. Wilson, 15 U. 53; 48 P. 41.

Sec. 771 providing method for disconnecting land from a city in certain cases, not unconstitutional as delegating legislative power to court and commissioners.

Young v. Salt Lake City, 24 U. 321; 67 P. 1066.

SEC. 6. **[Municipalities forbidden to sell waterworks or rights.]** No municipal corporation shall directly, or indirectly, lease, sell, alien or dispose of any water-works, water rights, or sources of water supply now, or hereafter to be owned or controlled by it; but all such water works, water-rights and sources of water supply now owned or hereafter to be acquired by any municipal corporation, shall be preserved, maintained and operated by it for supplying its inhabitants with water at reasonable charges: Provided, That nothing herein contained shall be construed to prevent any such municipal corporation from exchanging water-rights, or sources of water supply, for other water-rights or sources of water supply of equal value, and to be devoted in like manner to the public supply of its inhabitants.

The provisions of this section do not prohibit the acquisition of a secondary water right against a municipality. (On rehearing, 25 U. 456; 71 P. 1069).

Salt Lake City v. W. & El. P. Co., 24 U. 249; 67 P. 672.

This section does not forbid the acquisition by a pwoer company of the right to connect its flume with the water canal of a city for the purpose of discharging water therein.

S. L. City Water & E. P. Co. v. S. L. City, 25 U. 441; 71 P. 1067.

Conditional exchange of water rights by city not in violation of this section.

State v. S. L. City, 29 U. 361; 81 P. 273.

Though a city was forbidden to lease or sell its waterworks, yet, where a so-called lease was made and acted on for years by both parties, at great expenditure by lessee, the contract will not be set aside.

Ogden City v. Bear Lake Co., 28 U. 25; 76 P. 1069.

Contra, same case, 16 U. 440; 52 P. 697.

An ordinance, passed by a city after the adoption of the constitution, regulating its relations with one to whom prior to such adoption it had leased certain water rights, whereby the city is to receive considerable free water for public purposes, held valid and to merely effect a continuance of the form of contract and a disposition of the city's water rights.

Brummit v. Ogden Water Works Co., 33 U. 285; 93 P. 928.

ARTICLE XII.

CORPORATION.

SECTION 1. **[Corporations. Formation. Control.]** Corporations may be formed under general laws, but shall not be created by special acts. All laws relating to corporations may be altered, amended or repealed by the Legislature, and all corporations doing business in this State, may, as to such business, be regulated, limited or restrained by law.

Special law forbidden, art. 6, sec. 26.

A corporation is a creature of statute, possessing special statutory powers and dependent on the statute of its creation for its existence, which does not extend beyond the limits of the creating jusisdiction.

R. G. W. Ry. Co. v. Telluride P. Co., 23 U. 22; 63 P. 995; appeal dismissed, 187 U. S. 569.

Laws relating to corporations may be amended; even to make stock assessable to a greater extent.

Nelson v. Keith-O'Brien Co., 32 U. 396; 91 P. 30.

Non-assessable stock can not be made assessable without the consent of all the stockholders.

Garey v. St. Joe M. Co., 32 U. 497; 91 P. 369.

The state may not amend charters of existing corporations, so as to change the fundamental character of the corporation, impair the object of the grant or rights vested thereunder, nor amend them in such way as will impair the contractual relations or rights of the stockholders among themselves, nor betweeen the corporation and its stockholders.

Id.

The provision of Section 869 permitting a corporation with the consent of the majority of the stockholders to dispose of its entire property is applicable to a corporation formed before enactment of this provision.

Geddes et al. v. Anaconda Mine, 254 Fed. 226.

SEC. 2. **[Existing corporations to accept constitution.]** All existing charters, franchises, special or exclusive privileges, under which an actual and bona fide organization shall not have taken place, and business been commenced in good faith, at the time of the adoption of this Constitution, shall thereafter have no validity; and no corporation in existence at the time of the adoption of this Constitution shall have the benefit of future legislation without first filing in the office of the Secretary of State an acceptance of the provisions of this Constitution.

A foreign corporation failing to comply with the provisions of our constitution and laws, is not entitled to the benefit of the laws of this state relating to corporations.

R. G. W. Ry. Co. v. Telluride P. Co., 23 U. 22; 63 P. 995; appeal dismissed, 187 U. S. 569.
But see Booth v. Weigand, 30 U. 135; 83 P. 734, on rehearing of 28 U. 372; 79 P. 570.

SEC. 3. **[Legislature not to extend or validate franchises.]** The Legislature shall not extend any franchise or charter, nor remit the forfeiture of any franchise or charter of any corporation now existing, or which shall hereafter exist under the laws of this State.

Special law forbidden, art. 6, sec. 26.

SEC. 4. **["Corporation" defined. Suits.]** The term "Corporation," as used in this article, shall be construed to include all associations and joint-stock companies having any powers or privileges of corporations not possessed by individuals or partnerships, and all corporations shall have the right to sue, and shall be subject to be sued, in all courts, in like cases as natural persons.

SEC. 5. **[Corporate stock. Issuance, increase, etc.]** Corporations shall not issue stock, except to bona fide subscribers thereof or their assignee, nor shall any corporation issue any bond, or other obligation, for the payment of money, except for money or property received, or labor done. The stock of corporations shall not be increased, except in pursuance of general law, nor shall any law authorize the increase of stock without the consent of the person or persons holding the larger amount in value of the stock, or without due notice of the proposed increase having previously been given in such manner as may be prescribed by law. All fictitious increase of stock or indebtedness shall be void.

One subscribing for stock should be credited with the value of the property turned in.
Union Pac. R. R. Co. v. Blair, 48 U. 38; 156 P. 948.
One signing a subscription binding him to take stock in a corporation to be organized is a bona fide subscriber.
Utah Hotel Co. v. Madsen, 43 U. 285; 134 P. 577.
The subscribers for capital stock, except in mining and irrigation companies, must pay one hundred cents on the dollar, or its equivalent, for their stock, and until so paid they are liable to creditors of the corporation for any balance remaining unpaid on their subscriptions.
Rolapp v. Ogden & N. W. R. Co., 37 U. 540; 110 P. 364.
A corporation cannot issue bonds as a bonus to subscribers of the capital stock, and where subscribers to the stock of a corporation paid for the amount of stock issued to them so that they were entitled to fully paid stock, bonds of the corporation issued to them in addition to the stock were void as against creditors while in the hands of the stockholders, they being a fictitious increase of the indebtedness.
Id.

SEC. 6. **[Privileges of foreign corporations.]** No corporations organized outside of this State, shall be allowed to transact business within the State on conditions more favorable than those prescribed by law to similar corporations organized under the laws of this State.

The provisions of this section were not designed to prohibit the doing of one single act of business by a foreign corporation, with no apparent intention to engage in corporate business; and the bringing of a suit by such a corporation to secure its legal rights is not "doing business," within the constitution or laws of this state.
Barse Livestock Co. v. Range V. C. Co., 16 U. 59; 50 P. 630.
Booth v. Weigand, 30 U. 135; 83 P. 734. (Same case, 28 U. 372; 79 P. 570).
A foreign corporation failing to comply with the provisions of this section is not entitled to the benefit of the laws of this state relating to corporations.
R. G. W. Ry. Co. v. Telluride P. T. Co., 23 U. 22; 63 P. 995; appeal dismissed, 187 U. S. 569.
By complying with the requirements of the state laws, foreign corporations are accorded the same, and no other or greater rights and privileges, and the same protection of the laws, as domestic corporations, and the making and enforcement of their contracts are governed by the same rules.
Hiskey v. Pacific States S. L. & B. Co., 27 U. 409; 76 P. 20.

SEC. 7. **[Limitation on alienation of franchise.]** No corporation shall lease or alienate any franchise, so as to relieve the franchise or property held thereunder from the liabilities of the lessor, or grantor, lessee or grantee, contracted or incurred in operation, use or enjoyment of such franchise or any of its privileges.

The provisions of this section do not affect the power of an insolvent corporation to make preferences among its creditors.
Weyeth H. & M. Co. v. James-Spencer-B. Co. 15 U. 110; 47 P. 604.
The word "any" means any one of a number and "any franchise" includes all franchises, both primary or the right to exist, and secondary, or such as the right to occupy and use streets and public places in the operation of its work, as distinguished from the corporate property of the corporation.
Cooper v. Utah Light & Ry. Co., 35 U. 570; 102 P. 202.

The words "or property held thereunder" mean such property as is necessarily held and used in the operation, use, or enjoyment of

the privileges and rights conferred by the franchises.

Id.

In the construction of a constitutional provision the proceedings of the constitutional convention may be considered in determining the meaning of the terms used.

Id.

A corporation exercising the right to occupy and use streets and public places in the operation of an electric light and power plant and a street railway, under franchises granted by a city, cannot convey such franchises so as to relieve the property used in the exercise thereof from liability of a judgment obtained for personal injuries to an employee in the operation of such property.

Id.

A railroad company, which has leased a railroad to another company and is not operating it itself, is, notwithstanding, liable for depreciation of abutting property values by reason of cinders and smoke cast thereon.

Jordan v. Utah R. R. Co., 47 U. 519; 156 P. 939.

Sec. cited in Blackrock Copper Min. & M. Co., v. Tingey, etc., 34 U. 369; 98 P. 180.

A town in granting a franchise to a railroad passing through it may limit the speed.

Shortino v. S. L. & U. R. Co., 51 U. —; 173 P. —.

SEC. 8. **[Consent of local authorities necessary to use of streets.]** No law shall be passed granting the right to construct and operate a street railroad, telegraph, telephone or electric light plant within any city or incorporated town, without the consent of the local authorities who have control of the street or highway proposed to be occupied for such purposes.

SEC. 9. **[Place of business, process agent, etc.]** No corporation shall do business in this State, without having one or more places of business, with an authorized agent or agents, upon whom process may be served; nor without first filing a certified copy of its articles of incorporation with the Secretary of State.

A foreign corporation failing to comply with the provisions of this section is not entitled to the benefit of the laws of this state relating to corporations.

R. G. W. Ry. Co. v. Telluride P. T. Co., 23 U. 22; 63 P. 995; appeal dismissed, 187 U. S. 569.

Contracts of a foreign corporation made while doing business in the state, without complying with the constitution and laws of the state respecting such corporations, can be enforced in the courts of this state unless expressly declared unenforceable. (Overruling Booth & Co. v. Weigand, 28 U. 372; 79 P. 570).

Booth v. Weigand, 30 U. 135; 83 P. 734.

SEC. 10. **[Corporations limited to authorized objects.]** No corporation shall engage in any business other than that expressly authorized in its charter, or articles of incorporation.

The provisions of this section do not affect the power of an insolvent corporation to make preferences among its creditors.

Weyeth H. & M. Co. v. James-Spencer-B. Co.. 15 U. 110; 47 P. 604.

A foreign corporation coming into this state cannot bring with it powers with which it is not endowed in the state where created.

R. G. W. Ry. Co. v. Telluride P. T. Co., 23 U. 22; 63 P. 995; appeal dismissed, 187 U. S. 569.

Corporation formed to construct and manage ditches and canals not authorized to construct reservoirs for storing water; and assessment levied for the purpose is void.

Seeley v. Huntington Canal Co., 27 U. 179; 75 P. 367.

A writing executed by the president of the bank guaranteeing the payment of rent by a drug company to the plaintiff was ultra vires.

Tracy Loan & Trust Co. v. Merchants Bank, 50 U. —; 167 P. 353.

SEC. 11. **[Franchises may be taken for public use.]** The exercise of the right of eminent domain shall never be so abridged or construed, as to prevent the Legislature from taking the property and franchises of incorporated companies, and subjecting them to public use the same as the property of individuals.

Capital stock of corporations except mining and irrigation must represent full actual value, either in money or property.

Rolapp v. Ogden & N. W. R. R. Co., 37 U. 540; 110 P. 364.

SEC. 12. **[Common carriers.]** All railroad and other transportation companies are declared to be common carriers, and subject to legislative control; and such companies shall receive and transport each other's passengers and freight without discrimination or unnecessary delay.

Freight charges and control of common carriers, art 12, sec. 15.

A Railroad company may exclude all drivers of cabs, hacks and express wagons from going upon its depot grounds to solicit business, and an exclusive privilege granted to one concern to solicit busineess gives others no right to do so, even if such exclusive privilege is void as creating a monopoly, and though the grantee thereof be not excluded.

O. S. L. R. R. Co., v. Davidson, 33 U. 370; 94 P. 10.

SEC. 13. **[Competing railroads not to consolidate.]** No railroad corporation shall consolidate its stock, property or franchises with any other railroad corporation owning a competing line.

SEC. 14. **[Rolling stock considered personal property.]** The rolling stock, and other movable property, belonging to any railroad company, or corporation in this State, shall be considered personal property, and shall be liable to taxation and to execution and sale, in the same manner as the personal property of individuals, and such property shall not be exempted from execution and sale.

SEC. 15. **[Legislature to prescribe maximum rates. Discriminations.]** The Legislature shall pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight, for correcting abuses, and preventing discrimination and extortion in rates of freight and passenger tariffs by the different railroads, and other common carriers in the State, and shall enforce such laws by adequate penalties.

Regulation of freight charges, etc., not special legislation, art. 6, sec. 26.

Control of common carriers, art. 12, sec. 12.

SEC. 16. **[Armed bodies not to enter state, when.]** No corporation or association shall bring any armed person or bodies of men into this State for the preservation of the peace, or the suppression of domestic trouble without authority of law.

SEC. 17. **[Employee of corporation ineligible to municipal office, when.]** No officer, employee, attorney or agent of any corporation, company or association doing business under, or by virtue of any municipal charter or franchise, shall be eligible to or permitted to hold any municipal office, in the municipality granting such charter or franchise.

SEC. 18. **[Liability of stockholders of banks.]** The stockholders in every corporation, and joint stock association for banking purposes, in addition to the amount of capital stock subscribed and fully paid by them, shall be individually responsible for an additional amount, equal to the amount of their stock in such corporation for all its debts and liabilities of every kind.

Provisions of this section do not affect the power of an insolvent corporation to make preferences among its creditors.
Weyeth H. & M. Co. v. James-Spencer-B. Co., 15 U. 110; 47 P. 604.

The provisions of this section apply only to corporate banking institutions and not to other corporations.
Richardson v. Treasure H. M. Co., 23 U. 366; 65 P. 74.

SEC. 19. **[Blacklisting forbidden.]** Every person in this State shall be free to obtain employment whenever possible, and any person, corporation, or agent, servant or employee thereof, maliciously interfering or hindering in any way, any person from obtaining, or enjoying employment already obtained, from any other corporation or person, shall be deemed guilty of a crime. The Legislature shall provide by law for the enforcement of this section.

Blacklisting forbidden, art. 16, sec. 4.

SEC. 20. **[Trusts and combinations prohibited.]** Any combination by individuals, corporations, or associations, having for its object or effect the controlling of the price of any products of the soil or of any article of manufacture or commerce or the cost of exchange or transportation is prohibited, and hereby declared unlawful, and against public policy. The Legislature shall pass laws for the enforcement of this section by adequate penalties, and in case of incorporated companies, if necessary for that purpose, it may declare a forfeiture of their franchise.

ARTICLE XIII.

REVENUE AND TAXATION.

SECTION 1. **[Fiscal year.]** The fiscal year shall begin on the first day of January, unless changed by the Legislature.

Fiscal year begins December 1st, § 5794.

SEC. 2. **[What property taxable. Definitions. Revenue.]** All property in the State, not exempt under the laws of the United States, or under this Constitution, shall be taxed in proportion to its value, to be ascertained as provided by law. The word property, as used in this article, is hereby declared to include monies, credits, bonds, stocks, franchises and all matters and things (real, personal and mixed) capable of private ownership; but this shall not be so construed as to authorize the taxation of the stocks of any company or corporation, when the property of such company or corporation represented by such stocks, has been taxed. The Legislature shall provide by law for an annual tax sufficient, with other sources of revenue, to defray the estimated ordinary expenses of the state for each fiscal year. For the purpose of paying

the State debt, if any there be, the Legislature shall provide for levying a tax annually, sufficient to pay the annual interest and principal of such debt, within twenty years from the final passage of the law creating the debt.

Property exempted from taxation, art. 3, sec. 2; art. 13, sec. 3.

Stamp tax, or tax on incomes, etc., art. 13, sec. 12.

Mortgages on real and personal property exempted from taxation by constitutional amendment to art. 13, sec. 3, in 1906.

A mortgage being property distinct from other property, the holder of it, when residing within the state, is taxed as the owner of money in use and not upon interest in the land.

Judge v. Spencer, 15 U. 242; 48 P. 1097.

Chap. 48, Laws 1892, exempting mortgages from taxation, is in conflict with this section and Chap. 129, Laws 1896, and is repealed by implication.

Judge v. Spencer, 15 U. 242; 48 P. 1097.

The various provisions of the revenue law of 1896, which are brought in question, relating to valuation and equalization, are not in conflict with the constitution.

State v. Thomas, 16 U. 86; 50 P. 615.

The provisions of this section and sec. 3, that all property within the state must be assessed and taxed on a valuation fixed at its actual cash value, etc., construed to mean that such value is the cash price for which the property would sell in open market. Secs. 1 and 5, Chap. 129, Laws 1896, are not in conflict with these sections.

Id.

The provisions of this section, and of C. L. § 5873, authorize a tax upon property of a foreign corporation having no place of business in this state, owning railway cars which come into, pass through and do business in the state.

Union R. T. Co. v. Lynch, 18 U. 378, 55 P. 639; affirmed 177 U. S. 149.

Shares and property in national banks are assessable, subject to certain deductions.

Com'l Nat. Bank v. Chambers, 21 U. 324; 61 P. 560; affirmed 182 U. S. 556.

Where real estate is disconnected from a city before the taxes for the year are fixed, such taxes do not become a lien.

Gillmor v. Dale, 27 U. 372; 75 P. 932.

Franchise means the right of a corporation to exist as such and also the right of an existing corporation to carry on a particular enterprise, which right is property.

Black Rock M. & G. Co. v. Tingey, 34 U. 369; 98 P. 180.

Cited in State ex rel Ferry v. Corinne Drainage Dist., 48 U. 1; 156 P. 921.

State ex rel Moody v. Millard County Drainage Dist., 48 U. 1; 156 P. 924.

Lundberg v. Green River Irrig. Dist. et al., 49 U. 83; 119 P. 1039.

SEC. 3. **[Legislature to provide uniform tax. Exemptions.]** The Legislature shall provide by law a uniform and equal rate of assessment and taxation on all property in the State, according to its value in money, and shall prescribe by general law such regulations as shall secure a just valuation for taxation of all property, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property: Provided, That a deduction of debits from credits may be authorized: Provided further, That the property of the United States, of the State, counties, cities, towns, school districts, municipal corporations and public libraries, lots with the buildings thereon used exclusively for either religious worship or charitable purposes, and places of burial not held or used for private or corporate benefit, shall be exempt from taxation. Ditches, canals, reservoirs, pipes and flumes owned and used by individuals or corporations for irrigating lands owned by such individuals or corporations, or the individual members thereof, shall not be separately taxed as long as they shall be owned and used exclusively for such purpose: Provided further, That mortgages upon both real and personal property shall be exempt from taxation: Provided further, That taxes of the indigent poor may be remitted or abated at such time and in such manner as may be provided by law. [As amended Nov. 6, 1906.]

The section in its original form, and as amended Nov. 6, 1900, placed in the appendix to the constitution.

Amended Nov. 6, 1900, by adding "reservoirs and pipes," and providing for the abatement of taxes of the indigent poor.

Amended Nov. 6, 1906, by making mortgages upon both real and personal property exempt from taxation; art. 13, sec. 12, also amended as to mortgages Nov. 6, 1906.

U. S. property exempt from taxation, art. 3, sec. 2; Enabling Act, sec. 3.

All persons or corporatoins subject to taxation, art. 13, sec. 10.

Under the constitution and the laws, money is the standard of valuation for purpose of taxation, and it cannot be assessed for more than its legal value.

State v. Thomas, 16 U. 86; 50 P. 615.

Section 4465 providing for annual poll tax of $2.00 to be collected and expended in cities is constitutional, being within the police powers.

Salt Lake City v. Wilson, 46 U. 60; 148 P. 1104.

Under this section (prior to amendment) the legislature could not authorize the abatement of taxes of indigents, etc.

State v. Armstrong, 17 U. 166; 53 P. 981.

To prevent the legislature from exempting property not included within the constitution, express words of inhibition were not necessary.

State v. Armstrong, 17 U. 166; 53 P. 981.

Judge v. Spencer, 15 U. 242; 48 P. 1097.

Matthews v. Jensen, 21 U. 207; 61 P. 303.

Where a portion of certain property owned by a charitable institution is occupied and used by it for charitable purposes and the remaining portion is devoted to purposes of revenue, the portion used for charitable purposes in exempt, and the portion not so used is subject to taxation.

Parker v. Quinn, 23 U. 332; 64 P. 961.

The provisions of this section have reference to an ad valorem or direct tax upon property, and do not apply to licenses imposed upon privileges, business and occupations.

Ogden City v. Bell Tel. Co., 17 U. 66; 53 P. 985.

The inheritance tax law of 1901 is not in violation of constitutional provision requiring uniformity and equality of taxation.

Dixon v. Ricketts, 26 U. 215; 72 P. 947.

The taxing of both land and mortgage does not constitute double taxation.

Judge v. Spencer, 15 U. 242; 48 P. 1097.

"Stocks" are not "credits," and "credits" are not "stocks" within the meaning of the revenue act of this state, and the law does not authorize the deduction of the debts of the individual stockholder in a national bank from his shares of stock.

Com'l Nat. Bank v. Chambers, 21 U. 324; 61 P. 560; affirmed 182 U. S. 556.

As a general rule, all property is subject to taxation, and when any kind of property is exempt it constitutes an exception to the rule, and the exemption must be express.

Parker v. Quinn, 23 U. 332; 64 P. 961.

State v. Armstrong, 17 U. 166; 53 P. 981.

Judge v. Spencer, 15 U. 242; 48 P. 1097.

Matthews v. Jensen, 21 U. 207; 61 P. 303.

An act imposing on each domestic and foreign corporationa graduated license tax based on its authorized capital is permissible.

Black Rock Copper Mining & Milling Co. v. Tingey, 34 U. 369; 98 P. 180.

This section does not apply to special assessments but only to general taxes.

Wey v. Salt Lake City, 35 U. 504; 101 P. 380.

Lundberg v. Green River Irrig. Dist., et al., 40 U. 83; 119 P. 1039.

The provision requiring equality and uniformity of taxation has no application to an occupation or license tax, but is limited to a direct property tax, and where the constitution imposes no restrictions on the power of taxation, the courts will not arbitrarily impose any unless it clearly appears that the tax was oppressive.

Salt Lake City v. Christensen, 34 U. 38; 95 P. 523.

A social club for the benefit of its members used part of the club-house as a buffet and dining room wherein meals, cigars, and drinks were served to members, the net proceeds therefrom being devoted to charitable purposes. Held, the club-house was exempt under this section. This section should be given a liberal construction.

Salt Lake Lodge No. 85, B. P. O. E., v. Groesbeck, 40 U. 1; 120 P. 192.

Where certain kinds of personal property are intentionally assessed at a higher percentage of valuation than is placed on the general mass of taxable property in the county, the taxing officers may be compelled to reduce such excessvie assessment.

First Nat. Bank v. Christensen, 39 U. 568; 118 P. 778.

An act authorizing the county commissioners to establish detention homes for delinquent children in municipalities and requiring such municipalities to pay the expenses thereof is not in violation of this section.

Salt Lake County v. Salt Lake City, 42 U. 548; 134 P. 560.

A drainage law, providing for special assessments on the acreage basis does not contemplate taking the property without compensation, nor is it invalid as preventing uniformity and equality of taxation. This section does not apply to special assessments.

State ex rel Ferry v. Corinne, 48 U. 1; 156 P. 921.

State ex rel Moody v. Miller, 48 U. 11; 156 P. 921.

A taxation of a bank's capital stock without deducting value of realty owned by realty company, of which bank held all stock, representing one-half of bank's capital, which realty was taxed to building company, was double taxation and prohibited by this section.

McCornick v. Bassett, 49 U. 444; 164 P. 853.

SEC. 4. **[Taxation of mines.]** All mines and mining claims, both placer and rock in place, containing or bearing gold, silver, copper, lead, coal or other valuable mineral deposits, after purchase thereof from the United States, shall be taxed at the price paid the United States therefor, unless the surface ground, or some part thereof, of such mine or claim, is used for other than mining purposes, and has a separate and independent value for such other purposes; in which case said surface ground, or any part thereof, so used for other than mining purposes, shall be taxed at its value for such other purposes, as provided by law; and all the machinery used in mining, and all property and surface improvements upon or appurtenant to mines and mining claims, which have a value separate and independent of all such mines or mining claims, and the net annual proceeds of all mines and mining claims, shall be taxed by the State Board of Equalization. [Amended Nov. 3, 1908.]

November 3rd, 1908, amended by authorizing the State Board of Equalization to tax machinery and improvements and the net annual proceeds. Sec. in original form placed in appendix to the constitution.

See notes, § 5864.

The provisions of this section are not self-executing. Where a constitutional provision furnishes no rule for its own enforcement, or where it expressly or impliedly requires legislative action to give effect to the purposes contemplated, it is not self-executing.

Mercur M. Co. v. Spry, 16 U. 222; 52 P. 382.

Centennial-Eureka M. Co., v. Juab Co., 22 U. 395; 62 P. 1024.

The net proceeds of a mine are taxable at the place where the ores are taken to the surface through the main workings, and, being personal property, should be taxed as other personality.

Eureka Hill M. Co. v. Eureka, 22 U. 447; 63 P. 654.

Centennial-Eureka M. Co. v. Juab Co., 22 U. 395; 62 P. 1024.

The classification herein is not intended as a limitation to the phrase "other valuable mineral deposits," but embraces all mineral deposits including gypsum, and the net annual profits from the products manufactured therefrom, are taxable.

Nephi Plaster & Mfg. Co. v. Juab County, 33 U. 114; 93 P. 53.

The assessment of all coal lands at a uniform rate is a flagrant disregard of the plain provisions of this section.

Ririe v. Randolph, 50 U. —; 169 P. 941.

A mining company cannot deduct from the annual profits made by shipping a dump, the cost in previous years of mining the ore placed in the dump.

Mammoth Mining Company v. Juab County, 50 U. —; 170 P. 78.

SEC. 5. **[Local authorities to levy local taxes.]** The Legislature shall not impose taxes for the purpose of any county, city, town or other municipal corporation, but may, by law, vest in the corporate authorities thereof, respectively, the power to assess and collect taxes for all purposes of such corporation.

It is the plain duty of city authorities to levy taxes to pay municipal debts.
Shepard v. Kaysville, 16 U. 340; 52 P. 592.
Under the provisions of this section Ogden City was authorized to pass an ordinance for purpose of raising revenue by levying and collecting a license fee for each telephone instrument operated by defendant and used exclusively for local business, but such power does not extend to authorizing the city to license or tax interstate business of defendant.
Ogden City v. Bell Tel. Co., 17 U. 66; 53 P. 985.
The extent of the territorial limits of a municipality being a matter of legislative discretion, the exercise of such discretion is not a subject of judicial revision. A city may fix its own boundaries and its taxes. (Overruling Kaysville City v. Ellison, 18 U. 163; 55 P. 386, and earlier cases.)
Kimball v. Grantsville City, 19 U. 368; 57 P. 1.
Under provisions of this section, legislature is prohibited from imposing tax upon property within any city for municipal purposes, but is given right to delegate that power to the municipality.
Id.
License and tax distinguished. Statute giving power to license strictly construed. Sheep ordinance invalid.
Matthews v. Jensen, 21 U. 207; 61 P. 303.
Unjust and illegal discrimination between persons, in taxation, and the denial of equal justice are within the prohibition of the constitution of this state and of the United States. No person can be deprived of his property without due process of law.
Id.
The provisions of this section limit local or county taxation to local or county purposes, and were intended as a limitation upon the power of the legislature.
State v. Standford, 24 U. 148; 66 P. 1061.
The legislature is prohibited from providing for the appointment and control of county officers by state officers; salaries to be paid by counties.
Id.
The constitution was framed with the idea of giving the various counties local self government.
State v. Standford, 24 U. 148; 66 P. 1061.
State v. Eldredge, 27 U. 477; 76 P. 337.
The dependent mother's act does not violate this section, the payment therein provided being for a public purpose.
D. & R. G. R. R. Co. v. Grand County, 50 U. —; 170 P. 74.

SEC. 6. **[Annual statement to be published.]** An accurate statement of the receipts and expenditures of the public monies, shall be published annually in such manner as the Legislature may provide.

SEC. 7. **[Tax rate for state and school purposes.]** The rate of taxation on property for State purposes shall never exceed eight mills on each dollar of valuation to be apportioned as follows: Not to exceed four and one-half mills on each dollar of valuation for general State purposes; not to exceed three mills on each dollar of valuation for district school purposes; not to exceed one-half mill on each dollar of valuation for High School purposes; that part of the State tax apportioned to high school purposes shall constitute a fund to be called the "high school fund" and shall be apportioned to the cities and school districts maintaining high schools in the manner the Legislature may provide. And whenever the taxable property within the State shall amount to four hundred million dollars, the rate shall not exceed five mills on each dollar of valuation; unless a proposition to increase such rate, specifying the rate proposed and the time during which the same shall be levied, be first submitted to a vote of such of the qualified electors of the State as, in the year next preceding such election, shall have paid a property tax assessed to them within the State, and the majority of those voting thereon shall vote in favor thereof, in such manner as may be provided by law. [Amended Nov. 8, 1910.]

November, 8, 1910, amended by providing one-half mill for high school purposes and creating the high school fund and apportioning the same and providing that when assessed valuation shall be $400,000,000.00 instead of $200,000,000.00 the rate shall not exceed five per cent. Section in original form placed in appendix to the constitution.

SEC. 8. **[Officer not to make profit out of public moneys.]** The making of profit out of public monies, or using the same for any purpose not authorized by law, by any public officer, shall be deemed a felony, and shall be punished as provided by law, but part of such punishment shall be disqualification to hold public office.

Certain convictions disqualify voters, art. 4, sec. 6.

SEC. 9. **[State expenditures to be kept within revenues.]** No appropriation shall be made, or any expenditure authorized by the Legislature, whereby the expenditure of the State, during any fiscal year, shall exceed the total tax then provided for by law, and applicable for such appropriation or expenditure, unless the Legislature making such appropriation, shall provide for levying a sufficient tax, not exceeding the rates allowed in section seven of this article, to pay such appropriation or expenditure within such fiscal year. This provision shall not apply to appropriations or expenditures to suppress insurrections, defend the State, or assist in defending the United States in time of war.

State may create debt to repel invasion, etc., art. 14, sec. 2.

SEC. 10. **[All property taxable where situated.]** All corporations or persons in this State, or doing business herein, shall be subject to taxation for State, County, School, Municipal or other purposes, on the real and personal property owned or used by them within the territorial limits of the authority levying the tax.

All persons and corporations taxable, art. 13, sec. 3.

The extent of the territorial limits of a municipality being a matter of legislative discretion, the exercise of such discretion is not a subject of judicial revision. A city may fix its own boundaries and its taxes. (Overruling Kaysville City v. Ellison, 18 U. 163; 55 P. 386, and earlier cases.)

Kimball v. Grantsville City, 19 U. 368; 57 P. 1.

Where land was disconnected from a city before levy of taxes had been made, such tax did not become a lien.

Gillmor v. Dale, 27 U. 372; 75 P. 932.

Personal property is considered to be owned where it is situated and not where owner resides § 5875. Hence sheep not taxable by city in which owner lived when sheep had never been within city limits.

Murdock v. Murdock, 38 U. 373; 133 P. 330.

Sec. 11. **[Board of equalization. Members. Powers.]** Until otherwise provided by law, there shall be a State Board of Equalization consisting of four residents of the State who shall be appointed by the Governor, by and with the consent of the senate, whose terms of office shall be for four years and until their successors are appointed and qualified; provided, that two of said members shall be appointed every two years. There shall also be in each county of the State a County Board of Equalization, consisting of the Board of County Commissioners of said county. The duty of the State Board of Equalization and of the several County Boards of Equalization shall be to adjust and equalize the valuation of the real and personal property of the State and of the several counties thereof, as may be provided by law. Each board shall also perform such other duties as may be provided by law.

[Amended effective Jan. 1, 1913.]

Section in original form placed in appendix to the constitution.

Under this section and § 570x38, the county board of equalization may raise or lower the valuation of the assessment of any class of property in the county.

Salt Lake City v. Armstrong, 15 U. 472; 49 P. 641.

Chap. 68, laws 1899, providing that property and franchises owned by railroad and other companies must be assessed by state board of equalization, in so far as it confers power on such board to assess property wholly within one county, is in violation of this section of the Con., and void.

State, ex rel. v. Eldredge, 27 U. 477; 76 P. 337.

The state board of equalization has power to either raise or lower the total valuation of the property of any county, fixed by the county board and assessor, even though it may, by such action, raise or lower the aggregate valuation of all the counties in the state, but it cannot adjust or equalize valuations of property within a county as between individuals. A county board has power to equalize the valuation of property within its county between individuals and between localities.

State v. Thomas, 16 U. 86; 50 P. 615.

Evidently state and county boards of equalization were provided for in the constitution to supervise the actions of county assessors.

Id.

SEC. 12. **[Stamp, income, license or franchise tax permissible.]** Nothing in this Constitution shall be construed to prevent the Legislature from providing a stamp tax, or a tax based on income, occupation, licenses or franchises. [As amended Nov. 6, 1906.]

The section in its original form placed in the appendix to the constitution.

Amended Nov. 6, 1906, by omitting the word "mortgages."

Art. 13, sec. 3, also amended as to mortgages Nov. 6, 1906.

Under the provisions of this section, Ogden City was authorized to pass an ordinance for the purpose of raising revenue by levying and collecting a license fee for each telephone instrument operated by defendant and used exclusively for local business, but such power does not extend to authorizing the city to license or tax interstate business of defendant.

Ogden City v. Bell Tel. Co., 17 U. 66; 53 P. 985.

There is no limitation on the power of the legislature to impose the several kinds of taxes specified and an ordinance imposing a graduated occupation tax on a business is constitutional.

Salt Lake City v. Christensen, 34 U. 38; 95 P. 523.

An ordinance providing for tax of one dollar per year on each meter used by corporations generating and furnishing electricity held to be an occupation tax and not violative of franchise rights of company to use of streets.

Salt Lake v. Utah Light & Ry. Co., 45 U. 50; 142 P. 1067.

An act imposing on each domestic and foreign corporation a progressive annual license tax based on its authorized capital, is not void on the ground that it offends against the uniformity clause of the constitution.

Blackrock Copper Min., etc. v. Tingey, 34 U. 369; 98 P. 180.

A license tax is based on the police power of the state to regulate or prohibit a particular business, and not to raise revenue, while an occupation tax is primarily intended to raise revenue.

Provo City v. Provo Meat & Packing Co., 49 U. 528; 165 P. 477.

ARTICLE XIV.

PUBLIC DEBT.

SECTION 1. **[State debt limitation.]** To meet casual deficits or failures in revenue, and for necessary expenditures for public purposes, including the erection of public buildings, and for the payment of all Territorial indebtedness assumed by the State, the State may contract debts, not exceeding in the aggregate at any one time, an amount equal to one and one-half per centum of the value of the taxable property of the State, as shown by the last assessment for State purposes, previous to the incurring of such indebtedness. But the State shall never contract any indebtedness, except as in the next Section provided, in excess of such amount, and all moneys arising from loans herein authorized, shall be applied solely to the purposes for which they were obtained. [As amended Nov. 10, 1910.]

Section in original form placed in appendix to the constitution.

November 10, 1910, amended by fixing the maximum indebtedness an amount equal to one and one-half per cent of the assessed valuation of property in the state instead of $200,000 in excess of the territorial indebtedness and omitting the provision that after territorial indebtedness shall have been paid the state should never contract any indebtedness except as in section 4 provided in excess of $200,000, and moneys arising from loans should be applied solely to the purposes for which they were obtained.

Chap. 124, Laws 1909, providing for construction of central building from University of Utah permanent land fund and directing state land board to convert said fund into cash—held to be indebtedness of state and in excess of the indebtdness allowed under these sections.

State v. Candland, 36 U. 406; 104 P. 286.

SEC. 2. **[Debts for public defense.]** The State may contract debts to repel invasion, suppress insurrection, or to defend the State in war, but the money arising from the contracting of such debts shall be applied solely to the purpose for which it was obtained.

Appropriation in case of war, art. 13, sec. 9.

State v. Candland, 36 U. 406; 104 P. 286.

SEC. 3. **[Debts of counties, cities, etc., not to exceed revenue. Exception.]** No debt in excess of the taxes for the current year shall be created by any county or subdivision thereof, or by any school district therein, or by any city, town or village, or any subdivision thereof in this State; unless the proposition to create such debt, shall have been submitted to a vote of such qualified electors as shall have paid a property tax therein, in the year preceding such election, and a majority of those voting thereon shall have voted in favor of incurring such debt.

Property qualifications of voter, art. 1, sec. 4; art. 4, sec. 7.

For discussion as to what expenditures and receipts affect the question of the limit of indebtedness permitted to counties, see P. V. Coal Co. v. County Commissioners, 15 U. 97; 48 P. 1032.

Fritch v. S. L. Co. Com., 15 U. 83; 47 P. 1026.

Nielsen v. Utah National Bank, 40 U. 95; 120 P. 211.

Pardee v. Salt Lake County, 39 U. 482; 118 P. 122.

SEC. 4. **[Limit of indebtedness of counties, cities, etc.]** When authorized to create indebtedness as provided in Section 3 of this Article, no County shall become indebted to an amount, including existing indebtedness exceeding two per centum. No city, town, school district or other municipal corporation, shall become indebted to an amount, including existing indebtedness, exceeding four per centum of the value of the taxable property therein, the value to be ascertained by the last assessment for State and County purposes, previous to the incurring of such indebtedness; except that in incorporated cities the assessment shall be taken from the last assessment for city purposes; provided, that no part of the indebtedness allowed in this section shall be incurred for other than strictly County, City, Town or school district purposes; provided further, that any city of the first and second class when authorized as provided in Section three of this article, may be allowed to incur a larger indebtedness, not to exceed four per centum and any city of the third class, or town, not to exceed eight per centum additional, for supplying such city or town with water, artificial lights or sewers, when the works for supplying such water, light and sewers, shall be owned and controlled by the municipality. [Amended Nov. 8, 1910.]

Section in original form placed in appendix to the constitution.

November 8, 1910, amended by permitting third class city or town to create an additional indebtedness of eight per centum instead of four per centum.

The legislature has the inherent power to authorize a municipality to issue bonds for its indebtedness; the provisions of this section limit but do not confer such power.

State v. City Council, 23 U. 13; 64 P. 460.

The framers of the fundamental law of this state must be presumed to have had knowledge of the fact, because a matter of current history, that many municipalities of the proposed state were already indebted in excess of the four per cent limit mentioned in this section, and yet had an entirely inadequate supply of water, light and sewer facilities.

Id.

Under provisions of this section and § 792 the legislature has power to authorize cities to create an additional indebtedness for light, water and sewer purposes, not exceeding four per cent of the value of taxable property therein.

State, ex rel. v. Quayle, 26 U. 26; 71 P. 1060.

Conditional exchange of water rights by city not in violation of this section.

State v. S. L. City, 29 U. 361; 81 P. 273.

A 4 per cent bonded indebtedness may be incurred for general city purposes which includes supplying of light, water and sewers; and an additional like indebtedness may be incurred for lights, water and sewer alone.

State, ex rel. Willis v. Heber City, 36 U. 1; 102 P. 309.

SEC. 5. **[Borrowed money to be applied to authorized use.]** All monies borrowed by, or on behalf of the State, or any legal subdivision thereof, shall be used solely for the purpose specified in the law authorizing the loan.

SEC. 6. **[State not to assume county, etc., debts.]** The State shall not assume the debt, or any part thereof, of any county, city, town or school district.

SEC. 7. **[Existing indebtedness not impaired.]** Nothing in this article shall be so construed as to impair or add to the obligation of any debt heretofore contracted, in accordance with the laws of Utah Territory, by any county, city, town or school district, or to prevent the contracting of any debt, or the issuing of bonds therefor, in accordance with said laws, upon any proposition for that purpose, which, according to said laws, may have been submitted to a vote of the qualified electors of any county, city, town or school district before the day on which this Constitution takes effect.

No law impairing the obligation of contracts shall be passed, art. 1, sec. 18.

ARTICLE XV.

MILITIA.

SECTION 1. **[How constituted.]** The militia shall consist of all able-bodied male inhabitants of the State, between the ages of eighteen and forty-five years, except such as are exempted by law.

SEC. 2. **[Organization and equipment.]** The Legislature shall provide by law for the organization, equipment and discipline of the militia, which shall conform as nearly as practicable to the regulations for the government of the armies of the United States.

ARTICLE XVI.

LABOR.

SECTION 1. **[Rights of labor to be protected.]** The rights of labor shall have just protection through laws calculated to promote the industrial welfare of the State.

SEC. 2. **[Board of labor.]** The Legislature shall provide by law, for a Board of Labor, Conciliation and Arbitration, which shall fairly represent the interests of both capital and labor. The Board shall perform duties, and receive compensation as prescribed by law.

SEC. 3. **[Certain employments, etc., to be prohibited.]** The Legislature shall prohibit:

(1) The employment of women, or of children under the age of fourteen years, in underground mines.

(2) The contracting of convict labor.

(3) The labor of convicts outside prison grounds, except on public works under the direct control of the State.

(4) The political and commercial control of employees.

SEC. 4. **[Exchange of blacklists prohibited.]** The exchange of blacklists

by railroad companies, or other corporations, associations or persons is prohibited.

Interfering with employment forbidden, art 12, sec. 19.

SEC. 5. **[Injuries resulting in death. Damages.]** The right of action to recover damages for injuries resulting in death, shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation.

SEC. 6. **[Eight hours a day's labor on public works.]** Eight hours shall constitute a day's work on all works or undertakings carried on or aided by the State, County or Municipal governments; and the Legislature shall pass laws to provide for the health and safety of employees in factories, smelters and mines.

Eight hour law for underground miners is due process of law; employer legally convicted for violation.
Holden v. Hardy, 14 U. 71; 46 P. 756; affirmed 169 U. S. 366.
State v. Holden, 14 U. 96; 46 P. 1105.

The eight hour law was passed for the benefit of the laborer and he will not be permitted to waive it and collect for overtime.
Short v. Bullion-Beck M. Co., 20 U. 20; 57 P. 720.

SEC. 7. **[Legislature to enforce this article.]** The Legislature, by appropriate legislation, shall provide for the enforcement of the provisions of this article.

ARTICLE XVII.

WATER RIGHTS.

SECTION 1. **[Existing rights confirmed.]** All existing rights to the use of any of the waters in this State for any useful or beneficial purpose, are hereby recognized and confirmed.

Decisions on irrigation and water rights.
Notes to §§ 3450, et seq.
An appropriator of water for beneficial uses from a natural stream acquires a vested right therein and the right carries an interest in the stream to its source.
Chandler et al. v. Utah Copper Co. et al., 43 U. 479; 135 P. 106.

ARTICLE XVIII.

FORESTRY.

SECTION 1. **[Forests to be preserved.]** The Legislature shall enact laws to prevent the destruction of and to preserve the Forests on the lands of the State, and upon any part of the public domain, the control of which may be conferred by Congress upon the State.

ARTICLE XIX.

PUBLIC BUILDINGS AND STATE INSTITUTIONS.

SECTION 1. **[Property of territory becomes property of state.]** All Institutions and other property of the Territory upon the adoption of this Constitution, shall become the Institutions and property of the State of Utah.

SEC. 2. **[Charitable and penal institutions, how maintained.]** Reformatory and Penal Institutions, and those for the benefit of the Insane, Blind, Deaf and Dumb, and such other institutions as the public good may require, shall be established and supported by the State in such manner, and make such boards of control as may be prescribed by law.

SEC. 3. **[Seat of government and public institutions permanently located.]** The Public Institutions of the State are hereby permanently located at the places hereinafter named, each to have the lands specifically granted to it by the United States, in the Act of Congress, approved July 16th, 1894, to be disposed of and used in such manner as the Legislature may provide:

First:—The Seat of Government and the State Fair at Salt Lake City, and the State Prison in the County of Salt Lake.

Second:—The Institutions for the Deaf and Dumb, and the Blind, and the State Reform School at Ogden City, in the County of Weber.

Third:—The State Insane Asylum at Provo City, in the County of Utah.
Land grants, etc., art. 10, sec. 10; art. 20, sec. 1; Enabling Act, secs. 6-12.

ARTICLE XX.

PUBLIC LANDS.

SECTION 1. **[Land grants accepted on terms of trust.]** All lands of the State that have been, or may hereafter be granted to the State by Congress, and all lands acquired by gift, grant or devise, from any person or corporation, or that may otherwise be acquired, are hereby accepted, and declared to be the public lands of the State; and shall be held in trust for the people, to be disposed of as may be provided by law, for the respective purposes for which they have been or may be granted, donated, devised or otherwise acquired.

Permanent fund, guarantee, art. 10, secs. 3, 5, 7, 10; art. 19, sec. 3.
Lands granted, Enabling Act, secs. 6-12.

ARTICLE XXI.

SALARIES.

SECTION 1. **[Public officers to be paid salaries. Exceptions.]** All State, district, city, county, town and school officers, excepting notaries public, boards of arbitration, court commissioners, justices of the peace and constables, shall be paid fixed and definite salaries: Provided, That city justices may be paid by salary when so determined by the mayor and council of such cities.

State officers to be paid fixed salaries and to pay over fees; art. 7, sec. 20.
The office of city justice of the peace is recognized by provisions of this section.
Hulaniski v. Ogden City, 20 U. 233; 57 P. 876.
The office of city justice of the peace is not among those created by the constitution.
State v. Howell, 26 U. 53; 72 P. 187.
Fixing the salaries of justices and constables in cities of certain classes is not violative of this section.
Martineau v. Crabbe, 46 U. 327; 150 P. 301.
Probably the constitution forbids county commissioners from raising the salaries of officers after they have been elected.
Cromquist v. Mathews, 51 U. —; 173 P. —.

SEC. 2. **[Legislature to provide fees. Accounting.]** The Legislature shall provide by law, the fees which shall be collected by all officers within the state. Notaries public, boards of arbitration, court commissioners, justices of the peace, and constables paid by fees, shall accept said fees as their full compensation. But all other State, district, county, city, town and school officers, shall be required by law to keep a true and correct account of all fees collected by them and to pay the same into the proper treasury, and the officer whose duty it is to collect such fees shall be held responsible under his bond for the same.

Legislature to fix compensation of justices, art 8, sec. 8.
State officers to keep account of and pay over fees, art. 7, sec. 20.
Under the act of Feb. 17, 1896, it was held to be the duty of the county clerk to pay all fees collected by him in the district court in criminal and civil cases, except probate fees, from and after Jan. 4, 1896, into the state treasury.
Richards v. Stanton, 14 U. 180; 46 P. 1109.
Fixing the salaries of justices and constables in cities of certain classes is not violative of this section.
Martineau v. Crabbe, 46 U. 327; 150 P. 301.
The duties which a clerk of the district court discharges in naturalization proceedings under federal laws are not duties imposed on nor services forming a part of the office, and the salary received as compensation therefor does not constitute compensation for extra official services, and he need not account therefor to his county.
Eldredge v. S. L. County, 37 U. 188; 106 P. 939.

ARTICLE XXII.

MISCELLANEOUS.

SECTION 1. **[Homestead exemption.]** The Legislature shall provide by law, for the selection by each head of a family, and exemption of a homestead, which may consist of one or more parcels of lands, together with the appurtenances and improvements thereon of the value of at least fifteen hundred dollars from sale on execution.

Homestead generally, §§ 2862-2882, and notes.
Property exempt from execution, § 6925.
Homestead of decedent exempt when, §§ 6409, 7644, and notes.
The homestead exemption given by the constitution and by law is an absolute right, intended to protect the home against creditors;

and no waiver could affect the right of the wife and children.
Kimball v. Salisbury, 17 U. 381; 53 P. 1037.
Occupation and use is a sufficient selection of a homestead.
Kimball v. Salisbury, 17 U. 381; 53 P. 1037.
Kimball v. Salisbury, 19 U. 161; 56 P. 973.
Unless a party has actual notice of levy and sale of his homestead, his failure to assert the right is not a waiver.
Kimball v. Salisbury, 19 U. 161; 56 P. 973.
Selection may be made at any time before sale.
Folsom v. Asper, 25 U. 299; 71 P. 315.
Sec. 2871, providing that a homestead shall be subject to execution to satisfy judgments on debts secured by mechanics' liens for labor done for the improvement of the same, is in conflict with Con. art. 22, sec. 1, requiring the legislature to provide for the selection and exemption of a homestead; the constitution exempting a homestead from execution sale without exception.
Volker L. Co. v. Vance, 32 U. 74; 88 P. 896.
A debtor may claim homestead exemption to any land he owns at any time before sale.
Volker-Scowcroft Lbr. Co. v. Vance, 36 U. 348; 103 P. 970.
A single man, making contract for the erection of a house on his lot, cannot, by marrying after the work has been done thereby claim it is exempt so as to deprive the contractor of his mechanics' lien.
Evans v. Jensen, 50 U.—; 168 P. 762.

SEC. 2. **[Property rights of married women.]** Real and personal estate of every female, acquired before marriage, and all property to which she may afterwards become entitled by purchase, gift, grant, inheritance or devise, shall be and remain the estate and property of such female, and shall not be liable for the debts, obligations or engagements of her husband, and may be conveyed, devised or bequeathed by her as if she were unmarried.

In this state women are relieved from the common law disability and are given independent power to manage, control, transfer and dispose of, hold and enjoy their separate property without restriction or limitation by reason of marriage.
Morrison, M. & Co. v. Clark, 20 U. 432; 59 P. 235.

ARTICLE XXIII.

AMENDMENTS.

SECTION 1. **[Amendments: proposal, election.]** Any amendment or amendments to this Constitution may be proposed in either house of the Legislature, and if two-thirds of all the members elected to each of the two houses, shall vote in favor thereof, such proposed amendment or amendments shall be entered on their respective journals with the yeas and nays taken thereon; and the Legislature shall cause the same to be published in at least one newspaper in every county of the State, where a newspaper is published, for two months immediately preceding the next general election, at which time the said amendment or amendments shall be submitted to the electors of the State, for their approval or rejection, and if a majority of the electors voting thereon shall approve the same, such amendment or amendments shall become part of this Constitution. If two or more amendments are proposed, they shall be so submitted as to enable the electors to vote on each of them separately.

The amendments to the constitution adopted down to 1907, are as follows:
Art. 6, sec. 1, on legislative power, amended Nov. 6, 1900.
Art. 6, sec. 22, on passage of laws, amended Nov. 6, 1900.
Art. 10, sec. 6, on separate control of city schools, amended Nov. 6, 1900.
Art. 13, sec. 3, on taxation and exemptions, amended Nov. 6, 1900, and again Nov. 6, 1906.
Art. 13, sec. 12, as to mortgage tax, amended Nov. 6, 1906.
Art. 10, sec. 2, on public school system, amended Nov. 6, 1906.
Sections as amended will be found in their several places in the constitution; the original sections are inserted in an appendix to the constitution.

SEC. 2. **[Revision of the constitution.]** Whenever two-thirds of the members, elected to each branch of the Legislature, shall deem it necessary to call a convention to revise or amend this Constitution, they shall recommend to the electors to vote, at the next general election, for or against a convention, and, if a majority of all the electors, voting at such election, shall vote for a convention, the Legislature, at its next session, shall provide by law for calling the same. The convention shall consist of not less than the number of members in both branches of the Legislature.

SEC. 3. **[Id. Submission to electors.]** No Constitution, or amendments adopted by such Convention, shall have validity until submitted to, and adopted by, a majority of the electors of the State voting at the next general election.

ARTICLE XXIV.

SCHEDULE.

SECTION 1. **[Actions, contracts, etc., to continue.]** In order that no inconvenience may arise, by reason of the change from a Territorial to a State Government, it is hereby declared that all writs, actions, prosecutions, judgments, claims and contracts, as well of individuals as of bodies corporate, both public and private, shall continue as if no change had taken place; and all process which may issue under the authority of the Territory of Utah, previous to its admission into the Union, shall be as valid as if issued in the name of the State of Utah.

Action, prosecutions, etc., Enabling Act, sec. 17; art. 24, sec. 6.
Recognizances, judgments, records, art. 24, sec. 5.
Prosecution of offenses committed before statehood, art. 1, sec. 10; art. 24, secs. 1, 3, 6, and notes.

SEC. 2. **[Territorial laws continued.]** All laws of the Territory of Utah now in force, not repugnant to this Constitution, shall remain in force until they expire by their own limitations, or are altered or repealed by the Legislature. The act of the Governor and Legislative Assembly of the Territory of Utah, entitled, "An Act to punish polygamy and other kindred offenses," approved February 4th, A. D. 1892, in so far as the same defines and imposes penalties for polygamy, is hereby declared to be in force in the State of Utah.

Polygamous marriages forever prohibited, art. 3, sec. 1.
Territorial laws to continue in effect, Enabling Act, sec. 19.
The provision of the territorial law, made the law of this state by provisions of this section, authorizing the mayor, with consent of council, to appoint the city attorney, is not repugnant to art. 4, sec. 9.
Whipple v. Henderson, 13 U. 484; 45 P. 274.
Under provisions of this section, all laws of the territory, not repugnant to the constitution, remained in force after statehood until altered or repealed by the legislature, or until they expired by limitation.
P. V. Coal Co. v. Co. Com., 15 U. 97; 48 P. 1032.
Judge v. Spencer, 15 U. 242; 48 P. 1097.
Jungk v. Holkbrook, 15 U. 198; 49 P. 305.
The specific reference in this section to polygamy does not exclude from operation that part of the law of 1892 referring to adultery and fornication.
State v. Norman, 16 U. 457; 52 P. 986.
State v. Pierpont, 16 U. 476; 52 P. 992.
Territorial laws remained in force to enable accused to be tried by twelve jurors for crime committed before statehood.
State v. Hart, 19 U. 438; 57 P. 415.
And to authorize a grand jury under territorial laws to find indictments for offenses committed before statehood.
State v. Rock, 20 U. 38; 57 P. 532.
Under § 1772, Com. Laws. 1888, continued in force by this section, and under C. L. § 612, in effect before plaintiff qualified as city justice of the peace, any attempt by city council to abolish or alter the salary is void and of no effect as to plaintiff.
Hulaniski v. Ogden City, 20 U. 233; 57 P. 876.
Sec. 9207 not being inconsistent with Con. art. 1, sec. 12, or art. 8, sec. 9, gave defendant right to move for new trial upon facts discovered after judgment and to appeal from an order refusing to set aside the judgment and grant a new trial.
State v. Morgan, 23 U. 212; 64 P. 356.
By virute of the organic act, the common law respecting dower was in force during all the time that Utah remained a territory (from Sept. 9, 1850, to Jan. 4, 1896), except when abolished by territorial statute (from Feb., 1872, to March 3, 1887), being then restored by congress. By virtue of art. 24, sec. 2, of constitution, it remained in force from the admission of the state (Jan. 4, 1896), to Jan. 1, 1898, when it was modified by §§ 2826 and 2832, R. S. 1898.
Hilton v. Thatcher, 31 U. 360; 88 P. 20.

SEC. 3. **[Prisoners to be held.]** Any person, who, at the time of the admission of the State into the Union, may be confined under lawful commitment, or otherwise lawfully held to answer for alleged violation of any of the criminal laws of the Territory of Utah, shall continue to be so held or confined, until discharged therefrom by the proper courts of the State.

Prosecution of offenses committed before statehood, art 1, sec. 10; art. 24, secs. 1 and 6, and notes.
Criminal prosecutions not to abate, Enabling Act, sec. 17; art. 24, secs. 1, 6.

SEC. 4. **[Fines, etc., due the territory. Debts of the territory.]** All fines, penalties and forfeitures accruing to the Territory of Utah, or to the people of the United States in the Territory of Utah, shall inure to this State, and all debts, liabilities and obligations of said Territory, shall be valid against the State, and enforced as may be provided by law.

State assumes debts of territory, art. 3, sec. 3; Enabling Act, sec. 3.

SEC. 5. **[Recognizances. Judgments. Records. Fines due counties, etc.]** All recognizances heretofore taken, or which may be taken before the change from a Territorial to a State Government, shall remain valid, and shall pass to and be prosecuted in the name of the State; and all bonds executed to the Governor of the Territory, or to any other officer or court in his or their of-

ficial capacity, or to any official board for the benefit of the Territory of Utah, or the people thereof, shall pass to the Governor or other officer, court or board, and his or their successors in office, for the uses therein, respectively expressed, and may be sued on, and recovery had accordingly. Assessed taxes, and all revenue, property, real, personal or mixed, and all judgments, bonds, specialties, choses in action, claims and debts, of whatsoever description; and all records and public archives of the Territory of Utah, shall issue and vest in the State of Utah, and may be sued for and recovered, in the same manner, and to the same extent by the State of Utah, as the same could have been by the Territory of Utah; and all fines, taxes, penalties and forfeitures, due or owing to any county, municipality or school district therein, at the time the State shall be admitted into the Union, are hereby respectively assigned and transferred, and the same shall be payable to the county, municipality or school district, as the case may be, and payment thereof be enforced under the laws of the State.

SEC. 6. **[Criminal prosecutions begun and crimes committed before statehood.]** All criminal prosecutions, and penal actions, which may have arisen, or which may arise before the change from a Territorial to a State Government, and which shall then be pending, shall be prosecuted to judgment and execution in the name of the State, and in the court having jurisdiction thereof. All offenses committed against the laws of the Territory of Utah, before the change from a Territorial to a State Government, and which shall not have been prosecuted before such change, may be prosecuted in the name, and by the authority of the State of Utah, with like effect as though such change had not taken place, and all penalties incurred shall remain the same as if this Constitution had not been adopted.

Criminal prosecution not to abate, art. 24, secs. 1, 3; Enabling Act. sec. 17.

Prosecution of offenses committed before statehood, art. 1, sec. 10; art. 24, secs. 1 and 6, and notes.

Where offense committed before statehood, defendant entitled to trial by jury of twelve. Note to art. 1, sec. 10.

A person charged with committing an offense prior to statehood had a constitutional right under the laws of congress and the territorial laws then in effect, to be prosecuted only upon indictment presented by a grand jury; and he may not be prosecuted by way of information.

State v. Rock, 20 U. 38; 57 P. 532.

The laws of the territory of Utah, with reference to grand jurors, empowering them to act, inquire into offenses and find indictments, are still in force in this state as to offenses committed prior to its admission Jan. 4, 1896.

Id.

SEC. 7. **[Transfer of causes, records, etc.]** All actions, cases, proceedings and matters, pending in the Supreme and District Courts of the Territory of Utah, at the time the state shall be admitted into the Union, and all files, records and indictments relating thereto, except as otherwise provided herein, shall be appropriately transferred to the Supreme and District Courts of the State respectively; and thereafter all such actions, matters and cases, shall be proceeded with in the proper State courts. All actions, cases, proceedings and matters which shall be pending in the District Courts of the Territory of Utah, at the time of the admission of the State into the Union, whereof the United States Circuit or District Courts might have had jurisdiction had there been a State Government at the time of the commencement thereof respectively, shall be transferred to the proper United States Circuit and District Courts respectively; and all files, records, indictments and proceedings relating thereto, shall be transferred to said United States Courts: Provided, That no civil actions, other than causes and proceedings of which the said United States' Courts shall have exclusive jurisdiction, shall be transferred to either of said United States' Courts except upon motion or petition by one of the parties thereto, made under and in accordance with the act or acts of the Congress of the United States, and such motion and petition not being made, all such cases shall be proceeded with in the proper State Courts.

Transfer of causes, etc., Enabling Act, sec. 17.

Prosecutions of offenses committed before statehood, art. 1, sec. 10; art. 24; secs. 1 and 6, and notes.

The law of the territory governs a case which was begun in justice's court before statehood, though the appeal was perfected afterward.

Hodgson v. U. P. Ry. Co., 14 U. 381; 46 P. 270.

Case begun in Utah county before statehood properly tried there afterward.

Jungk v. Holbrook, 15 U. 198; 49 P. 305.

A case commenced in first district court of Utah territory was properly transferred after statehood to the fourth district court, state of Utah.
Davidson v. Hunter, 22 U. 117; 61 P. 556.

SEC. 8. **[Seals of courts.]** Upon a change from Territorial to State Government, the seal in use by the Supreme Court of the Territory of Utah, until otherwise provided by law, shall pass to and become the Seal of the Supreme Court of the State, and the several District Courts of the State may adopt seals for their respective courts, until otherwise provided by law.

Supreme and district courts each have a seal, art. 8, sec. 17.

SEC. 9. **[Transfer of probate causes to district courts.]** When the State is admitted into the Union, and the District Courts in the respective districts are organized, the books, records, papers and proceedings of the probate court in each county, and all causes and matters of administration pending therein, upon the expiration of the term of office of the Probate Judge, on the second Monday in January, 1896, shall pass into the jurisdiction and possession of the District Court, which shall proceed to final judgment or decree, order or other determination in the several matters and causes, as the Territorial Probate Court might have done, if this Constitution had not been adopted. And until the expiration of the term of office of the Probate Judges, such Probate Judges shall perform the duties now imposed upon them by the laws of the Territory. The District Courts shall have appellate and revisory jurisdiction over the decisions of the Probate Courts as now provided by law, until such latter courts expire by limitation.

General jurisdiction of district courts, art. 8, secs. 7, 9.
Under sec. 9 of art. 24, and secs. 1 and 7 of art. 8, a probate judge appointed under the territorial government ceases to hold office as such after January 13, 1896.
State, ex rel. Bishop v. McNally, 13 U. 25; 43 P. 920.

SEC. 10. **[Officers to hold office until superseded.]** All officers, civil and military, now holding their offices and appointments in this Territory by authority of law, shall continue to hold and exercise their respective offices and appointments, until susperseded under this Constitution: Provided, That the provisions of this section shall be subject to the provisions of the Act of Congress, providing for the admission of the State of Utah, approved by the President of the United States on July 16th, 1894.

Territorial officers to continue until state admitted, Enabling Act, sec. 5.
This section does not change the intent of § 1764, C. L. 1888, to supersede an appointive officer at the expiration of two years.
State, ex rel. Weber v. Beardsley, 13 U. 502; 45 P. 569.

SEC. 11. **[Election for adoption or rejection of constitution, and for state officers. Voters.]** The election for the adoption or rejection of this Constitution, and for State Officers herein provided for, shall be held on the Tuesday next after the first Monday in November, 1895, and shall be conducted according to the laws of the Territory, and the provisions of the Enabling Act; the votes cast at said election shall be canvassed, and returns made, in the same manner as was provided for in the election for delegates to the Constitutional Convention.

Provided, That all male citizens of the United States, over the age of twenty-one years, who have resided in this Territory for one year next prior to such election, are hereby authorized to vote for or against the adoption of this Constitution, and for the State Officers herein provided for. The returns of said election shall be made to the Utah Commission, who shall cause the same to be canvassed, and shall certify the result of the vote for or against the Constitution, to the President of the United States, in the manner required by the Enabling Act; and said Commission shall issue certificates of election to the persons elected to said offices severally, and shall make and file with the Secretary of The Territory, an abstract, certified to by them, of the number of votes cast for each person for each of said offices, and of the total number of votes cast in each county.

Terms of state officers, art. 7, sec 1.
Election on constitution and for first state officers, Enabling Act, secs. 2, 4.
Qualifications of voters at general election, art. 4, sec. 2.
Women not entitled to vote on the adoption of the constitution, nor for first state officers.
Anderson v. Tyree, 12 U. 129; 42 P. 201.

SEC. 12. **[Id. Officers to be elected.]** The State Officers to be voted for at the time of the adoption of this Constitution, shall be a Governor, Secretary of State, State Auditor, State Treasurer, Attorney-General, Superintendent of Public Insruction, members of the Senate and House of Representatives, three Supreme Judges, nine District Judges, and a Representative to Congress.

Terms begin, when, art. 24, sec. 16. Enabling Act, sec. 19.

SEC. 13. **[Contest for district judgeship, how determined.]** In case of a contest of election between candidates, at the first general election under this Constitution, for Judges of the District Courts, the evidence shall be taken in the manner prescribed by the Territorial laws, and the testimony so taken shall be certified to the Secretary of State, and said officer, together with the Governor and the Treasurer of the State, shall review the evidence, and determine who is entitled to the certificate of election.

Tie votes, how decided, art. 7, sec. 2.

SEC. 14. **[Constitution to be submitted to voters. Ballot.]** This Constitution shall be submitted for adoption or rejection, to a vote of the qualified electors of the proposed State, at the general election to be held on the Tuesday next after the first Monday in November, A. D. 1895. At the said election the ballot shall be in the following form:

For the Constitution. Yes. No.

As a heading to each of said ballots there shall be printed on each ballot the following Instructions to Voters:

All persons desiring to vote for the Constitution must erase the word "No."

All persons desiring to vote against the Constitution must erase the word "Yes."

Election on constitution, Enabling Act, sec. 4. General elections, when held, art. 4, sec. 9.

SEC. 15. **[Election of officers not provided for herein.]** The Legislature, at its first session, shall provide for the election of all officers, whose election is not provided for elsewhere in this Constitution, and fix the time for the commencement and duration of their terms.

SEC. 16. **[When constitution in force.]** The provisions of this Constitution shall be in force from the day on which the President of the United States shall issue his proclamation, declaring the State of Utah admitted into the Union; and the terms of all officers elected at the first election under the provisions of this constitution, shall commence on the first Monday, next succeeding the issue of said proclamation. Their terms of office shall expire when their successors are elected and qualified under this Constitution.

Terms of first officers begin, when, Enabling Act, sec. 19.
Constitution adopted Nov. 5, 1895, by a vote of 31,305 to 7,687; proclamation of the president of the United States admitting the state into the union issued Jan. 4, 1896; inauguration of state officers, Jan. 6, 1896.
State constitution in force from time of proclamation of president, Jan. 4, 1896.
Anderson v. Tyree, 12 U. 129; 42 P. 201.

Done in Convention at Salt Lake City, in the Territory of Utah, this eighth day of May, in the year of our Lord one thousand eight hundred and ninety-five, and of the Independence of the United States the one hundred and nineteenth.

JOHN HENRY SMITH,
President.

Attest:
PARLEY P. CHRISTENSEN,
Secretary.

LOUIS BERNHARDT ADAMS.
RUFUS ALBERN ALLEN.
ANDREW SMITH ANDERSON.
JOHN RICHARD BARNES.
JOHN RUTLEDGE BOWDLE.
JOHN SELL BOYER.
THEODORE BRANDLEY.
HERBERT GUION BUTTON.
WILLIAM BUYS.
CHESTER CALL.

George Mousley Cannon.
John Foy Chidester.
Parley Christensen.
Thomas H. Clark, Jr.
Louis Laville Coray.
Elmer Ellsworth Corfman.
Charles Crane.
William Creer.
George Cunningham.
Arthur John Cushing.
William Driver.
Dennis Clay Eichnor.
Alma Eldredge.
George Rhodes Emery.
Andreas Engberg.
David Evans.
Abel John Evans.
Lorin Farr.
Samuel Francis.
William Henry Gibbs.
Charles Carroll Goodwin.
James Frederic Green.
Francis Asbury Hammond.
Charles Henry Hart.
Harry Haynes.
John Daniel Holladay.
Samuel Hood Hill.
William Howard.
Henry Hughes.
Joseph Alonzo Hyde.
Anthony Woodward Ivins.
Wm. F. James.
Lycurgus Johnson.
Joseph Loftis Jolley.
Frederick John Kiesel.
David Keith.
Thomas Kearns.
William Jasper Kerr.
Andrew Kimball.
James Nathaniel Kimball.
Richard G. Lambert.
Lauritz Larsen.
Christen Peter Larsen.
Hyrum Lemmon.
Theodore Belden Lewis.
William Lowe.
Peter Lowe.
James Paton Low.
Anthony Canute Lund.
Karl G. Maeser.
Richard Mackintosh.
Thomas Maloney.
William H. Maughan.
Robert McFarland.
George Parcust Miller.
Elias Morris.
Jacob Moritz.
John Riggs Murdock.
Joseph Royal Murdock.
James David Murdoch.
Aquila Nebeker.
Jeremiah Day Page.
Edward Partridge.
Mons Peterson.
James Christian Peterson.
Frank Pierce.
John David Peters.
Wm. B. Preston.
Alonzo Hazelton Raleigh.
Franklin Snyder Richards.
Joel Ricks.
Brigham Henry Roberts.
Jasper Robertson.
Joseph Eldredge Robinson.
Willis Eugene Robison.
George Ryan.
John Henry Smith.
George B. Squires.
Harrison Tuttle Shurtleff.
Edward Hunter Snow.
Hiram Hupp Spencer.
David Brainerd Stover.
Charles Nettleton Strevell.
Charles William Symons.
Moses Thatcher.
Daniel Thompson.
Ingwald Conrad Thoresen.
Joseph Ephraim Thorne.
Samuel R. Thurman.
William Grant Van Horne.
Charles Stetson Varian.
Heber M. Wells.
Noble Warrum, Jr.
Orson Ferguson Whitney.
Joseph John Williams.

By
order of the
Convention
May 8th, 1895.

John Henry Smith,
President.

APPENDIX

TO

CONSTITUTION OF UTAH

GIVING IN THEIR ORIGINAL FORMS THOSE SECTIONS OF THE CONSTITUTION WHICH HAVE BEEN AMENDED, AND AMENDED SECTIONS, WHERE THEY WERE SUBSEQUENTLY AMENDED.

ARTICLE VI.

LEGISLATIVE DEPARTMENT.

SECTION 1. **[Power vested in senate and house.]** The Legislative power of this State shall be vested in a Senate and House of Representatives, which shall be designated The Legislature of the State of Utah. [As originally enacted.]

Amended Nov. 6, 1900, to provide for legislation by initiative and referendum.

SEC. 22. **[Enacting clause. Passage and amendments of law.]** The enacting clause of every law shall be: "Be it enacted by the Legislature of the State of Utah," and no bill or joint resolution shall be passed, except with the assent of a majority of all the members elected to each house of the Legislature and after it has been read three times. The vote upon the final passage of all bills shall be by yeas and nays; and no law shall be revised or amended by reference to its title only; but the act as revised, or section as amended, shall be re-enacted and published at length. [As originally enacted.]

Amended Nov. 6, 1900, to provide for legislation by initiative and referendum.

ARTICLE X.

EDUCATION.

SEC. 2. **[Public school system. Maintenance.]** The Public School system shall include kindergarten schools; common schools, consisting of primary and grammar grades; high schools; an Agricultural College; a University, and such other schools as the Legislature may establish. The common schools shall be free. The other departments of the system shall be supported as provided by law: Provided, That high schools may be maintained free in all cities of the first and second class now constituting school districts, and in such other cities and districts as may be designated by the Legislature. But where the proportion of school monies apportioned or accruing to any city or district shall not be sufficient to maintain all the free schools in such city or district, the high schools shall be supported by local taxation. [As originally enacted.]

SEC. 2. **[Public school system. Maintenance.]** The Public School system shall include kindergarten schools, common schools, consisting of primary and grammar grades, High Schools, an Agricultural College, a University, and such other schools as the Legislature may establish. The common schools shall be free. The other departments of the system shall be supported as provided by law. Provided, That High Schools may be maintained free in all cities of the first and second class now constituting school districts, and in such other cities and districts as may be designated by the Legislature. But where the proportion of school monies apportioned or accruing to any city

or district shall not be sufficient to maintain all the free schools in such city or district, the High Schools shall be supported by local taxation;

Provided, That when any cities or districts shall establish High Schools, the Legislature may authorize the use of State school funds to assist in supporting such schools, said funds being apportioned to the cities or districts concerned by the State Board of Education. [As amended Nov. 6, 1906.]

The section in its original form placed in the appendix to the constitution. Amended Nov. 6, 1906, to empower the legislature to authorize the use of state school funds to assist in supporting high schools.

Amended Nov. 8, 1910, by omitting all special provisions concerning High schools.

SEC. 3. **[State school fund. Interest distributed.]** The proceeds of all lands that have been, or may be granted by the United States to this State, for the support of the common schools; the proceeds of all property that may accrue to the State by escheat or forfeiture; all unclaimed shares and dividends of any corporation incorporated under the laws of this State; the proceeds of the sale of timber, minerals or other property from school and State lands, other than those granted for specific purposes; and the five per centum of the net proceeds of the sales of public lands lying within the State, which shall be sold by the United States, subsequent to the admission of this State into the Union, shall be and remain a perpetual fund, to be called the State School Fund, the interest of which only, together with such other means as the Legislature may provide, shall be distributed among the several school districts according to the school population residing therein. [As originally enacted.]

November 8, 1910, amended by providing that funds derived from the state tax for high schools shall be aportioned among the cities and school districts according to the attendance at the high schools providing the schools are maintained at the standard fixed by the Board of Education.

SEC. 6. **[Separate control of city schools.]** In cities of the first and second class, the public school system shall be maintained and controlled, by the Board of Education of such cities, separate and apart from the counties in which said cities are located. [As originally enacted.]

Amended Nov. 6, 1900, by omitting the words "maintained and."

ARTICLE XIII.

REVENUE AND TAXATION.

SEC. 3. **[Legislature to provide uniform tax. Exemptions.]** The Legislature shall provide by law a uniform and equal rate of assessment and taxation on all property in the State, according to its value in money, and shall prescribe by general law such regulations as shall secure a just valuation for taxation of all property; so that every person and corporation shall pay a tax in proportion to the value of his, her or its property: Provided, That a deduction of debts from credits may be authorized: Provided further, That the property of the United States, of the State, counties, cities, towns, school districts, municipal corporations and public libraries, lots with the buildings thereon used exclusively for either religious worship or charitable purposes, and places of burial not held or used for private or corporate benefit, shall be exempt from taxation. Ditches, canals, and flumes owned and used by individuals or corporations for irrigating lands owned by such individuals or corporations, or the individual members thereof, shall not be separately taxed so long as they shall be owned, and used exclusively for such purpose. [As originally enacted.]

Amended Nov. 6, 1900, by adding "reservoirs and pipes," and providing for the abatement of taxes of the indigent poor. See section next following.

SEC. 3. **[Legislature to provide uniform tax. Exemptions.]** The Legislature shall provide by law a uniform and equal rate of assessment and taxation on all property in the State, according to its value in money, and shall prescribe by general law such regulations as shall secure a just valuation for taxation of all property, so that every person and corporation shall pay a tax

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Amended Nov. 6, 1906, by making mortgages upon both real and personal property exempt from taxation.

SEC. 4. **[Taxation of mines.]** All mines and mining claims, both placer and rock in place, containing or bearing gold, silver, copper, lead, coal or other valuable mineral deposits, after purchase thereof from the United States, shall be taxed at the price paid the United States therefor, unless the surface ground, or some part thereof, of such mine or claim, is used for other than mining purposes, and has a separate and independent value for such other purposes; in which case said surface ground, or any part thereof, so used for other than mining purposes, shall be taxed at its value for such other purposes, as provided by law; and all the machinery used in mining, and all property and surface improvements upon or appurtenant to mines and mining claims, which have a value separate and independent of such mines or mining claims, and the net annual proceeds of all mines and mining claims, shall be taxed as provided by law. [As originally enacted.]

Nov. 3, 1908, amended by authorizing the State Board of Equalization to tax machinery and improvements and the net annual proceeds.

SEC. 7. **[Tax rate for state purposes.]** The rate of taxation on property, for State purposes, shall never exceed eight mills on each dollar of valuation; and whenever the taxable property within the State shall amount to two hundred million dollars, the rate shall not exceed five mills on each dollar of valuation; and whenever the taxable property within the State shall amount to three hundred million dolars, the rate shall never thereafter exceed four mills on each dollar of valuation; unless a proposition to increase such rate, specifying the rate proposed, and the time during which the same shall be levied, be first submitted to a vote of such of the qualified electors of the State as, in the year next preceding such election, shall have paid a property tax assessed to them within the State, and the majority of those voting thereon shall vote in favor thereof, in such manner as may be provided by law. [As originally enacted.]

Nov. 8, 1910, amended by providing one-half mill for high school purposes and creating the high school fund and apportioning the same and providing that when assessed valuation shall be $400,000,000.00 instead of $200,000,000.00 the rate shall not exceed five per cent.

SEC. 12. **[Stamp, income, license, franchise, or mortgage tax permissible.]** Nothing in this Constitution shall be construed to prevent the Legislature from providing a stamp tax, or a tax based on income, occupation, licenses, franchises or mortgages. [As originally enacted.]

Amended Nov. 6, 1906, by omitting the word "mortgages."

ARTICLE XIV.

SECTION 1. **[State debt, limitation.]** To meet casual deficits or failures in revenue, and for necessary expenditures for public purposes, including the erection of public buildings, and for the payment of all Territorial indebtedness assumed by the State, the State may contract debts, not exceeding in the aggregate at any one time, the sum of two hundred thousand dollars over and above the amount of the Territorial indebtedness assumed by the

State. But when the said Territorial indebtedness shall have been paid, the State shall never contract any indebtedness, except as in the next section provided, in excess of the sum of two hundred thousand dollars, and all monies arising from loans herein authorized, shall be applied solely to the purposes for which they were obtained. [As originally enacted.]

Nov. 10, 1910, amended by fixing the maximum indebtedness an amount equal to one and one-half per cent of the assessed valuation of property in the state instead of two hundred thousand dollars in excess of the territorial indebtedness and omitting the provision that after territorial indebtedness shall have been paid the state should never contract any indebtedness except as in Section 4 provided, in excess of two hundred thousand dollars, and moneys arising from loans should be applied solely to the purposes for which they were obtained.

SEC. 4. **[Limit of indebtedness of counties, cities, etc.]** When authorized to create indebtedness as provided in section three of this article, no county shall become indebted to an amount, including existing indebtedness, exceeding two per centum. No city, town, school district or other municipal corporation, shall become indebted to an amount, including existing indebtedness, exceeding four per centum of the value of the taxable property therein, the value to be ascertained by the last assessment for State and county purposes, previous to the incurring of such indebtedness; except that in incorporated cities the assessment shall be taken from the last assessment for city purposes: Provided, That no part of the indebtedness allowed in this section, shall be incurred for other than strictly county, city, town or school district purposes: Provided, further, That any city or town, when authorized as provided in Section three of this Article, may be allowed to incur a larger indebtedness, not exceeding four per centum additional, for supplying such city or town with water, artificial lights or sewers, when the works for supplying such water, light and sewers, shall be owned and controlled by the municipality. [As originally enacted.]

Nov. 8, 1910, amended by permitting third class city or town to create an additional indebtedness of eight percentum instead of four percentum.

The following amendments to the Constitution of Utah were adopted at the general election held November 5, 1918, too late to be inserted in their proper places.

ARTICLE XIII.

Section 3 of Article XIII was amended to take effect Jan. 1st, 1919, to read as follows:

Sec. 3. **Legislature to provide uniform tax. Exemptions.** The legislature shall provide by law a uniform and equal rate of assessment and taxation on all property in the State, according to its value in money, and shall prescribe by general law such regulations as shall secure a just valuation for taxation of all property, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property: *provided,* That a deduction of debits from credits may be authorized: *provided further,* That the property of the United States, of the State, counties, cities, towns, school districts, municipal corporations and public libraries, lots with the buildings thereon used exclusively for either religious worship or charitable purposes, and places of burial not held or used for private or corporate benefit, shall be exempt from taxation. Ditches, canals, reservoirs, pipes and flumes owned and used by individuals or corporations for irrigating lands owned by such individuals or corporations, or the individual members thereof, shall not be separately taxed as long as they shall be owned and used exclusively for such purpose: *provided further,* That mortgages upon both real and personal property shall be exempt from taxation: *provided further,* That the taxes of the indigent poor may be remitted or abated at such time and in such manner as may be provided by law: *provided further,* That the legislature may provide for the exemption from taxation of homes, homesteads, and personal property, not to exceed two hundred and fifty dollars in value for homes and homesteads and one hundred dollars of personal property.

Section 4 of Article XIII was amended to take effect Jan. 1st, 1919, to read as follows:

Sec. 4. **Taxation of Mines.** All metalliferous mines or mining claims, both placer and rock in place shall be assessed at $5.00 per acre, and in addition thereto at a value based on some multiple or sub-multiple of the net annual proceeds thereof. All other mines or mining claims and other valuable mineral deposits, including lands containing coal or hydrocarbons, shall be assessed at their full value. All machinery used in mining and all property or surface improvements upon or appurtenant to mines or mining claims, and the value of any surface use made of mining claims, or mining property for other than mining purposes, shall be assessed at full value. The state board of equalization shall assess and tax all property herein enumerated, *provided* that the assessment of $5.00 per acre and the assessment of the value of any use other than for mining purposes shall be made as provided by law.

ARTICLE XXII.

Article XXII was amended by adding Section 3 thereto to take effect Jan. 1st, 1919, which reads as follows:

Sec. 3. **Prohibition of the manufacture and sale of intoxicating liquors.** The manufacture, sale, keeping or storing for sale or offering or exposing for sale, or importing, carrying, transporting, advertising, distributing, giving away, exchanging, dispensing, or serving of all fermented, malt, vinous or spirituous liquors, alcohol, wine, porter, ale, beer, absinthe or any other intoxicating drink, mixture or preparation of like nature; and all malt or brewed drinks; fruits preserved in alcoholic liquors of any kind; and all beverages containing in excess of one-half of one per centum of alcohol by volume; and

all mixtures, compounds or preparations, whether liquid or not, which are intended when mixed with water, or otherwise, to produce by fermentation or otherwise an intoxicating liquor, are hereby forever prohibited in the State, except alcohol for scientific and manufacturing purposes, and wine used for sacramental purposes.

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NATURALIZATION LAWS AND REGULATIONS

NATURALIZATION LAWS

ACT OF JUNE 29, 1906 (34 STAT. L., PART 1, P. 596), AS AMENDED IN SECTIONS 16, 17, AND 19, BY THE ACT OF CONGRESS APPROVED MARCH 4, 1909[1] (35 STAT. L., PART 1, P. 1102); IN SECTIONS 4 AND 13, BY THE ACT OF CONGRESS APPROVED JUNE 25, 1910[2] (36 STAT. L., PART 1, P. 829); AND BY THE ACT OF CONGRESS APPROVED MARCH 4, 1913[3] (37 STAT. L., PART I, P. 736), CREATING THE DEPARTMENT OF LABOR.

AN ACT TO PROVIDE FOR A UNIFORM RULE FOR THE NATURALIZATION OF ALIENS THROUGHOUT THE UNITED STATES, AND ESTABLISHING THE BUREAU OF NATURALIZATION.

[Portion of act creating the Department of Labor.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That there is hereby created an executive department in the Government to be called the Department of Labor, with a Secretary of Labor, who shall be the head thereof, to be appointed by the President, by and with the advice and consent of the Senate; * * *

* * * * * * * *

SEC. 3. That the following-named offices, bureaus, divisions, and branches of the public service now and heretofore under the jurisdiction of the Department of Commerce and Labor, and all that pertains to the same, known as * * * the Bureau of Immigration and Naturalization, * * * the Division of Naturalization, * * * be, and the same hereby are, transferred from the Department of Commerce and Labor to the Department of Labor, and the same shall hereafter remain under the jurisdiction and supervision of the last-named department. The Bureau of Immigration and Naturalization is hereby divided into two bureaus, to be known hereafter as the Bureau of Immigration and the Bureau of Naturalization, and the titles Chief Division of Naturalization and Assistant Chief shall be Commissioner of Naturalization and Deputy Commissioner of Naturalization. The Commissioner of Naturalization or, in his absence, the Deputy Commissioner of Naturalization, shall be the administrative officer in charge of the Bureau of Naturalization and of the administration of the naturalization laws under the immediate direction of the Secretary of Labor, to whom he shall report directly upon all naturalization matters annually and as otherwise required, * * *.

[Act of June 29, 1906, as amended by the acts above referred to.]

That the Bureau of Naturalization, under the direction and control of the Secretary of Labor, shall have charge of all matters concerning the naturalization of aliens. That it shall be the duty of the Bureau of Immigration to provide, for use at the various immigration stations throughout the United States, books of record, wherein the commissioners of immigration shall cause a registry to be made in the case of each alien arriving in the United States from and after the passage of this act of the name, age, occupation, personal description (including height, complexion, color of hair and eyes), the place of birth, the last residence, the intended place of residence in the United States, and the date of arrival of said alien, and, if entered through a port, the name of the vessel in which he comes. And it shall be the duty of said commission-

[1]See pp. 133-134. [2]See pp. 116-117, 119-120. [3]See p. 115.

ers of immigration to cause to be granted to such alien a certificate of such registry, with the particulars thereof.[1]

SEC. 2. [This section is omitted as it authorized the Secretary of Commerce and Labor to provide the necessary offices in the city of Washington and take the necessary steps for the proper discharge of the duties imposed by the act of June 29, 1906.]

SEC. 3. That exclusive jurisdiction to naturalize aliens as citizens of the United States is hereby conferred upon the following specified courts:

United States circuit[2] and district courts now existing, or which may hereafter be established by Congress in any State, United States district courts for the Territories of Arizona,[3] New Mexico,[3] Oklahoma,[3] Hawaii, and Alaska, the supreme court of the District of Columbia, and the United States courts for the Indian Territory;[3] also all courts of record in any State or Territory now existing, or which may hereafter be created, having a seal, a clerk, and jurisdiction in actions at law or equity, or law and equity, in which the amount in controversy is unlimited.

That the Naturalization jurisdiction of all courts herein specified, State, Territorial, and Federal, shall extend only to aliens resident within the respective judicial districts of such courts.

The courts herein specified shall, upon the requisition of the clerks of such courts, be furnished from time to time by the Bureau of Naturalization with such blank forms as may be required in the naturalization of aliens, and all certificates of naturalization shall be consecutively numbered and printed on safety paper furnished by said bureau.

SEC. 4. That an alien may be admitted to become a citizen of the United States in the following manner and not otherwise:

First. He shall declare on oath before the clerk of any court authorized by this act to naturalize aliens, or his authorized deputy, in the district in which such alien resides, two years at least prior to his admission, and after he has reached the age of eighteen years, that it is bona fide his intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly, by name, to the prince, potentate, state, or sovereignty of which the alien may be at the time a citizen or subject. And such declaration shall set forth the name, age, occupation, personal description, place of birth, last foreign residence and allegiance, the date of arrival, the name of the vessel, if any, in which he came to the United States, and the present place of residence in the United States of said alien; *Provided, however,* That no alien who, in conformity with the law in force at the date of his declaration, has declared his intention to become a citizen of the United States shall be required to renew such declaration: *Provided further,* That any person belonging to the class of persons authorized and qualified under existing law to become a citizen of the United States who has resided constantly in the United States during a period of five years next preceding May first, nineteen hundred and ten, who, because of misinformation in regard to his citizenship or the requirements of the law governing the naturalization of citizens has labored and acted under the impression that he was or could become a citizen of the United States and has in good faith exercised the rights or duties of a citizen or intended citizen of the United States because of such wrongful information and belief may, upon making a showing of such facts satisfactory to a court having jurisdiction to issue papers of naturalization to an alien, and the court in in its judgment believes that such person has been for a period of more than five years entitled upon proper proceedings to be naturalized as a citizen of the United States, receive from the said court a final certificate of naturalization, and said court may issue such certificate without requiring proof of former declaration by or on the part of such person of their intention to become a

[1] See rule 5 of the regulations.

[2] United States circuit courts abolished December 31, 1911, by act of Congress approved March 3, 1911. (36 Stat. L., part 1, p. 1167).

[3] United States Territorial courts abolished by acts of Congress conferring statehood.

citizen of the United States, but such applicant for naturalization shall comply in all other respects with the law relative to the issuance of final papers of naturalization to aliens.[1]

Second. Not less than two years nor more than seven years after he has made such declaration of intention he shall make and file, in duplicate, a petition in writing, signed by the applicant in his own handwriting and duly verified, in which petition such applicant shall state his full name, his place of residence (by street and number, if possible), his occupation, and, if possible, the date and place of his birth; the place from which he emigrated, and the date and place of his arrival in the United States, and, if he entered through a port, the name of the vessel on which he arrived; the time when and the place and name of the court where he declared his intention to become a citizen of the United States; if he is married he shall state the name of his wife and, if possible, the country of her nativity and her place of residence at the time of filing his petition; and if he has children, the name, date, and place of birth and place of residence of each child living at the time of the filing of his petition: *Provided,* That if he has filed his declaration before the passage of this act he shall not be required to sign the petition in his own handwriting.

The petition shall set forth that he is not a disbeliever in or opposed to organized government, or a member of or affiliated with any organization or body of persons teaching disbelief in or opposed to organized government, a polygamist or believer in the practice of polygamy, and that it is his intention to become a citizen of the United States and to renounce absolutely and forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly by name to the prince, potentate, state, or sovereignty of which he at the time of filing of his petition may be a citizen or subject, and that it is his intention to reside permanently within the United States, and whether or not he has been denied admission as a citizen of the United States, and, if denied, the ground or grounds of such denial, the court or courts in which such decision was rendered, and that the cause for such denial has since been cured or removed, and every fact material to his naturalization and required to be proved upon the final hearing of his application.

The petition shall also be verified by the affidavits of at least two credible witnesses, who are citizens of the United States, and who shall state in their affidavits that they have personally known the applicant to be a resident of the United States for a period of at least five years continuously, and of the State, Territory, or district in which the application is made for a period of at least one year immediately preceding the date of the filing of his petition, and that they each have personal knowledge that the petitioner is a person of good moral character, and that he is in every way qualified, in their opinion, to be admitted as a citizen of the United States.

At the time of filing his petition there shall be filed with the clerk of the court a certificate from the Department of Labor, if the petitioner arrives in the United States after the passage of this act, stating the date, place, and manner of his arrival in the United States,[2] and the declaration of intention of such petitioner, which certificate and declaration shall be attached to and made a part of said petition.

Third. He shall, before he is admitted to citizenship, declare on oath in open court that he will support the Constitution of the United States, and that he absolutely and entirely renounces and abjures all allegiance, and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly by name to the prince, potentate, state, or sovereignty of which he was before a citizen or subject; that he will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same.

Fourth. It shall be made to appear to the satisfaction of the court admitting any alien to citizenship that immediately preceding the date of his ap-

[1] Last proviso added by act of June 25, 1910.
[2] See rule 5, page 131.

plication he has resided continuously within the United States five years at least, and within the State or Territory where such court is at the time held one year at least, and that during that time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same. In addition to the oath of the applicant, the testimony of at least two witnesses, citizens of the United States, as to the facts of residence, moral character, and attachment to the principles of the Constitution shall be required, and the name, place of residence, and occupation of each witness shall be set forth in the record.

Fifth. In case the alien applying to be admitted to citizenship has borne any hereditary title, or has been of any of the orders of nobility in the kingdom or state from which he came, he shall, in addition to the above requisites, make an express renunciation of his title or order of nobility in the court to which his application is made, and his renunciation shall be recorded in the court.

Sixth. When any alien who has declared his intention to become a citizen of the United States dies before he is actually naturalized the widow and minor children of such alien may, by complying with the other provisions of this act, be naturalized without making any declaration of intention.

SEC. 5. That the clerk of the court shall, immediately after filing the petition, give notice thereof by posting in a public and conspicuous place in his office, or in the building in which his office is situated, under an appropriate heading, the name, nativity, and residence of the alien, the date and place of his arrival in the United States, and the date, as nearly as may be, for the final hearing of his petition, and the names of the witnesses whom the applicant expects to summon in his behalf; and the clerk shall, if the applicant requests it, issue a subpœna for the witnesses so named by the said applicant to appear upon the day set for the final hearing, but in case such witnesses can not be produced upon the final hearing other witnesses may be summoned.

SEC. 6. That petitions for naturalization may be made and filed during term time or vacation of the court and shall be docketed the same day as filed, but final action thereon shall be had only on stated days, to be fixed by rule of the court, and in no case shall final action be had upon a petition until at least ninety days have elapsed after filing and posting the notice of such petition: *Provided,* That no person shall be naturalized nor shall any certificate of naturalization be issued by any court within thirty days preceding the holding of any general election within its territorial jurisdiction. It shall be lawful at the time and as a part of the naturalization of any alien, for the court, in its discretion, upon the petition of such alien, to make a decree changing the name of said alien, and his certificate of naturalization shall be issued to him in accordance therewith.

SEC. 7. That no person who disbelieves in or who is opposed to organized government, or who is a member of or affiliated with any organization entertaining and teaching such disbelief in or opposition to organized government, or who advocates or teaches the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers, either of specific individuals or of officers generally, of the Government of the United States, or of any other organized government, because of his or their official character, or who is a polygamist, shall be naturalized or be made a citizen of the United States.

SEC. 8. That no alien shall hereafter be naturalized or admitted as a citizen of the United states who can not speak the English language: *Provided,* That this requirement shall not apply to aliens who are physically unable to comply therewith, if they are otherwise qualified to become citizens of the United States: *And provided further,* That the requirements of this section shall not apply to any alien who has prior to the passage of this act declared his intention to become a citizen of the United States in conformity with the law in force at the date of making such declaration: *Provided further,* That

the requirements of section eight shall not apply to aliens who shall hereafter declare their intention to become citizens and who shall make homestead entries upon the public lands of the United States and comply in all respects with the laws providing for homestead entries on such lands.

SEC. 9. That every final hearing upon such petition shall be had in open court before a judge or judges thereof, and every final order which may be made upon such petition shall be under the hand of the court and entered in full upon a record kept for that purpose, and upon such final hearing of such petition the applicant and witnesses shall be examined under oath before the court and in the presence of the court.

SEC. 10. That in case the petitioner has not resided in the State, Territory, or district for a period of five years continuously and immediately preceding the filing of his petition he may establish by two witnesses, both in his petition and at the hearing, the time of his residence within the State, provided that it has been for more than one year, and the remaining portion of his five years' residence within the United States required by law to be established may be proved by the depositions of two or more witnesses who are citizens of the United States, upon notice to the Bureau of Naturalization and the United States attorney for the district in which said witnesses may reside.

SEC. 11. That the United States shall have the right to appear before any court or courts exercising jurisdiction in naturalization proceedings for the purpose of cross-examining the petitioner and the witnesses produced in support of his petition concerning any matter touching or in any way affecting his right to admission to citizenship, and shall have the right to call witnesses, produce evidence, and be heard in opposition to the granting of any petition in naturalization proceedings.

SEC. 12. That it is hereby made the duty of the clerk of each and every court exercising jurisdiction in naturalization matters under the provisions of this act to keep and file a duplicate of each declaration of intention made before him and to send to the Bureau of Naturalization at Washington, within thirty days after the issuance of a certificate of citizenship, a duplicate of such certificate, and to make and keep on file in his office a stub for each certificate so issued by him, whereon shall be entered a memorandum of all the essential facts set forth in such certificate. It shall also be the duty of the clerk of each of said courts to report to the said bureau, within thirty days after the final hearing and decision of the court, the name of each and every alien who shall be denied naturalization, and to furnish to said bureau duplicates of all petitions within thirty days after the filing of the same, and certified copies of such other proceedings and orders instituted in or issued out of said court affecting or relating to the naturalization of aliens as may be required from time to time by the said bureau.

In case any such clerk or officer acting under his direction shall refuse or neglect to comply with any of the foregoing provisions he shall forfeit and pay to the United States the sum of twenty-five dollars in each and every case in which such violation or omission occurs, and the amount of such forfeiture may be recovered by the United States in an action of debt against such clerk.

Clerks of courts having and exercising jurisdiction in naturalization matters shall be responsible for all blank certificates of citizenship received by them from time to time from the Bureau of Naturalization, and shall account for the same to the said bureau whenever required so to do by such bureau. No certificate of citizenship received by any such clerk which may be defaced or injured in such manner as to prevent its use as herein provided shall in any case be destroyed, but such certificate shall be returned to the said bureau; and in case any such clerk shall fail to return or properly account for any certificate furnished by the said bureau, as herein provided, he shall be liable to the United States in the sum of fifty dollars, to be recovered in an action of debt, for each and every certificate not properly accounted for or returned.

SEC. 13.[1] That the clerk of each and every court exercising jurisdiction

[1] Section 13 as amended by act of June 25, 1910.

in naturalization cases shall charge, collect, and account for the following fees in each proceeding:

For receiving and filing a declaration of intention and issuing a duplicate thereof, one dollar.

For making, filing, and docketing the petition of an alien for admission as a citizen of the United States and for the final hearing thereon, two dollars; and for entering the final order and the issuance of the certificate of citizenship thereunder, if granted, two dollars.

The clerk of any court collecting such fees is hereby authorized to retain one-half of the fees collected by him in such naturalization proceeding; the remaining one-half of the naturalization fees in each case collected by such clerks, respectively, shall be accounted for in their quarterly accounts, which they are hereby required to render the Bureau of Naturalization, and paid over to such bureau within thirty days from the close of each quarter in each and every fiscal year, and the moneys so received shall be paid over to the disbursing clerk of the Department of Labor, who shall thereupon deposit them in the Treasury of the United States, rendering an account therefor quarterly to the Auditor for the State and other Departments, and the said disbursing clerk shall be held responsible under his bond for said fees so received.

In addition to the fees herein required, the petitioner shall, upon the filing of his petition to become a citizen of the United States, deposit with and pay to the clerk of the court a sum of money sufficient to cover the expenses of subpœnaing and paying the legal fees of any witnesses for whom he may request a subpœna, and upon the final discharge of such witnesses they shall receive, if they demand the same from the clerk, the customary and usual witness fees from the moneys which the petitioner shall have paid to such clerk for such purpose, and the residue, if any, shall be returned by the clerk to the petitioner: *Provided,* That the clerks of courts exercising jurisdiction in naturalization proceedings shall be permitted to retain one-half of the fees in any fiscal year up to the sum of three thousand dollars, and that all fees received by such clerks in naturalization proceedings in excess of such amount shall be accounted for and paid over to said bureau as in case of other fees to which the United States may be entitled under the provisions of this act. The clerks of the various courts exercising jurisdiction in naturalization proceedings shall pay all additional clerical force that may be required in performing the duties imposed by this act upon the clerks of courts from fees received by such clerks in naturalization proceedings.

And in case the clerk of any court exercising naturalization jurisdiction collects fees in excess of the sum of six thousand dollars in any fiscal year the Secretary of Labor may allow salaries, for naturalization purposes only, to pay for clerical assistance, to be selected and employed by that clerk, additional to the clerical force, for which clerks of courts are required by this section to pay from fees received by such clerks in naturalization proceedings, if in the opinion of said Secretary the naturalization business of such clerk warrants further additional assistance: *Provided,* That in no event shall the whole amount allowed the clerk of a court and his assistants exceed the one-half of the gross receipts of the office of said clerk from naturalization fees during such fiscal year: *Provided further,* That when, at the close of any fiscal year, the business of such clerk of court indicates in the opinion of the Secretary of Labor that the naturalization fees for the succeeding fiscal year will exceed six thousand dollars the Secretary of Labor may authorize the continuance of the allowance of salaries for the additional clerical assistance herein provided for and employed on the last day of the fiscal year until such time as the remittances indicate in the opinion of said Secretary that the fees for the then current fiscal year will not be sufficient to allow the additional clerical assistance authorized by this act.

That payment for the additional clerical assistance herein authorized shall be in the manner and under such regulations as the Secretary of Labor may prescribe.

SEC. 14. That the declarations of intention and the petitions for naturalization shall be bound in chronological order in separate volumes, indexed, consecutively numbered, and made part of the records of the court. Each certificate of naturalization issued shall bear upon its face, in a place prepared therefor, the volume number and page number of the petition whereon such certificate was issued, and the volume number and page number of the stub of such certificate.

SEC. 15. That it shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud or on the ground that such certificate of citizenship was illegally procured. In any such proceedings the party holding the certificate of citizenship alleged to have been fraudulently or illegally procured shall have sixty days personal notice in which to make answer to the petition of the United States; and if the holder of such certificate be absent from the United States or from the district in which he last had his residence, such notice shall be given by publication in the manner provided for the service of summons by publication or upon absentees by the laws of the State or the place where such suit is brought.

If any alien who shall have secured a certificate of citizenship under the provisions of this act shall, within five years after the issuance of such certificate, return to the country of his nativity, or go to any other foreign country, and take permanent residence therein it shall be considered prima facie evidence of a lack of intention on the part of such alien to become a permanent citizen of the United States at the time of filing his application for citizenship, and, in the absence of countervailing evidence, it shall be sufficient in the proper proceeding to authorize the cancellation of his certificate of citizenship as fraudulent, and the diplomatic and consular officers of the United States in foreign countries shall from time to time, through the Department of State, furnish the Department of Justice with the names of those within their respective jurisdictions who have such certificates of citizenship and who have taken permanent residence in the country of their nativity, or in any other foreign country, and such statements, duly certified, shall be admissible in evidence in all courts in proceedings to cancel certificates of citizenship.

Whenever any certificate of citizenship shall be set aside or canceled, as herein provided, the court in which such judgment or decree is rendered shall make an order canceling such certificate of citizenship and shall send a certified copy of such order to the Bureau of Naturalization; and in case such certificate was not originally issued by the court making such order it shall direct the clerk of the court to transmit a copy of such order and judgment to the court out of which such certificate of citizenship shall have been originally issued. And it shall thereupon be the duty of the clerk of the court receiving such certified copy of the order and judgment of the court to enter the same of record and to cancel such original certificate of citizenship upon the records and to notify the Bureau of Naturalization of such cancellation.

The provisions of this section shall apply not only to certificates of citizenship issued under the provisions of this act, but to all certificates of citizenship which may have been issued heretofore by any court exercising jurisdiction in naturalization proceedings under prior laws.

SEC. 16. [Superseded by act of March 4, 1909. See section 74, page 128.]

SEC. 17. [Superseded by act of March 4, 1909. See section 75, page 129.]

SEC. 18. That it is hereby made a felony for any clerk or other person to issue or be a party to the issuance of a certificate of citizenship contrary to the provisions of this act, except upon a final order under the hand of a court having jurisdiction to make such order, and upon conviction thereof such clerk or other person shall be punished by imprisonment for not more than five

years and by a fine of not more than five thousand dollars, in the discretion of the court.

SEC. 19. [Superseded by act of March 4, 1909. See section 77, page 129.]

SEC. 20. That any clerk or other officer of a court having power under this act to naturalize aliens, who wilfully neglects to render true accounts of moneys received by him for naturalization proceedings or who wilfully neglects to pay over any balance of such moneys due to the United States within thirty days after said payment shall become due and demand therefor has been made and refused, shall be deemed guilty of embezzlement of the public moneys, and shall be punishable by imprisonment for not more than five years, or by a fine of not more than five thousand dollars, or both.

SEC. 21. That it shall be unlawful for any clerk of any court or his authorized deputy or assistant exercising jurisdiction in naturalization proceedings to demand, charge, collect, or receive any other or additional fees or moneys in naturalization proceedings save the fees and moneys herein specified; and a violation of any of the provisions of this section or any part thereof is hereby declared to be a misdemeanor and shall be punished by imprisonment for not more than two years, or by a fine of not more than one thousand dollars, or by both such fine and imprisonment.

SEC. 22. That the clerk of any court exercising jurisdiction in naturalization proceedings, or any person acting under authority of this act, who shall knowingly certify that a petitioner, affiant, or witness named in an affidavit, petition, or certificate of citizenship, or other paper or writing required to be executed under the provisions of this act, personally appeared before him and was sworn thereto, or acknowledged the execution thereof or signed the same, when in fact such petitioner, affiant, or witness did not personally appear before him, or was not sworn thereto, or did not execute the same, or did not acknowledge the execution thereof, shall be punished by a fine not exceeding five thousand dollars, or by imprisonment not to exceed five years.

SEC. 23. That any person who knowingly procures naturalization in violation of the provisions of this act shall be fined not more than five thousand dollars, or shall be imprisoned not more than five years, or both, and upon conviction the court in which such conviction is had shall thereupon adjudge and declare the final order admitting such person to citizenship void. Jurisdiction is hereby conferred on the courts having jurisdiction of the trial of such offense to make such adjudication. Any person who knowingly aids, advises, or encourages any person not entitled thereto to apply for or to secure naturalization, or to file the preliminary papers declaring an intent to become a citizen of the United States, or who in any naturalization proceeding knowingly procures or gives false testimony as to any material fact, or who knowingly makes an affidavit false as to any material fact required to be proved in such proceeding, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both.

SEC. 24. That no person shall be prosecuted, tried, or punished for any crime arising under the provisions of this act unless the indictment is found or the information is filed within five years next after the commission of such crime.

SEC. 25. That for the purpose of the prosecution of all crimes and offenses against the naturalization laws of the United States which may have been committed prior to the date when this act shall go into effect, the existing naturalization laws shall remain in full force and effect.

SEC. 26. That sections twenty-one hundred and sixty-five, twenty-one hundred and sixty-seven, twenty-one hundred and sixty-eight, twenty-one hundred and seventy-three of the Revised Statutes of the United States of America, and section thirty-nine of chapter one thousand and twelve of the Statutes at Large of the United States of America for the year nineteen hundred and three, and all acts or parts of acts inconsistent with or repugnant to the provisions of this act are hereby repealed.

SEC. 27. That substantially the following forms shall be used in the proceedings to which they relate:

DECLARATION OF INTENTION.

(Invalid for all purposes seven years after the date hereof.)

....., ss:

I, ..., aged ..... years, occupation ....., do declare on oath (affirm) that my personal description is: Color ....., complexion ....., height ....., weight ....., color of hair ....., color of eyes ....., other visible distinctive marks .....; I was born in ..... on the ..... day of ....., anno Domini .....; I now reside at .....; I emigrated to the United States of America from ..... on the vessel .....; my last foreign residence was ..... It is my bona fide intention to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly to ....., of which I am now a citizen (subject); I arrived at the (port) of ....., in the State (Territory or District) of .....; on or about the ..... day of ....., anno Domini .....; I am not an anarchist; I am not a polygamist nor a believer in the practice of polygamy; and it is my intention in good faith to become a citizen of the United States of America and to permanently reside therein. So help me God.

(Original signature of declarant).....

Subscribed and sworn to (affirmed) before me this ..... day of ....., anno Domini .....

[L. S.]

.....,

(Official character of attestor.)

PETITION FOR NATURALIZATION.

..... Court of .....

In the matter of the petition of ..... to be admitted as a citizen of the United States of America.

To the ..... Court:

The petition of ..... respectfully shows:

First. My full name is.....

Second. My place of residence is number ..... street, city of ....., State (Territory or District) of .....

Third. My occupation is .....

Fourth. I was born on the ..... day of ..... at .....

Fifth. I emigrated to the United States from ....., on or about the ..... day of ....., anno Domini ....., and arrived at the port of ....., in the United States, on the vessel .....

Sixth. I declared my intention to become a citizen of the United States on the ..... day of ....., at ....., in the ..... court of .....

Seventh. I am ..... married. My wife's name is ..... She was born in ..... and now resides at ..... I have ..... children, and the name, date, and place of birth and place of residence of each of said children is as follows: .....; .....; .....; .....

Eighth. I am not a disbeliever in or opposed to organized government or a member of or affiliated with any organization or body of persons teaching disbelief in organized government. I am not a polygamist nor a believer in the practice of polygamy. I am attached to the principles of the Constitution of the United States, and it is my intention to become a citizen of the United States and to renounce absolutely and forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly to ....., of which at this time I am a citizen (or subject), and it is my intention to reside permanently in the United States.

Ninth. I am able to speak the English language.

Tenth. I have resided continuously in the United States of America for a term of five years at least immediately preceding the date of this petition, to

wit, since ....., anno Domini ....., and in the State (Territory or District) of ..... for one year at least next preceding the date of this petition, to wit, since ..... day of ....., anno Domini .....

Eleventh. I have not heretofore made petition for citizenship to any court. (I made petition for citizenship to the ..... court of ..... at ....., and the said petition was denied by the said court for the following reasons and causes, to wit, ..., and the cause of such denial has since been cured or removed.)

Attached hereto and made a part of this petition are my declaration of intention to become a citizen of the United States and the certificate from the Deparment of Labor required by law. Wherefore your petitioner prays that he may be admitted a citizen of the United States of America.

Dated .....

(Signature of petitioner) ....

...., ss:

....., being duly sworn, deposes and says that he is the petitioner in the above-entitled proceeding; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

Subscribed and sworn to before me this ..... day of ....., anno Domini .....

[L. S.]

....., ...,

Clerk of the ..... Court.

AFFIDAVIT OF WITNESSES.

..... Court of .....

In the matter of the petition of .... to be admitted a citizen of the United States of America.

...., ss:

....., occupation ....., residing at ....., and ...., occupation ....., residing at ....., each being severally, duly, and respectively sworn, deposes and says that he is a citizen of the United States of America; that he has personally known ...., the petitioner above mentioned, to be a resident of the United States for a period of at least five years continuously immediately preceding the date of filing his petition, and of the State (Territory or District) in which the above-entitled application is made for a period of ..... years immediately preceding the date of filing his petition; and that he has personal knowledge that the said petitioner is a person of good moral character, attached to the principles of the Constitution of the United States, and that he is in every way qualified, in his opinion, to be admitted as a citizen of the United States.

....

.....

Subscribed and sworn to before me this ..... day of ....., nineteen hundred and .....

[L. S.]

....., ...,

(Official character of attestor.)

CERTIFICATE OF NATURALIZATION.

Number .....

Petition, volume ....., page .....

Stub, volume ....., page .....

(Signature of holder) ....

Description of holder: Age, ...; height, ...; color, ...; complexion, ...; color of eyes, ...; color of hair, ...; visible distinguishing marks, ... Name, age, and place of residence of wife, ...,

....., ... Names, ages, and places of residence of minor children, ..., ..., ...; ....., ..., ...; ....., ..., ...

....., ..., ss:

Be it remembered, that at a ..... term of the ..... court of ....., held at ..... on the ..... day of ....., in the year of our Lord nineteen hundred and ....., ..., who previous to his (her) naturalization was a citizen (or subject) of ....., at present residing at number .... street, ... city (town), ... (State, Territory or District), having applied to be admitted a citizen of the United States of America pursuant to law, and the court having found that the petitioner had resided continuously within the United States for at least five years and in this State for one year immediately preceding the date of the hearing of his (her) petition, and that said petitioner intends to reside permanently in the United States, had in all respects complied with the law in relation thereto, and that .....he was entitled to be so admitted, it was thereupon ordered by the said court that .....he be admitted as a citizen of the United States of America.

In testimony whereof the seal of said court is hereunto affixed on the ..... day of ....., in the year of our Lord nineteen hundred and ..... and of our independence the .....

[L. S.]

....

(Official character of attestor.)

STUB OF CERTIFICATE OF NATURALIZATION.

No. of certificate, ...

Name ....; age, ...

Declaration of intention, volume ....., page .....

Petition, volume ....., page .....

Name, age, and place of residence of wife, ..., ..., ... Names, ages, and places of residence of minor children, ..., ..., ...; ....., ..., ..., ...; ....., ..., ...; ....., ..., ...; ....., ..., ...; .....

.....

.....

Date of order, volume ....., page .....

(Signature of holder) ....

SEC. 28. That the Secretary of Labor shall have power to make such rules and regulations as may be necessary for properly carrying into execution the various provisions of this act. Certified copies of all papers, documents, certificates, and records required to be used, filed, recorded, or kept under any and all of the provisions of this act shall be admitted in evidence equally with the originals in any and all proceedings under this act and in all cases in which the originals thereof might be admissible as evidence.

SEC. 29. That for the purpose of carrying into effect the provisions of this act there is hereby appropriated the sum of one hundred thousand dollars, out of any moneys in the Treasury of the United States not otherwise appropriated, which appropriation shall be in full for the objects hereby expressed until June thirtieth, nineteen hundred and seven; and the provisions of section thirty-six hundred and seventy-nine of the Revised Statutes of the United States shall not be applicable in any way to this appropriation.

SEC. 30. That all the applicable provisions of the naturalization laws of the United States shall apply to and be held to authorize the admission to citizenship of all persons not citizens who owe permanent allegiance to the United States, and who may become residents of any State or organized Territory of the United States, with the following modifications: The applicant shall not be required to renounce allegiance to any foreign sovereignty; he shall make his declaration of intention to become a citizen of the United States at least two years prior to his admission; and residence within the jurisdiction of the United States, owing such permanent allegiance, shall be regarded as residence within the United States within the meaning of the five years' residence clause of the existing law.

SEC. 31. That this act shall take effect and be in force from and after ninety days from the date of its passage: *Provided,* That sections one, two, twenty-eight, and twenty-nine shall go into effect from and after the passage of this act.

Approved, June 29, 1906.

ACT OF FEBRUARY 24, 1911 (36 STAT. L., PT. 1, P. 929).

An act providing for the naturalization of the wife and minor children of insane aliens making homestead entries under the land laws of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That when any alien, who has declared his intention to become a citizen of the United States, becomes insane before he is actually naturalized, and his wife shall thereafter make a homestead entry under the land laws of the United States, she and their minor children may, by complying with the other provisions of the naturalization laws, be naturalized without making any declaration of intention.

Approved, February 24, 1911.

[In regard to the acquisition of citizenship by other means than naturalization, see secs. 1992, 1993, and 1995 of the United States Revised Statutes.]

UNITED STATES REVISED STATUTES.

CITIZENSHIP, TITLE XXV.

Citizenship of women by marriage.

SEC. 1994. Any woman who is now or may hereafter be married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen.

NATURALIZATION[1], TITLE XXX.

Honorably discharged soldiers exempt from certain formalities.

SEC. 2166. Any alien, of the age of twenty-one years and upward, who has enlisted, or may enlist, in the armies of the United States, either the regular or the volunteer forces, and has been, or may be hereafter, honorably discharged, shall be admitted to become a citizen of the United States, upon his petition, without any previous declaration of his intention to become such; and he shall not be required to prove more than one year's residence within the United States previous to his application to become such citizen; and the court admitting such alien shall, in addition to such proof of residence and good moral character, as now provided by law, be satisfied by competent proof of such person's having been honorably discharged from the service of the United States.

Aliens of African nativity and descent.

SEC. 2169. (*As amended, 1875.*)—The provisions of this title shall apply to aliens being free white persons and to aliens of African nativity and to persons of African descent.

Residence within the United States required for five years continuously.

Sec. 2170.[2] No alien shall be admitted to become a citizen who has not for the continued term of five years next preceding his admission resided within the United States.

Naturalization to alien enemies prohibited.

SEC. 2171. No alien who is a native citizen or subject, or a denizen of any country, State, or sovereignty with which the United States are at war at the time of his application, shall be then admitted to become a citizen of the United States; but persons resident within the United States, or the Territories thereof, on the eighteenth day of June, in the year one thousand eight hundred and twelve, who had before that day made a declaration, according to law, of their intention to become citizens of the United States, or who were on that day entitled to become citizens without making such declaration, may

[1] For list of sections repealed see sec. 26 of act of June 29, 1906. Page 122.

[2] The United States Circuit Court of Appeals has held that this section was not repealed by the naturalization act of June 29, 1906. (See United States v. Rodiek, 162 Fed., 469.)

be admitted to become citizens thereof, notwithstanding they were alien enemies at the time and in the manner prescribed by the laws heretofore passed on that subject; nor shall anything herein contained be taken or construed to interfere with or prevent the apprehension and removal, agreeably to law, of any alien enemy at any time previous to the actual naturalization of such alien.

Children of persons naturalized under certain laws to be citizens.

SEC. 2172. The children of persons who have been duly naturalized under any law of the United States, or who, previous to the passing of any law on that subject, by the Government of the United States, may have become citizens of any one of the States, under the laws thereof, being under the age of twenty-one years at the time of the naturalization of their parents, shall, if dwelling in the United States, be considered as citizens thereof; and the children of persons who now are, or have been, citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens thereof; but no person heretofore proscribed by any State, or who has been legally convicted of having joined the army of Great Britain during the Revolutionary War, shall be admitted to become a citizen without the consent of the legislature of the State in which such person was proscribed.

Alien seamen of merchant vessels.

SEC. 2174. Every seaman, being a foreigner, who declares his intention of becoming a citizen of the United States in any competent court, and shall have served three years on board of a merchant vessel of the United States subsequent to the date of such declaration, may, on his application to any competent court, and the production of his certificate of discharge and good conduct during that time, together with the certificate of his declaration of intention to become a citizen, be admitted a citizen of the United States; and every seaman, being a foreigner, shall, after his declaration of intention to become a citizen of the United States, and after he shall have served such three years, be deemed a citizen of the United States for the purpose of manning and serving on board any merchant vessel of the United States, anything to the contrary in any act of Congress notwithstanding; but such seaman shall, for all purposes of protection as an American citizen, be deemed such, after the filing of his declaration of intention to become such citizen.

TWENTY-SECOND STATUTES AT LARGE, PAGE 61.

[Act of May 6, 1882.]

Naturalization of Chinese prohibited.

SEC. 14. That hereafter no State court or court of the United States shall admit Chinese to citizenship; and all laws in conflict with this act are hereby repealed.

TWENTY-EIGHTH STATUTES AT LARGE, PAGE 124.

[Act of July 26, 1894.]

Aliens honorably discharged from service in Navy or Marine Corps.

Any alien of the age of twenty-one years and upward who has enlisted or may enlist in the United States Navy or Marine Corps, and has served or may hereafter serve five consecutive years in the United States Navy or one enlistment in the United States Marine Corps, and has been or may hereafter be honorably discharged, shall be admitted to become a citizen of the United States upon his petition, without any previous declaration of his intention to become such; and the court admitting such alien shall, in addition to proof of good moral character, be satisfied by competent proof of such person's service in and honorable discharge from the United States Navy or Marine Corps.

THIRTY-FOURTH STATUTES AT LARGE, PAGE 1228.

[Act of March 2, 1907.]

An act in reference to the expatriation of citizens and their protection abroad.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of State shall be authorized, in his discretion, to issue passports to persons not citizens of the United States as follows: Where any person has made a declaration of intention to become such a citizen as provided by law and has resided in the United States for three years a passport may be issued to him entitling him to the protection of the Government in any foreign country: *Provided,* That such passport shall not be valid for more than six months and shall not be renewed, and that such passport shall not entitle the holder to the protection of this Government in the country of which he was a citizen prior to making such declaration of intention.

SEC. 2. That any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign state.

When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years: *Provided, however,* That such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe: *And provided also,* That no American citizen shall be allowed to expatriate himself when this country is at war.

SEC. 3. That any American woman who marries a foreigner shall take the nationality of her husband. At the termination of the marital relation she may resume her American citizenship, if abroad, by registering as an American citizen within one year with a consul of the United States, or by returning to reside in the United States, or, if residing in the United States at the termination of the marital relation, by continuing to reside therein.

SEC. 4. That any foreign woman who acquires American citizenship by marriage to an American shall be assumed to retain the same after the termination of the marital relation if she continue to reside in the United States, unless she makes formal renunciation thereof before a court having jurisdiction to naturalize aliens, or if she resides abroad she may retain her citizenship by registering as such before a United States consul within one year after the termination of such marital relation.

SEC. 5. That a child born without the United States of alien parents shall be deemed a citizen of the United States by virtue of the naturalization of or resumption of American citizenship by the parent: *Provided,* That such naturalization or resumption takes place during the minority of such child: *And provided further,* That the citizenship of such minor child shall begin at the time such minor child begins to reside permanently in the United States.

SEC. 6. That all children born outside the limits of the United States who are citizens thereof in accordance with the provisions of section nineteen hundred and ninety-three of the Revised Statutes of the United States and who continue to reside outside the United States shall, in order to receive the protection of this Government, be required upon reaching the age of eighteen years to record at an American consulate their intention to become residents and remain citizens of the United States and shall be further required to take the oath of allegiance to the United States upon attaining their majority.

SEC. 7. That duplicates of any evidence, registration, or other acts required by this Act shall be filed with the Department of State for record.

THIRTY-FIFTH STATUTES AT LARGE, PAGE 1102.
[Act of March 4, 1909.]

An act to codify, revise, and amend the penal laws of the United States.

SEC. 74. Whoever shall falsely make, forge, or counterfeit, or cause or procure to be falsely made, forged, or counterfeited, or shall knowingly aid or assist in falsely making, forging, or counterfeiting any certificate of citizenship, with intent to use the same, or with the intent that the same may be used by some other person, shall be fined not more than ten thousand dollars, or imprisoned not more than ten years, or both.

SEC. 75. Whoever shall engrave, or cause or procure to be engraved, or assist in engraving, any plate in the likeness of any plate designed for the printing of a certificate of citizenship; or whoever shall sell any such plate, or shall bring into the United States from any foreign place any such plate, except under the direction of the Secretary of Labor or other proper officer; or whoever shall have in his control, custody, or possession any metallic plate engraved after the similitude of any plate from which any such certificate has been printed, with intent to use or to suffer such plate to be used in forging or counterfeiting any such certificate or any part thereof; or whoever shall print, photograph, or in any manner cause to be printed, photographed, made, or executed, any print or impression in the likeness of any such certificate, or any part thereof; or whoever shall sell any such certificate, or shall bring the same into the United States from any foreign place, except by direction of some proper officer of the United States; or whoever shall have in his possession a distinctive paper which has been adopted by the proper officer of the United States for the printing of such certificate, with intent unlawfully to use the same, shall be fined not more than ten thousand dollars, or imprisoned not more than ten years, or both.

SEC. 76. Whoever, when applying to be admitted a citizen, or when appearing as a witness for any such person, shall knowingly personate any person other than himself, or shall falsely appear in the name of a deceased person, or in an assumed or fictitious name; or whoever shall falsely make, forge, or counterfeit any oath, notice, affidavit, certificate, order, record, signature, or other instrument, paper, or proceeding required or authorized by any law relating to or providing for the naturalization of aliens; or whoever shall utter, sell, dispose of, or shall use as true or genuine, for any unlawful purpose, any false, forged, antedated, or counterfeit oath, notice, certificate, order, record, signature, instrument, paper, or proceeding above specified; or whoever shall sell or dispose of to any person other than the person for whom it was originally issued any certificate of citizenship or certificate showing any person to be admitted a citizen, shall be fined not more than one thousand dollars, or imprisoned not more than five years, or both.

SEC. 77. Whoever shall use or attempt to use, or shall aid, assist, or participate in the use of any certificate of citizenship, knowing the same to be forged, counterfeit, or antedated, or knowing the same to have been procured by fraud or otherwise unlawfully obtained; or whoever, without lawful excuse, shall knowingly possess any false, forged, antedated, or counterfeit certificate of citizenship purporting to have been issued under any law of the United States relating to naturalization, knowing such certificate to be false, forged, antedated, or counterfeit, with the intent unlawfully to use the same; or whoever shall obtain, accept, or receive any certificate of citizenship, knowing the same to have been procured by fraud or by the use or means of any false name or statement given or made with the intent to procure, or to aid in procuring, the issuance of such certificate, or knowing the same to have been fraudulently altered or antedated; or whoever, without lawful excuse, shall have in his possession any blank certificate of citizenship provided by the Bureau of Naturalization with the intent unlawfully to use the same; or whoever, after having been admitted to be a citizen, shall, on oath or by affidavit, knowingly deny that he has been so admitted, with the intent to evade or

avoid any duty or liability imposed or required by law, shall be fined not more than one thousand dollars, or imprisoned not more than five years, or both.

SEC. 78. Whoever shall in any manner use, for the purpose of registering as a voter, or as evidence of a right to vote, or otherwise unlawfully, any order, certificate of citizenship, or certificate, judgment, or exemplification, showing any person to be admitted to be a citizen, whether heretofore or hereafter issued or made, knowing that such order, certificate, judgment, or exemplification has been unlawfully issued or made; or whoever shall unlawfully use, or attempt to use, any such order or certificate, issued to or in the name of any other person, or in a fictitious name, or the name of a deceased person, shall be fined not more than one thousand dollars, or imprisoned not more than five years, or both.

SEC. 79. Whoever shall knowingly use any certificate of naturalization heretofore or which hereafter may be granted by any court, which has been or may be procured through fraud or by false evidence, or which has been or may hereafter be issued by the clerk or any other officer of the court without any appearance and hearing of the applicant in court and without lawful authority; or whoever, for any fraudulent purpose whatever, shall falsely represent himself to be a citizen of the United States without having been duly admitted to citizenship, shall be fined not more than one thousand dollars, or imprisoned not more than two years, or both.

SEC. 80. Whoever, in any proceeding under or by virtue of any law relating to the naturalization of aliens, shall knowingly swear falsely in any case where an oath is made or affidavit taken, shall be fined not more than one thousand dollars and imprisoned not more than five years.

SEC. 81. The provisions of the five sections last preceding shall apply to all proceedings had or taken, or attempted to be had or taken, before any court in which any proceeding for naturalization may be commenced or attempted to be commenced, and whether such court was vested by law with jurisdiction in naturalization proceedings or not.

By the terms of section 341 of the act referred to above the foregoing sections specifically repealed sections 5395, 5424, 5425, 5426, 5428, and 5429 of the Revised Statutes of the United States, as well as sections 16, 17, and 19 of the act of June 29, 1906 (34 Stat. L., pt. 1, ch. 3592, p. 596).

NATURALIZATION REGULATIONS

These Regulations supersede those of November 11, 1911.

DEPARTMENT OF LABOR,
OFFICE OF THE SECRETARY,
Washington, August 20, 1913.

1. Since September 26, 1906, naturalization jurisdiction of State courts is confined to such as have "a seal, a clerk, and jurisdiction in actions at law or equity, or law and equity, in which the amount in controversy is unlimited."

All declarations of intention filed prior to September 27, 1906, became invalid for naturalization purposes on September 27, 1913. United States v. Antonio Morena, United States Supreme Court. Handed down January 7, 1918.

2. Any alien who prior to September 27, 1906, has declared his intention in conformity with the law in force at the date of his declaration, shall not be required to renew such declaration.

3. Aliens who lawfully declared their intention on and after June 29, 1906, and prior to September 27, 1906, must comply with all of the requirements of the naturalization act of June 29, 1906, in petitioning for naturalization, with the exception that those arriving prior to June 29, 1906, are not required to furnish certificates of arrival.

Aliens who declared their intention prior to June 29, 1906, in accordance with the requirements of law, must comply with all of the requirements of the naturalization act of June 29, 1906, in petitioning for naturalization, except that they will not be required to file certificates of arrival, sign their petitions in their own handwriting, or to speak the English language.

4. Any alien who declares his intention after June 29, 1906, and files his petition thereon, must sign said petition in his own handwriting, and must be able to speak the English language, unless excepted by the provisos in section 8 of the naturalization act. If an alien is physically unable to speak, that fact should be stated in his petition in lieu of the statement, "I am able to speak the English language." Aliens who arrive in the United States before reaching 18 years of age can not obtain citizenship without making declaration of intention, which may be made in a court having naturalization jurisdiction over the place of their established residence after reaching that age.

5. Blank forms "Facts for declaration of intention" (Form 2213) and "Facts for petition for naturalization" (Form 2214) are provided clerks of courts for the preliminary use of persons making declaration of intention or petition for naturalization, and may be taken away from the office of the clerk in order that the information called for may be obtained in full. When either of said forms is returned to the clerk he shall examine it to see that all the information required is furnished before proceeding to make out a declaration or petition.

In all cases where aliens have arrived in this country after June 29, 1906, they should be given the form, "Application for certificate of arrival," Form 2226, at the time they desire to file petitions for naturalization, instead of Form 2214. This application has attached to it the facts required in a petition for naturalization. The application and other blanks on the form should all be carefully filled out by the alien and mailed with his triplicate declaration of intention to the Commissioner of Naturalization to enable him to obtain and transmit the required certificate of arrival (Form 526 or 526a) to the clerk of court for filing with the petition. The clerk of the court should not commence the execution of the petition until he has received the certificate of arrival prescribed by this regulation. The certificate of arrival will contain its serial number in the upper right-hand corner, which the clerk of the court will insert in the petition for naturalization at the place indicated.

6. Declarations of intention will be furnished in bound volumes (Form 2202, 50 leaves; 2202A, 150 leaves; or 2202B, 250 leaves) as a court record, varied in number of pages according to the requirements of the court. In addition to the bound records, the duplicate and triplicate declarations of intention (Form 2203) will be furnished as loose sheets attached together and perforated, so that they can be readily torn apart, the triplicate to be given to the declarant and the duplicate to be forwarded to the Bureau of Naturalization. Each bound record will contain an index in addition to the original declarations of intention, and will be paged in consecutive order. At the time the original declarations of intention in the bound volumes are filled out and signed the names of the declarants must be entered in the index. The declarations shall be numbered consecutively, beginning with No. 1 in volume 1 and continuing the sequence from volume to volume.

7. The originals of the petitions for naturalization will also be furnished in bound volumes (Form 2204, 100 leaves, or 2204B, 250 leaves) paged in consecutive order and provided with an index. The duplicate petitions (Form 2205) will be furnished as loose sheets, and when executed must be forwarded to the Bureau of Naturalization by registered mail, as provided in rule 22 of these regulations. The original petitions for naturalization in the bound volumes must be filled out and signed, the names of the petitioners entered in the index, and retained as part of the permanent records of the office in which filed. Petitions shall be numbered consecutively, beginning with No. 1 in volume 1 and continuing in order in the following volumes. The first petition in volume 2 must not be numbered "1," but shall receive the number following that given the last petition in volume 1.

8. Certificates of naturalization (Form 2207) will be supplied in bound volumes consisting of original and duplicate certificates and stubs. Each original and duplicate certificate and the stub will be given the same serial number, the stub to the original certificate bearing a page number in addition to its serial number. The original certificate will be given to the petitioner in accordance with the final order of the court, and the duplicate shall be forwarded to the Bureau of Naturalization by registered mail, as provided in rule 22 of these regulations, the stub to the original constituting a part of the permanent records of the court. The bound volumes, containing the declarations, petitions, and certificates, constitute the "records" and dockets required by sections 6 and 14 of the naturalization act. The department requires no other dockets to be kept.

9. No certificate of naturalization shall be issued to a petitioner until after the judge of the court granting naturalization has signed the order to that effect.

10. Clerks of courts will be furnished with requisition blanks (Form 2201) on which are listed, by number and title, all blank forms, including record and order books, to be used in the naturalization of aliens, and these forms must be obtained exclusively from the Bureau of Naturalization, Department of Labor, none other being official. Manila envelopes or jackets (Form 2211) will be furnished to clerks in which to place the triplicate declaration of intention or the original certificate of naturalization before delivering it to the person making the declaration or to the person naturalized.

11. The first supply of blank forms will be furnished upon the written application of the clerks of courts having jurisdiction to naturalize aliens, accompanied, in the case of clerks of State courts, by authoritative evidence (preferably the certificate of the attorney general of the State) that the courts of which such clerks are officers have "a seal, a clerk, and jurisdiction in actions at law or equity, or law and equity, in which the amount in controversy is unlimited." Subsequent supplies of such blank forms will be furnished the clerks of courts having jurisdiction to naturalize aliens upon the receipt by the Bureau of Naturalization of requisitions made on Form 2201.

12. Clerks of courts when first making application to the Bureau of Naturalization for the supplies of the blank forms required in the naturalization

of aliens shall state whether any declarations of intention have been filed or orders of naturalization made by their courts since September 26, 1906. They should also state the number of certificates of naturalization issued by the court since June 1, 1903, if such certificates fail to comply with the requirements of the immigration act of March 3, 1903.

13. Where the same court holds sessions at different places, whether a clerk is appointed at each of said places or the one clerk is required to transact the business of the court wherever it may sit, separate supplies shall be kept, in order to comply with the requirements of section 14 of the naturalization act, which provides that the bound declarations of intention and of petitions for naturalization shall be in chronological order.

14. In every case in which the name of a naturalized alien is changed by order of court, as provided in section 6, the clerk of the court is required to report both the original and the new name of the said person to the Bureau of Naturalization when transmitting to it the duplicate of the certificate of naturalization of the alien whose name is changed.

15. On the first working day of each month the clerk shall inform the Bureau of Naturalization on Form 2209 of the date of posting notice on Form 2206, as required by section 5, and of the day, month, and year, as near as may be, for the final hearing of each and every petition for naturalization filed and posted during the preceding month. These reports on Form 2209 must specify only the petitions filed in the month to which the report relates and no others. In continued cases notice on Form 2206 must be amended to show the postponed date and remain posted until final action is had.

16. On the first working day of each month following the sitting of a court in naturalization cases the clerk of such court shall forward to the Bureau of Naturalization on Form 2210 a list containing the name of each and every alien who, during such sitting of court, has been denied naturalization and shall state the reason or reasons for such denial.

17. Applications for lost or destroyed naturalization papers issued prior to September 27, 1906, should be disposed of in accordance with the rules in force in the court at the time of the issuance of the papers.

The following rule applies exclusively to naturalization papers issued since September 26, 1906:

Applications for the issuance of declarations of intention (Form 2203) or certificates of naturalization (Form 2207), in lieu of declarations of intention or certificates of naturalization claimed to have been lost or destroyed, shall be submitted in affidavit form to the clerk of the court by which any such declarations of intention or certificates of naturalization were originally issued, and shall contain full information in regard to the lost or destroyed papers, and as to the time, place, and circumstances of such alleged loss or destruction. (Form 2225 prepared for this purpose may be obtained from the clerk of any naturalization court.) The clerk shall forward to the Bureau of Naturalization the above-mentioned applications, together with such information as he may have bearing upon the merits thereof, for investigation, and no such paper so applied for shall be issued until the Bureau of Naturalization reports the results of its investigation as to the merits of the application.

In every case in which the clerk of the court issues, in accordance with the foregoing, a declaration of intention (Form 2224) or a certificate of naturalization (Form 2207), upon proof of the loss or destruction of the original, he shall make an entry on the original declaration showing the issuance of a certified copy, or on the stubs of both the new and the old certificates of naturalization, showing the issuance of a new certificate, giving the numbers of the new and old certificates, and shall immediately thereafter forward to the Bureau of Naturalization the duplicate of any such paper so issued.

One certified copy of declaration of intention (Form 2215) or certificate of naturalization (Form 2216) may be furnished by the clerk of the issuing court under his hand and the seal of the court for the use only of the person concerned to establish his citizenship status in connection with any entry un-

der the public land laws of the United States. When issued these forms must be made in duplicate, one to be given to the person applying therefor and the duplicate forwarded with other naturalization papers on the first working day of the succeeding month to the Bureau of Naturalization. Unless the applicant presents to the clerk his original declaration or certificate for comparison, these forms can under no conditions be issued. In case the alien makes a second land entry he may support his second entry by describing the first land claim with which his declaration or certificate is filed.

The fees to be collected for the issuance of each of the copies of declarations of intention and of certificates of naturalization described in this regulation, and the disposal to be made of such fees when collected, will be determined in accordance with the law and the rules in force in the respective courts. No part of these fees is required to be forwarded to this department. Clerks are, however, required to make quarterly reports, on Form 2217, on the first working day of January, April, July, and October, of the number of such papers issued during the preceding quarter.

18. Original declarations of intention, or certificates of naturalization, issued subsequent to September 26, 1906, and surrendered to the General Land Office in support of entries upon public land, may be returned upon proper application. In cases of declarations of intention the clerk will forward the application to the Bureau of Naturalization, accompanied by a certified copy on Form 2215. In cases of certificates, the application will be accompanied by a personal description of the applicant. In both instances a description of the land should be included, giving the section, township, and range, together with the date and place of making the entry. The originals will then be procured from the General Land Office and returned to the clerk of the court.

19. For recording the affidavits of substituted witnesses under section 5 of the act of June 29, 1906, blank forms (Form 2218) have been prepared as pasters to be affixed to the backs of petitions in the bound volume, following the "Order of court admitting petitioner." Copies of this form may be procured by the usual requisition (Form 2201). Do not send copies of this form to the Bureau of Naturalization.

20. Aliens making declaration of intention, or filing petitions for naturalization, must sign their names in full and without abbreviation in the appropriate places on the various blank forms, and the entries of their names by the clerk must correspond in every particular. Where a name contains an initial which is used only to distinguish one individual from another with the same surname, that fact should be noted on the paper.

21. Clerks of courts shall not receive declarations of intention (Form 2202) or file petitions for naturalization (Form 2204) from other aliens than white persons and persons of African nativity or of African descent. Any alien, other than a Chinese person, who claims that he is a white person in the sense in which that term is used in section 2169, R. S., U. S., should be allowed, if he insists upon it after an explanation is made showing him the risk of denial, to file his declaration or his petition, as the case may be, leaving the issue to be determined by the court.

Declarations should not be received from, nor petitions for naturalization filed by, persons not residing in the judicial district within which the court is held.

22. On the first working day of each and every month, and not otherwise, clerks of courts shall forward to the Bureau of Naturalization duplicates of all declarations of intention, petitions for naturalization, and certificates of naturalization filed or issued during the preceding month. Duplicate petitions for naturalization and duplicate certificates of naturalization shall be forwarded by registered mail; and duplicate declarations of intention as well as other papers may be inclosed therewith provided the combined weight of the documents does not exceed 4 pounds, otherwise they shall be forwarded separately by unregistered mail. The same course should be followed in forwarding naturalization papers to the bureau which have been returned for correc-

tion. Each clerk making a shipment of naturalization papers other than papers returned for correction is required to forward therewith a report on Form 2208 showing the number of such papers filed or issued during the month reported. Where petitions for naturalization have been filed the report on Form 2209 showing the approximate dates of final hearings shall also be inclosed with such shipment. When no naturalization business has been transacted during any month it is unnecessary to render monthly reports to that effect, but report should be made as prescribed in rule 23.

23. All fees provided for in section 13 of the act of June 29, 1906, shall be accounted for on the "Abstract of collections" (Form 2212) within thirty days after the close of each quarter of a fiscal year. These quarters end September 30, December 31, March 31, and June 30, respectively. One-half of all moneys so collected, up to $6,000, and all in excess thereof, shall be remitted to the Commissioner of Naturalization, Bureau of Naturalization, with said quarterly account, such remittance to be made payable to the order of the "Secretary of Labor," preferably by draft. The Comptroller of the Treasury has decided that section 13 requires the collection of the final fee of $2 whether the certificate of naturalization be issued or denied.

In cases where no naturalization business is transacted during any quarter, Form 2212 shall be forwarded as aforesaid with the words "No transactions" noted thereon.

24. (a) Where a petition for naturalization is filed under section 2166, R. S., U. S., exempting honorably discharged soldiers from the necessity for filing declarations of intention and proving more than one year of residence in the United States in addition to good moral character, insert in lieu of the information regarding declaration of intention: "Petitioner is an honorably discharged soldier and applies for citizenship under section 2166, R. S., U. S. He enlisted in the (name of organization) on the (day, month, and year)." (Complete the petition according to paragraph 3 of this rule.)

(b) Where an alien files his petition for naturalization under the act of July 26, 1894, and claims exemption from the necessity for filing a declaration of intention on account of service in the United States Navy or Marine Corps, the words having reference to declaration of intention in the petition should be struck through and in lieu thereof the following inserted: "Petitioner is an honorably discharged member of the Navy (or member of the Marine Corps, if that be the case) and applies for citizenship under the act of July 26, 1894. He enlisted on the (day, month, and year) and was discharged on the (day, month, and year)." Each enlistment of the applicant and his discharge therefrom should be shown. (Complete the petition according to paragraph 3 of this rule.)

In executing petitions under the two foregoing exemptions, that portion of the last paragraph preceding the signature of the petitioner relating to the declaration of intention and certificate of arrival should be struck through when the alien arrived on or prior to June 29, 1906. When the arrival was after that date, only the words "my declaration of intention to become a citizen of the United States and" should be struck through. The statement following the signature of the petitioner to the body of the petition should be struck through entirely in cases of aliens arriving on or before June 29, 1906; but for those arriving after that date only the words "declaration of intention" should be struck through, and in both cases the entry in lieu thereof should be made "Honorable discharge certificate of petitioner was exhibited to me this ..... day of ....." An appropriate note should also be entered upon the stub of the certificate issued to said applicant.

(c) Certain aliens are permitted to petition for naturalization under the terms of the act of June 25, 1910, without proof of previous declarations of intention. Clerks of courts should state in lieu of the information regarding the declaration of intention "Filed under provisions of section 3 of the act of Congress approved June 25, 1910," and the statement following the first signature of the petitioner should be changed so as to read "Declaration of in-

tention omitted under the terms of the act of June 25, 1910." Affidavit, Form 2227, setting forth particulars as to the reason for the exemption claimed must be signed and sworn to by the petitioner before the clerk of the court or his authorized deputy. In the event this form is not presented by an officer in the naturalization service it will be forwarded to the clerk of the court for use in any case to which it relates, upon examination of the duplicate petition in the bureau.

(d) Petitions for naturalization under the sixth subdivision of section 4 may be legally filed by children of a deceased declarant only after such children have attained their majority and who were minors at the time of the death of the father. Where a petition is filed by a child under the foregoing conditions, the fifth assertion should be altered to read: "My father declared his intention to become a citizen of the United States on the ..... day of ....., A. D. ....., and died on the ..... day of ....., A. D. ....."

Where a petition for naturalization is filed under this subdivision by the widow of a deceased declarant, the fifth assertion should be altered to correspond to the foregoing in relation to the child, with the exception that the word "husband" should be inserted instead of the word "father."

In the last two cases referred to the words in the paragraph immediately preceding petitioner's first signature should be altered to show that the father's or husband's declaration (as the case may be), or a certified copy thereof, is attached to the original petition, and the statement of the clerk of the court immediately below the first signature of the petitioner should be changed to show the facts. If the petitioner arrived in the United States prior to June 29, 1906, the words in statement immediately preceding the first signature of petitioner and thereafter having reference to the certificate of arrival should also be struck through. If the petitioner arrived in the United States after June 29, 1906, certificate of arrival must be obtained in accordance with Rule 5 of these regulations, and the words in the two statements above referred to should remain unaltered with the exception that the last statement should include the number of the certificate of arrival appearing in the upper right-hand corner thereof.

(e) Where a petition for naturalization is filed by the widow of an alien, based upon her own declaration of intention, the date of her husband's demise should be shown in the fifth assertion.

Naturalization papers may be legally filed by any unmarried woman who is otherwise qualified, or the widow of a foreign-born person not naturalized, but not by a woman during the existence of the marital relation. Notation of the facts in each case should be made upon the face of each paper before it is issued.

25. So far as practicable the clerks of courts having jurisdiction under the provisions of the naturalization laws will be furnished, upon requisition therefor on Form 2201, with appropriately addressed envelopes for communicating with the bureau. When not using such envelopes, however, all communications, in addition to the other necessary address, should be plainly marked "Bureau of Naturalization."

26. Clerks of courts having jurisdiction to naturalize under the provisions of the act of June 29, 1906, are requested, in case the foregoing rules and regulations fail to remove from their minds doubt as to the proper course of action in any case, to write to the Commissioner of Naturalization, Bureau of Naturalization, for instructions before taking such action.

(Signed) W. B. Wilson,
Secretary.

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THE
COMPILED LAWS OF UTAH

1917

TITLE 1.

ACCOUNTANCY.

1. (01.) Board created. Oath of office. Terms. Vacancies. Within sixty days after the passage of this title (March 14, 1907) the governor shall appoint three persons, at least two of whom shall be competent and skilled public accountants, who shall have been in practice as such in this state for not less than three years, to constitute and serve as a state board of accountancy. The members of such board shall, within thirty days after their appointment, take and subscribe to the oath of office as prescribed by the laws of the state of Utah, and file the same with the secretary of state. They shall hold office for four years and until their successors are appointed and qualified; save and except that one of the members of the board first to be appointed under this title shall hold office for two years, and two for four years. Upon the expiration of each of said terms, members sufficient to fill the board shall be appointed by the governor, for the term of four years and until their successors are appointed and qualified; and after the year 1910 the members of the board shall be appointed from the holders of certificates issued under this title. Any vacancies that may occur, from any cause, shall be filled by the governor for the unexpired term. '07, p. 91.

2. (02.) Location of office. Duties of board. The state board of accountancy shall have its office in the city and county of Salt Lake, and its powers and duties shall be as follows:

1. To formulate rules for the government of the board and for the examination of and granting of certificates of qualification to persons applying therefor;

2. To hold written examinations of applicants for such certificates, at least annually, at such places as circumstances and applications may warrant;

3. To grant certificates of qualification to such applicants as may, upon examination, be found qualified in "theory of accounts," "practical accounting," "auditing," and "commercial law," as affecting accountancy, to practice as certified public accountants;

4. To charge and collect from all applicants a fee of $25, to meet the expenses of examination, issuance of certificates and conducting its office; *provided,* that all such expenses, including not exceeding $10 per day for each member while attending the sessions of the board or conducting examinations, must be paid from the current receipts, and no portion shall ever be paid from the state treasury;

5. To require the annual renewal of all such certificates, and to collect therefor a renewal fee of not exceeding $5;

6. To revoke for cause any such certificate, after written notice to the holder, and a hearing being had thereon;

7. To report annually to the governor, on or before the 1st day of December, all such certificates issued or renewed, together with a detailed statement of receipts and disbursements; *provided,* that any balance remaining in excess of the expenses incurred may be retained by the board and used in defraying the expenses thereof;

8. The board may, in its discretion, under regulations provided by its rules, waive the examination of applicants possessing the qualifications mentioned in § 3, who shall have been for more than two years prior to the passage of this title (March 14, 1907) practicing in this state as public accountants on their own account, and who shall, in writing, apply for such certificate within one year thereafter. '07, p. 92.

3. (03.) Qualifications. Certificate. Any citizen of the United States or any person who has duly declared his intention of becoming such citizen, residing and doing business as a public accountant in this state, being over the age of twenty-one years and of good moral character, may apply to the state board of accountancy for examination under its rules, and if found qualified the board shall issue to him a certificate of qualification to practice as a certified accountant, and upon the issuance and receipt of such certificate, and during the period of its existence, or of any renewal thereof, he shall be styled and known as a certified public accountant or expert of accounts, and no other person shall be permitted to assume and use such title or to use any words, letters, or figures to indicate that the person using the same is a certified public accountant. '07, p. 93.

4. (04.) Penalty. If any person shall represent himself to the public as having received a certificate as provided in this title, or shall assume to practice as a certified public accountant, or use the abbreviation C. P. A. or any similar words or letters to indicate that the person using the same is a certified public accountant, without having received such C. P. A. certificate as provided in this title, or if any person, having received any such certificate and having thereafter lost it by revocation, or by failure to renew the same, as herein provided, shall continue to practice as a certified public accountant, he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined a sum not exceeding $200 for each offense. '07, p. 93.

TITLE 2.

ADOPTION.

10. (1.) Who may adopt. Any minor child may be adopted by any adult person as in this title provided, or a child not a minor, whose parents are both dead, may be adopted by another adult person as in this title provided.

Am'd '07, p. 81.

Child, includes adopted child, § 3140.

11. (2.) Relative ages. A person adopting a child must be at least ten years older than the child adopted.

Cal. Civ. C. § 222.

12. (3.) Married persons may adopt, when. A married man, not lawfully separated from his wife, cannot adopt a child without the consent of his wife, nor can a married woman, not thus separated from her husband, adopt a child without his consent, if the husband or wife not consenting is capable of giving such consent.

Cal. Civ. C. § 223.

13. (4.) Consent of child's parents necessary, when. A legitimate child cannot be adopted without the consent of its parents, if living, nor an illegitimate child without the consent of its mother, if living, except that consent is not necessary from a father or mother deprived of civil rights, or adjudged guilty of adultery, cruelty, or desertion, and for either cause divorced, or adjudged to be a habitual drunkard, or who has been judicially deprived of the custody of the child on account of cruelty, neglect, or desertion.

Cal. Civ. C. § 224*.

The mother of an illegitimate child intended before the time of the birth of the child to give it to someone willing to keep it; a third person to whom she entrusted the matter gave it to a husband and wife desiring to adopt the child. About three weeks after the mother surrendered the custody, she sought to have the child returned to her, and the parties refused, and the mother was induced to part with the child to conceal her shame; she did not abandon the child, and when she and the father of the child married, the father, by habeas corpus on his own behalf and on behalf of the mother, was entitled to the custody of the child despite the claim of abandonment.

Harrison v. Harker, 44 U. 541; 142 P. 716.

A mere oral arrangement for adoption may be revoked before the statute is complied with.

Id.

14. (5.) Consent of child necessary, when. The consent of a child, if over the age of twelve years, is necessary to its adoption.

Cal. Civ. C. § 225.

15. (6.) Hearing. Proceedings. The person adopting a child and the child adopted and the other persons whose consent is necessary, must appear before the judge of the district court of the county where the person adopting resides, and the necessary consent must thereupon be signed and an agreement be executed by the person adopting to the effect that the child shall be adopted and treated in all respects as his own lawful child; *provided,* that if the persons whose consent is necessary are not within the county, then their written consent, duly acknowledged in the manner provided for the acknowledgment of deeds, shall be filed in said district court at the time of the application for adoption.

Cal. Civ. C. § 226*.

16. (7.) Id. Decree. The judge must examine all persons appearing before him pursuant to the preceding section, each separately, and, if satisfied that the interests of the child will be promoted by the adoption, he must make out an order declaring that the child shall thenceforth be regarded and treated in all respects as the child of the person adopting.

Cal. Civ. C. § 227.

17. (8.) Child takes family name. Status. A child, when adopted, may take the family name of the person adopting. After adoption, the two shall sustain the legal relation of parent and child, and have all the rights and be subject to all the duties of that relation.

Cal. Civ. C. § 228.

18. (9.) Rights and duties of parents. The parents of an adopted child are, from the time of the adoption, relieved of all parental duties towards and all responsibility for the child so adopted, and shall have no rights over it.

Cal. Civ. C. § 229.

19. (10.) Illegitimate child adopted by acknowledgment. The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such, and such child is thereupon deemed for all purposes legitimate from the time of its birth. The foregoing provisions of this title do not apply to such an adoption.

Cal. Civ. C. § 230.
Succession of illegitimate child, § 6413.
A bachelor who takes an illegitimate child into his family, and acknowledges it to be his own, gives such child right of inheritance.
In re Garr's Estate, 31 U. 57; 86 P. 757.
Cited in: Rohwer v. District Court, 41 U. 279; 125 P. 671.

20. (11.) Adoption of deserted child. Whenever it is made to appear to the satisfaction of the district court of any county that any minor child has been deserted by its parents or surviving parent, and that it has no legal guardian, it shall be lawful, with the approval of the district judge, for any person desirous of adopting the said child to adopt the same, according to law.

Mont. Civ. C. § 320.

TITLE 3.

ANIMALS.

CHAPTER 1.

ESTRAYS AND TRESPASSING ANIMALS.

50. (12.) Constable is poundkeeper. Brand books and sheets. The constable in each precinct in this state is hereby made ex officio the poundkeeper in such precinct, and is entitled to and is hereby made the custodian of all brand books and brand sheets pertaining thereto, which shall, at all reasonable hours, and without charge, be open to the inspection of the public.

51. (13.) Estrays defined. All horses, asses, mules, and neat cattle found running at large, except sucking animals running with their mothers and upon which there is no brand, and all such animals that are branded, the owner of which cannot, after a reasonable search, be found, and which have been running at large on any range within the state for two years or more, and all hogs found running at large upon the premises of any person other than their owner, are hereby declared to be estrays and forfeited to the state.

Am'd '03, p. 58.

Trespassing animals, § 58.

52. (14.) Impounding and disposal of estrays, generally. It is hereby made the duty of the poundkeeper of each precinct in the state to take into his possession and impound all estrays running within his precinct, and to dispose of the same as hereinafter provided. He shall in person or by deputy attend all general roundups in his precinct, and take into his possession all estrays found thereat, and dispose of the same in the manner provided for the disposal of estrays in other cases.

Where a party taking up animals fails to impound them as estrays, and deliver them to the poundkeeper, he becomes a trespasser ab initio, and no demand by the owner is necessary in order to enable him to maintain replevin.
Nielsen v. Hyland, 51 U. —; 170 P. 778.

53. (15.) Notice of sale of estrays. Within three days after any estrays shall come into the possession of the poundkeeper, he shall advertise the same

in a newspaper published in the county, if there be one, having general circulation in the county, by publishing a notice in at least one issue of said paper, and by posting notices for a period of ten days in three of the most public places in the precinct, one of which places shall be at or near the postoffice, if there be one in the precinct. He shall immediately deliver a copy of such notice to the county clerk, or mail the same to him by registered letter. The county clerk shall, upon receipt of said notice, file and preserve the same in his office for a period of six months thereafter, and shall immediately post a copy thereof at the front door of the county courthouse. The notice so filed with the clerk shall be open during reasonable hours for inspection by the public, free of charge. The notice herein provided for shall contain a description of the animals, including all marks and brands, when taken, and the day, hour, and place of sale, and may be substantially in the following form:

NOTICE.

State of Utah, county of.....

In the.....precinct of said county.

I have in my possession the following described estray animals which, if not claimed and taken away, will be sold at public auction to the highest cash bidder at....., in.....precinct, on....., the ..... day of....., 19....., at the hour of.....

(Description of animals.)

Said estrays were taken up by me in said precinct on the.....day of ....., 19.....

.....

Poundkeeper for.....precinct.

Am'd '01, p. 100.

Notice of sale of trespassing animals, § 63.

54. (16.) Claimants. Sale. Bill of sale. If, at any time before the sale of any estrays, such animals shall be claimed and proved to be the property of any person, the poundkeeper shall deliver them to the owner upon receiving from him the cost of impounding, keeping, and advertising the same. If the animals are not so claimed and taken away, he shall, at the time and place mentioned in the notice, proceed to sell the same, one at a time, to the highest cash bidder, and shall execute and deliver a bill of sale transferring said animals to the purchaser or purchasers thereof, which bill of sale shall be substantially in the following form:

I hereby certify that in pursuance of the law regulating the disposal of estrays and trespassing animals, I have this day sold to....., for the sum of $....., he being the highest bidder, ... head of....., branded with the state estray brand and otherwise described as follows, to wit:

(Description of animals.)

Witness my hand this.....day of....., 19.....

.....

Poundkeeper of.....precinct, ...county, state of Utah.

The poundkeeper shall immediately file a copy of such bill of sale with the county clerk, or mail the same to him by registered letter. The copy so filed with the clerk shall be preserved for a period of two years and shall be open to inspection during all reasonable hours, free of charge. Such bill of sale shall transfer and vest in such purchaser the full title to the animals thus transferred.

55. (17.) Record of estrays. The poundkeeper shall keep an accurate record of all estrays received by him, their age, color, sex, marks, and brands, the time and place of taking and the expense of keeping and selling the same, all animals claimed and taken away, all animals sold and to whom so sold and the amount paid, all moneys paid to owners after sale, all moneys paid into the county treasury, and all other matters necessary to a compliance with the provisions of this chapter. The board of county commissioners of each county shall provide the poundkeeper of each precinct with a suitable book, in which

shall be entered the records required by law to be kept by the poundkeeper. Such records shall be open to the inspection of the public at all reasonable hours, and shall be deposited by the poundkeeper with his successor in office.

Record of trespassing animals, § 68.

TRESPASSING ANIMALS.

56. (18.) Local fence law. Any county, or precinct thereof, in the state may, at any general or special election called for that purpose by the board of county commissioners, by a vote of the majority of all the legal voters of such county or precinct, declare in favor of fencing farms and allowing domestic animals to run at large; and in such cases the provisions of this chapter authorizing the detention and sale of animals for damages shall be inoperative.

This section is a complete law as formed by the legislature, and the submission thereof to voters of particular localities is not unconstitutional as a delegation of legislative power.

Peterson v. Petterson, 42 U. 270; 130 P. 244.
State v. Briggs, 46 U. 288; 146 P. 261.

57. (19.) Lawful fence. It shall be the duty of the board of county commissioners to declare by ordinance what shall constitute a lawful fence for that county.

Division fences, § 115.

58. (20.) Trespassing animals. Damages. Impounding. If any neat cattle, horses, asses, mules, sheep, goats, or swine shall trespass or do damage upon the premises of any person, except in cases where such premises are not enclosed by a lawful fence in counties where a fence is required by law, the party aggrieved, whether he be the owner or the occupant of such premises, may recover damages by an action at law against the owner of the trespassing animals, or by distraining and impounding said animals in the manner provided herein; *provided,* that in cases where an action is brought for the recovery of such damages, none of the animals trespassing shall be exempt from execution, and the fees in such cases shall be but one-half the fees in other civil cases.

Estrays, § 51.

Where an owner has fenced in with his own lands tracts of government land in violation of an act of congress prohibiting the fencing of government land or obstructing free passage over the same, he cannot impound cattle which have been turned inside his inclosure by the owner.

Buford v. Houtz, 5 U. 591; 18 P. 633; affirmed, 133 U. S. 320.

Taylor v. Buford, 8 U. 113; 29 P. 880.

One holding possession of land in violation of the law cannot claim damages for trespassing animals.

Id.

The common law of England, that every man must restrain his stock within his own land, is not applicable to the sparsely settled portions of the west.

Buford v. Houtz, 5 U. 591; 18 P. 633; affirmed, 133 U. S. 320.

In taxing costs in an action for damage caused by trespass of sheep, it was prejudicial error not to apply the provisions of this section, that the fees in such action shall be one-half the fees in other civil cases.

Smith v. Valentine, 23 U. 539; 66 P. 295.

Owner of sheep is not liable for damages resulting from an unintentional trespass on unenclosed land in a county in which the fence law is in force, yet he is liable if he intentionally drives the sheep on such land.

Jones v. Blythe, 33 U. 362; 93 P. 994.

Plaintiff purchasing lucerne seed from the owner of lands and leaving it in an enclosed field to dry was an "occupant" within the purview of the statute, and might support an action against the owner of cattle trespassing on the field and destroying the seed without pleading or proving negligence.

Peterson v. Petterson et al., 39 U. 354; 117 P. 70.

Sheep owner is not liable for damages resulting from an unintentional trespass on unenclosed land in a county in which the fence law is in force.

Thomas v. Blythe, 44 U. 1; 137 P. 396.

An owner of sheep who directed his herder to drive or permit the animals on unenclosed lands of plaintiff is liable for trespass, evidence in this case held to warrant a finding that the trespass was wilful and intentional.

Mower v. Olsen, 49 U. 373; 164 P. 482.

The owner of unenclosed pasture land located on the public range in this state, when surrounded by large tracks of unimproved public domain, may not recover damages for trespass by animals, unless wilful.

Hall v. Bartholomew, 50 U. ——; 169 P. 943.

When a person exercises dominion over strays without taking the steps herein provided, he becomes a wrongdoer, and demand is not necessary to institute suit for recovery thereof.

Neilson v. Hyland, 51 U. ——; 170 P. ——.

59. (21.) Id. Appraisement of damages. The owner or occupant of any property may distrain all of said animals trespassing or doing damage thereon. He shall, within twenty-four hours thereafter, deliver said animals to the poundkeeper of the precinct, together with a certificate of the appraisement of the damage done by such animals. Such appraisement must be made by some disinterested male citizen, a freeholder, over twenty-one years of age. It must state the amount of the damage, the time when committed, the

name of the person damaged, the name of the owner of the animals, if known, and if not known it must state that fact, together with a description of the animals, including all visible marks and brands. If the animals appear to be owned by different parties, a separate appraisement and a separate certificate thereof shall be made of the damage done by the lot or group of animals which appears to belong to each of the different owners. In such cases the owners shall be notified separately, and each lot or group of animals shall be advertised and sold separately in the same manner as though the damage had been done by different animals at different times.

60. (22.) Id. Owner to be notified. The person distraining the animals must, if the owner of the same be known to him and if he resides within ten miles of the place of the trespass, immediately deliver to such owner, or leave at his place of residence if he cannot be found, a copy of such certificate of appraisement; but if the owner does not live within ten miles of the place of trespass, the party distraining the animals may, at his option, deliver a copy of such certificate to the owner in person, or deposit the same in the nearest postoffice in a registered letter addressed to said owner. He shall be entitled to charge 10 cents a mile one way for the first ten miles necessarily traveled in delivering such certificate, and 5 cents for each additional mile, to be taxed as costs against the animals.

61. (23.) Damages cannot be recovered, when. If the party distraining any animals shall fail to deliver them or the certificate of appraisement to the poundkeeper within forty-eight hours, or shall fail to deliver to the owner of the animals, if known, a copy of the certificate of appraisement within twenty-four hours after he receives the same, or to deposit the same in the postoffice as herein provided, he shall not be entitled to recover damages under the provisions of this chapter.

62. (24.) Where owner unknown. Duty of poundkeeper. Whenever any animals are delivered to the poundkeeper, and the certificate of appraisement is filed with him as herein provided, and such certificate states that the owner is unknown, the poundkeeper shall immediately examine all brand books or brand sheets in his possession, and if the owner be ascertained thereby, or if the owner be already known to the poundkeeper, he shall, if the owner live within ten miles, immediately deliver a copy of such certificate of appraisement to such owner, or leave the same at his residence if he cannot be found; if the owner do not live within ten miles, the poundkeeper may at his option deliver such copy personally to the owner, or deposit the same in the nearest postoffice in a registered letter addressed to such owner. He shall, however, serve the copy in one of the ways provided herein; *provided,* that whenever personal service of a copy of any paper is required by this chapter, service by agent will be deemed sufficient.

63. (25.) Notice of sale of trespassing animals. As soon as any such animals are delivered to the poundkeeper, he shall immediately proceed to advertise the same as hereinafter provided, except when the owner is known and has been notified, in which case he shall hold said animals forty-eight hours before advertising the same. He shall advertise in a newspaper published in the county, if there be one, having general circulation in the county, by publishing a notice in at least one issue of said paper, and by posting notices in three of the most public places in the precinct, one of which shall be at or near the postoffice, if there be one, and shall deliver a copy of the same to the county clerk, or send the same by deputy or by registered mail. The clerk shall perserve such notice and post a copy thereof as provided in § 53. The notice herein provided for shall state the time when the damage was done and the amount thereof, the name of the party damaged, a description of the animals, including all visible marks and brands, and the day, hour, and place at which such animals will be sold, which shall be not less than ten nor more than twenty days from the time of posting such notice. Said notices may be substantially in the following form:

SALE OF ANIMALS FOR DAMAGES.

State of Utah, county of.....

In the.....precinct of said county.

I have in my possession the following described animals, which, if not claimed and taken away, will be sold at public auction to the highest cash bidder at..... in.....precinct on the.....day of..... 19....., at the hour of.....

(Description of animals.)

Said animals are held by me to secure the payment of $.....damages done by said animals upon the premises of.....on the.....day of ....., 19.....

.....

Poundkeeper of.....precinct.

Am'd '03, p. 15.

Notice of sale of estrays, § 53.

64. (26.) Owner may pay and take animals. Disputed appraisal. The owner of any trespassing animals taken up under the provisions of this chapter may, at any time before the sale thereof, claim and take such animals away upon paying the amount of damages set forth in the certificate of appraisement and the accrued costs, and if such animals are included in a lot or group of animals belonging to other parties against which the damages and costs are assessed as a whole, he shall pay his proportion of the total amount of damages and costs assessed against such animals, according to the number of animals he owns when compared with the number of the entire lot or group. If he deems the appraisal too high he may choose another appraiser having the qualifications herein provided, who with the first shall make a new appraisal, and if they cannot agree they shall choose a third and the three shall proceed to make another appraisal, and the decision of the majority shall be final.

Appraisal of damages, § 59.

65. (27.) Sale. Bill of sale. If such animals are not claimed and taken away by the owner, the poundkeeper shall, at the time and place set forth in the notice of sale, proceed to sell such animals, one at a time, to the highest cash bidder. If the owner of any lot of animals to be sold is known, the poundkeeper shall sell only enough of said animals to pay the damages and costs, and the remainder may be turned over to the owner at any time thereafter; but if the owner be not known, the poundkeeper shall proceed to sell all of said animals so advertised for sale. He shall execute and deliver a bill of sale therefor, and file a copy with the county clerk as hereinbefore provided. Said copies shall be preserved for a period of two years and shall be open for inspection at all reasonable hours, free of charge.

66. (28.) Redemption within ninety days. The owner of any trespassing animals sold under the provisions of this chapter may, at any time within ninety days of the date of such sale, redeem such animals from the purchaser or assignee having the same in his possession, upon paying to such purchaser or assignee the sum for which such animals were originally sold, together with 10 per cent additional, and a reasonable compensation for the care and keeping of the same. If such purchaser or assignee refuse to give up such animals on the owner proving his title to the same, and on his tendering the amount due as herein provided, such owner may maintain an action at law to recover the same; *provided,* that the purchaser or any assignee who has disposed of such animals shall not be liable to such owner in any amount. If no redemption of such animals be made within ninety days after the date of such sale, then such sale shall be absolute and shall vest the title to such animals in the purchaser or his assignee. Any person selling or disposing of any such animal within ninety days of its sale under the provisions of this chapter, shall notify the purchaser of the same of the date of the original sale and the amount paid for such animal at that time, and if he fails to do so he shall be liable for any

loss that may accrue to such purchaser by reason of such animal being redeemed for a less amount than he paid therefor.

67. (29.) Owner entitled to residue of proceeds. If any estrays or trespassing animals sold under the provisions of this chapter shall, within a period of six months immediately ensuing after the date of the sale thereof, be claimed and proved to be the property of any person, it shall be the duty of the poundkeeper at the expiration of such time to forthwith pay the money received for such animals to the owner thereof, less the amount of damages and the expense of taking, keeping, and selling the same; but in the event such animals are not claimed as aforesaid, then such money shall become the property of the county, and the poundkeeper shall immediately pay the same into the county treasury; *provided,* that in case there is a contest between two or more persons claiming to be the owners of any such animals, the poundkeeper shall deposit such money with the county treasurer to be by him paid to the party who shall establish by action his right to the same.

68. (30.) Record of trespassing animals. The poundkeeper shall keep an accurate record of all trespassing animals received by him, which shall contain all the items required by § 55, together with the names of the injured party and the owner of the animals, the amount of the damages claimed, and all other matters necessary to a complete account of the transaction. Such record shall be open for inspection at all reasonable hours.

69. (31.) Estray brand. There shall be a state estray brand, to consist of the letters S. U., which letters shall be three inches in length. The board of county commissioners shall immediately furnish the poundkeeper of each precinct with the proper branding iron, and the poundkeeper shall place such estray brand upon the left side of the neck of all animals sold by him except hogs, sheep, and goats.

70. (32.) Fees of poundkeeper and appraisers. The poundkeeper shall be entitled to the following fees: For taking into his possession any animal, or animals, if found together, 50 cents; for driving the same each mile, 10 cents; for traveling in delivering copy of certificate of appraisement, 10 cents a mile, one way, for the first ten miles, and 5 cents for each mile thereafter; for advertising, including posting and mailing notices, $1; for each bill of sale, including filing copy with clerk, 50 cents; *provided,* that all animals sold to one person shall be included in one bill of sale; for branding, 25 cents for the first, and 10 cents for each additional animal; for selling, 5 per cent of the amount of the sale; for keeping, a reasonable sum, to be determined by the market price of forage and pasturage at the time and place where the animals were kept. Appraisers shall be allowed 20 cents an hour for the time employed, and 10 cents a mile, one way, for going to places of trespass.

71. (33.) Unlawful sales. The owner of any animals unlawfully impounded or sold may maintain an action to recover the same and damages for the detention thereof.

72. (34.) Retaking animals unlawfully. Any person who shall take any animal out of the possession of anyone lawfully holding the same under the provisions of this chapter, either by stealth, force, or fraud, or who shall intercept or hinder any person lawfully taking up or attempting to take up such animals, is guilty of a misdemeanor.

73. (35.) Cities and towns. The provisions of this chapter shall in no way interfere with existing legal rights of incorporated cities and towns in relation to animals running at large.

Cities may provide for, § 570x68. Towns may provide for, § 786x4

CHAPTER 2.

DRIVING AND HERDING.

90. (52.) Driving away animals. Penalty. Any person, other than the owner or his agent, who shall drive any horses, mules, cattle, or sheep farther from their usual or customary ranges, or from any field, yard, or street, than the nearest or most convenient corral, and who shall neglect to return such horses, mules, cattle, or sheep immediately to their accustomed range or place from which they were driven, shall be deemed guilty of a misdemeanor.

91. (53.) Mixing animals. Trespass. Every person having charge of or engaged in driving any drove of cattle, horses, mules, or sheep, shall use due diligence to prevent the same from mixing with the cattle, horses, mules, or sheep belonging to actual settlers, and shall also prevent said animals from trespassing on such land as may be the property of an actual settler and used by him for grazing of animals or growing of hay, grain, or timber, and from doing injury to ditches made for irrigation of crops. If any person in charge of or engaged in driving any herd shall injure any resident in the state by driving or herding the same on lands or ditches owned or leased by settlers, the owner or lessee of said herd shall be liable to said owners or lessees for all damages done, and if such injury be wilfully committed, the person driving such animals shall be deemed guilty of a misdemeanor, and, on conviction thereof, may be fined in any sum not exceeding $100.

92. (54.) Skinning animals found dead. Any person other than the owner or his agent or employe or other person duly authorized, who shall remove the skin, hide, or pelt from the carcass of any neat cattle or sheep found dead, shall be deemed guilty of a misdemeanor.

93. (55.) Stock law detectives. Rewards. The board of county commissioners of any county, when such board deems it necessary for the public welfare, may appoint one or more detectives to discover and detect violations of the stock law within any such county, and such detectives shall be paid from the county treasury such compensation as may be fixed by the board of county commissioners; and the board may offer and pay from the county treasury rewards for the detection of persons violating the provisions of this chapter.

CHAPTER 3.

BULLS, RAMS, ETC.

94. (56.) Stud-horses, rams, etc., running at large. Every person owning or having in charge a stud-horse, jack, or ridgel over eighteen months old, or a ram over three months old, who shall permit the same to run at large within the limits of, or on the summer range of, any town or settlement in this state, shall be deemed guilty of a misdemeanor, and, on conviction thereof, may be fined in any sum not exceeding $25 for each offense; *provided,* that if two-thirds of the voters of any county, or isolated part of a county, shall desire, and the board of county commissioners shall so decide, then the provisions of this section shall be inoperative in such county or part of county during such time as the board may determine.

95. (57.) Unlawful to turn cattle on public range, when. It shall be unlawful to turn loose or range any cattle upon the public domain, range, or forest reserves of this state, without keeping therewith, during the breeding season of each year, one bull for every forty head, or fraction thereof, of female breeding cattle so ranged; *provided,* that any person so ranging any portion of forty head of female breeding cattle shall jointly provide and arrange for an interest in a bull running at large on the public domain, range, or forest reserve where said cattle are ranged. Am'd '09, p. 222; '15, p. 59.

96. Bulls to be pure bred. Registration certificate to be recorded. It shall be unlawful to own and turn loose or allow to run at large upon the public domain, range, or forest reserve of this state any bull other than a pure bred, of some recognized beef breed of cattle. A pure bred bull as contemplated by this chapter must be a bull having a registration certificate from the breed association of its respective breed or one whose breeder has issued a certificate under oath stating therein that the bull is pure bred, and stating the breed to which it belongs, such certificate to be recorded in a book provided for that purpose in the county clerk's office of the county in which the bull is to be ranged, on or before the day any such bull is permitted to run at large. Am'd '09, p. 222; '15, p. 59.

97. Penalty. A violation of any provision of §§ 95 and 96 shall be a misdemeanor. '15, p. 59.

CHAPTER 4.

DISEASED ANIMALS.

100. (58.) Importation of diseased animals. Any person owning or having in charge any domestic animal afflicted with a contagious or infectious disease, that, knowing such animal to be diseased, shall bring or drive the same into this state, shall be deemed guilty of a misdemeanor.

Bringing in diseased animals, §§ 177-208. Sale diseased animals forbidden, § 178.

101. (59.) Killing diseased animals. Any person owning or having in charge any animal afflicted with glanders or farcy, shall, upon discovery of its condition, at once deprive it of life; and any peace officer may deprive such animal of life on the omission or refusal so to do by the owner or person in charge. Any such owner or person in charge omitting or refusing to comply with the provisions of this section shall be deemed guilty of a misdemeanor.

Cal. Pen. C. Sup. (1893), § 402½*.

102. (60.) Diseased animals, care and sale of. Any person owning or having in charge any domestic animal afflicted with a contagious or infectious disease, that, knowing such animal to be diseased, shall allow it to run at large upon any unenclosed land, common, or highway, or that shall sell or dispose of such animal without fully disclosing its condition to the purchaser, shall be deemed guilty of a misdemeanor.

Similar provisions, § 179.

103. (61.) Id. Removal of. Any person owning or having in charge any domestic animal afflicted with a contagious or infectious disease shall immediately remove the same to some place where it cannot endanger the health of other domestic animals.

Diseased animals to be quarantined, §§ 177-182.

104. (62.) Penalty. Damages. Any person violating any of the provisions of this chapter, in addition to the penalties herein provided, shall be liable for all damages that may accrue to any party damaged by reason of said animals imparting disease.

An allegation in a complaint that defendant wilfully and negligently drove his diseased sheep with a herd of plaintiff's sheep alleges more than is necessary, and the allegation of wilfulness may be diregarded as surplusage.
Lindsay v. Smart, 43 U. 554; 137 P. 837.

CHAPTER 5.

DIPPING SHEEP.

105. (63.) Requirements. Penalty. Every person owning, controlling, or ranging sheep in the state shall have all such sheep thoroughly dipped at least once a year in some preparation that will kill scab, or shall be deemed guilty of a misdemeanor, and upon conviction thereof may be fined in any sum not exceeding $100 for each offense.

Inspection and dipping of sheep by live stock board, § 180.

CHAPTER 6.

REMOVAL AND BURIAL.

106. (64.) Requirements. Any domestic animal which may die within the limits of any town or settlement, or near any main-traveled state or county road, shall be removed or buried within two days from the death of said animal by the owner thereof or the person having it in charge. If such person cannot be found, then such animal shall be removed or buried at the expense of the county in which it is found. If any such animal shall die within the limits of any incorporated city, and the owner thereof or the person having it in charge can not be found, it shall be removed or buried at the expense of the city.

Infected hog to be buried or burned, § 207.

107. (65.) Animals left unburied. Deposit on land of another. No such animal shall be left unburied within one-half mile from any town or settlement, or one-quarter mile from any main-traveled state or county road, or residence, or twenty rods from any spring, running stream, or water ditch. Any person who shall deposit any such animal on the land of another without his consent, and shall fail to remove it therefrom upon two days' notice by the owner or possessor of such land, shall be deemed guilty of a misdemeanor, and shall be punished as in § 108 provided.

108. (66.) Penalty. Any person refusing or neglecting to comply with any of the requirements of this chapter shall, upon conviction thereof before any justice of the peace having jurisdicition, be fined in any sum not exceeding $10, the expense of removing or burying said animal, and costs of suit.

109. (67.) Owner liable for expense. If the owner or the person in charge of any such animal at the time of its death shall fail to remove or bury the same as in this chapter provided, any citizen may bury or remove such animal and collect pay therefor from the owner, if known, or from the county when the owner is unknown. It shall be the duty of all sheriffs, constables, and city marshals to see that the provisions of this chapter are carried into effect.

CHAPTER 7.

KILLED ON RAILWAYS.

110. (68.) Notice to be given. Every person operating a railway within this state that shall injure or kill any live stock of any description by the running of any engine or engines, car or cars, over or against any such live stock, shall, within three days thereafter, post at the first railway station in each direction from the place of such injury or killing a notice in writing in some conspicuous place on the outside of such stations, and file a duplicate with the county clerk of the county in which stock is injured or killed, which notice shall contain the number and kind of animals so injured or killed and a full description of each, with the time and place, as near as may be, of such injury or killing, and shall be dated and signed by some officer or agent of such person operating such railway.

Liability of railroad for stock killed, § 1238.

111. (69.) Penalty. Every person that shall wilfully fail, neglect, or refuse to comply with the provisions of this chapter shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be fined in any sum not exceeding $50.

CHAPTER 8.

INJURIES BY DOGS.

112. (70.) Liability of owner. Every person owning or keeping a dog shall be liable in damages for any injurious act committed by such dog; and it shall not be necessary in any action brought therefor to allege or prove that such dog was of a vicious or mischievous disposition, or that the owner or keeper thereof knew that it was vicious or mischievous.

County commissioners to provide against injuries by dogs, § 1400x13.

113. (71.) Dogs acting together. Where any injury has been committed by two or more dogs acting together, and such dogs are owned or kept by different persons, all such persons may be joined as defendants in the same action to recover damages therefor, and the amount found by the court or jury for such injury shall be apportioned among the several defendants found liable, and judgment entered severally against them for the amount so apportioned.

CHAPTER 9.

FENCES.

114. (72.) Throwing down fence. Opening gate. Any person who shall wilfully throw down a fence or open bars or gates into any enclosure other than his own, or into any field owned by joint occupancy, and leave the same open, shall be deemed guilty of a misdemeanor, and he shall also be liable for all damages thereby sustained. Am'd '05, p. 20.

Trespass and injury to property, § 8390.

115. (73.) Division fences. When two or more persons shall agree to fence a joint enclosure, or to build a division fence or fences, each party shall be required to build his portion of lawful fence, according to the amount of land enclosed, and keep the same in repair, and, if either party shall neglect or refuse so to do, he shall be liable for all damage done in consequence of said neglect. In all cases where a person has enclosed his land with a fence, and the owner of adjoining land desires to enclose such adjoining land with a fence so that the first fence, or any part thereof, will be made a partition fence between such tracts of land, the owner of such adjoining land must, before making such enclosure, pay to the owner of such fence one-half of the value of all that part of such fence as will become a partition fence between such adjoining tracts of land; and when one party ceases to improve or cultivate his land or opens his enclosure, he must not take away any part of the partition fence belonging to him if the owner or occupant of such adjoining enclosure shall, within thirty days after notice, pay therefor the value of said fence; nor shall such partition fence be removed when by so doing the crops enclosed by such fence will be exposed to destruction.

Lawful fence, § 57.

CHAPTER 10.

SALTING ANIMALS ON RANGE.

125. (73x.) Animals on range to be salted. Any person, company, or corporation who shall turn loose or graze upon any public range of this state, any cattle, horses, or sheep shall, at the time or within thirty days thereafter, provide or place at or near one or more watering places on said range, and where the cattle, horses, or sheep can have easy access thereto, at least five pounds of salt for each animal they turn upon the range, except sheep, which shall be one pound per head per annum, not counting calves, colts, and lambs

under six months old; *provided,* when said stock remains on any range continuously, the owner or owners shall be required to renew the said amount of salt once in six months; *provided,* that this shall not apply to any one turning cattle, horses, or sheep upon any range where salt naturally exists in sufficient quantities for the use of said stock.

Any person, company, or corporation who refuses or neglects to comply with the requirements of this section shall be deemed guilty of a misdemeanor.

'05, p. 38.

CHAPTER 11.

LEASES OF CERTAIN LIVE STOCK TO BE RECORDED.

('17, p. 181.)

130. Leases acknowledged and recorded. Interest, how affected. All leases for more than fifty head of horses, one hundred head of cattle, or five hundred head of sheep shall be in writing, and must be acknowledged in the same manner as grants of real property, and such leases or copies thereof duly certified by an officer authorized by the laws of the state of Utah to take acknowledgments to conveyances of real property shall be filed in the office of the county recorder of the county in which the lessee resides; and a failure to comply with the provisions of this section shall render the interest of the lessor in the property subject and subsequent to the claims of creditors of the lessee and of subsequent purchasers and incumbrancers of the property in good faith and for value.

131. Indexing. All leases so filed shall be indexed in the index to chattel mortgages, under the names of the lessees, in the same manner that mortgagors in chattel mortgages are indexed.

Recording chattel mortgages, § 470.

132. Record of all instruments affecting property. All assignments, cancellations, or releases, and all other instruments affecting the property described in the lease, shall be filed with the county recorder in the same county where the lease or copy thereof is filed, and shall be attached by the county recorder to the lease or copy thereof so filed.

133. Fees. The fee for filing leases or certified copies thereof and of indexing the same shall be 50 cents; and the fee for filing any assignment, cancellation, release, or other instrument affecting the property described in any such lease or certified copy thereof, and for attaching the same to the instrument filed to which it relates, shall be 25 cents.

CHAPTER 12.

LICENSING LIVE STOCK OF NON-RESIDENTS.

('17, p. 71.)

134. Annual license. Every non-resident person, firm, partnership, association, or corporation who may graze, herd, or pasture sheep, goats, cattle, or horses within this state, as either owner, lessee, or manager of said sheep, goats, cattle, or horses must annually procure a license therefor from the sheriff as collector of transient grazing licenses of each county within which said sheep, goats, cattle, or horses are grazed, herded, or pastured, and shall pay therefor the amount of 15 cents per head for each and every sheep or goat and 50 cents per head for cattle or horses grazed, herded, or pastured within this state.

135. Penalty. Every person who shall engage in the business of grazing, herding, or pasturing of any sheep, goats, cattle, or horses, as either owner, lessee, or manager thereof, within any county of the state of Utah, without having first procured a license therefor, as prescribed by the preceding section, shall be guilty of a misdemeanor.

136. Collectors of license. For the purposes of this chapter, the sheriffs of the various counties shall be the collectors of licenses.

137. Moneys paid to county. All moneys collected for sheep, goat, cattle, or horse grazing licenses during each month shall, on or before the 10th day of the following month, be paid by the sheriff, as license collector, to the county treasurer of the county wherein such licenses are collected, and shall be by him placed to the credit of the general fund of such county. It shall be the duty of the county auditor, between the 10th and 20th day of each month, to check the sheriff's returns to the treasurer for the preceding month, together with the unused licenses and the duplicate and canceled licenses remaining in his possession. If found correct, the auditor shall give the sheriff his clearance, which shall detail the sheep, goat, cattle, or horse grazing license transactions during the preceding month.

138. When chapter not applicable. This chapter shall not apply to the citizens of states whose state does not impose a license or grazing tax on sheep, goats, cattle, and horses owned by residents of this state.

CHAPTER 13.

PREVENTING THE SPREAD OF RABIES AND OTHER ANIMAL DISEASES.

('17, p. 391.)

150. Dangerous diseases. Quarantine. Rabies or hydrophobia. Whenever any case or cases of rabies, or other animal diseases dangerous to the health of human beings, which may be declared by the state board of health as coming under the provisions of this chapter, shall be reported as existing in any county, city and county, or incorporated city or town in the state of Utah, the state board of health shall make or cause to be made a preliminary investigation as to whether such disease does exist, and as to the probable area of the state in which the population or animals are thereby endangered. If upon such investigation the state board of health shall find that any of the said diseases does exist, a quarantine shall be declared against all such animals as may be designated in the quarantine order, and living within the area specified in said order, and if the quarantine shall be for the purpose of preventing the spread of rabies or hydrophobia the declaration (notice) shall contain a warning to the owners of dogs within the quarantined area to confine closely or to muzzle all such dogs so as effectually to prevent biting, and after such notice as aforesaid any dog found running at large in such quarantined area or known to have been removed from or to have escaped from such area, not being muzzled as aforesaid, may be killed by any person, without liability therefor.

Experiments for extermination of rabies, etc., § 221.

151. Investigations. Following the order of quarantine, the state board of health shall make or cause to be made a thorough investigation as to the extent of the disease, the probable number of persons and animals exposed, and the area found to be involved.

152. Powers and duties of peace officers. It shall be the duty of all peace officers and boards of health to carry out the provisions of this chapter. During the period for which any quarantine order is in force, all peace officers are empowered to kill or, in their discretion, to capture and hold for further

action by the state board of health or its representatives, all animals in a quarantine area found on public highways, lands, and streets, or not held in restraint on private premises as specified in this chapter.

153. Right of examinations. All proper officials within the meaning of this chapter are hereby authorized to examine and enter upon all private premises for the enforcement of this chapter.

154. Penalty. Any owner or other person in the possession of any animal being held or maintained in violation of the provisions of this chapter shall be deemed guilty of a misdemeanor and punished by a fine of not less than $5, nor more than $250 and be imprisoned in the county jail not more than ninety days, at the discretion of the court.

155. Measures of control. Whenever it becomes necessary, in the judgment of the state board of health or its secretary, to enforce the provisions of this chapter in any county, city and county, or incorporated city or town, the said board or its secretary may institute special measures of control to supplement the efforts of the local authorities in any county, city and county, or incorporated city or town whose duties are specified in this chapter.

156. Quarantine defined. Quarantine shall be defined for the purposes of this chapter as meaning the strict confinement upon the private premises of the owners, under restraint, by leash, or closed cage, or padlock, of all animals specified by the order.

CHAPTER 14.

STATE LIVE STOCK BOARD.

('17, p. 353.)

170. Creation of board. Membership. Qualification. Inspector. Bonds. There is hereby created a state live stock board. This board shall consist of five members to be appointed by the governor, with the consent of the senate, upon the passage and approval of this chapter. At least one of the members thereof shall be an actual and practical sheep man, and at least one member shall be an actual and practical cattle man, and one of the members of said board shall be a graduate of some recognized veterinary college of good standing. He shall be the state inspector of live stock. Each of said members, before entering upon the duties of his office, shall take and subscribe the constitutional oath of office, and execute a bond with at least two sureties, or a qualified surety, in the penal sum of $2500, conditioned for the faithful performance of the duties of said office, and such bond to be approved by the board of examiners and filed with the secretary of state.

The board makes rules for inspection and quarantine, § 172.
Co-operates with bureau of animal industry, § 193.
Furnishes all blanks, § 224.
Issues subpoenas and administers oaths, § 182.
Appoints inspectors, § 175.
Upon approval of governor, may condemn and destroy, § 192.
State inspector may kill for examination, § 195.
Establishes quarantine, § 195.
Designates marks and brands, § 210.

171. Compensation. The members of the state live stock board shall receive no salary or emolument whatsoever; *provided, however,* that said members shall be paid, as hereinafter provided, their actual and necessary traveling expenses in attending meetings of said board; and *provided further,* that the state inspector of live stock shall receive a salary to be fixed by the governor, but not to exceed $2500 per annum, and his actual and necessary expenses in the performance of his duties, which expenses shall not exceed $1000 per annum.

172. Rules. Quarantine. Marks and brands. The board shall make such rules and regulations touching the manner of inspection of live stock, affecting quarantine and sanitary conditions, and the recording of marks and brands

and certificates of pure-bred live stock as they shall deem proper, not in conflict with this chapter.

173. Terms. The said members of the state live stock board shall hold office for two years and until their successors are appointed and qualified, unless sooner removed for incompetency or neglect of duty.

174. Secretary. Salary. Duties. Bond. It shall be the duty of the state live stock board to appoint a competent clerk, who shall be secretary of the board and shall receive a salary not to exceed $1800 per annum. It shall be the duty of said clerk to receive and account for all moneys and funds of whatsoever character coming into the charge and custody of said board, and to transmit the same to the proper officer of the state not later than the last day of the month in which they are received, and to keep complete and accurate records and discharge the duties hereinafter fixed, as well as all other duties required of him as clerk of said board. Before entering upon the duties of his office, the said clerk shall subscribe the constitutional oath of office, and execute a bond in the sum of $5000, conditioned for the faithful performance of his duties, which bond shall be approved by the board and filed with the secretary of state.

Ex officio recorder of marks and brands, § 209.

175. Inspectors. Remuneration. Appointments. The state live stock board is hereby authorized to appoint and deputize such special inspectors as said board shall deem necessary for the proper protection of the live stock interests of the state; such inspectors shall be under the control and direction of said board and subject to its rules and regulations. Said special inspectors shall be paid such remuneration for their special services as may be determined by said board, but not to exceed $6 per day for actual and necessary expenses in the performance of their duties, but shall not be paid for any time devoted by them, wholly in or part, to the furtherance of their own business or interest. Practical resident sheep or cattle men, or hog raisers, may, if necessary, be appointed deputy inspectors in any county of the state upon the request and recommendation of ten residents of such county who are engaged in the raising of the kind of live stock for which such inspector is required.

176. Id. Duties. Reports. It shall be the duty of the state live stock inspector to investigate any and all cases of contagious or infectious diseases among the domestic animals of this state, or any epidemic or instance of poisoning affecting such animals which may come to his knowledge, and for that purpose he shall visit in person, or by deputy inspector, at once, any locality within the state where any such diseases, epidemic, or poisoning may be reported to exist, and shall make prompt, full, and careful examination of all such matters. He shall prescribe the proper quarantine, care, and necessary remedies, inaugurate and direct the necessary sanitary measures to prevent the spread of such disease, and report the same to the state live stock board, and shall perform such other and further duties as may be prescribed by law or by the rules of the board.

177. Quarantine regulations. Assessments. Prohibition by governor. Costs and fees. The state live stock board may make and adopt such quarantine and sanitary regulations affecting the protection and movement of live stock into and out of the state of Utah and within the borders of said state as may, from time to time, be necessary to prevent the introduction or spread of any contagious or infectious disease; and to compensate the state for the expense of carrying out of such regulations, the board may collect a fee of 3 cents per head on all cattle and horses, and 1½ cents per head on all sheep entering the state of Utah from any quarantined or infected territory.

And whenever the state live stock board or any members thereof, or the inspector, shall know or have good reason to believe that any contagious or infectious disease exists in any locality in any other state, or that there are conditions which render domestic animals of said infected districts liable to bring disease into this state, he or it shall report the same to the governor of

the state of Utah, who thereupon may issue a proclamation prohibiting the importation or entry of any such live stock into this state, unless accompanied by a certificate of health given by the state live stock inspector, or special inspectors appointed by the state live stock board, which inspectors shall carefully examine all such live stock previous to the giving of such certificates. All costs connected with such examinations or inspections shall be paid by the owner or owners of such stock so examined; *provided,* that no sanitary inspection shall be necessary and no fees collected from the owners of any animals to which a clean bill of health has been previously granted by the federal authorities within ten days prior to the day of entry into the state, or such other time prior thereto as the board may determine in its rules and regulations, and that no fee shall be collected from the owner of any animals entering this state by railroad shipment in direct route to other states or territories, which animals do not remain in the state of Utah for a longer period than is required for watering, feeding, or transferring in transit.

178. Prevention and eradication of infectious diseases. Liability of owners. Penalty. It shall be the duty of the state live stock board to make and adopt such quarantine and sanitary regulations as are deemed necessary to prevent the introduction or spread of southern or splenetic fever, contagious pleuro-pneumonia, hog cholera, or any other contagious or infectious diseases of live stock, and it shall have power to order the destruction or disposal of live stock to prevent the spread of disease or to eradicate such disease when deemed necessary by the board.

Any person, firm, or corporation, being the owner of or having in charge any domestic animal or animals infected with or exposed to any contagious or infectious disease, knowing such animal or animals to be so infected or exposed to, or after having received notice from any officer or inspector of the state live stock board that such animal or animals are so infected, who shall permit such animal or animals to run at large, or shall keep it or them where other domestic animals can be infected by such disease, or may be exposed to its contagion or infection, or who shall sell, ship, drive, trade, or give away such diseased or exposed animal or animals without fully disclosing the fact of its diseased or exposed condition to the purchaser, shall be deemed guilty of a misdemeanor.

Diseased animals, §§ 100-104.

179. Liability of owners of diseased sheep. Any person or persons owning or keeping any sheep known to be diseased or exposed to the scabies, or any other contagious or infectious disease to which sheep are subject, shall be liable in the full amount of damage occasioned to other sheep owners or holders by reason of any diseased or exposed sheep being moved or allowed to stray from its or their premises or range.

Similar provisions, § 102.

180. Duty and power of board to prevent spread of diseases. Whenever it shall become known to the state live stock board that the diseases known as mange, itch, scabies, or hog cholera, or any other infectious or contagious disease exists among the cattle, sheep, horses, hogs, or domestic animals of any county, district, or section of the state, it shall be the duty of said board to take such steps as will prevent the spread of such disease within the state, and said board shall have the power, as a sanitary measure, to inspect and compel the dipping, spraying, testing, or immunizing or other treatment as determined by it, of all such animals within the state, under such rules and regulations as the said board may adopt, and the said board may order and compel the owner or owners or the persons in charge of such animals to dip, spray, or otherwise treat all or any part of said animals as said board may find to be infected with or to have been exposed to such diseases. If the owner or owners or persons in charge of such animals so ordered treated shall, after notice, fail to dip, spray, or otherwise treat, test, or immunize such animals as ordered, then the state live stock board is hereby authorized to seize or cause to be seized, dipped, sprayed, or otherwise treated, tested, or immunized

any such animals, and to hold and sell the same, or such part thereof as may be necessary to pay all costs of said inspection, seizing, caring for, dipping, spraying, or other treatment, testing, or immunizing, together with costs of sale. Such sale shall be made at such time and place, and in such manner as may be prescribed by said board after not less than three, nor more than fifteen days' notice of the time, place, and purpose of such sale has been given to the owner or owners or person in charge of said animals, and in case personal service of such notice cannot be had within the county in which the animals are being held by said board, then such notice shall be given either by personal service outside of said county, or by advertisement in a newspaper of general circulation within the county where said animals are treated, and if no such newspaper be published therein, then in the nearest newspaper of general circulation; *provided, however,* that the owner or owners of such animals so seized and held may at any time prior to said sale recover possession of the same upon payment to the state live stock board of the amount of the total costs and charges incurred against said animals; and *provided, further,* that any sum realized from the sale of any such animal over and above the total of such costs and charges shall be paid by the board to the owners of the animals sold, if such owner is known, or can, by reasonable diligence, be found; otherwise said surplus to be placed in the general fund.

Dipping sheep, § 105.

181. Limited quarantine. Peace officers to assist in maintaining. Expenses. The state live stock board may quarantine any county, district, or section of the state for the purpose of preventing the spread of any infectious or contagious disease among the domestic animals within the State. The said board shall have the authority, through its members, officers, or inspectors, to call on all sheriffs, constables, or other peace or police officers of any town, precinct, or county within the state, to assist in maintaining such quarantine, and to arrest anyone who may violate such quarantine or the rules or regulations made by said board for the purpose of maintaining it, and it shall be the duty of all sheriffs, constables, peace or police officers to act in such case when so called upon, and they shall be allowed their fees and necessary expenses in so doing.

182. Penalty for violation of quarantine regulations. Power of board to enforce same. Any person or corporation who shall violate or disregard any quarantine provision of this chapter, or any sanitary or quarantine rule, regulation, or order of the state live stock board, in pursuance of its official duties, shall be fined in a sum of not less than $25 nor more than $1000, or by imprisonment for a period of not more than one year, or by both such fine and imprisonment. For the purpose of carrying out the provisions of this chapter each member of the state live stock board and the secretary of said board is authorized to subpœna and examine witnesses and to administer oaths for the purpose of soliciting information to be used for enforcing the provisions hereof, and in the furtherance of the quarantine, sanitary, and other regulations.

183. Stock inspections. Duties of carriers. Liability. Exception. It shall be unlawful for any corporation, co-partnership, association, person, or persons to ship or to present for loading, or attempt to load, any cattle, horses, or mules for shipment upon any railroad in this state, or to drive or attempt to drive or otherwise take the same beyond the boundaries of this state, or beyond the boundaries of any county within the state, except for temporary grazing or feeding purposes, until the same shall have been duly inspected as hereinafter provided. It shall be unlawful for any railroad company to receive for transportation any herd, band, carload, or a portion of a carload of cattle, horses, or mules until the same shall have been duly inspected by the sheriff of the county in which said animals are delivered for shipment, and until such railroad company shall have been furnished by said sheriff with a certificate showing that the brands or earmarks on such cattle, horses, or mules have been duly inspected, as required by this chapter. Any railroad company, or

any officer, agent, or servant of any railroad company, who shall violate the provisions of this section shall be guilty of a misdemeanor and shall be fined in any sum not in excess of $5000 for each offense. Nothing in this section shall be construed as affecting horses, cattle, or sheep owned by residents of this state which are ranged a portion of the year in adjoining states, or which are taken into adjoining states for shipment (back into this state), and no railroad company shall be liable for any penalty for receiving and shipping such horses, cattle, or sheep.

Inspection by dairy and food commissioner before slaughtering § 1990.

184. Duties of sheriffs. Place of inspection. Certificates. Cost for delays. Every corporation, co-partnership, association, person, or persons, or their or its agents, servants, or employees having in charge cattle, horses, or mules destined for transportation by rail from any point within this state to any point within or without this state, or to be driven beyond the boundaries of this state, or the counties thereof, except for the purposes of temporary grazing or feeding, shall make application to the sheriff of the county in which inspection is required by this chapter to be made, to inspect the marks, brands, or earmarks of any such cattle, horses, or mules, stating in such application the time and place when and where such animals will be ready for inspection. And it shall be the duty of such sheriff, within twenty-four hours after the reception of such notice, to attend at the place designated in such application and inspect said cattle, horses, or mules, and to make a record of said animals, and if satisfied give the certificate required by the provisions of this chapter, certifying that said animals and their marks, brands, and earmarks have been inspected and noted.

In all cases of cattle, horses, or mules transported by rail, the place of inspection shall be at some stockyard at the proposed point of shipment of said animals; an inspection of cattle, horses, or mules destined to be driven or taken out of the state shall be held at some point within this state and within ten miles of the state line; an inspection when animals are driven or taken from one county to another shall be had in the county from which said animals are driven or taken, or if driven or taken through a county or counties within this state, then in the last county through which they are driven or taken before arriving at the county in which their destination is located.

If the owner or person in charge of said animals shall cause any unreasonable delay or loss of time to any inspector or sheriff so notified to attend an inspection as aforesaid, such owner or person in charge of any such cattle, horses, or mules shall pay the expenses and salaries of the officers, subject to such delay or loss of time, not to exceed $5 per day; *provided,* that the sheriff shall have the power to designate some station or point en route at which stock shipped shall be inspected instead of the initial shipping point.

185. Warrants of arrest. Manner of service. Prosecutions. In case of violation of this chapter by a railroad company or corporation, the warrant of arrest may be served upon the president, secretary, or manager in this state, or any general or local agent thereof in the county where the action is pending, and upon the return of said warrant so served, the railroad company or corporation may be deemed in court and subject to the jurisdiction thereof, and any fine imposed may be collected by execution against the property of such corporation, but this section shall not be construed to exempt any agent or employe from prosecution.

186. Liability for transporting uninspected animals. Should any corporation, co-partnership, association, person, or persons, their or its agents or employees ship, drive, or take away any animals other than those inspected or described in the certificates as provided in §§ 184 and 185, or should they remove any of said animals and substitute others therefor, without the knowledge of the officers authorized to issue said certificates, they shall be guilty of a misdemeanor.

187. Reports by sheriffs. Liability for failure. It shall be the duty of any sheriff making any inspection, as aforesaid, to make a report to the

secretary of the state live stock board, which he shall certify to as correct, of the result of said inspections, at least once every thirty days, or oftener if required by said board to do so. Any sheriff, or any other officer or inspector, who shall knowingly make any false record or certificate under the provisions of this chapter, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine in a sum not exceeding $1000, or imprisonment not exceeding one year, or both such fine and imprisonment.

188. Liability for violation of five preceding sections. Any corporation, co-partnership, association, person, or persons who shall violate any of the provisions of §§ 183, 184, 185, 186, and 187, or who shall ship any band, herd, or carload of cattle, horses, or mules upon any railroad in this state, or who shall drive, take, or otherwise remove the same without having the same inspected as required by the provisions of this chapter, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine in a sum of not more than $1000, or by imprisonment for a period of not more than one year, or by both such fine and imprisonment; but nothing in this chapter shall be construed as repealing the laws now in force respecting the larceny of live stock or cattle.

189. Brands and proof of ownership. Duty of officers. In making an inspection of any animal, as provided in this chapter, prior to shipment by rail or during removal as herein provided, if any sheriff or inspector shall find any animal or animals bearing marks or brands other than those of the owner of the other cattle in said shipment or removal, and if said owner or shipper shall fail to exhibit a bill of sale, or other evidence of title or authority for the possession of said animal or animals, the sheriff or inspector shall take possession of the same for the state live stock board and dispose of the same according to the rules and regulations prescribed by said board.

190. Rules for disposition of live stock. The state live stock board are hereby authorized and empowered to make such reasonable rules and regulations regarding the disposition of any live stock taken up by inspectors or sheriffs, as provided in § 189, as may seem to said board to be proper and just and for the best interests of the owners of said cattle and of the state.

191. Hides to be held for inspection. Previous examinations. Qualification of inspectors. Duties. Statements. Record of sales. Mutilation of brands. Duties of sheriff. Every person or persons not regularly engaged in the butcher, slaughter-house, or packing business, or regularly engaged in slaughtering animals for sale, who shall slaughter one or more cattle, shall retain or cause to be retained in his or their possession the hides taken from such animal or animals with the ears attached thereto, and without any alterations or disfiguration of the brands or marks on said hides or ears, until such hides have been inspected and tagged as required by the provisions of this law.

Before any such person or persons shall slaughter one or more cattle, they shall cause the same to be inspected. The inspection shall be made at the place where such animal is to be slaughtered. Such slaughter shall take place within three days after the inspection. The inspection may be made by the sheriff of the county, or his deputy, or by two disinterested land owners, able to speak, read, and write the English language, who are in no way related to the owner of such animal. Such unofficial inspectors shall examine by day light the animals to be slaughtered, and shall make and sign a statement showing when and where the examination is made, the name of the owner, and the character of the animal, giving a full description, including color, as well as marks and brands; and the owner, within ten days after such inspection, shall deposit such statement with the sheriff of the county wherein such inspection is made.

Any butcher, slaughter or packing house owner, manager, or employe, or any other corporation, co-partnership, association, person, or persons slaughtering any cattle purchased and delivered from within the county where such animal is slaughtered, shall, before slaughtering any such animal, make and

fill out, in clear, legible English, a statement giving the name of the owner from whom the cattle were purchased, the place where said animal or animals were kept in the county before purchase and delivery, together with a full description, including color, approximate age and weight, as well as marks and brands. Such statement shall, within one week from the date of slaughter of any such animal, or sooner if the sheriff shall request it, be filed with the sheriff of the county in which such animal or animals are slaughtered.

All such corporations, co-partnerships, associations, person, or persons shall retain or cause to be retained in its, his, or their possession the hides taken from such animal or animals so purchased and delivered, with the ears attached thereto, and without any alteration or disfiguration of the brands or marks on said hides or ears, until said hides have been inspected and tagged as hereinafter required. They shall also keep a record showing the name and address of the person to whom any hides are sold, together with the date of sale and the number sold.

It shall be unlawful for any person to mutilate any brand or other mark by which any cattle or the hide of any cattle may be identified, or to destroy or conceal any hide for the purpose of preventing discovery of the identity of any such animal.

It shall be unlawful for any corporation, co-partnership, association, person, or persons to buy, sell, or to offer for sale, or to trade, exchange, or give away the hide of any cattle, except those shipped in from a county other than that in which the cattle are slaughtered, until such hide has been inspected by the sheriff of the county in which such animal or animals were slaughtered, and a tag, furnished by the state live stock board, placed securely thereon by said sheriff of said county, as evidence of such examination, or to fail to keep a record of all hides sold, as provided in this section.

It shall be the duty of the sheriff of each county to examine and tag, with tags furnished for the purpose by the state live stock board, the hides of all cattle slaughtered within the county in which the said sheriff has jurisdiction; *provided,* that such hides shall be presented to the sheriff at his office or at a place designated by him, except in the case of slaughter-house or packing-house owners or keepers where twenty or more hides are accumulated for inspection. In such case, it shall be the duty of the sheriff to go to such packing or slaughter-house plants by person or by deputy and examine and tag such hides on the premises where the animals were slaughtered; *provided,* that if such slaughter house or packing house be located at such great distance as to cause such inspection to be made at great expense and inconvenience, the sheriff may designate some competent resident disinterested person to examine and tag such hides.

192. Power of board to condemn and destroy in case of epidemic. Emergency. Whenever there exists an outbreak or epidemic of any contagious or infectious disease among domestic animals of this state, of such character as to endanger and imperil live stock, the state live stock board shall, upon the approval of the governor, have the power to condemn and destroy in disposal of any live stock so infected with contagious or infectious disease, or any live stock which has been exposed to, or is deemed by the board capable of communicating such contagious or infectious disease to other domestic animals, and to condemn and destroy any barns, sheds, corrals, pens, or other property which the said board may determine is necessary to be destroyed in order to prevent the spread of such contagion or infection. Such condemnation and destruction shall take place only when, in the opinion of the said board and the governor, an emergency exists and such action is justified and necessary for the safety and protection of the live stock of this state.

193. Co-operation with bureau of animal industry. Whenever there shall be an outbreak of any contagious or infectious disease among the domestic animals of the state of such a nature as to imperil the live stock of adjoining states, it shall be the duty of the state live stock board to notify the secretary of the United States department of agriculure and seek to co-oper-

ate in every way possible with the bureau of animal industry of that department in preventing the spread of the disease beyond the boundaries of this state, and in promptly eradicating the disease within the state.

194. Appraisement prior to destruction. Whenever the state live stock board shall find it necessary to condemn and destroy any animals or property within this state, because of any contagious or infectious disease, as provided herein, such animals or property shall not be destroyed until after a fair appraisement shall have been made of the value of such animals or property by three appraisers, one to be appointed by the state live stock board, one by the owner of the property to be destroyed and the third to be selected by these two. Said appraisers shall make a report to the said board, under oath, as to their appraisement, and the board shall forward such appraisement to the governor with its recommendation as to what proportion of such appraisement is considered by it a just bill against the state of Utah.

195. Right to make precautionary post-mortem examination. Quarantine by national board. Report to state officers. Whenever the state live stock inspector, or any veterinary surgeon acting under his orders, shall find indications of any contagious or infectious disease among any domestic animals in this state, and such inspector or veterinarian is unable to determine positively the actual nature of such disease, he shall have the power to order one or more of the animals so inspected slaughtered, so that a post-mortem examination may be made to determine the exact nature of the disease.

Whenever any member of the state live stock board, or any deputy inspector employed by it, or any veterinarian acting under its order, or any inspector or agent of the bureau of animal industry of the United States department of agriculture, shall find positively or shall have good reason to believe that any disease investigated by him is contagious or infectious, and that any animals are likely to communicate such disease to other animals, he shall have the power at once to establish a quarantine over such animals and premises and to take such action as he may deem necessary to prevent the spread of such contagion or infection, in accordance with the rules and regulations of the board, and shall promptly report these actions to the state live stock board, and any violation of such quarantine or sanitary measure or order of the state live stock inspector, or his deputy acting under his orders, shall be considered the same as a violation of any rule or order of the state live stock board.

196. Importation certificates. Exceptions. It shall be unlawful for any person to bring into this state any cattle for dairy or breeding purposes, except when said cattle are accompanied by a certificate from a state or federal inspector, certifying that they have been examined and subjected to the tuberculin test within forty days prior to their shipment into this state, and are free from tuberculosis and every other contagious or infectious disease; *provided*, that the provisions of this chapter shall not apply to what is known as range cattle or branded cattle raised in pasture or open range. Any transportation company which shall accept shipment of any live stock without certificate of health accompanying the bill of lading shall be deemed guilty of a misdemeanor.

197. Examination of milch cows. Tuberculin tests. Every person who sells milk to a dairy, and every person engaged in the dairy business in this state, shall cause every cow milked by him to be examined and subjected to the tuberculin test by a competent person under the direction of the state inspector or an inspector of the United States bureau of animal industry to ascertain if any such cows are infected with tuberculosis, but no fees shall be charged therefor.

198. Regulations governing range cattle. It shall be unlawful for any person, persons, firm, or corporation or their agents or employes to bring or cause to be brought in any manner whatsoever into this state strictly range cattle unless they are accompanied by a health certificate showing the said

cattle to be free from contagious, infectious, or communicable disease or exposure thereto, the certificate to be rendered in such form and manner as may be provided in the rules and regulations of the state live stock board.

199. Reimbursements for condemned animals. Wherever animals are condemned and slaughtered, as provided in §§ 197 and 224, the owners of such animals, desiring to be reimbursed therefor, must present their claims to the state live stock board within ninety days from the date on which such animals were killed, and the said board shall, within a reasonable time thereafter, pass upon the said claim and transmit the same to the state board of examiners with a recommendation as to the sum, if any, which should be paid upon such claim, and in all cases where animals are slaughtered or property destroyed, as provided in §§ 194, 196, 197 and 224, the said board of examiners may pay for said property a reasonable compensation, to be paid out of the state bounty fund; *provided,* that the said board of examiners shall not allow or pay on any one claim more than $1000, but if, in the opinion of the board of examiners, the owner is entitled to compensation over and above this sum, such claim in excess of said sum of $1000 shall be transmitted by the governor to the next session of the legislature, with his recommendation as to the payment of such excess.

200. Health certificates for imported swine. It shall be unlawful for any corporation, co-partnership, association, person, or persons to import swine into the state for any purpose other than immediate slaughter, unless they be accompanied by a health certificate of inspection issued by a state or federal inspector, showing them to be free from all contagious, infectious, or communicable diseases, and that hog cholera or swine plague was not known to exist in the immediate neighborhood from which the shipment originated, within a period of six months prior to the date of shipment.

201. Transportation of hogs. It shall be unlawful to ship, trail, drive, or otherwise move or allow to stray or drift, any hogs from a quarantined area established under this chapter, except in accordance with rules and regulations of the board; and it shall be unlawful to ship, trail, drive, or otherwise move or allow to drift from one point in the state to another point in the state, any hogs affected with or exposed to hog cholera or swine plague or other contagious or infectious disease, except in accordance with the rules and regulations of the board.

202. Disinfection of cars. It shall be unlawful for any person, firm, corporation, railroad company, or operator of a railroad to load or cause to be loaded into any car or cars any hogs for shipment into or within the state of Utah, except those for immediate slaughter, until said cars shall have been cleaned and disinfected in accordance with the rules and regulations of the board.

203. Board to make rules for co-operation. The state live stock board shall be authorized and empowered to make and enforce such rules and regulations that shall be deemed necessary to co-operate with the bureau of animal industry, United States department of agriculture, in order to control or eradicate hog cholera or any other contagious or infectious disease among swine or other live stock.

204. Railroad stockyards infectious. All railroad stockyards shall be considered as infectious territory, and all hogs, except those for immediate slaughter, shall be unloaded in chutes in some section of the yards which has been thoroughly cleaned and disinfected in accordance with the rules and regulations of the board and kept clean and disinfected, for the reception of all hogs other than those for immediate slaughter.

205. All stockyards at market centers infectious. All stockyards at market centers shall be considered as infectious territory, and at all points of destination for all hogs, except those for immediate slaughter, there shall be provided for the unloading of such hogs a portion or section of the yards and

chutes which shall be kept cleaned and disinfected in accordance with the rules and regulations of the board.

206. Hogs transported within state treated as interstate shipments. All hogs, except those for immediate slaughter, which are being shipped from one section or portion of the state of Utah to another section or portion of the state, when passing through public stockyards or market centers, shall be treated and handled as in this chapter specified for interstate shipments.

207. Disposition of dead infected swine. Any person, persons, firm, or corporation owning or having charge of any swine which have died of hog cholera, or other contagious, infectious, or communicable disease, shall, within twenty-four hours from the death of such animal, dispose of the carcass of such animal by burying or burning or in such other manner as may be provided in the rules and regulations of the state live stock board.

Removal and burial of animals, §§ 106-109.

208. Duration of quarantine. All hogs, except those for immediate slaughter, upon arrival at destination shall be by the consignee kept in some clean or disinfected place away from all other hogs for a period of eighteen days from the date of arrival at destination, and the state live stock inspector shall be notified by the owner or consignee of such date of arrival and the date of releasing said hogs from confinement.

209. (36, 37.) State recorder of marks and brands. Auxiliaries. The clerk of the state live stock board is hereby made ex officio state recorder of marks and brands. There shall be an auxiliary office in every county other than that in which the general office is located, and the duties of such auxiliary office are hereby devolved upon the county clerks of the counties respectively.

210. (38.) Marks and brands. Duty of inspector. Fees. Whenever any person wishes to obtain a recorded mark or brand, application therefor may be made to the state live stock board directly or through the auxiliary office of the county in which the applicant resides, and it shall be the duty of the state live stock inspector to designate the mark or brand to be used by such applicant, and to define the place or position it shall occupy on the animals, consulting always the choice or convenience of the applicants, as far as may be, without interfering with previously recorded marks or brands; *provided,* that no brand shall be recorded by the connecting of any letter, figure, sign, or character to a brand heretofore recorded; *provided, further,* that if a character is wanted for which there is no type, the applicant shall pay the extra expense therefor. A fee of $1 shall be collected for each mark or brand so recorded.

211. (39.) Records and certificates. The secretary of the state live stock board shall keep a record of all marks and brands, with the names and residences of the persons owning the same, in a book suitable for the purpose, which shall be free to the inspection of all persons interested; and he shall furnish to the owners certified copies of all marks or brands, which certificates shall be deemed evidence in law.

A sheep brand required under this section is not prima facie evidence of ownership in the person procuring the record, on an issue of ownership.
Smith et al. v. Cummings et al., 39 U. 306; 117 P. 38.

212. (40.) Publication of lists. Distribution. The secretary of the state live stock board shall prepare, on or before the 1st day of October of each year, a list of all recorded marks and brands which have not been previously published, and he shall cause a thousand copies of the same to be printed at public expense, in pamphlet or other convenient form for distribution. Immediately after publication he shall gratuitously distribute to the sheriffs and county clerks of the various counties in the state a sufficient number of copies to supply the said sheriffs and county clerks and the constables in said counties, and shall hold for sale and shall sell at a uniform price to be fixed by the board of examiners the remaining copies at not more than 25 per cent in addition to the price per copy paid for printing and binding.

Am'd '01, p. 65; '03, p. 14.

213. (41.) Duties of auxiliary offices. Fees. Clerks of auxiliary offices shall receive and forward to the secretary of the state live stock board all applications for recording marks and brands, and shall furnish to each applicant the secretary's certificate of the mark or brand designated and recorded for him, for which service a fee of 50 cents, in addition to the secretary of the live stock board's fee, shall be collected. It shall be the duty of the county clerks to distribute gratuitously to the officers in each county mentioned in § 210 the printed copies of the recorded marks and brands, and all such printed copies shall be deemed the property of the several officers, respectively, and shall be delivered by them to their successors in office.

Fee for recording brands, § 210.

214. (42.) Use of like brands prohibited. Any person using a like brand in the position and place recorded to another shall be deemed guilty of a misdemeanor.

Penalty for altering mark or brand, § 8448.

215. (43.) Re-recording marks and brands. All owners of live stock within the state shall, within one year from May 15, 1911, and every ten years thereafter, send in to the recorder of marks and brands, for re-recording, all recorded marks and brands used by them.

216. (44.) Id. No fee. The recorder of marks and brands shall, for the said period of one year, receive for record, free of charge, all marks and brands heretofore recorded in his office and shall re-record the same.

217. (45.) Compilation. Distribution and sale of copies of records. The recorder of marks and brands shall, after re-recording said marks and brands, collate, compile, and index in a record of suitable size, all such marks and brands, and shall furnish the county clerks of the various counties in the state with sufficient copies of said records for the use of such clerks and constables in said counties, and shall hold for sale and shall sell at a uniform price to be fixed by the board of examiners the remaining copies at not less than 25 per cent in addition to the price per copy paid for printing and binding; *provided,* that the state board of examiners may, if in its judgment the best interest of the state may be subserved thereby, let the publication of said records of marks and brands to the lowest responsible bidder, who shall be permitted to sell said books at a uniform price, not to exceed the sum of $2.50 per copy. Am'd '01, p. 65.

218. (46.) Recording after one year. After the expiration of one year, as provided in § 216, the recorder of marks and brands shall proceed to record further marks and brands submitted for record, as provided by law. All marks and brands heretofore recorded not re-recorded, as provided in the four next preceding sections, are hereby declared obsolete and their record null and void.

219. Transportation by common carriers. It shall be unlawful for any railroad company or other common carrier to receive for transportation, or transport from any quarantined area of this state into or through an unquarantined area, or receive for transportation or transport within any quarantined area of this state, any animals subject to such quarantine, or as a connecting carrier knowingly to receive without the quarantined area any such animals from any quarantined area and to transport the same within this state. Nor shall any corporation, co-partnership, association, person, or persons deliver to any railway company or common carrier any such animals for any such transportation, nor shall any corporation, co-partnership, association, person, or persons drive on foot or cause to be driven, or transport or cause to be transported in any manner, any animal subject to quarantine from any quarantined area of this state into or through any unquarantined area thereof, nor permit any such animal to go, stray, or drift from any such quarantined area; *provided,* that the state live stock board may, if considered necessary by it, temporarily suspend the provisions of this section.

220. Notice of foot and mouth disease. Duties of registered veterinarians. Every owner of live stock, and every breeder or dealer in live stock, and every one bringing live stock into the state shall, on perceiving the appearance of symptoms of aphthous fever, or foot and mouth disease, among the live stock owned by him or under his care, give immediate notice to the state live stock board of the facts discovered by him as aforesaid; and any owner of live stock who shall fail to make report as herein provided shall forfeit all claim for indemnity for animals slaughtered in accordance with the provisions of this chapter, and no such indemnity shall be granted to him. Every veterinarian registered to practice in the state in accordance with §§ 6185-6198, shall, immediately upon discovering symptoms of aphthous fever, or foot and mouth disease, in any live stock, report the facts so discovered to the state live stock sanitary board; and failure to make such report without delay shall be cause for revocation of his right to practice as a veterinarian in the state.

221. Experiments for extermination of predatory animals and control of rabies. The board is hereby authorized and empowered to conduct experiments as to the best means and methods to be employed in the extermination of predatory wild animals, either by baiting, trapping, or otherwise; and to take such measures as it shall deem necessary for the control of rabies among coyotes and dogs, and for the eradication of coyotes, lynx, wolves, panthers, mountain lions, bear, prairie dogs, as well as rabbits and other rodents, and to engage and to employ the necessary assistants in such work. The board is further authorized to purchase poisons and other materials in bulk to be used by the employes of the board and under its direction and supervision in the eradication of said animals.

Preventing spread of animal diseases, §§ 150-156. State bounty fund, § 435.

222. Acceptance of rules governing national bureau of animal industry. The governor is hereby authorized to accept, on behalf of the state, the rules and regulations prepared by the secretary of agriculture, under and in pursuance of the acts of congress for the establishment of the bureau of animal industry, for the prevention and regulation of the exportation of diseased cattle, for the suppression and extirpation of pleuro-pneumonia and other contagious diseases in domestic animals, for establishing or maintaining quarantine districts, or any other acts of congress relating to the diseases, movement, quarantine, or other regulations of cattle, sheep, hogs, horses, or other domestic animals.

223. Rights and privileges of inspectors for the bureau of animal industry. The inspectors for the bureau of animal industry for the United States department of agriculture, under the joint supervision of the state live stock board and the chief of the bureau of animal industry of the United States government, shall have the right of disinfection, inspection, immunizing, testing, quarantine, and condemnation, slaughter and disposal of animals affected or infected with any contagious, infectious, or communicable disease, or suspected to be affected, or that have been exposed to any such disease; and for this purpose said inspectors and all inspectors of the state live stock board are hereby authorized and empowered to enter upon all grounds and premises in this state where animals are kept. Said inspectors, state or federal, shall have the power to call on sheriffs, constables, and peace officers to assist them in the discharge of their duties in carrying out the provisions of the said acts of congress referred to in § 222, and the rules of the department of agriculture made thereunder, and the provisions of this chapter, and the rules of the state live stock board, and it is hereby made the duty of sheriffs, constables, and peace officers to assist said inspectors, when so requested, and the said inspectors shall have the same powers and protection as peace officers while engaged in this state in the discharge of their duties under this chapter and under the said acts of congress.

224. State board to furnish blanks, forms, and tags. The state live

stock board is hereby empowered to supply, at the expense of the state, blank forms for all reports, certificates, labels, or signs required by the provisions of this chapter, and to supply to the sheriff of each county of the state all necessary tags for tagging hides as herein provided.

225. Enforcement of statutes relating to inhumane treatment. It is hereby made the duty of the board to enforce the laws and statutes of this state relating to the inhumane and cruel treatment of any and all live stock.

Cruelty to animals, §§ 8387, 8388, 8416-8427.

226. Duties of state chemist. It shall be the duty of the state chemist to make examinations of all tissues, grasses, water, or samples of any substances which are submitted to him by the board, or do anything of a pathological nature where it is necessary to make a diagnosis of diseases among live stock.

227. Offices and business hours of board. The state live stock board shall occupy quarters in the capitol building of the state of Utah, where their general offices shall be kept open from 9 a. m. until 5 p. m. daily, Sundays and holidays excepted.

228. Payment of counties for services of sheriffs. There shall be paid to each county of the state, out of the moneys herein appropriated, a reasonable amount for the services of the sheriff in making the inspections required by this chapter, such amount to be determined by the state live stock board, according to the number of inspections made and the distances traveled, and paid annually.

229. Appropriation. For carrying out the provisions of this chapter there is hereby appropriated from any funds in the state treasury not otherwise appropriated the sum of $30,000; *provided,* that the expenses incurred in the administration of the state bounty fund shall be defrayed out of said bounty fund.

State bounty fund, § 435.

230. Punishment as to persons. If any natural person or persons shall in any way violate any of the provisions of this chapter, or the rules or regulations of the state live stock board, and no punishment for such violation is herein specifically prescribed, such person or persons shall be punished by a fine of not less than $100 nor more than $1000 each, or by imprisonment in the county jail not to exceed six months, or by both such fine and imprisonment.

231. Punishment as to corporations. If any corporation shall in any way violate any of the provisions of this chapter, or the rules and regulations of the board, and no punishment for such violation is herein specifically prescribed, it shall be punished by a fine of not less than $100 nor more than $5000.

TITLE 4.

APPRENTICESHIP.

260. (74.) Who may be bound. Contract. Any minor child may be bound to service until the attainment of the age of legal majority. Such binding must be by written indenture, specifying the terms of agreement, age of the minor, if known, and shall, moreover, be signed by the minor if over twelve years of age. Nothing herein shall be so construed as to prevent the district court from binding out any idle, vicious, or vagrant minor child without his or her consent or the consent of the parent or guardian of such minor child, if such parent or guardian neglects, refuses, or otherwise fails in properly controlling the actions and education of such minor, and does not train him or her up in some useful vocation.

To barbers, §§ 360, 371, 373.

Inmates Industrial School may be bound, § 5373.

261. (75.) Duty of county commissioners. It is hereby made the duty of the county commissioners to look after and take notice of all such cases, and whenever they shall find a child incorrigible and the parents unable, unwilling, or negligent, as hereinbefore mentioned, to bring the matter to the attention of the district court.

262. (76.) Relation of master and apprentice. The powers, liabilities, and duties of the master and the rights of the apprentice are the same as those of parent and child respectively, except as to inheritance, and except as is otherwise provided by law.

263. (77.) Interests of minor. The parent, guardian, or officer, by whose act or consent any minor is thus bound, must watch over the interests of the minor so bound, and take measures for his or her relief whenever circumstances shall justify or the true interest of the minor shall require it.

264. (78.) Ill-treatment. Discharge. Compensation. If the master shall ill-treat his apprentice, or in any manner palpably fail in the discharge of his duties in regard to said apprentice, the apprentice may be discharged from further service, and may recover damages and compensation for services.

265. (79.) Duty of master. Misbehavior of apprentice. It shall be the duty of the master to correct and teach such minor child to observe the principles of good order and industry, and train him or her to some useful vocation. And it is hereby made the duty of such minor to observe obedience to, and respect for, the requirements of the master. But if the apprentice, bound as aforesaid, shall refuse to serve according to the terms of the indenture, or grossly misbehave, and the master shall be incapable or unable to influence or control such apprentice, he may be discharged from further obligations or liability, at the discretion of the court; and in the event of a discharge, the apprentice shall receive such allowance for the service previously rendered as may be considered just under the circumstances.

266. (80.) Dissolution of contract. The death of the master, or his removal from the state, works a dissolution of the indenture, unless otherwise provided therein, or unless the apprentice shall elect to continue in his service.

267. (81.) Foreign indenture. Any person, apprentice, or servant, who shall have so elected or agreed to render service in any other state, territory, or country, shall come under the same regulations and requirements as herein provided; all such agreements or indentures for service being held as inviolate and binding as if they had been entered into and executed within this state.

268. (82.) Vicious parents. Duty of court. If from habitual intemperance and vicious and brutal conduct, or from vicious, brutal, and criminal conduct towards a child, the parent of the same shall be considered an unsuitable person to retain the guardianship or control the education of the child, the judge of the district court may appoint a suitable person to be the guardian of such child, and may, if deemed expedient, also cause said child to be bound as an apprentice to some suitable person, during his or her minority. Nothing herein shall be so construed as to permit the taking of such child if either the father or mother be a proper guardian.

269. (83.) Schooling and clothing. The master shall send the apprentice to school as provided by law, and at all times and in all cases shall clothe the apprentice in a comfortable and becoming manner.

Compulsory education, § 4740-4742.

TITLE 5.

ARCHITECTURE.

('11, p. 244.)

275. State board of architecture created. Qualifications. Terms. Vacancies. There is hereby created a board consisting of five members, which shall be styled and known as the state board of architecture of the state of Utah, and within thirty days after the passage of this act the governor of this state shall, by and with the consent of the senate, appoint five persons who are to be members of said board. Each of said persons so appointed shall be architects residing in the state of Utah who have been engaged in the practice of architecture in said state for at least five years. Two of said persons so appointed shall be designated by the governor to hold office for two years from the date of the passage of this title, and two of said persons so appointed shall be designated by the governor to hold office for four years from the date of the passage of this title, and one of said persons so appointed shall be designated by the governor to hold office for six years from the date of the passage of this title. And thereafter, upon the expiration of the term of office of any person so appointed, the governor of the state shall appoint his successor, whose term of office shall be six years, or until his successor is appointed and qualified. All persons appointed under this title after the year 1911 shall have the above specified qualifications, and shall also be duly licensed under this title. Any vacancy occurring in the membership of the board shall be filled by the governor of the state for the unexpired term of the membership. Members of the board shall serve without compensation from the state; said board shall have power to sue and be sued in its official name, and to employ legal counsel and clerical assistance, and all money received under this title may be applied in defraying the expenses incurred by said board either in the employment of legal counsel or clerical assistance or in any other manner whatsoever.

276. Oath of office. Organization. Bond of treasurer. Each member of the state board of architecture shall, before entering upon the discharge of his duties, qualify by making and filing with the secretary of state an oath of office that he is, and for five years next prior to the making of said oath has been, a bona fide resident of the state of Utah, and is, and for more than five years next prior to the making of said oath has been, actually engaged in the practice of architecture, and that he will support the constitution of the United States and the constitution of the state of Utah, and will discharge the duties of his office with fidelity. The said board shall, within thirty days from and after the appointment of its members, meet and elect from their number a president, and a secretary who shall also act as treasurer of said board. The said president, secretary and treasurer shall hold said offices for two years, or until their successors have been duly elected and qualified. The treasurer, before entering upon his duties, shall file a bond with the secretary of state for the sum of $500, to be approved by said secretary of state, conditioned to faithfully account to said board for all moneys received by him under and by virtue of this title. The board shall adopt rules and regulations not inconsistent with this title to govern its proceedings, and shall also adopt a seal with which it shall attest its official acts. The secretary shall have the care and custody thereof, and he shall keep a record of all the proceedings of the board which shall be open at all times to public scrutiny, and the board shall cause the prosecution of all persons violating the provisions of this title.

277. Quorum. Rules and regulations. Three members of the board shall constitute a quorum for the transaction of business, and any member of the board shall have authority to administer oaths, and the board shall have authority to take testimony in all matters relating to the duties of the board. The board shall adopt rules and regulations for the examination of applicants for licenses to practice architecture in accordance with the provisions of this

title, and may amend and repeal such rules and regulations from time to time. Said board shall, upon the election of each officer thereof, and upon the amendment, repeal, or modification of its rules and regulations for the examination of applicants for licenses, file with the secretary of state a copy of such rules and regulations, or the amendments, repeal, or modification thereof.

278. Examinations. Applicants. Fee. Provisions shall be made by the board hereby created for holding examinations at least four times in each year for applicants for licenses to practice architecture, and any person of good moral character over the age of twenty-one years, upon payment of an examination fee of $15 to the secretary of the board, shall be entitled to an examination for determining his or her qualifications. All examinations must be made directly by said board, or by a committee of two of its members delegated by said board. Said examination shall have special reference to the construction of buildings, and a test of the knowledge of the candidate of the strength of materials, and of his or her ability to make practical application of such knowledge in the ordinary professional work of an architect, and in the duties of a supervisor in mechanical work on buildings, and shall also seek to determine his or her knowledge of the laws of sanitation as applied to buildings. If the result of the examination of any applicant shall be satisfactory to four members of the board under its rules and regulations, the secretary of the board shall, upon its order, and upon payment to the secretary of the board by the candidate of a license fee of $10, issue to said candidate a license to practice architecture in this state in accordance with the provisions of this title, which license shall contain the full name of the applicant, and shall state that the said person is duly authorized to practice architecture in this state in accordance with the provisions of this title. Said license shall be signed by the president and secretary of the board, and sealed with its seal. All papers received by the secretary in relation to applications for licenses shall be kept on file in his office, and a proper index and record thereof shall be kept by him.

279. When license may be granted without examinations. Any person of good moral character who shall, by affidavit, show to the satisfaction of the said board hereby created that he or she was engaged in the practice of architecture in the state of Utah on the date of the passage of this title, shall be granted by the board a license, without passing any examination, upon payment to the secretary of said board of a license fee of $10; *provided, however,* that such application shall be made within three months from the date of the passage of this title. The license granted under the provisions of this section shall contain the full name of the applicant, and shall state that said person is duly authorized and licensed to practice architecture in this state in accordance with the provisions of this title, and shall be signed by the president and secretary of the board, and sealed with its seal.

280. License to be recorded. Fee. Every licensed architect shall have his or her license recorded in the office of the county recorder in the county wherein said architect resides, and shall pay to the recorder for recording the same the sum of $1. The county recorder shall keep in a book kept for that purpose a record of all licenses so recorded, and the same shall be open for public inspection the same as other public records. Until such license of any architect is recorded, as herein provided, the holder thereof shall not exercise any of the privileges conferred herein to practice architecture.

281. Seal. Description. Every licensed architect shall have a seal, the impression of which shall contain the name of the architect and the words "licensed architect, state of Utah," with the name of the county of his residence, and said architect shall affix said seal to all drawings, plans, and specifications prepared by him.

282. "Practicing architecture" defined. Any person shall be regarded as practicing architecture within the meaning of the provisions of this title who shall plan or supervise the erection, enlargement, or alteration of any building

for another after having received, or with the intent to receive therefor, either directly or indirectly, any fee, compensation, or other pecuniary benefit or consideration; or who shall hold himself out by means of signs, cards, advertisements, or otherwise as an architect; *provided,* that nothing in this title shall be construed to prevent draftsmen, students and other employes or those lawfully practicing architecture under licenses as herein provided for, from acting under the instruction, control and supervision of their employers; and *provided,* that nothing in this title shall be construed to prevent superintendents of buildings, employed and paid by the owners, from acting under the control and direction of licensed architects; and *provided, further,* that nothing in this title shall prevent any person from making plans for his own buildings, or from furnishing plans or other data for the buildings of other persons, or from supervising the construction, erection, enlargement, or alteration of buildings for other persons, *provided,* that the person so furnishing such plans or data, or so supervising the erection, enlargement, or alteration of such buildings shall fully inform the person for whom said plans or data are furnished and for whom the said work of supervision is done that he, the said person furnishing said plans and data or performing the said work of supervision, is not a licensed architect.

283. Revocation of license. An architect's license obtained in accordance with the provisions of this title shall remain in full force until revoked for cause as in this title provided. Whenever any architect, is guilty of unprofessional conduct, as the same is defined in this title, then the license of said person shall be revoked by the court in the manner herein provided. In such proceeding the person making the charge shall be complainant and the person charged shall be defendant, and a sworn complaint shall be filed with the secretary of the board charging the accused with having been guilty of unprofessional conduct and setting forth the acts constituting such conduct. On the filing of such complaint, the secretary of the board must forthwith issue a summons. Said summons shall notify the accused of the time and place when and where the charges contained in the complaint shall be heard, and shall have attached thereto a copy of the complaint and the facts certified to the district court. Proceedings for such revocation or cancellation shall be conducted in the manner provided by law for proceedings in civil cases, except as in this title provided. The state board of architecture of the state of Utah shall be plaintiff and the person charged shall be defendant in any such proceeding. The complaint in said proceeding shall be in writing, certified by the oath of one of the members of the board, or by any person having knowledge of the facts constituting the unprofessional conduct, and praying a decree of the court canceling or revoking the certificate or license of the defendant. When, after trial, the defendant is found guilty as charged, or when, upon his default, which may be entered as in civil cases, *provided,* the facts stated in the complaint constitute unprofessional conduct as defined in this title, then in either such case the court must decree a cancellation or revocation of the certificate or license of the defendant. Upon entry of such judgment and decree, it shall be the duty of the secretary of the said board of architecture to file a certified copy of said judgment and decree with the county recorder of the counties in which the certificate of the defendant is recorded, and said recorder must thereupon write upon the margin of the record of said certificate of said defendant the following:

"This certificate was revoked and canceled by a decree of the district court of.....county, Utah, on the.....day of.....," giving the day, month, and year of such revocation by said court, together with the county wherein said decree was made and entered by said district court.

284. "Unprofessional conduct" defined. The words "unprofessional conduct," as used in this title, are hereby defined to mean any of the following acts or omissions:

1. Lending his name to be used as a licensed architect by another person who is not a licensed architect;

2. Conviction of a felony or misdemeanor involving moral turpitude, in which case the record of conviction is conclusive evidence;

3. Having a pecuniary interest in the performance of the contract for the work designed, planned, or supervised by him without the knowledge and consent of the person employing him;

4. Receiving from the contractor working under him any pay or commission or other pecuniary benefit except with the knowledge and consent of the owner erecting or altering the building;

5. The procuring of any contract in the practice of his profession through fraudulent representations;

6. The failure to exercise reasonable care or skill in this profession, either in planning the erection or construction or alteration of buildings or in the supervising of the same;

7. Dishonest acts done by him in the practice of his profession;

8. Wilfully misleading or defrauding any person employing him as an architect by any artifice or false statement.

285. Notice to be given by non-licensed architects. Any person who furnishes plans or other data for the erection, enlargement, or alteration of any building, or who supervises the work to be done upon any building, who is not licensed under the provisions of this title, shall not recover any compensation for the services rendered by him unless he shall, before entering upon the performance of such services, fully inform the person to whom the same is rendered that he is not a licensed architect.

286. Benefits of lien laws restricted. The benefits and privileges of the lien laws of this state in so far as they apply to architects are hereby restricted to architects who shall comply with the provisions of this title.

Architect's lien, § 1372.

287. Meetings of board. The board hereby created shall meet on the first Monday in January, April, July, and October of each year at 10 o'clock a. m., and at such other times as the president of the board shall deem necessary. The place of meeting shall be at the state capitol.

288. Removal. Any member of said board may be removed for misconduct in office by a two-thirds vote of all members of the board, but no member shall be removed before he has been given a trial before said board.

289. Annual license fee. Penalty for delinquency. No person shall continue to practice under this title after the 1st day of July, A. D. 1912, unless such person shall pay to the secretary of the board hereby created an annual license fee in the sum of $5. Said fee herein provided for shall be due and payable to the secretary at his office on the 1st day of July, A. D. 1912, and on the 1st day of July in each and every year thereafter, and when paid, the secretary shall issue to the person paying such fee an annual license authorizing him or her to practice architecture in this state for the period of one year. Such license shall contain the name of the person paying the fee, and shall state that said person has paid his or her annual license fee required by virtue of this section. Any person who is required to pay the license fee herein provided for, who shall refuse or neglect to pay the same on or before noon of the 1st day of September following the 1st day of July, when said fee is payable, shall be deemed to be delinquent, and for said delinquency there shall be added to the amount of the license fee a penalty of $5, and unless said fee and penalty shall be paid on or before the 1st day of December following, the delinquent person shall, by reason of such delinquency, forfeit his right to practice architecture within this state, and the secretary of the board shall, on or before the 15th day of January of each year, enter upon his records the cancellation and revocation of all delinquent persons, and shall serve notice upon the county recorder of the county wherein the license is recorded that

the licenses of such delinquent persons have been by the state board of architecture duly revoked for non-payment of the annual license fee, and upon receipt of such notice the county recorder shall, in his records, make note of such revocation.

TITLE 6.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

295. (84.) Insolvent debtor may assign. Transfer to creditor. An insolvent debtor may, in good faith, execute an assignment of property to one or more assignees, in trust for the benefit of creditors, in conformity with the provisions of this title; *provided,* that nothing herein contained shall affect the power of a person, although insolvent and whether residing within or without this state, to transfer property in this state in good faith to a particular creditor for the purpose of paying or securing the whole or a part of a debt owing to such creditor.

Mont. Civ. C. §§ 4510*, 4512*; Cal. Civ. C. § 3449.

The rule of the common law permitting insolvent debtors, whether individuals or corporations, to prefer creditors, is impregnable in this state, and cannot be overthrown, except by legislative enactment.

Wyeth Co. v. James-Spencer-Bateman Co., 15 U. 110; 47 P. 604.

Passow v. Wetherbee, — U. —; 167 P. 350.

An insolvent debtor at common law may assign a part or the whole of his property for the benefit of his creditors and may prefer the one creditor or class of creditors over others equally meritorious.

Wyeth Co. vs. James-Spencer-Bateman Co., 15 U. 110; 47 P. 604.

A corporation is an artificial person, and has the same power as a natural person, in the absence of statutory restrictions, to prefer creditors that are not its officers or agents.

Id.

An assignee for the benefit of creditors succeeds only to such rights as the assignor had at the time of the assignment, and acquires no title to property held under contract of conditional sale when the condition is unperformed.

Lippincott v. Rich, 19 U. 140; 56 P. 806.

In a general assignment for the benefit of creditors, the title to all real or personal property vests in the assignee whether mentioned in the schedule or not.

Snyder v. Murdock, 20 U. 419; 59 P. 91.

An officer of a corporation has no inherent power, by reason of his office, to make a general assignment of the property of the corporation. Such power rests only in the board of directors duly assembled.

Cupit v. Park City Bank, 20 U. 292; 58 P. 839.

Where both parties act in good faith, the execution of a mortgage by an insolvent corporation to a minority stockholder for money loaned to be applied by corporation to payment of current debts, and a subsequent foreclosure by the stockholder, is not an unlawful preference; the trust fund theory not prevailing.

Callahan v. Pioneer Nurseries Co., 49 U. 541; 164 P. 878.

This chapter is merely directory and does not forbid an insolvent debtor making a valid assignment in conformity to the rules of the common law.

Utah Assn. Credit Men v. McConnell, 50 U. —; 167 P. 817.

An assignment under which all creditors participate without compliance with the statute is valid.

Id.

296. (85.) Wages a preferred claim. In all assignments for the benefits of creditors, statutory or otherwise, or trusteeship agreements, wages not to exceed $400 to each claimant owing to workmen, clerks, traveling or city salesmen, or servants of the assignor for services or labor rendered or performed within five months next previous to the assignment are preferred claims, and must be paid before any other creditor of the assignor, and shall be paid in full in all cases where there is sufficient property therefor, otherwise they alone shall be paid pro rata; *provided, however,* that no officer or general manager of a corporation nor any member in an association or partnership making an assignment or trusteeship agreement shall be entitled to the preference herein provided. Am'd '13, p. 26.

Mont. Civ. C. § 4514*.

Wages preferred in similar cases, § 3684.

297. (86.) Preferences to joint and to individual creditors. Joint, or joint and several, debtors can prefer their joint creditors only out of joint property; and can prefer the individual creditors of each only out of the separate property of each.

Mont. Civ. C. § 4517; Cal. Civ. C. § 3451*.

An assignment by a partnership which prefers the creditors of the individual partners, such creditors having loaned money to the individual partners knowing that both were insolvent at the time, is fraudulent in fact.

Smith v. Sipperley, 9 U. 267; 34 P. 54.

Where partners agreed that the joint property should belong to one of them, he to assume the partnership debts, such agreement, if bona fide and for a valuable consideration, would be a valid transfer to the succeeding partner, and his right thereunder to assign for the benefit of creditors of the firm, in the

absence of fraud, even though preference were made to the wife of the assignor, who was a bona fide creditor of the firm, could not be disputed.

Douglass v. Alder, 13 U. 303; 44 P. 706.

The right of a partnership to assign the firm's assets without including the individual property of each partner, under §§ 2471 and 2472, C. L. U. 1888, includes the right of the creditor to proceed against the individual property of the parties composing the partnership, when the partnership property shall prove insufficient to pay the firm debts, and is reconcilable with the provisions of § 2470, C. L. U. 1888.

Wilson v. Sullivan, 17 U. 341; 53 P. 994.

298. (87.) Assignment void in what cases. An assignment for the benefit of creditors is void against any creditor of the assignor not assenting thereto in the following cases:

1. If it gives a preference dependent upon any condition or contingency, or with any power of revocation reserved;

2. If it tend to coerce any creditor to release or compromise his demand;

3. If it provide for the payment of any claim known by the assignor to be false or fraudulent, or for the payment of more upon any claim than is known to be justly due from the assignor;

4. If it reserve any interest in the assigned property, or in any part thereof, to the assignor or for his benefit, before all his existing debts are paid;

5. If it confer upon the assignee any power which, if exercised, might prevent or delay the immediate conversion of the assigned property to the purposes of the trust; *provided*, that the assignment may provide reasonable terms and manner of sale to be carried out only so far as practicable and not prejudicial to the interests of the estate, in the discretion of the court.

Mont. Civ. C. § 4518*; Cal. Civ. C. § 3457*.

Preferring a bona fide creditor of the partnership, who is a brother of one of the partners, is not in itself fraudulent.

Pettit v. Parsons, 9 U. 223; 33 P. 1038.

Where an assignment is attacked on the ground of fraud in fact, the acts complained of must affect the assignment and be participated in by the assignee.

Id.

Where a voluntary deed of assignment prefers the assignee to a large amount, when in fact he was not a creditor of the insolvent corporation, it voids the deed entirely, nothwithstanding the assignee did not participate in the fraud.

Coblentz v. Driver Mercantile Co., 10 U. 96; 37 P. 242.

Smith v. Sipperley, 9 U. 267; 34 P. 54.

The preference in a deed of assignment to one who was not a creditor of the corporation assignor, but who merely loaned money to a director, who loaned it to the corporation, was fraudulent.

Noble Mercantile Co. v. Mt. Pleasant Co-operative Ass'n, 12 U. 213; 42 P. 869.

The corporation's deed of assignment, wherein the directors, who were general creditors, preferred themselves over other creditors whose claims are equally meritorious, is void.

Id.

Deeds of assignment giving authority to the assignee to sell upon credit are fraudulent and void as to creditors not consenting thereto.

Beus v. Shaughnessy, 2 U. 492.

Lippincott v. Rich, 19 U. 140; 56 P. 806.

An assignment which provides that the assignees "out of the proceeds of the personal property will pay," etc., and that the assignees accept the trust and "agree to execute the same by disposing of the property and collecting the choses in action due the assignor and applying the proceeds to the payment of debts," etc., is not void as authorizing expressly a sale upon credit.

Sprecht v. Parsons, 7 U. 107; 25 P. 730.

There is no objection to the validity of an assignment, made in anticipation on the part of the assignor of the immediate issue of an attachment against his property.

Billings v. Parsons, 17 U. 22; 53 P. 730.

The assent of creditors to an assignment made for their benefit is not necessary to the validity of the assignment.

Id.

A fraudulent intent on the part of the debtor alone is not sufficient to avoid an assignment for the benefit of creditors, when no preferences are made, and where neither the assignee nor assignor participated in the fraud.

Id.

Preferring a banker to other creditors, in absence of statutory restrictions and insolvent laws, unless there is express proof of fraud participated in by assignee, will not invalidate assignment.

Burnham v. McCornick, 18 U. 42; 55 P. 77.

Where a person was a director and stockholder of a corporation which assigned its property for the benefit of creditors, and also a director and stockholder in a bank which was made a preferred creditor, and voted in favor of such preference, the double relation would not make the assignment void when the same result would have been reached had he refrained from voting.

Colorado F. & I. Co. v. Western H. Co., 16 U. 4; 50 P. 628.

The fact that a director and stockholder wrongfully appropriated funds of a corporation cannot render an assignment fraudulent unless such fraud was connected with the assignment and the assignee or one or more of the creditors participated in it.

Natl. Bank Rep. v. Scott, 18 U. 400; 55 P. 374.

A court of equity may set aside an assignment for any of the reasons mentioned in the statutes or recognized as sufficient by the rules of equity.

Id.

A corporation assignment which prefers bona fide idebtedness evidenced by notes upon which a minority stockholder and officer was an accommodation indorser, is not in violation of the statute and does not constitute fraud in law.

Wells, Fargo & Co. v. Scott & Co., 18 U. 127; 55 P. 81.

It is proper for a corporation to prefer indebtedness evidenced solely by individual note of a stockholder and director, where the money was borrowed for the corporation and it received the benefit thereof.

Wells, Fargo & Co. v. Scott & Co., 18 U. 127; 55 P. 81.

Natl. Bank Rep. v. Scott, 18 U. 400; 55 P. 374.

If a creditor accepts benefit of an assignment, knowing the facts, he cannot repudiate it thereafter on the ground that it is illegal and fraudulent; nor can he, hav-

ing repudiated it, take under its provisions as other creditors who have accepted it.
McLaughlin v. Park City Bank, 22 U. 473; 63 P. 589.

Where a corporation receives the exclusive benefit of the money borrowed for it on the endorsement of one of its directors, a corporate mortgage, given to secure the estate of such director who paid, is not a giving of unlawful preference to the corporate director.
Kurtz v. Ogden Canyon, 37 U. 313; 108 P. 15.

299. (88.) Assignment to be in writing. Contents. Recording. Every such assignment shall be by an instrument in writing, setting forth the name of the assignor, his residence and business, the name of the assignee and his residence and business, and in a general way describing the property assigned, with its location, and stating the purpose of the assignment. It shall be executed and acknowledged in the manner prescribed for the execution and acknowledgment of deeds, and recorded in the office of the recorder of the county where the property assigned is located. The assignor shall annex to such instrument an inventory, under oath, of his estate, real and personal, according to the best of his knowledge, and a list of the creditors, and the amount of their respective demands; but such inventory shall not be conclusive as to the amount of the debtor's estate, and such assignment shall vest in the assignee the title to any other property belonging to the debtor at the time of making the assignment, except property exempt from execution and insurance upon the life of the assignor, unless the instrument mentions such exempt property and insurance, and declares an intention of the assignor that they shall pass thereby. As soon as such instrument is recorded, it shall be filed, with the inventory and list of creditors, in the office of the clerk of the district court of the county in which the property so assigned is located; as shall also all subsequent papers connected with such proceedings.

Iowa, McClain's An. C. (1888) § 3294*; Cal. Civ. C. § 3458*.
Where a general assignment for the benefit of creditors contains, under provisions of this section, a general description of property assigned, and, in terms, embraces all the property of assignors, it is so far in compliance with the statute.
Snyder v. Murdock, 20 U. 407; 59 P. 88.

300. (89.) Inventory. Bond. The assignee shall forthwith file with the clerk of the district court of the county where the property assigned is located, a true and full inventory and valuation of said estate, under oath, so far as the same has come to his knowledge, and shall then enter into bonds to the state, for the use of the creditors, in double the amount of the inventory and valuation, with one or more sureties, to be approved by said clerk, for the faithful performance of said trust; and the assignee may thereupon proceed to perform any duty necessary to carry into effect the purpose of said assignment.

Iowa, McClain's An. C. (1888) § 3295*; Cal. Civ. C. § 3461*.

301. (90.) Notice of assignment. The assignee shall forthwith give notice of such assignment by publication in some newspaper in the county, and if none, then in a newspaper having general circulation therein, which notice shall be published at least once a week for six weeks, and shall forthwith send a notice by mail to each creditor of whom he shall be informed, directed to his usual place of residence, requiring such creditor to present to him within three months thereafter his claims, under oath.

Iowa, McClain's An. C. (1888) § 3296*.
A sufficient notice to attaching creditors is given, under provisions of this section, and §§ 301 and 4875, by giving such creditors personal notice of the assignment and mailing to each of them a notice thereof, recording the deed as soon as the property of the assignors is discovered in an adjoining county, and the publication of notice to creditors in the county where assignors reside.
Snyder v. Murdock, 20 U. 407; 59 P. 88.

302. (91.) Filing claims. The claims of all creditors, clearly and distinctly stated and sworn to by the claimant, or by some person acquainted with the facts, shall be filed with the assignee within three months of the date of the first publication provided for in the preceding section, unless the court extends such time for all or some of such claimants, which it may do in its discretion where peculiar circumstances seem to justify such extension, but in no case shall such extension be extended beyond nine months.

303. (92.) Assignee's report. At the expiration of three months from the time of first publishing notice, the assignee shall report and file with the clerk of the court a true and full list, under oath, of all such creditors of the

assignor as shall have claimed to be such, with a statement of their claims, an affidavit of publication of notice, and a list of the creditors, with their places of residence, to whom notice has been sent by mail, and the date of mailing the same.

Iowa, McClain's An. C. (1888) § 3297*.

304. (93.) Contesting claim of creditor. Any person interested may appear within one month after such report is filed and contest the claim or demand of any creditor by written exceptions thereto filed with the clerk, who shall forthwith cause notice thereof to be given to the creditor, which shall be served as in case of a summons and returnable at a time to be named therein, not less than ten nor more than forty days; at which time the court shall proceed to hear the proofs and allegations of the parties in the case and render such judgment thereon as shall be just.

Iowa, McClain's An. C. (1888) § 3298*.

305. (94.) Taxes a prior claim. In all assignments of property for the benefit of creditors, assessments thereof, or taxes levied thereon, whether under the laws of the state or ordinances of municipal corporations, shall be entitled to priority, and paid in full by the assignee, and claims therefor need not be filed with him.

Iowa, McClain's An. C. (1888) § 3308*.

306. (95.) Dividends to creditors. If no exception is made and filed to the claim, other than of the class mentioned in § 296, of any creditor, or if the same has been adjudicated, the court shall order the assignee to make, from time to time, fair and equal dividends among the creditors of the assets in his hands in proportion to their claims, and according to the preferences or classes, if any, named in the assignment, and, as soon as may be, render a final account of said trust to said court. If, upon making the final dividend to the creditors, the assignee shall be unable, after reasonable efforts, to ascertain the place of residence of any creditor, or any person who is authorized to receive the dividend due him, he shall report the same to the court, with evidence showing diligent attempts to find such creditor or person authorized to receive the dividend, whereupon the court may, in its discretion, order the distribution of the unclaimed dividend among the other creditors.

Iowa, McClain's An. C. (1888) §§ 3299*-3301*.

307. (96.) Assignee under supervision of court. Disposal of property. The assignee shall at all times be subject to the order and supervision of the court or judge, and, from time to time, may be compelled, by citation or attachment, to file reports of his proceedings and of the situation and condition of the trust, and to proceed in the execution of the duties required by this title; and he shall dispose of all personal property and divide the proceeds of the same among the creditors as they may be entitled thereto within six months from the date of the assignment, unless further time be given for good cause by the court, and shall dispose of real estate within one year from such date, and make full settlement by that time, unless the court or judge, for good reason shown, shall extend the time therefor.

Iowa, McClain's An. C. (1888) § 3302*.

Assignee of choses in action may collect debts and give remittances even though the deed of assignment contains no power of attorney.

Wilson v. Sullivan, 17 U. 341; 53 P. 994.

An assignee, having sufficient funds, who refuses to pay a preferred claim, renders himself liable to an action for an accounting and to enforce payment.

Utah Natl. Bank v. Forbes, 18 U. 225; 55 P. 61.

308. (97.) Want of inventory. Effect. Examination of debtor. No assignment shall be declared fraudulent or void for want of any list or inventory, as provided in this title. The court or judge may, upon application of the assignee or any creditor, compel the appearance in person of the debtor before such court or judge forthwith, or at the next term, to answer under oath such matters as may be inquired of him, and such debtor may be fully examined under oath as to the amount and situation of his estate, and the names of the creditors and amounts due to each, with their places of residence, and may be compelled to deliver to the assignee any property or estate embraced in the assignment.

Iowa, McClain's An. C. (1888) § 3303.

309. (98.) Additional inventory. Additional property. The assignee shall, from time to time, file with the clerk of the court an inventory and valuation of any additional property which may come into his hands under said assignment after the filing of the first inventory, and the clerk or the judge of the district court may thereupon require him to give additional security.

Iowa, McClain's An. C. (1888) § 3304.

310. (99.) Debts not matured. Delay in filing claims. Any creditor may claim debts to become due, as well as debts due, but on debts not due a reasonable rebate shall be made when the same are not drawing interest, and all creditors who shall not file their claims within three months from the publication of notice, as aforesaid, shall not participate in the dividends until after the payment in full of all claims presented within said term, and allowed by the court, unless the court has extended the time for filing such claims.

Iowa, McClain's An. C. (1888) § 3305.

311. (100.) Sales. Confirmation. The assignee may dispose of and sell all the estate assigned, real and personal, which the debtor had at the time of the assignment, may sue for and recover in his own name everything belonging or appertaining to said estate, and generally do whatever the debtor might have done in the premises, but no sale of real estate belonging to said trust shall be made without notice, published as in case of sales of real estate on execution, unless the court or judge shall otherwise order, and no such sales shall be valid until approved by the court or judge.

Iowa, McClain's An. C. (1888) § 3306*.

A sale of personal property to an innocent purchaser by an assignee under a deed not void upon its face, in the absence of fraud, is valid.

Ogden Paint & O. Co. v. Child, 10 U. 475; 37 P. 734.

A preferred creditor who has accepted a benefit under a void assignment may levy an execution upon a subsequent judgment upon property conveyed by the assignee; and a sale under such execution will not be enjoined at the instance of a judgment creditor who had never assented to the assignment and had never levied execution upon such property.

Id.

312. (101.) Removal of assignee. Upon a written application of a majority of the creditors in amount, the court shall remove the assignee and appoint in his stead a person approved by the creditors in the same number and amount, and the person so removed shall immediately turn over to the clerk of the district court, or any person appointed by the court, all money and property of the estate in his hands.

Iowa, McClain's An. C. (1888) § 3295*.

313. (102.) Death or neglect of assignee. If an assignee dies before the closing of his trust, or in case any assignee shall fail or neglect, for the period of twenty days after the making of any assignment, to file an inventory and valuation, and give bond as required in this title, the district court or any judge thereof of the county where such assignment may be recorded, on the application of any person interested, shall appoint some person to execute the trust, who shall, on giving bond with sureties as required of an assignee, have all the powers of the assignee first appointed, and be subject to all the duties hereby imposed. If it is shown to the court at any time that the assignee is guilty of wasting or misapplying the trust fund, he may be removed, and a successor appointed in the same manner.

Iowa, McClain's An C. (1888) § 3307.

314. (103.) Commissions to assignee. In the absence of any provision in the assignment to the contrary, an assignee for the benefit of creditors is entitled to the same commissions as are allowed by law to executors and administrators as compensation in full for all services.

Mont. Civ. C. § 4533*.

315. (104.) Power of judge in vacation. Any judge of the district court in vacation shall have power, in cases under this title, to issue citations and attachments, remove assignees, order the sale of personal or real property, approve sales or deeds thereof, direct the making of dividends, allow compensation to assignees and to counsel employed by them in the management of assigned estates, and do any and all other acts provided for in this title that the court may do when in session.

Powers of judge out of court, §§ 1679, 1817.

TITLE 7.

ATTORNEYS AND COUNSELORS.

316. (105.) Who may be admitted. Any citizen of the United States, or person who has bona fide declared his or her intention to become one, in the manner required by law, of the age of twenty-one years, of good moral character, and who possesses the necessary qualifications of learning and ability, is entitled to admission as an attorney and counselor in all the courts of this state.

317. (106.) Qualifications. Every applicant for admission as an attorney and counselor must produce satisfactory testimonials of good moral character, and, except as hereinafter provided, must either:

1. Have had a preliminary education other than legal, and have regularly and attentively studied law for a period of at least three years, and have passed a satisfactory examination upon the principles of common law, equity, criminal law, and the statutes and practice of this state; or,

2. Be a regular graduate of the law school of the University of Utah.

Am'd '15, p. 17.

318. (107.) License to practice. If the applicant is found qualified, the court shall admit him as an attorney and counselor in all the courts of this state, and, upon payment of the fee prescribed by law, shall direct an order to be entered to that effect upon its records, and that a certificate of such record be given to him by the clerk of the court, which certificate is his license.

Am'd '15, p. 17.

319. (108.) Court may establish rules. The supreme court may establish rules for the admission of attorneys and counselors, not inconsistent with the provisions of this title, and for the examination of applicants as hereinbefore provided. Am'd '15, p. 17.

320. (109.) Admission of attorneys of other states. The examination as hereinbefore provided may be dispensed with in the case of a person who has been admitted as an attorney and counselor in the highest court of any other state, or of any territory, and his license or a certified copy thereof showing the state or territory, the name of the court, and the time when such admission was obtained, together with a certificate from the highest court of the state in which the applicant last practiced law to the effect that he is of good moral character, shall be deemed sufficient to entitle him to admission.

Am'd '15, p. 17.

321. (110.) Oath. Every person, on his admission, must take an oath to support the constitution of the United States, and the constitution of this state, and to faithfully discharge the duties of an attorney and counselor to the best of his knowledge and ability.

322. (111.) Roll. The clerk of the supreme court must keep a roll of the attorneys and counselors admitted to practice, which must be signed by each person admitted before he receives his license.

323. (112.) Practicing without license. If any person shall practice law in any court except a justice's court, without having a license as attorney and counselor, he is guilty of a contempt of court.

Who may act as attorneys in justices', city, and municipal courts, § 7438.

324. (113.) General duties. It is the duty of an attorney and counselor:

1. To support the constitution and the laws of the United States and of this state;

2. To maintain the respect due to the courts of justice and judicial officers;

3. To counsel or maintain no other actions, proceedings, or defenses than those which appear to him legal and just, excepting the defense of a person charged with a public offense;

4. To employ, for the purpose of maintaining the causes confided to him, such means only as are consistent with truth, and never to seek to mislead the judges by any artifice or false statement of fact or law;

5. To maintain inviolate the confidence, and, at every peril to himself, to preserve the secrets of his client;

6. To abstain from all offensive personality, and to advance no fact prejudicial to the honor or reputation of a party or a witness unless required by the justice of the cause with which he is charged;

7. Not to encourage either the commencement or continuance of an action or proceeding from any corrupt motive of passion or interest;

8. Never to reject, for any consideration personal to himself, the cause of the defenseless or the oppressed.

Although the law makes it the duty of the U. S. district attorney to appear for the U. S., there is no incompatibility between such officer's appearing and acting in the litigation for the plaintiff, the government, and at the same time for the receiver.

U. S. v. The Church, 6 U. 44; 21 P. 503.

Under subs. 2, 4, and 6 of this section, an attorney, as a party to an action, is prohibited from knowingly making defamatory charges against a judge.

Morrison v. Snow, 26 U. 247; 72 P. 924.

In re Snow, 27 U. 265; 75 P. 741.

325. (114.) Deceit or collusion. Penalty. An attorney and counselor who is guilty of deceit or collusion, or who consents thereto with intent to deceive a court or judge or a party to an action or proceeding, is liable to be disbarred, and shall forfeit to the injured party treble damages, to be recovered in a civil action.

Iowa, McClain's An. C. (1888) § 290.

326. (115.) Authority of. An attorney and counselor has authority:

1. To execute, in the name of his client, a bond or other written instrument necessary and proper for the prosecution of an action or proceeding about to be or already commenced, or for the prosecution or defense of any right growing out of an action, proceeding, or final judgment rendered therein;

2. To bind his client in any of the steps of an action or proceeding, by his agreement filed with the clerk, or entered upon the minutes of the court, and not otherwise;

3. To receive money claimed by his client in an action or proceeding, during the pendency thereof, or after judgment, unless a revocation of his authority is filed, and upon payment thereof, and not otherwise, to discharge the claim or acknowledge satisfaction of the judgment.

Iowa, McClain's An. C. (1888) § 291*.

When the record shows that a defendant appeared by his attorney, such record is conclusive of the appearance, but only prima facie evidence of the authority, of the attorney to act. Such authority may be denied and rebutted by proof. And if without authority the judgment will not be allowed to stand, and the defendant will not be left to his remedy against the attorney.

Blyth & Fargo Co. v. Swenson, 15 U. 345; 49 P. 1027.

Where attorney is employed merely to straighten out an account, the relation of attorney and client, in ordinary acceptation of the term, does not exist.

Burraston v. Bank of Nephi, 22 U. 328; 62 P. 425.

On appeal by one defendant, a stipulation attached to the bill of exceptions, signed by appellant's counsel and also by the attorney who appeared for plaintiff and for appellant's co-defendants, was binding as to such co-defendants, although it did not in terms stipulate for them.

Walker Bros. v. Skliris, 34 U. 353; 98 P. 114.

Where a stipulation purports to be signed by the appellee's attorney, and there is nothing in the record which shows his repudiation of either the stipulation or signature, and nothing to show that he did not sign it, unless the court should take judicial notice that the signature is not in his handwriting, it is binding on him.

Id.

An oral stipulation to extend time for filing an answer which is not made a matter of record is of no legal effect.

McWhirter v. Donaldson, 36 U. 293; 104 P. 731.

327. (116.) Attorney must show authority. The court may, on motion of either party and on the showing of reasonable grounds therefor, require the attorney for the adverse party, or for any one of the several adverse parties, to produce or prove by his own oath or otherwise the authority under which he appears; and until he does so, may stay all proceedings by him on behalf of the parties for whom he assumes to appear.

Iowa, McClain's An. C. (1888) § 292.

328. (117.) Change of attorneys. The attorney in any action or special proceeding may be changed at any time before judgment or final determination, as follows:

1. Upon his own consent, filed with the clerk or entered upon the minutes;

2. Upon the order of the court or judge thereof upon the application of the client, after notice to the attorney.

The court will not, by an order of substitution, aid a litigant in perpetrating a wrong upon its own officer, but will withhold such order until reasonable compensation for services rendered and proper expenses are paid or secured to the attorney.

Sandberg v. Victor M. Co., 18 U. 66; 55 P. 74.

329. (118.) Notice of change. When an attorney is changed, as provided in the next preceding section, written notice of the change and of the substitution of a new attorney or of the appearance of the party in person, must be given to the adverse party; until then he must recognize the former attorney.

330. (119.) Substitution of attorneys. When an attorney dies, or is removed, or suspended, or ceases to act as such, a party to an action or proceeding for whom he was acting as attorney must, before any further proceedings are had against him, be required by the adverse party, by written notice, to appoint another attorney or to appear in person.

331. (120.) Removal and suspension. An attorney and counselor may be removed or suspended by the supreme court, and by the district courts, for any of the following causes, arising after his admission to practice:

1. His conviction of felony or misdemeanor, involving moral turpitude, in which case the record of conviction is conclusive evidence;

2. Wilful disobedience or violation of an order of the court requiring him to do or forbear an act connected with or in the course of his profession, and any violation of the oath taken by him or of his duties as such attorney and counselor;

3. Corruptly or wilfully and without authority appearing as attorney for a party to an action or proceeding;

4. Lending his name to be used as an attorney and counselor by another person who is not an attorney and counselor;

5. For any other act to which such a consequence is by law attached.

In all cases where an attorney is removed or suspended by a district court, the judgment or order of removal or suspension may be reviewed on appeal by the supreme court.

Judgment upon conviction, § 343.

Cited in: In re Marsh, 42 U. 186; 129 P. 411.

Champerty renders an attorney amenable to the summary jurisdiction of the court, notwithstanding it may be effectual as a defense to the enforcement of a contract.

In re Evans & Rogers, 22 U. 366; 62 P. 913.

The summary proceeding of disbarment is civil, not criminal but requires more than a preponderance of the evidence. The guilt of the attorney must be clearly established.

Id.

Under provisions of this section, the supreme court has power to revoke the license of an attorney violating the provisions of the statute regulating attorneys and counselors.

Morrison v. Snow, 26 U. 247; 72 P. 924.

An attorney may allege in his pleadings any facts pertinent to the case which, if proved, would entitle him to relief, and he will be protected even though he should fail in making his proof to substantiate them, but the protection thus accorded him cannot be used as a shield to protect him in making false, scandalous, and defamatory charges against a court or judicial officer.

In re Snow, 27 U. 265; 75 P. 741.

Contract of an attorney with his client to purchase pending litigation from his client held not sufficient to warrant disbarment.

In re Jones, 29 U. 333; 81 P. 162.

An agreement to prosecute a cause for a contingent fee and to advance the client costs and expenses, under the promise of the client to repay the same, is not champerty.

In re Evans et al., 42 U. 282; 130 P. 217.

Attorney, convicted of want of honesty and integrity, should be disbarred rather than suspended.

In re Platz, 42 U. 439; 132 P. 390.

Acts done by an attorney before being admitted to the bar, although not directly connected with his practice, but which tend to show a lack of integrity, are nevertheless material and relevent in disbarment proceedings, if offered in connection with acts of such attorney affecting his integrity occurring after his admission to practice.

In re Platz, 42 U. 439; 132 P. 390.

The legislature cannot limit the courts in their right to determine the moral qualifications of attorneys or prevent them from refusing to admit morally unfit persons to the practice of the law.

In re Platz, 42 U. 439; 132 P. 390.

In re Hilton, 48 U. 172; 158 P. 690.

The court may disbar an attorney when he forfeits his claim to good moral character by misconduct of a nature rendering him unfit to be continued in office.

In re Hilton, 48 U. 172; 158 P. 690.

An attorney may publicly or privately criticize the decision of the court, pointing out wherein he deems it defective, and may state that it should not be final, but he cannot slander or defame the court, and if he does, he is subject to discipline and disbarment.

In re Hilton, 48 U. 172; 158 P. 690.

An attorney employed to defend a criminal goes to the office of the chief of police and secures a bundle containing clothes worn by the deceased at the time of the murder, and

is taken in custody as he is leaving with it by a rear alley. While not conduct calling for disbarment, was reprehensible, and the attorney was suspended for sixty days and ordered to pay costs of the proceeding.
In re Hanson, 48 U. 163; 158 P. 778.

332. (121.) Conviction of crime. In case of the conviction of an attorney or counselor of a felony or misdemeanor, involving moral turpitude, the clerk of the court in which such conviction is had must, within thirty days thereafter, transmit to the supreme court a certified copy of the record of conviction.

333. (122.) Proceedings for removal or suspension. Proceedings to remove or suspend an attorney and counselor under the first subdivision of § 331 must be taken by the court on the receipt of a certified copy of the record of conviction. Proceedings in other cases may be taken by the court for matters within its knowledge, or may be taken upon the information of another.

334. (123.) Id. Accusation, when in writing. If the proceedings are upon the information of another, the accusation must be in writing.

335. (124.) Id. Accusation, how stated. The accusation must state the matters charged and be verified by the oath of some person to the effect that the charges therein contained are true. An oath upon information and belief shall be sufficient. Am'd '15, p. 17.

336. (125.) Id. Citation to accused. After receiving the accusation, the court must make an order requiring the accused to appear and answer it at a specified time in the same or a subsequent term, and must cause a copy of the order and of the accusation to be served upon the accused at least ten days before the day appointed in the order.

337. (126.) Appearance. The accused must appear at the time appointed in the order and answer the accusation, unless for sufficient cause the court assign another day for that purpose. If he do not appear, the court may proceed and determine the accusation in his absence.

338. (127.) How to answer. The accused may answer to the accusation either by objecting to its sufficiency or by denying it.

339. (128.) Demurrer. Denial. If he object to the sufficiency of the accusation, the objection must be in writing, but need not be in any specific form, it being sufficient if it presents intelligibly the grounds of the objection, If he deny the accusation, the denial may be oral and without oath, and must be entered upon the minutes.

340. (129.) Answer after demurrer. If an objection to the sufficiency of the accusation be not sustained, the accuser must answer within such time as may be designated by the court.

341. (130.) Plea. Trial. If the accused plead guilty, or refuse to answer the accusation, the court must proceed to judgment of removal or suspension. If he deny the matters charged, the court must, at such time as it may appoint, proceed to try the accusation.

To authorize the disbarment of an attorney, the charges should be clearly sustained by convincing proof and a fair preponderance of the evidence, but the technical nicety of the criminal law is not applicable where the court is inquiring into the conduct of its own officers.
In re Hanson, 48 U. 163; 158 P. 778.

342. (131.) Reference. The court may, in its discretion, order a reference to a committee to take deposition in the matter.

The findings of a referee appointed by the supreme court in a disbarment proceeding are, in a large sense, merely advisory, and the court can modify any finding or make new ones to conform to the evidence as it views it.
In re Hanson, 48 U. 163; 158 P. 778.

343. (132.) Judgment. Upon conviction, in cases arising under the first subdivision of § 331, the judgment of the court must be that the name of the party be stricken from the roll of attorneys and counselors of the court, and that he be precluded from practicing as such attorney or counselor in all the courts of this state; and, upon conviction in other cases, the judgment of the court may be, according to the gravity of the offense charged, deprivation of the right to practice as an attorney or counselor in the courts of this state permanently, or for a limited period.

Decisions on judgment in disbarment cases. Note to § 331.

A court of general and superior jurisdiction permanently disbarring an attorney has power to entertain an application for reinstatement for any reason satisfactory to it.

In re Evans, et al., 42 U. 282; 130 P. 217.

344. (133.) Attorney as surety. No practicing attorney and counselor shall become a surety in any civil or criminal action, suit, or proceeding which may be instituted in any of the courts of this state, in which he is engaged as attorney.

An attorney cannot act as an attorney and a surety in the same action.

McWhirter v. Donaldson, 36 U. 293; 104 P. 731.

345. (134.) Sheriffs, etc., not to practice. Partners. Sheriffs, county clerks, and constables, and their deputies, are prohibited from practicing law or acting as attorneys and counselors in the counties where they reside and hold office, or from having as a partner an attorney and counselor or any one who acts as such.

346. (135.) Compensation. Lien. The compensation of an attorney and counselor for his services is governed by agreement, express or implied, which is not restrained by law. From the commencement of an action, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action or counterclaim, which attaches to a verdict, report, decision, or judgment in his client's favor and the proceeds thereof in whatsoever hands they may come; and cannot be affected by any settlement between the parties before or after judgment.

N. Y. Civ. Proc. § 66.

Attorney's fee on foreclosure, § 7237; in suits for wages, § 3687; in action to enforce lien, § 3750; in action to compel cancellation of mortgage, § 4907; in action for divorce, § 2998; in action for separate maintenance, § 3010; in action on bond for public work, § 3755; on appeal from industrial commission, § 3148.

Compensation of attorneys left to agreement of parties, § 7035.

Champerty, penalty, note to § 331.

Five thousand dollars is a proper allowance to the principal attorney for the receiver, where the amount involved is over $700,000, for one year's services, and $4,000 is sufficient for his other attorney, who at the same time was U. S. district attorney and receiving a salary to represent the government.

U. S. v. The Church, 6 U. 72; 21 P. 516.

There is no attorney lien for fees on a cause of action before judgment.

Sandberg v. Victor M. Co., 18 U. 66; 55 P. 74.

Where a cause of action accrued and action was commenced before this section went into effect, it was error to instruct the jury that the statute applied to the case and gave attorneys a lien upon plaintiff's cause of action which attached to the verdict, decision, or judgment, which a settlement by plaintiff out of court and without his attorney's knowledge or consent could not affect; though, under the common law, the court has authority to set aside the satisfaction of a judgment collusively obtained in order to defraud plaintiff's attorneys of their fees.

Potter v. Ajax M. Co., 19 U. 421; 57 P. 270.

The provisions of this section are not retroactive and cannot affect a cause of action accruing before they became operative.

Id.

Statute allowing attorney's fee to lien claimant held unconstitutional as being a special law.

Brubaker v. Bennett, 19 U. 401; 57 P. 275.

Statute allowing attorney's fee to plaintiff in action to compel cancellation of mortgage held unconstitutional as being a special law.

Openshaw v. Halfin, 24 U. 426; 68 P. 138.

In proceedings against one for a contempt in violating an injunction restraining him from infringing a trade mark, it was proper on a finding for plaintiff to award him a reasonable attorney's fee.

Davidson v. Munsey, 29 U. 181; 80 P. 743.

Attorneys have a lien on the judgment for costs properly advanced by them.

Sandberg v. Victor M. Co., 18 U. 66; 55 P. 74.

Under this statute it was competent for attorney and client to agree that the attorney's compensation should be contingent upon success. It was not competent for the attorney, in consideration thereof, to agree to pay the fees and costs of suit, but one who was not a party to such contract has no right to question its validity.

Croco v. O. S. L. R. R. Co., 18 U. 311; 54 P. 985.

Kennedy v. O. S. L., 18 U. 325; 54 P. 988.

An agreement between attorney and client, whereby the attorney undertakes and agrees to furnish and pay all costs and expenses in a case which he is to prosecute, in consideration of a share in the proceeds of any judgment recovered, is champertous, against public policy, and cannot be enforced by either party.

Nelson v. Evans & Rogers, 21 U. 202; 60 P. 557.

Sec. 3683, C. L. U. 1888, modified the force and effect of the common law as to champertous contracts and left the mode and manner of compensation of attorneys to agreement between parties.

Potter v. Ajax M. Co., 22 U. 273; 61 P. 999.

An attorney has a lien on the cause of action only "from the commencement of an action."

Broadbent v. D. & R. G. R. R. Co., 48 U. 598; 160 P. 1185.

Where an attorney after judgment authorizes the judgment debtor to settle for the amount of the judgment with the attorney's client, and such settlement is made with the attorney's consent the attorney waives his right to a lien, and he is limited to a personal judgment against his client for his services.

Norton v. McInnch, 50 U. —; 166 P. 984.

347. (136.) Refusal of attorney to account. An attorney and counselor who receives money or property of his client in the course of his professional business, and who refuses to pay or deliver the same to the person entitled thereto within a reasonable time after demand, is guilty of a misdemeanor.

Iowa, McClain's An. C. (1888) § 302.

348. (137.) Disputed lien. Bond of client. When an attorney and

counselor claims to be entitled to a lien upon money or property of his client in his possession, he is not liable to the penalty of the next preceding section unless he neglects or refuses to pay or deliver such money or property to the person entitled thereto upon such person giving a bond with sufficient surety, to be approved by the clerk of the district court, conditioned for the payment of the amount of such attorney's claim when legally established.
Iowa, McClain's An. C. (1888) §§ 303*, 304*.

349. (138.) Id. Bond of attorney. Nor shall the attorney and counselor be liable as aforesaid if he shall give a sufficient bond, to be approved by the clerk of the district court, conditioned that he will pay or deliver the whole or any portion of such money or property to the claimant in the event such claimant shall finally establish his right thereto.
Iowa, McClain's An. C. (1888) §§ 303*, 304*.

TITLE 8.

BARBERS.

360. (138x.) Must obtain certificate of registration. Penalty. It shall be unlawful for any person to follow the occupation of a barber or a barber's apprentice, or to conduct a barber shop, barber school, or barber college in this state, unless he shall have first obtained a certificate of registration as provided in this title. A person so engaged less than six months shall be considered an apprentice, and at the expiration of six months of such employment shall be subject to the provisions of this title as hereinafter provided. No person practicing the occupation of a barber in any barber school or college in this state shall serve a person afflicted with erysipelas, eczema, impetigo, sycosis, tuberculosis, or any other contagious or infectious disease. Any person so afflicted is hereby prohibited from being barbered in any barber shop, barber school or college in this state. Any violation of this section will be considered a misdemeanor as provided for in this title. '03, p. 187; '07, p. 248.
Apprenticeship, §§ 260-269.

361. (138x1.) Board of examiners. A board of examiners, to consist of three persons, is hereby created to carry out the purposes and enforce the provisions of this title. The governor shall appoint, on or before the 1st day of May, 1903, one barber to serve one year, one qualified physician to serve two years, and one barber to serve three years, who, with their respective successors, to be appointed annually thereafter, and to serve for the term of three years, shall constitute a board of examiners of barbers, two of whom shall be practical barbers who have been actually engaged in the business of barbering for at least five years. '03, p. 188.

362. (138x2.) Bond and oath. Each member of said board shall give a bond in the sum of $500, with sureties, to be approved by the secretary of state, conditioned for the faithful performance of his duties, and shall take the oath provided by law for public officers. Vacancies in said board shall be filled by the governor for the unexpired portion of the term. '03, p. 188.

363. (138x3.) Officers. Said board shall elect a president, secretary, and treasurer, shall have its headquarters at such place in the state as the board may determine, and shall have a common seal. A majority of said board may, in meeting duly assembled, perform the duties and exercise the powers devolving upon said board under the provisions of this title. '03, p. 188.

364. (138x4.) Powers of board. Such board shall have power to adopt reasonable rules and regulations prescribing the sanitary requirements of a barber shop, barber school or college, subject to the approval of the state board of health, and to cause the rules and regulations so approved to be printed in a suitable form, and to transmit a copy thereof to the proprietor of each barber shop, barber school or college in this state.

It shall be the duty of every proprietor or person operating a barber shop, barber school or college in this state to keep posted in a conspicuous place in his shop, school or college, so as to be easily read by his customers, a copy of such rules and regulations. A failure of any such proprietor or manager to keep such rules so posted, or to observe the requirements thereof, shall be sufficient grounds for the revocation of his license, but no license shall be revoked without a reasonable opportunity being offered to such proprietor or manager to be heard in his defense. Any member of said board shall have power to enter and make examination of any barber shop, barber school or college in this state during business hours for the purpose of ascertaining the sanitary conditions thereof. Any barber shop, barber school or college in this state in which tools, appliances, and furnishings in use therein are kept in an unclean or insanitary condition so as to endanger health, is hereby declared to be a public nuisance, and the proprietor thereof shall be subject to prosecution and punishment therefor. Each member of said board shall have power to administer oaths, and the board may, at its discretion, appoint deputies who shall exercise the powers herein granted to said board, said deputies to serve without pay. '03, p. 188; '07, p. 244.

365. (138x5.) Compensation and expenses, how paid, report. Each member of said board shall receive a compensation of $4 per day for actual service, and 8 cents for each mile actually traveled in attending the duties of the board. All moneys received by said board as fees shall be paid into the state treasury at the close of each month, and shall be placed to the credit of the state board of barber examiners. All claims for expenses incurred by the board and for all salaries paid shall be submitted to the state board of examiners, and, if approved, shall be paid by the warrant of the state auditor out of any moneys on hand in the state treasury to the credit of the state board of barber examiners. But no claims shall be allowed or warrant issued in excess of the amount of fees on hand to the credit of said board. A detailed report of the fees collected, verified under oath, shall be filed with the state auditor and the state treasurer at the time fees are deposited with the state treasurer. Am'd '15, p. 22.

366. (138x6.) Board to report. Said board shall report annually to the governor a full statement of the receipts and disbursements of the board during the preceding year, a full statement of its doings and proceedings, and such recommendations as it may deem proper, looking to the better carrying out of the intents and purposes of this title. '03, p. 189.

367. (138x7.) Public examinations. Notice. Said board shall hold each year, at such times and places as it shall designate, at least four public examinations, notice whereof shall be given by publication at least ten days before the holding of any such meeting, in at least one newspaper printed and published in the city of Salt Lake, and in at least one newspaper printed and published in the county in which said meeting shall be held. Am'd '15, p. 23.

368. (138x8.) Barbers must file affidavit with secretary of board. Every person now engaged in the occupation of a barber in this state shall, within ninety days after March 25, 1907, file with the secretary of said board an affidavit setting forth his name, residence, and the length of time during which, and the place where he has practiced such occupation, and shall pay to the treasurer of said board $1, and a certificate of registration entitling him to practice said occupation thereupon shall be issued to him. '03, p. 189; '07, p. 245.

369. (138x9.) Other applicants. Qualifications. Fee. Any person other than those mentioned in § 368 desiring to obtain a certificate of registration under this title shall make application to said board therefor, and shall pay to the treasurer of said board an examination fee of $5, and shall present himself at the next regular meeting of the board for the examination of applicants, whereupon said board shall proceed to examine said person, and being satisfied that he is above the age of sixteen years, of good moral character,

free from contagious or infectious diseases; that he has either studied the occupation for six months as an apprentice under a qualified practicing barber, or that he has studied the occupation in a barber school or college, as defined by this title, for six months, or has practiced the occupation for at least six months and is possessed of a requisite skill in said occupation to properly perform all the duties thereof, including his ability in the preparation of tools, shaving, hair cutting, and a thorough knowledge of the sanitary requirements of a barber shop, barber school or college, and all the duties and services incident thereto, his name shall then be entered by the board in the register hereinafter provided for, and a certificate of registration shall be issued to him authorizing him to practice said occupation in this state; *provided*, that whenever it appears that the applicant has insufficient knowledge of the sanitary requirements of a barber shop, school, or college to prevent the spread of disease, the board may withhold from him a qualified barber certificate if it shall appear that he is not qualified to practice the said occupation.

'03, p. 189; '07, p. 245.

370. (138x10.) Barber school or college defined. A barber school or college is hereby declared to be a school or college conducted by suitable persons who are authorized to practice the occupation of a barber in this state, and in which all instruction is given by competent persons so authorized and in which the course and period of training shall comply with the rules and regulations of said board specifically adopted for the government of barber schools or colleges. '03, p. 190; '07, p. 246.

371. (138x11.) Apprentices. Nothing in this title shall prohibit any person from serving as an apprentice in said occupation under a barber authorized to practice the same under this title, nor from serving as a student in any school for the teaching of such occupation under the instruction of a qualified barber. '03, p. 190.

372. (138x12.) Id. Every apprentice, in order to avail himself of the provisions of this title, must file with the secretary of the board a statement in writing showing the name and place of business of his employer, the date of commencement of employment with him, and the full name and age of said apprentice, and shall pay to the treasurer of said board a fee of $1.

'03, p. 190; '07, p. 246.

Apprenticeship, §§ 260-269.

373. (138x13.) Board shall furnish a card or insignia. Said board shall furnish to each person to whom a certificate of registration is issued and to each registered apprentice a card or insignia bearing the seal of the board and the signature of its president and secretary, certifying that the holder thereof is entitled to practice the occupation of a barber's apprentice in this state, and it shall be the duty of the holder of such card or insignia to post the same in a conspicuous place in front of his working chair, where it may readily be seen by all persons whom he may serve. Said card or insignia shall be renewed on or before the 1st day of July of each year, and the holder of said certificate of registration or apprentice card shall pay to the secretary of said board the sum of $1 for such renewal card or insignia. Upon the failure of any holder of a certificate of registration or apprentice card to apply for a renewal of his card or insignia on or before the 1st day of July in each year, his said certificate or apprentice card may be revoked by said board, subject to the provisions of § 375. '03, p. 190; '07, p. 246.

374. (138x14.) Register to be kept. Said board shall keep a register, in which shall be entered the names of all persons to whom certificates are issued under this title, and said register shall be at all times open to public inspection. '03, p. 190.

375. (138x15.) Revocation of certificate. Reinstatement, when. Said board shall have power to revoke any certificate of registration granted by it under this title, for (a) conviction of crime; (b) habitual drunkenness; (c) gross incompetency; (d) the keeping of a shop, or the tools, appliances, or fur-

nishings thereof in an unclean and insanitary condition; (e) failure to comply with the requirements of § 373; *provided,* that before any certificate shall be revoked the holder thereof shall have notice in writing of the charge or charges against him, and shall have a reasonable opportunity to be heard in his defense; *provided, further,* that upon the revocation of any certificate, the holder thereof may appeal said matter to the district court of the county in which he resides, in the manner as is now or may hereafter be provided for appeals from justices' courts, and such laws are hereby made applicable. The secretary of said board shall send the files and a copy of the minutes in the matter before the board to the clerk of the district court of the county in which the appeal is taken, and such minutes and files shall constitute the records on appeal. Any person whose certificate has been revoked may, after the expiration of ninety days, apply to have the same regranted, and the same shall be regranted to him upon a satisfactory showing that the disqualification has ceased. Am'd '15, p. 23.

Appeals from Justice's Court, § 7514.

376. (138x16.) Violation a misdemeanor. Any person practicing the occupation of barber without having obtained a certificate of registration, as provided by this title, or employing a barber who has not such a certificate, or falsely pretending to be qualified to practice such occupation under this title, or for violating any of the provisions of this title, is guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than $10 nor more than $100, or by imprisonment in the county jail for not less than ten days nor more than ninety days. '03, p. 191.

TITLE 9.

BASTARDY.

('11, p. 84.)

380. Complaint to be made to justice of the peace. Warrant. When an unmarried female, pregnant or delivered of a child which by law will be deemed a bastard, shall make complaint to a justice of the peace within the county where she may be so pregnant or delivered, or where the person accused may be found, and shall accuse, under oath or affirmation, a person with being the father of such child, it shall be the duty of such justice to issue a warrant against the person so accused and cause him to be brought forthwith before him, or, in his absence, before any other justice of the peace in such county.

This act does not offend against Con. art. 6, sec. 23, prohibiting the passage of bills containing more than one subject, which shall be expressed in its title.
State v. Hammond, 46 U. 249; 148 P. 420.

This act is not invalid as a whole for failure to define bastardy or because the procedure to be followed is vague and uncertain.
State v. Reese, 43 U. 447; 135 P. 270.

This proceeding is civil, not criminal, hence the state is only required to establish accused's guilt by a preponderance of the evidence, and not beyond a reasonable doubt.
State v. Reese, 43 U. 447; 135 P. 270.

381. Examination of plaintiff. Rights of defendant. Upon his appearance, it shall be the duty of the county attorney to examine the woman upon oath or affirmation before the justice and in the presence of the man who is alleged to be the father of the child, touching the charge against him. The defendant shall have the right to controvert such charge, and evidence may be heard as in other cases. If the justice shall be of the opinion that there is probable cause to believe that the defendant is the father of such bastard, it shall be his duty to bind the defendant so accused with such sufficient surety, to appear before the district court and answer such charge, as in other cases. If the defendant shall neglect or refuse to give bonds as security as aforesaid, said justice shall cause such defendant to be committed to the jail of the county.

382. Information to be filed. In all cases of commitment under this title, an information shall be filed in the district court as in other cases.

Information, § 8779.

383. Continuance. Security for appearance. If the defendant plead not guilty to such information and the case be set for trial on the issue of fact, and if at the day appointed for such trial the woman be not delivered or be unable to attend, the court may continue the case, but shall require the defendant to give such security as the court may deem just to insure his presence to answer such information after the birth of the child; and if such mother be not able to attend on the day appointed, said security shall remain in full force until she is able to attend.

384. Mother and defendant competent witnesses. On the trial of every issue of fact as to the bastardy, the mother and defendant shall be admitted as competent witnesses, and the credibility shall be left to the jury.

The jury is entitled to consider prosecutrix's evidence in accordance with all the facts and circumstances of the case and determine its credibility under the same rules that apply to other witnesses; hence, it was not error to refuse to charge the jury to consider or weigh her testimony "with caution."

State v. Reese, 43 U. 447; 135 P. 270.

It was proper to show any acts of sexual intercourse during period of gestation and other acts within reasonable time before the act relied on may be shown as bearing upon the probability of intercourse at the time stated in the complaint.

State v. Hammond, 46 U. 249; 148 P. 420.

As against the prosecutrix, no act of sexual intercourse with others than defendant may be shown by cross-examination or otherwise, unless within the period of gestation.

Id.

Evidence by the prosecutrix as to conversations between her and defendant before he was arrested concerning their friendly relations is admissible, as are also letters from defendant to prosecutrix tending to show that they were lovers.

Id.

Where there is a square conflict in the testimony of accused and the prosecutrix, the jury is entitled to determine where the truth lies, and the prosecutrix's testimony does not need corroboration.

State v. Reese, 43 U. 447; 135 P. 270.

An instruction as to the form of verdict was not fatally defective which required the jury to find not only that accused was not the father of prosecutrix's child. but that he was not guilty of such sexual intercourse, in order to find for the defendant, where there was evidence of only one act of sexual intercourse.

State v. Reese, 43 U. 447; 135 P. 270.

State v. Hammond, 46 U. 249; 148 P. 420.

This proceeding being civil in character, it was not error for the court to refuse to submit the case to the jury on the theory that the prosecutrix was an accomplice and that her testimony with reference to the act of intercourse must be corroborated in order to convict.

State v. Reese, 43 U. 447; 135 P. 270.

Where there is a square conflict in testimony, error in requiring the witness, a married man, to answer a question whether he during the ride did not place his own arm around prosecutrix's sister, was prejudicial to the accused, as it might affect his credibility with the jury.

Id.

The sole issue is who is the father of the child in question, and other evidence of conduct of the parties occurring more than a year prior to the sexual intercourse in question is inadmissible.

Id.

Evidence to show accused's conduct and inclination towards prosecutrix for a reasonable time prior to the time in question is proper on cross-examination as showing a probability of intercourse alleged.

Id.

The state must prove, by a preponderance of the evidence, that accused had sexual intercourse with the prosecutrix within the period of gestation, and unless this is done, evidence of his conduct and that of prosecutrix outside of such period is irrelevant.

Id.

385. In case of acquittal woman to pay costs. If upon the trial of the issue aforesaid, the jury shall find that the child is not the child of the defendant or alleged father, then the judgment of the court shall be that the defendant be discharged. In such case the woman making the complaint shall pay the costs of the prosecution, and judgment may be entered therefor and execution issued thereon, as in other cases.

386. Penalty, if defendant be found guilty. Bond. In case the issue be found against the defendant or reputed father, or whenever he shall in open court have confessed the truth of the accusation against him, he shall be condemned by the order and judgment of the court to pay a sum of money not exceeding $200 for the first year after the birth of such child, and a sum not exceeding $150 yearly for seventeen years succeeding said first year for the support and maintenance and education of such child; and shall, moreover, be adjudged to pay all the costs of the prosecution, for which costs execution shall issue as in other cases, and the said reputed father shall be required by said court to give bond with sufficient security, to be approved by the judge thereof, for the payment of such sum of money as shall be awarded by said court as aforesaid, which said bond shall be made payable to the state of Utah, conditioned for the due and faithful payment of said yearly sum in equal

quarterly instalments to the clerk of said court; and the said bond shall be filed and preserved by the clerk of said court.

This provision is not unreasonable and is enforcible.
State v. Reese, 43 U. 447; 135 P. 270.
Before fixing the amount defendant is compelled to contribute toward the support and education of the child, the court should carefully inquire into the financial standing and ability of both the father and the mother and fix such a sum as under all the circumstances may be just and reasonable, not exceeding the statutory limit.
State v. Hammond, 46 U. 249; 148 P. 420.
State v. Reese, 43 U. 447; 135 P. 270.

387. Defendant failing to give security must be committed to jail. In case the defendant shall refuse or neglect to give such security as will be ordered by the court, he shall be committed to the jail of the county, there to remain until he shall comply with such order, or until otherwise discharged in due course of law. Any person so committed may be discharged for insolvency or inability to give bond, provided that such discharge shall not be made within one year after such commitment.

The provision requiring that an insolvent shall remain in jail a year before discharged was unreasonable and grossly oppressive, and for that reason void, but the invalidity thereof does not affect the balance of the act, and hence an insolvent so convicted, on proving his inability to perform judgment, should not be incarcerated in the first instance, or, if he had been incarcerated, he should be discharged without reference to the period of his imprisonment.
State v. Reese, 43 U. 447; 135 P. 270.

388. Disposition of money. The money, when received, shall be laid out and appropriated for the support of such child in such manner as shall be directed by the court, but when a guardian be appointed for such bastard, the money arising from such bond shall be paid over to such guardian.

389. Default in payment of instalments. Procedure. Whenever default shall be made in the payment of a quarterly instalment or any part thereof mentioned in the bond provided for in the foregoing section, the judge of the district court for the county wherein such bond is filed, shall, at the request of the mother, guardian, or any other person interested in the support of such child, issue an order to show cause to the principal and sureties of said bond, requiring them to appear on the day named in said order, and show cause, if any they have, why execution should not issue against them to the amount of the instalment or instalments due and unpaid on said bond, and that such order to show cause may be served by the sheriff or any constable within the county in which such principal or surety resides or may be found, and such service shall be made at least five days before the return day named in such order. If the amount due on such instalment or instalments shall not be paid before the time mentioned in such order to show cause, the said court shall render judgment in favor of the state against the principal and the sureties who have been served with such order for the amount unpaid on the instalment or instalments due upon the said bond, together with the costs of such proceeding, and execution shall issue therefor against the judgment debtors as in other cases, for the amount of said judgment and costs.

390. Reputed father guilty of contempt, when. Any judge shall have power, in case of default in the payment, when due, of any instalment or instalments thereof, according to the condition of the said bond, to adjudge the reputed father of such child guilty of contempt by reason of non-payment of any instalment or instalments aforesaid, and may order such defendant to be committed to the jail of the county until the amount of such instalment or instalments as may be due shall be fully paid, together with the costs of commitment. The commitment of such reputed father shall not operate to stay the execution upon such judgment as aforesaid.

391. Custody of child. The reputed father of a bastard shall not have the right to the custody or control of such child if the mother is living and wishes to retain such custody and control, until after it shall have arrived at the age of ten years, unless, upon petition to the district court for the county in which the mother resides, it shall, upon full hearing, after notice to the mother, be made to appear that said mother is not a suitable person to have control and custody of such child.

392. Bond becomes void, when. If such bastard child shall not be born

alive, or, being born alive, should die, and the fact shall be suggested upon the records of said court, then such bond shall be void.

393. Id. Intermarriage of mother and reputed father legitimatizes child. If the mother of any bastard child and the reputed father shall at any time after its birth intermarry, said child shall in all respects be deemed to be legitimate, and the bond for the support of said child shall thereupon become void.

394. Prosecution must be brought within four years. No prosecution under this title shall be brought after four years from the birth of such bastard child; *provided,* that the time for which the person accused shall be absent from the state shall not be computed.

395. Release of reputed father. The mother of a bastard child, before or after its birth, may release the reputed father of such child from all legal liability on account of such bastard, upon such terms as may be consented to in writing and approved by the judge of the district court for the county in which the mother resides, *provided,* that a release obtained from such mother in consideration of the payment to her of a sum of money less than $500 shall not be a bar to a suit for bastardy against such father, and if, after such release is obtained, suit is instituted against such father and the issue be found against him, he shall be entitled as a set off for the amount so paid, and it shall be accredited to him as a first payment, or payments; and *provided, further,* that such father may compromise all his legal liability on account of such bastard with the mother thereof by paying to her a sum not less than $500.
'11, p. 87.

TITLE 10.

BEES.

415. (139.) Inspector to be appointed. The board of county commissioners of the several counties shall, when petitioned by at least five actual beekeepers, appoint a qualified person inspector of bees for their respective counties. Am'd '03, p. 157.

416. (140.) Qualifications. Such inspector shall hold office during the pleasure of the board of county commissioners, and until his successor is appointed and qualified. He shall qualify by taking and subscribing the official oath, and by giving bond to be approved by the respective boards of county commissioners, which oath and bond shall be filed with the county clerk.
Am'd '03, p. 157.

417. (141.) Compensation. Assessment. Inspectors shall be paid out of the county treasury for services actually rendered at such rate per day as the board of county commissioners may fix. The assessor of each county is hereby required to assess each colony of bees in his county in the same manner as other assessments are made. All taxes shall be assessed and collected thereon in the manner provided by law for the collection and payment of county taxes. Am'd '03, p. 157.

418. (142.) Inspection. Arbitration. All hives of bees in each county shall be carefully inspected at least once each year by the inspector; *provided,* the inspector may use his discretion as to whether he inspects each and every colony of bees in a seemingly healthy apiary; and at any time upon complaint that disease exists among bees of any person the inspector to whom complaint is made shall immediately inspect the bees said to be infected. The inspector shall have authority to take charge and control of diseased bees and their hives, and the tools and implements used in connection therewith for treatment; or destroy such bees, broods, or hives and their contents, or implements, as may be infected; *provided,* that if any owner questions a decision of the inspector, the owner may appeal to three arbitrators selected from among the

beekeepers of the county, one of whom shall be chosen by the bee owner and one by the inspector, they two to choose a third man, whose decision, concurred in by at least two of their number, shall be conclusive as to the condition of the bees at the time of such examination. Am'd '03, p. 157.

419. (143.) Certificate of removal. It shall be unlawful to remove bees from any county or district in the state of Utah into any other county or district without first obtaining a certificate from the county bee inspector, stating that said bees are in a healthy condition and especially free from foul brood; *provided,* the person so applying for permission to remove bees shall pay the inspector for his services and certificate at the same rate he is allowed by the county for such time actually engaged; *provided further,* that the said certificate shall not be issued until it has been satisfactorily shown to the inspector that the bees so sought to be removed have been free from foul brood for at least one year. Am'd '03, p. 157; '07, p. 134.

420. (143x.) Foul brood. Every beekeeper or other person who shall be aware of the existence of foul brood, either in his own apiary or elsewhere, shall immediately notify the county inspector of bees of the existence of such disease, and in default of so doing shall be guilty of a misdemeanor, and upon conviction before a justice of the peace be liable to a fine of $5 and costs. '03, p. 158.

421. (143x1.) Disinfection. After inspecting infected hives or fixtures, or handling diseased bees, the inspector shall, before leaving the premises or proceeding to any other apiary, thoroughly disinfect his own person and clothing, and shall see that any assistant or assistants with him have also thoroughly disinfected their persons and clothing. '03, p. 158.

422. (143x2.) Obstructing a misdemeanor. Any person who shall hinder or obstruct, or attempt to hinder or obstruct, a duly appointed inspector from the performance of any duty required by this title shall be deemed guilty of a misdemeanor, and upon conviction thereof before a justice of the peace having jurisdiction, shall be fined for the first offense not less than $5 nor more than $25, and for any additional offenses any sum not exceeding $50. Am'd '03, p. 158.

TITLE 11.

COMMISSION FOR ADULT BLIND.

('09, p. 176.)

425. Utah commission for the adult blind created. Terms. Oath. Bond. There is hereby created a state board to be known as the Utah commission for the adult blind, which shall consist of five trustees, the governor to be president of said board, the four other members to be appointed by the governor, by and with the consent of the senate. Two of the trustees first appointed shall serve for two years, and two for four years, and until their successors are duly appointed and qualified. At the expiration of the term of office of any trustee, his successor shall be appointed by the governor with the advice and consent of the senate, for the term of four years. Each member of the board, before entering upon the duties of his office, shall subscribe to the constitutional oath and execute a bond to the state, with sureties to be approved by the secretary of state, in the penal sum of $5000, conditioned for the faithful discharge of his duties. The oath and bond shall be delivered to the secretary of state.

School for blind, §§ 5319-5323.

426. Shall be deemed a corporation. By the aforementioned name the said commission may sue and be sued, contract and be contracted with, may take and hold by purchase, gift, devise, or bequest, real and personal property for its uses. It may also convert property received by gift, devise, or be-

quest and not suitable for its use into other property so available or into money. It shall be deemed a public corporation, and its property shall be exempt from all taxes and assessments.

427. Compensation. Expenses. No member of the board shall receive any compensation for his services as such member; but may be paid his actual expenses incurred in attending meetings of the board or its committees, or attending to any business thereof under the authority of the board or of its committees.

428. May adopt rules and regulations. Powers and duties. The board may adopt by-laws, and from time to time repeal or amend them, and may therein provide for regular and special meetings of the board and for the distribution of its business to committees. It may make such rules, in accordance with law, as it may deem proper, in the furtherance of the objects hereby committed to its charge. It may employ such instructors and assistants as in its judgment may be necessary, and fix their compensation. All contracts made with instructors and employes shall be subject to termination at any time, at the will of the board, when in its judgment the public interest shall require it. No partisan, political, or religious belief shall be required as a qualification of any beneficiary or of any instructor, officer, or employe of the said board.

429. Id. Care of Adult Blind. The duties and powers of the commission shall be: To prepare and maintain a register of the adult blind in Utah, which shall contain such facts as the commission may deem important; to establish, equip, and maintain, at such place or places within the state as it may deem expedient, one or more workshops for the industrial training and employment of the adult blind; to maintain a bureau of information, the object of which shall be to assist in the finding of employment and in the development of home industries for the adult blind; to furnish material and tools to adult blind persons either in their homes or in the workshop to be maintained by the board; and to assist adult blind persons in the marketing of their handiwork and products. The commission, in furtherance of the purposes of this title, may provide for temporary lodgings and temporary support for any adult blind person engaged at any workshop established by it, but shall not undertake the permanent support or maintenance of any blind adult person; and shall seek to ameliorate the condition of the adult blind by promoting visits among the aged or helpless adult blind in their homes, and by such other methods as it may deem expedient. The commission may receive in the workshop established by it, adult blind persons from other states, upon the payment of such fees as the commission shall determine. The commission shall file a report annually, in the month of December, with the governor covering a statement of receipts and expenditures, the condition of the several workshops under its charge, the number of beneficiaries doing work at their own homes, and such other matters touching the objects of its creation as they may deem proper. The annual report must be verified by the oath of the president of the board of trustees.

430. "Adult blind" defined. The term "adult blind," as used in this title, shall be construed to mean only blind persons of the age of twenty-one years or over.

431. Appropriation. The sum of $4000 is hereby appropriated from any moneys in the treasury not otherwise appropriated. The commission is also authorized to solicit and receive donations, bequests, and endowments, the same and said appropriation to be used by the said commission in carrying out the provisions of this title.

TITLE 12.

BOUNTIES.

CHAPTER 1.

STATE BOUNTY FUND

('09, p. 204; '13, p. 161; '17, p. 425.)

435. Purpose. Fund. Tax levy. Claims. For the purpose of encouraging the destruction of bear, mountain lion, cougar, grey wolves, coyotes, lynx, wildcat, jack rabbits, prairie dogs, ground squirrels, and gophers, there is hereby created a fund to be known as the state bounty fund, which shall be handled and paid out as hereinafter provided.

1. The sum of $30,000 is hereby appropriated annually out of the general funds of the state, not otherwise appropriated.

2. The board of county commissioners of each county in the state are hereby authorized, and they shall, at the time of the annual levy of taxes, levy a tax of 5 mills on the dollar on all sheep and goats, and 4 mills on the dollar on all range horses and cattle, according to the assessed valuation of the same, said tax to be collected as other taxes and paid into the state treasury. The state treasurer shall keep the same, together with the $30,000 appropriated by this chapter, in a separate fund to be known as the state bounty fund, and pay the same out upon the state auditor's warrant as hereinafter provided; *provided,* that when said state bounty fund is exhausted, there shall be no further warrants issued against the same, and the state auditor shall immediately notify the clerks of the several counties that said fund is exhausted, and they shall thereafter receive no application for warrants, or issue certificates thereon; *provided, further,* that all unpaid bounty claims now on file or which may hereafter be filed in the state auditor's office issued under the provisions of Chapter 92, Laws of Utah, 1913, may be paid from this appropriation, as provided in the acts under which said bounty certificates were issued.

This title appeared in R. S. 1898 under Rewards, §§ 2039-2042.
Expenses paid out of fund, § 229.
Experiments for extermination of predatory animals and rabies, § 221.
Eradication of rabies, § 438.

436. Animals designated. Rates. Bounties shall be paid for the destruction of the following designated animals, to wit: For each bear, mountain lion, or cougar, $25; grey, black, or timber wolf, so destroyed, $50; for each coyote, lynx, or bobcat, so destroyed, $2.50; and for each jack rabbit or gopher so destroyed, 5 cents; and for each prairie dog or ground squirrel so destroyed 3 cents. '01, p. 178; '03, p. 45; '05, p. 173; '07, p. 113; '17, p. 425.

Bounties on grasshoppers and crickets, §§ 450-458.
County commissioners may pay additional bounties on animals and birds, § 460.

437. Obtaining bounties. Time. Proviso. Any person who desires to obtain the bounties provided for in § 436 on any bear, mountain lion, cougar, grey, black, or timber wolf, wolf pup, coyote, lynx, or wildcat shall, within sixty days of the date of killing of such animals, present to the county clerk of the county in which said animal or animals were killed, the entire skin of such animal or animals, including the scalp with the ears, tailbone to the knee of each foreleg with paws connected; except that in the case of mountain lions and cougars, it shall be required that the entire hide or pelt of such animals be presented with the entire bone of the right front leg intact from the shoulder down; and *provided,* that in the case of prairie dogs, ground squirrels, and gophers, the entire head, including the ears, shall be presented in such a state of preservation as to enable the county clerk to identify such animals; *provided,* that in the case of jack rabbits the two ears attached may be accepted in lieu of the head. *Provided,* that all such parts of such animal or animals shall be accompanied by an affidavit subscribed and sworn to before said county clerk, stating that the animal or animals upon which such bounty is

claimed and from which the skin, skins, or head, as the case may be, exhibited to said county clerk were taken or were killed by the person presenting the same and claiming said bounty, within sixty days of date of presenting the same, within the county in which they are so presented in which such claim for bounty is made. Such affidavit shall be substantially in the following form, to wit:

I do solemnly swear that the skin or skins or heads by me thus exhibited to the county clerk of the county of....., in the state of Utah, was taken from an animal by me personally killed within said county and state of Utah, within sixty days prior to the date of this affidavit.

'01, p. 178; '03, p. 45; '05, p. 173.

Corroborative affidavit, § 439.

438. Accounts. Payments. Eradication of rabies. The county clerk of each county shall keep a true account of the moneys paid out under this chapter, and the number of jack rabbits, gophers, and prairie dogs and ground squirrels for which bounty has been paid, and whenever the amount so paid reaches the sum of $50, or more, the clerk shall present said account, sworn to by him as being true and correct, to the state auditor, who shall draw his warrant upon the state treasurer, who shall pay the same out of the state bounty fund; *provided,* that the state livestock board is hereby authorized to expend 25 per cent of the state bounty fund for the eradication of rabies and predatory animals in co-operation with the federal government. '17, p. 425.

439. Corroborative affidavit. At the time of presenting such skin or skins, or heads, and at the time of subscribing to the affidavit described in § 437, the person presenting the same and claiming bounty thereon shall cause to be filed with the said county clerk, a corroborative affidavit, signed and sworn to by at least one reputable citizen and taxpayer of the county wherein such animal or animals are said to have been killed and in which claim for bounty is made, which corroborative affidavit shall state that the party claiming such bounty is a reputable person and, to the best of the affiant's knowledge and belief, the facts set forth in the affidavit of the claimant described in § 437 are true. '01, p. 178.

440. Duty of county clerk. Certificate. It shall thereupon be the duty of the county clerk to issue a certificate under the seal of his office, stating the number and kind of animals killed and for which the proper portion of the animal or skin as herein provided for has been presented for identification and destroyed, and stating the sum or sums which said person is entitled to receive under the provisions of this chapter. Said certificate shall be in substantially the following form, as may be required for the different kinds of animals:

State of Utah, county of....., ss.

I, ..., county clerk of ..... county, state of Utah, do hereby certify that ..... has exhibited to me this ..... day of ....., 19....., the skin of ....., or head of ....., and that said claimant has this day filed with me his affidavit that he killed such animal or animals from which such skin or head was taken, within the above-named county, within sixty days prior to the date of his aforesaid affidavit. And I further certify that the said claimant has filed in my office a corroborative affidavit sworn to by ....., known to me to be a reputable citizen and taxpayer within the county, stating that the above-named claimant is a reputable person and that to the best of affiant's knowledge and belief the facts set forth in said claimant's affidavit are true. And I further certify that I have in the presence of ....., the county ..... of said county, canceled each of the said skins or heads by severing the skin of each foreleg at the knee and destroying by burning the two forepaws so severed, or in the case of mountain lions or cougars, by skinning out the entire bone of the right foreleg, destroying the same by burning, or in the case of rabbits, prairie dogs, ground squirrels, and gophers, by destroying the entire head by burning, according to law, this.....

day of ....., 19....., and I certify that there is due to the within-named claimant the sum of $.....

.....

County clerk of the county of ....., state of Utah.

Countersigned by ....., the county ..... of said county.

'01, p. 178; '03, p. 45; '05, p. 174; '07, p.113.

441. Cancellation of skins. Report to state auditor. Record. The county clerk shall thereupon, in the presence of any other county officer of the same county, one of whom shall attend as a witness upon request, sever the skin of both forepaws at the knee in the case of bears, grey, black, or timber wolves, wolf pups, coyotes, lynx, or wildcats, or in the case of mountain lions or cougars skin out the entire bone of the right foreleg, or in the case of jack rabbits, prairie dogs, ground squirrels, and gophers shall retain the entire head, all such parts shall be destroyed by burning in the presence of one other county officer besides the county clerk, and such additional county officer shall file with the board of county commissioners a statement showing the number and kinds of parts of animals he witnessed destroyed and the date of such destruction; *provided, however,* that before any bounty shall be paid on any grey wolf, the skin, presented as hereinbefore provided, shall be held by the county clerk and passed on by the board of county commissioners at its first regular meeting. After such skins are presented, said county clerk shall immediately forward to the state auditor certified copies of the affidavits hereinbefore required, and the certificates made by him, together with the endorsements made by the other county officer, witnessing the identification and cancellation of such skin, or skins, or heads; such papers shall be forwarded by mail, or other safe ways. It shall be the duty of each and every county clerk within the state to keep a record in a bounty book of all county certificates issued by him, to whom, for what, and in what sums issued, and to preserve in his office all affidavits filed by claimants for bounty certificates. '01, p. 179; '03, p. 46; '05, p. 174; '07, p. 114.

442. State auditor to draw warrant. Upon receipt of the papers in this chapter hereinbefore provided, the state auditor shall examine the same, and if he shall find that the certificates, affidavits, and other papers are in conformity with the provisions of this chapter, he shall draw a warrant in favor of the person entitled to the same, upon the treasurer of the state, for the amount shown by said certificate to be due, and shall deliver or transmit the same to the person entitled thereto. '01, p. 179; '03, p. 146; '05, p. 175.

443. Notice before shipments made. All railroads, transportation companies, and stage lines that receive for shipment into this state the skins, or heads, of any animals provided for in this chapter upon which bounty may be paid shall, before bringing such skins or heads into this state, notify the county clerk of the county to which such skins or heads have been consigned; such notice shall give the number and kinds of such skins or heads, and the name and address of consignor and consignee.

444. Officers to retain records. The county clerk and the county auditor shall in no case permit any of the books, records, affidavits, certificates, certified copies thereof, or any blank forms for any of the papers provided for in this chapter to be removed from his office except in the manner in this chapter specifically described. '05, p. 175.

445. Fund separate. Reports. It shall be the duty of the state treasurer to keep the fund for the extermination of wild animals separate from the other state funds, and to report monthly the amount received for said fund, the amount paid in bounties, and the amount on hand, to the state auditor, whose duty it shall be to make a similar report to the legislature at each regular session. '01, p. 179; '03, p. 46; '05, p. 176; '07, p. 114.

446. Raising animals for bounty prohibited. Any person who shall raise, keep alive, or aid in raising or keeping alive any of the animals referred to in this chapter for the purpose of securing a bounty for destroying the

same, or who shall attempt to obtain a bounty on such animal or animals, shall be deemed guilty of a misdemeanor.

447. False Claims. Perjury. Penalty. Any person who shall make any false claim or affidavit, or who shall aid, abet, or connive in the making of any false claim or affidavit for the purpose of obtaining such bounty hereinbefore provided for, or who shall thereby aid in fraudulently obtaining the same, shall be deemed guilty of perjury, and upon conviction thereof shall be punished according to law. '01 p. 180; '03 p. 46; '05 p. 176.

CHAPTER 2.

GRASSHOPPERS AND CRICKETS.

450. (143x12.) Rewards for the destruction of grasshoppers, etc. The boards of county commissioners of the respective counties of this state shall be and hereby are empowered, whenever in their judgment the best interests of the county demand, to provide by ordinance for the payment of rewards for the destruction of grasshoppers, locusts, and crickets. '03, p. 6.

451. (143x13.) Maximum bounty. The bounty shall at no time exceed 1 cent per pound net, for such insects aforesaid, but may be in a less amount. '03, p. 7.

452. (143x14.) Proceedings to obtain reward. The person or persons who shall hereafter destroy any of the above named insects, in order to receive the bounty mentioned in the next preceding section, shall produce the same, as required by the county commissioners establishing the bounty ordinance in accordance with the provisions of this chapter, before the county clerk or receiving agent, and it shall be the duty of such clerk or receiving agent to diligently examine such person or persons, or such other person or persons as the said officers may deem proper, on oath or affirmation, touching the time when, and the place where, such insects were caught and the circumstances thereof. '03, p. 7.

453. (143x15.) Manner of payment. If, upon such examination, the clerk or receiving agent shall be satisfied that the grasshoppers, locusts, or crickets were caught within the limits of the county for which such clerk or receiving agent is qualified to act, he shall immediately cause such insects to be properly buried, and issue receipts therefor, and, upon presentation of such receipts, the county clerk shall issue to such person or persons a warrant on the county treasurer for said amounts. '03, p. 7.

454. (143x16.) Receiving agent. The county commissioners are hereby empowered to appoint a receiving agent in each town or precinct in their respective counties with authority to carry out the provisions of this chapter and the bounty ordinance enacted by the county commissioners. Said receiving agents shall give bonds, respectively, in the sum of $500 for the faithful performance of their duties. '03, p. 7.

455. (143x17.) Receiving agent to report. The receiving agents aforesaid shall keep on file an itemized receipted statement showing the quantity of said insects received and destroyed in the respective districts in which they were caught, with the amount of reward to be paid therefor, signed by the person or persons who are to receive the bounty, and transmit a full report of the record to the county clerk semi-monthly. '03, p. 7.

456. (143x18.) County clerk to report to state auditor. The county clerk of each county shall keep a true account of the moneys paid out under the provisions of this chapter, and whenever the amount so paid reaches the sum of $50 or more, the clerk shall present said account, sworn to by him as being true and correct, to the state auditor, who shall draw his warrant on the

state treasurer for two-thirds of said amount, which shall be paid by said treasurer out of any money not otherwise appropriated. '03, p. 7.

457. (143x19.) Penalties. Any person or persons exhibiting to the county clerk or any receiving agent any grasshoppers, locusts, or crickets, with intent to defraud the state, or who shall intentionally avoid any of the provisions of this chapter, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not less than $10 nor more than $200, or by imprisonment in the county jail for any period not to exceed six months, or by both such fine and imprisonment. '03, p. 7.

458. (143x20.) County to pay one-third, state two-thirds. One-third of all amounts paid out under the provisions of this chapter shall be paid by the county where the amount is expended, and two-thirds of such amount shall be paid by the state. '03, p. 8.

CHAPTER 3.

ANIMALS AND BIRDS

460. (143x21.) Rewards for killing certain animals and birds. The boards of county commissioners of the respective counties of the state shall be empowered, whenever in their judgment the best interests of the county demand, to provide by ordinance for the payment of rewards for the destruction of certain wild animals and birds, within their respective counties, as follows: Not more than $1 each on foxes and minks; not more than 10 cents each on muskrats; not more than 5 cents each on jack rabbits, prairie dogs, and ground squirrels; not more than 5 cents each on gophers; not more than 25 cents each on pelicans, blue cranes, fishhawks, loons, squawks, and fishducks; not more than 3 cents each on English sparrows, and 5 cents per dozen on the eggs of English sparrows. R. S. '98, § 2039; am'd '03, p. 4.

Bounties on certain wild animals, §§ 435-447.

461. (143x22.) Id. Proceedings to obtain reward. The person or persons who shall hereafter kill any of the above named wild animals or birds, in order to receive the reward mentioned in the next preceding section shall produce the skin, or head, or scalp with ears attached, as required by the county commissioners of the county offering such reward, of such lynx, grey wolf, wildcat, coyote, fox, mink, mountain lion, bear, or rabbit; or the head of such English sparrow, pelican, blue crane, fishhawk, loon, squawk, and fishduck; or the tail of any other animal mentioned in the next preceding section, before the county clerk in and for the county aforesaid; and it shall be the duty of such county clerk to diligently examine such person or persons, and such other witness as said clerk may deem proper, on oath or affirmation, touching the time when and place where such animal or bird was so killed, and the circumstances thereof. If, upon such examination, the county clerk shall be satisfied that such animal or bird was killed by the person or persons producing the skin or head or tail of such animals or birds as mentioned in § 460 within the limits of the county for which said county clerk is qualified to act, he shall immediately cause such skin to be punched in the center of the neck thereof with the letters B. P., said letters to be not less than one inch in length and of proportionate width, or the head or tail of such animal or bird to be burned, and shall issue a warrant on the treasurer of said county for the reward offered, in accordance with the provisions of this chapter, to the person or persons producing such skin, tail, or head; *provided,* that no payments shall be made where the reward for such skins, heads, or tails would be less than $1; *provided further,* that the county commissioners shall be empowered, when they deem proper, to appoint deputies in such precincts as are situated ten miles or more from the respective county seats with authority to carry out the provisions of this chapter by giving an order on the county clerk

for the amount of said reward; said deputies shall give a bond in the penal sum of $200 for the faithful performance of their duties. They shall be governed by such rules and regulations as are provided by ordinance by the county commissioners, and shall be subject to removal at any time.
R. S. '98, § 2040.

462. (143x23.) Record and report. The county clerk of each county shall keep on file an itemized receipted statement showing the quantity and kinds of hides, heads, or tails, the district in which they were killed, and the amount of the reward paid therefor, signed by the party receiving the reward, and shall make a full report of the same to the board of county commissioners at its quarterly sessions. R. S. '98, § 2041.

463. (143x24.) State liable for one-half of rewards paid. The county clerk of each county shall keep a true account of the moneys paid out under this chapter, and the number of species of animals, or English sparrows, and other birds for which bounties have been paid, and whenever the amount so paid reaches the sum of $50 or more, the clerk shall present said account sworn to by him as being true and correct, to the state auditor, who shall draw his warrant upon the state treasurer for one-half of said amount, which shall be paid by said treasurer out of any money not otherwise appropriated, and forwarded by him to the treasurer of said county. R. S. '98, § 2042.

TITLE 13.

CAPITOL GROUNDS.

464. (144.) Control. It shall be the duty of the state board of examiners to take full possession and control of the capitol grounds, and to do all things which said board may deem necessary and proper for the preparation of said grounds for the purpose for which they are held.

Seat of government located at Salt Lake City, Con. art. 19, sec. 3.

Armory and Arsenal on, when, § 3886.

465. (145.) Report. Said board shall present to the legislature a report of its proceedings under this title, with such recommendations as it may deem advisable.

TITLE 14.

CERTIFICATION OF BONDS AND WARRANTS.

466. (146.) By whom. The county clerk or the county auditor of each county, the auditor or the recorder of each city, the clerk of each board of education, and the clerk of each school district in this state shall indorse a certificate upon every bond, warrant, or other evidence of debt, issued pursuant to law, by any such officer, that the same is within the lawful debt limit of such county, city, board of education, or school district, respectively, and is issued according to law. He shall sign such certificate in his official character.

Debt limit of counties, cities, etc., Con. art. 14, secs. 3, 4.

467. (147.) Provisions governing. Warrants for interest on the bonded debt, for salaries, and for the current expenses of any county, city, school district, or board of education in this state may be certified by the county clerk, county auditor, city recorder, city auditor, clerk of the school district, or clerk of the board of education, to be within the lawful debt limit of such county, city, board of education, or school district, whenever the same, together with all other indebtedness of said city, county, board of education, or school district, shall not exceed the amount of the indebtedness of such city, county, board of education, or school district at the time of the admission of this state into the union, in addition to the whole amount of taxes of such

county, city, board of education, or school district for the year in and for which such warrant or warrants are issued.

468. (148.) Protection to officer certifying. Whenever a board of county commmissioners, city council, trustees of a school district, or board of education of any such county, city, or school district shall find or declare that any appropriation or expenditure for which a warrant or warrants are to be issued, was or is for interest upon the bonded debt, for salaries, or for the current expenses of such county, city, board of education, or school district, such finding or declaration shall conclusively protect the county clerk, county auditor, city recorder, city auditor, clerk of the school district, or clerk of the board of education of any such county, city, school district, or board of education, as to such facts, in certifying any warrant or warrants therefor to be within the lawful debt limit of such county, city, board of education, or school district.

469. (149.) Penalty. Any person mentioned in § 466 who shall neglect to indorse any certificate required thereby, or who shall make any such certificate falsely and fraudulently, shall be guilty of a misdemeanor, and punishable by a fine, not exceeding $1000, or imprisonment in the county jail, not exceeding one year, or by both such fine and imprisonment.

TITLE 15.

CHATTEL MORTGAGES.

470. (150.) What necessary to validity. Unless the possession of personal property be delivered to and retained by the mortgagee, no mortgage thereof shall be valid as against the rights and interests of any person other than the parties thereto, unless:

1. The mortgage, duly witnessed by at least one person, provide that the property may remain in the possession of the mortgagor;

2. The mortgage be accompanied by the affidavit of the parties thereto, or, in case any party is absent, by the affidavit of the parties present and that of the agent or attorney of such absent party, that the same is made in good faith to secure the amount named therein and without any design to hinder or delay the creditors of the mortgagor;

3. The mortgage, or copy thereof, certified to as such by a notary public or other officer authorized to take acknowledgments, be filed in the office of the recorder of the county where the mortgagor resides, or, in case he is a nonresident of this state, in the office of the recorder of the county or counties where the property may be at the time of the execution of the mortgage.

Decisions on conditional sales, note to § 487. All instruments filed with county recorder, except chattel mortgages, must be recorded, § 1595.

Live stock lease to be indexed, §§ 130-133.

Chattel mortgage subject to landlord's lien, it seems, § 3777.

A mortgage must be accompanied by a delivery within a reasonable time, followed by an actual and continued change of possession of the property. The fact that the vendee retains the vendor in his employ, in caring for or in the selling of the property, though a badge of fraud, is not per se a fraud against creditors.

Ewing v. Merkley, 3 U. 406; 4 P. 244.

As between the mortgagee and subsequent creditors, a mortgage is not invalidated by the fact that it recognizes the validity and precedence of a former chattel mortgage which is void, and possession is taken for the benefit of both the mortgagee in the first, and the mortgagee in the second, mortgage.

Eddy v. Ireland, 6 U. 147; 21 P. 501.

Where a chattel mortgage is executed in Michigan, assigning among other things a certain account due in Utah, the law governing is the law of Michigan as to chattel mortgages, which, in the absence of proof, is presumed to be that of Utah.

Oak Leather Co. v. Union Bank, 9 U. 87; 33 P. 246.

The mortgagee having taken possession of the goods at the time the mortgage was given, the fact that the foreclosure was void for irregularity does not divest the mortgagee of his right of possession where he is purchaser at the foreclosure sale, nor does it render the property liable to seizure at the instance of the mortgagor's creditors.

Park v. Parsons, 10 U. 330; 37 P. 570.

The words "hinder" and "delay" have practically the same meaning. The omission of the word "hinder" and the use of the word "delay" or "defraud" does not render the affidavit accompanying a chattel mortgage defective.

Petrovitzky v. Brigham, 14 U. 472; 47 P. 666.

The delivery of stock certificates as security for a loan does not constitute a mortgage, but a pledge.

Barse Co. v. Range Cattle Co., 16 U. 59; 50 P. 630.

Where a mortgage on stock of goods permits the mortgagor to remain in possession and sell the mortgaged property in usual course of trade, and the rights reserved show that it is intended as a shield to the mortgagor, it operates as a fraud upon the rights of creditors and is void.

McKibbon v. Brigham, 18 U. 78; 55 P. 66.

Mortgage of stock of goods to be sold and renewed by mortgagor is invalid.

Nelden-J. Drug Co. v. Com'l Bank, 27 U. 59; 74 P. 195.

A mortgage of a specific number of sheep out of a herd comprising a much larger number of similar sheep, which does not separate or designate the sheep mortgaged, is void for uncertainty.

Jacobsen v. Christiansen, 18 U. 149; 55 P. 562.

Under the laws of Idaho, an affidavit was not bad for merely omitting the word "defraud."

Deseret Nat. Bank v. Kidman, 25 U. 379; 71 P. 873.

A mortgage is good as between the parties, though not executed in compliance with law.

Johnson v. Hibbard, 27 U. 342; 75 P. 737.

A "title reservation" contract is not subject to provisions of the chattel mortgage.

Passow v. Emery, 37 U. 49; 106 P. 935.

An unfiled chattel mortgage is valid against all persons having claims against the mortgagor which accrued previous to execution and delivery of mortgage, unless such persons acquire a lien by attachment or otherwise against the property before mortgage is filed.

Volker Lbr. Co. v. Utah and O. L. Co. et al., 45 U. 603; 148 P. 365.

Where chattel mortgage is filed it becomes effective against all persons extending credit to mortgagor after such filing, unless such persons can invalidate it on the ground of fraud or other legal basis of attack.

Id.

Where it clearly appears from a reading of the certificate in connection with the affidavit in a chattel mortgage, that the one who executed the mortgage was the same person who acknowledged its execution, there was a sufficient compliance with the statute.

Deseret Nat. Bank. v. Kidman, 25 U. 379; 71 P. 873.

471. (152.) Foreclosure. An action for the foreclosure of a mortgage of personal property or for the enforcement of any lien thereon, may be conducted in the manner provided by law for the foreclosure of a mortgage or lien upon real property, and without the right of redemption; or, a mortgage of personal property containing a power of sale upon default being made in the conditions of such mortgage, authorizing the exercise of such power, may be foreclosed, by advertisement, in the manner and upon the notice hereinafter provided.

Foreclosure of mortgages, real and chattel, §§ 7230-7237.

A mortgagee of personal property held as indemnity for signing a note as surety, may, with the mortgagor's consent, take possession of such property and sell it under foreclosure, even before he has been indemnified by reason of his suretyship. Where such transaction is carried out in good faith, it will be binding on the mortgagor's creditors.

Park v. Parsons, 10 U. 330; 37 P. 570.

Foreclosure held to be in time as against purchasers.

Armstrong v. Broom, 5 U. 176; 13 P. 364; affirmed 137 U. S. 266.

Under Wyoming statute, a chattel mortgage does not pass title without foresclosure and sale; one who purchases of mortgagor takes subject to lien of mortgagee.

Blyth & Fargo Co. v. Houtz, 24 U. 62; 66 P. 611.

An action to foreclose a chattel mortgage may be started in a county where the note is payable though the property is in and defendants reside in, another county.

Emerson, Brantingham Imp. Co. v. Giles, 52 U. —; 173 P. —.

472. (153.) Enjoining foreclosure by advertisement. When the mortgagee or his assignee has commenced foreclosure by advertisement, and it shall be made to appear, by the affidavit of the mortgagor or his agent or attorney, to the satisfaction of the judge of the district court of the county where the mortgaged property is situated, that the mortgagor has a legal counterclaim or any other valid defense against the collection of the whole or any part of the amount claimed to be due on such mortgage, such judge may, by an order to that effect, enjoin the mortgagee or assignee from foreclosing such mortgage by advertisement, and direct that all further proceedings for the foreclosure be had in the district court properly having jurisdiction of the subject matter.

N. Dak. (1895), § 5884*.

The judge of the district court is powerless to impose conditions upon the mortgagor's rights given under this section, as by requiring a bond from the mortgagor.

Watts v. Greenwood, 49 U. 118; 162 P. 72.

But under § 1813, the court has the power, where it appears that the mortgaged property is perishable or that it is live stock, to call on the mortgagor to consent to sell or to require indemnity bond from him, or to order the property sold, or otherwise to protect the rights of the parties.

Id.

473. (154.) Discharge. Penalty. A chattel mortgage, when satisfied, shall be discharged by an entry by the mortgagee, his agent, assignee, or legal representative, on the margin of the index, which shall be attested by the recorder without fee; or the recorder may discharge the same on the presentation of an order in writing duly signed and acknowledged. After the full performance of the conditions of the mortgage, any mortgagee, agent, assignee, or legal representative who shall wilfully neglect, for the space of ten days after being requested, to discharge the same, shall be liable to the mortgagor or his assigns in the sum of $50 damages, and also for all actual damages sustained by such neglect or refusal.

Neb. (1895) § 3189*.

474. (155.) Chattel mortgage expires in three years. Renewal. Every mortgage so filed shall be void as against the creditors of the person making the same, or against subsequent purchasers or mortgagees in good faith, after the expiration of three years after the filing thereof; unless within thirty days after the expiration of the term of three years from such filing and within thirty days after the expiration of each year thereafter, the mortgagee, his agent or attorney, shall make an affidavit exhibiting the interest of the mortgagee in the property at the time last aforesaid claimed by virtue of such mortgage, and if such mortgage is to secure the payment of money the amount yet due and unpaid, and shall file the same with the county recorder, to be attached to the instrument or copy on file, to which it relates; *provided*, that no mortgage of personal property shall be valid as against creditors of the mortgagor or subsequent purchasers or mortgagees in good faith after the expiration of the five years from the date of the original filing.

Am'd '15, p. 51.

Kan. (1889) § 3905.

Under § 5, chap. 21, laws of Utah, 1884, a mortgage on chattels was made in good faith to secure a bona fide debt, although the property was found in the possession of the mortgagor ninety days after the maturity of the obligation; but notice of lis pendens of a suit to foreclose was filed on the day preceding the expiration of the said ninety days; held, that a decree of foreclosure and sale made in said suit will prevail against purchasers with notice under an execution issued and levied on the next day after the expiration of said ninety days.

Armstrong v. Broom, 5 U. 176; 13 P. 364; affirmed 137 U. S. 266.

Affidavit and statement may be filed at any time subsequent to the expiration of the thirty days, provided they are filed before any rights have attached to the mortgaged property; time not being of the essence of the right, except where rights exist or are acquired on the mortgaged property before the thirty day period has expired.

Grubb v. Lashus, 42 U. 254; 129 P. 1029.

475. (156.) Id. If such effidavit be made and filed before any purchase of such mortgaged property shall be made, or other mortgage deposited, or lien obtained thereon, in good faith, it shall be as valid to continue in effect such mortgage as if the same had been made and filed within the period above provided.

Kan. (1889) § 3906.

476. (157.) Seizure by third party. Personal property mortgaged may be taken on attachment, if any legal cause for attachment exists, or on execution issued at the suit of a creditor of a mortgagor; but, before the property is so taken, the officer must pay or tender the mortgagee the amount of the mortgage debt and interest at the place where by its terms it is made payable, if such place is within this state. If it specifies no place of payment, or if it is payable without this state, then he must deposit the amount thereof with the county recorder of any county wherein the mortgage is filed, payable to the mortgagee or his order.

477. (158.) Copy of mortgage as evidence. A copy of any mortgage of personal property, made and filed as provided in this title, certified by the recorder in whose office the same shall be filed, may be read in evidence in any court in this state without further proof of the execution of the original, if such original be out of the control of the person wishing to use it.

478. (159.) Bills of sale, etc. The provisions of the foregoing sections shall extend to and include all such bills of sale, deeds of trust, and other conveyances of personal property as shall have the effect of a mortgage or lien upon such property.

Conditional sales of equipment to railroads; §§ 487, 1269. Decisions on conditional sales; note to § 487.

479. (160.) Foreclosure by advertisement. Notice. Notice that such mortgage will be foreclosed by a sale of the mortgaged property or some part thereof, shall be given as follows: By advertisement published at least once a week for two successive weeks prior to the sale in some newspaper printed in the county in which such sale is to take place, or, in case no newspaper is printed therein, by posting up notices at least ten days prior to the sale in at least five public places in such county, two of which shall be in the precinct where the mortgaged property is to be offered for sale.

Neb. (1895) § 728*.

480 (161.) Id. Contents of notice. Every such notice shall specify: First, the date of the mortgage and where filed; second, the names of the mortgagor and mortgagee and the assignee of the mortgagee, if any; third, the amount claimed to be due thereon at the time of the first publication or posting of such notices; fourth, a description of the mortgaged property conforming substantially with that contained in the mortgage; fifth, the time and place of sale.

Neb. (1895) § 729*.

481. (162.) Id. Sale. All sales shall be made within thirty days after the seizure of the property, unless the same shall be postponed as hereinafter provided. All sales shall be made by public auction, and shall be commenced between the hours of twelve m. and four o'clock p. m., and shall be held in the county where the mortgage was first filed, or in any county where the property may have been removed by consent of parties and in which the mortgage was duly filed, and in view of the property so being sold. The mortgagee, his assignees, and his or their legal representatives, may fairly and in good faith purchase any of the mortgaged property offered at such sale, and when the mortgage shall have been foreclosed as herein provided any and all right and equity of redemption which the mortgagor may or might have had shall be and become extinguished.

Neb. (1895) §§ 731-733*.

482. (163.) Postponement of sale. Any sale may be postponed to a definite time by public announcement made at the time and place of sale, with the consent of the mortgagor, if he is present; *provided,* that if a sale be postponed for more than one week, notice shall be given by publication, or by posting as in the first instance.

N. Dak. (1895) § 5887*.

483. (164.) Return of sale. Penalty. Within ten days after the sale of any mortgaged property as herinbefore provided, the mortgagee or his assignee shall make, or cause to be made, a statement under oath of the proceedings under such sale, specifying particularly the property sold, the amount received therefor, and the costs and expenses, which shall be itemized, and the disposition made by him of the proceeds of the sale, and shall deliver the same to the mortgagor or send the same to him by registered letter; and on failure so to do shall forfeit to the mortgagor the sum of $25 damages.

N. Dak. (1895) § 5888*.

484. (165.) Distribution of proceeds. Fees. Out of the proceeds arising from the sale, the person making the sale shall pay: First, the costs and expenses of foreclosure; second, the amount of the mortgage debt due to the person entitled thereto; and, third, the balance, if any, to the owner of the mortgaged property. The fees for the publication of notice shall in no case exceed the sum of $3. The fee of the person crying the sale shall be $2 per day.

N. Dak. (1895) § 5889*.

485. (166.) Fraudulent disposal of property. Any mortgagor, agent, servant, or employe of any mortgagor of personal property who shall, during the time such mortgage remains in force, destroy, sell, conceal, or otherwise dispose of the whole or any part of the mortgaged property, or who shall remove the same or any part thereof from the state without the written consent of the mortgagee, his legal representatives or assigns, shall be deemed guilty of obtaining money under false pretenses, and, on conviction thereof, shall be punished by a fine not exceeding three times the value of the property described in the mortgage, or by imprisonment in the county jail not more than six months, or by both such fine and imprisonment. The term mortgage in this section shall embrace deeds of trust and all instruments intended as security for debt.

486. (167.) Wife must concur. It shall be unlawful for the husband, where the relation of husband and wife exists, to create any lien, by chattel mortgage or otherwise, upon any personal property owned by him and exempt

by law to resident heads of families from seizure and sale upon any attachment, execution, or other process issued from any court in this state, without the consent of his wife; and from and after the time when this title shall take effect (January 1, 1898), no such mortgage of personal property shall be valid unless executed by both husband and wife.

Kan. (1889) § 3914*.

487. (168.) Conditional sales to railways. The provisions of this title shall not apply to contracts made by any railway company owning or operating a railway in this state, for the possession, use, and conditional purchase of rolling stock and equipments to operate such railway, and containing the condition that the title shall not pass until full payment of the purchase price; and such contract shall be valid as to all persons without recording the same.

Conditional sales of equipment to railroads, § 1260.

A conditional sale of a locomotive is valid as against the vendee's creditors, though it is not executed and recorded as chattel mortgages are required to be.

Lima Machine Works v. Parsons, 10 U. 105; 37 P. 244.

CONDITIONAL SALES GENERALLY:

A conditional sale of personal property, with delivery of possession to the vendee with an agreement that the property in the chattels is not to vest in the vendee until the performance of the condition, is not fraudulent per se, and is valid as against third persons claiming through the vendee.

Shoshonetz v. Campbell, 7 U. 46; 24 P. 672.

For discussion of the distinction between a pledge and a chattel mortgage, see

Hyams v. Bamberger, 10 U. 3; 36 P. 202.

A conditional sale of merchandise to be resold by the vendee is valid as against his attaching creditors.

Hirsch v. Steele, 10 U. 18; 36 P. 49.

In the absence of fraud an agreement for a conditional sale is good and valid as well against third persons as against parties to the transaction.

Russell v. Harkness, 4 U. 197; 7 P. 865; affirmed 118 U. S. 663.

Where default is made by a vendee in the condition expressed in a conditional sale of personal property, wherein it was provided that title should not pass to the vendee until all conditions were performed, the vendor is entitled to possession of the property and to choose his own paymaster, and he is not bound to accept any offer of payment from any person other than the original purchaser.

Lippincott v. Rich, 19 U. 140; 56 P. 806.

Lippincott v. Rich, 22 U. 196; 61 P. 526.

Contract note for sale of personal property held to constitute a conditional sale; which would give seller right to possession on default, as against a mortgage given by purchaser.

Freed F. & C. Co. v. Sorensen, 28 U. 419; 79 P. 564.

Lippincott v. Rich, 19 U. 140; 56 P. 806.

Lippincott v. Rich, 22 U. 196; 61 P. 526.

Detroit H. Co. v. Stevens, 16 U. 177; 52 P. 379.

Standard Laundry v. Dole, 22 U. 311; 61 P. 1103.

TITLE 16.

CITIES AND TOWNS.

CHAPTER 1.

INCORPORATION AND CLASSIFICATION.

520. (169.) Petition for incorporation. When the inhabitants of any part of any county not embraced within the limits of any city shall desire to be organized into a city, they may apply, by petition in writing, signed by not less than one hundred of the real property taxpayers, who are qualified electors, of territory to be embraced in the proposed city, to the board of county commissioners of the proper county, which petition shall describe the territory proposed to be embraced in such city, and shall have annexed thereto an accurate map or plat thereof, and state the name proposed for such city, and shall be accompanied with satisfactory proof of the number of inhabitants within the territory embraced in said limits. Am'd '99, p. 77.

Legislature shall provide for municipal incorporation by general law, Con. art. 11, sec. 5.

521. (170.) Proceedings. Election. When such petition shall be presented the board of county commissioners shall forthwith designate the class of the proposed city, and in cities of the first or of the second class, designate the boundaries of the municipal wards thereof, and shall fix the time and place within the boundaries of such proposed city at which the election may be held to determine such question. Such election shall be held and conducted, as nearly as may be, in the same manner as provided by law for conducting general elections. Before such election is held, the board of county com-

missioners shall give notice by publication in some newspaper published within said limits, if there be one, at least once a week for four successive weeks; but if there be no newspaper published therein, then by posting notices at least four weeks in five public places within said limits. Said notices shall contain a statement of the contents of the petition and describe the territory proposed to be incorporated, and the officers to be elected, and shall also designate the time and place at which the election shall be held. The ballots used at such election shall be "for incorporation," or "against incorporation," and if "for incorporation," the names of the persons to be voted for.

522. (171.) Notice of result. It a majority of the ballots cast at such election be in favor of incorporation, the county clerk shall immediately, on the result of the canvass of the returns of said election being filed in the proper office, give notice of the result by publication in the same manner and for the same time as provided in the preceding section, and in such notices he shall designate to which of the classes of municipal corporations hereinafter provided such city shall belong. A copy of the notice, with proper proof of its publication, shall be filed with the papers, and a certified copy of all papers and record entries relating to the matter on file in the clesk's office, shall be filed in the office of the county recorder and in the office of the secretary of state. Upon the filing of said papers, it shall be the duty of the secretary of state to make publication in some newspaper having general circulation within the state, of the incorporation of said city.

523. (172.) Officers to be elected. Canvass. At the time of holding said election the qualified voters within the limits shall vote for the municipal officers hereinafter provided for. The canvass and returns of the votes cast at said election shall be made as provided by law.

Bonds of officers, § 604.

524. (173.) Incorporation complete, when. When the papers referred to in § 522 are filed and the officers are elected and qualified for such city, and publication is made by said clerk and the secretary of state, the incorporation thereof shall be complete; and all courts in this state shall take judicial notice of the existence of such city.

525. (174.) Classification. Municipal corporations in this state now existing, and those hereafter organized, are hereby divided into three classes. Those cities having 50,000 or more inhabitants shall be known as cities of the first class; those cities having more than 5000 and less than 50,000 inhabitants shall be known as cities of the second class; and all other cities shall be known as cities of the third class. Am'd '17, p. 200.

526. 175.) Change of class. Whenever any city of the second class shall have attained the population of 50,000 or more, or any city of the third class, or town, shall have attained the population of 5000 or more, and such fact shall have been duly ascertained and certified to the governor by the mayor or the president of the board of trustees, he shall declare, by public proclamation, such city or town to be of the first or second class, as the case may be, and such city or town, thus changed, shall be governed by the provisions of this title applicable to cities of such class. Am'd '17, p. 200.

Taking census, § 570x72.

527. (176.) Judicial notice of change. All courts in this state shall take judicial notice of the change of the organization of any city or town.

Judicial notice generally, § 7076.

Courts will take judicial notice of the fact that Salt Lake City has a population sufficient to make it a city of the first class, and, as such, it becomes one of the proper class without any act done upon its part. (Overruling Hays v. Corey, 6 U. 150; 21 P. 1089.) People v. Page, 6 U. 353; 23 P. 761.

528. (177.) Legal results of change in classification. All rights and property of every kind and description which were vested in any municipal corporation under its former organization shall be deemed and held to be vested in the same municipal corporation upon its becoming incorporated under the provisions of this title; but no rights or liabilities, either in favor of or against such incorporation, existing at the time of becoming so incorpor-

ated under this title, and no action or prosecution of any kind shall be affected by such change, but the same shall stand and progress as if no change had been made; *provided,* that whenever a different remedy is given by this title, which may properly be made applicable to any right existing at the time of such city or town so becoming incorporated under this title, the same shall be deemed cumulative to the remedy before provided, and used accordingly.

Similar section, § 815.

529. (178.) Id. Ordinances. All ordinances and resolutions in force in any city or town when it shall change its organization under this title shall continue in full force and effect until repealed or amended, notwithstanding such change of organization; and the making of such change of organization shall not be construed to affect the change in the legal identity of the corporation of such city or town, provided such ordinances and resolutions do not conflict with the provisions of this title.

530. (179.) Id. Officers. When any town or city shall, by proclamation of the governor, become a city of the second class, or any city of the second class shall in like manner become a city of the first class, the officers then in office shall continue to be the officers of the city until the next municipal election, and until their successors shall be duly elected and qualified. When new territory is organized as a city or town, or a town becomes a city, by petition and vote of the people, the officers first elected shall serve until the next municipal election, and until their successors shall be duly elected and qualified.

531. (180.) General powers of corporation. Cities and towns incorporated under this title shall be bodies politic and corporate and shall be known and designated by the name and style adopted, and under such name may sue and be sued, contract and be contracted with, acquire and hold real and personal property for corporate purposes, have a common seal, and may change the same at pleasure, have perpetual succession, and exercise all the powers hereinafter conferred.

532. (181.) Municipal wards. All incorporated cities of the first and of the second class shall be divided into five municipal wards, the boundaries of which shall be prescribed by ordinance; *provided,* that the boundaries of municipal wards shall not be changed oftener than once in five years, and the wards shall be as nearly as may be of equal population, and in compact form.

CHAPTER 2.

MUNICIPAL GOVERNMENT.

533. (182.) Government. The municipal government of all cities of the first class is hereby vested in a board of five commissioners, consisting of a mayor and four commissioners, and in cities of the second class in a board of commissioners, consisting of a mayor and two commissioners, to be known as the board of commissioners of their respective cities. The municipal government of all cities of the third class is hereby vested in a mayor and city council. The city council shall be composed of five councilmen, chosen at large by the qualified voters of the city. The board of commissioners of cities of the first and the second class shall discharge, exercise, and have all the duties, powers, and privileges as are now or may be hereafter provided by law and are now or may be hereafter vested jointly or severally in the mayor and city council of cities of the first and the second class, and shall have all the rights, duties, powers, and privileges as may hereafter be provided by law for boards of commissioners of cities of the first and the second class; the boards of commissioners of cities of the first and the second class shall be the successors in office of the mayor and city councilmen of said cities of the first and the second class, and the offices of mayor and city councilmen

in cities of the first and the second class as now provided by law are hereby abolished, to take effect on the first Monday in January, 1912, at twelve o'clock meridian. Am'd. '11, p. 225.

Fills vacancy in city and municipal courts, §§ 1703, 1776.
Orders execution of deeds under townsite act, § 6121.
Qualifications, § 534, by whom chosen, § 535.
General powers, §§ 570-570x87.
Vacancies, how filled, § 548.
The act creating commission form of government is constitutional.
Larsen v. Salt Lake City, 44 U. 437; 141 P. 98.

534. (183.) Mayor, commissioners and auditors. Qualifications. The mayor, commissioners, and auditors of cities of the first and the second class, and mayors and city councilmen of cities of the third class, shall be qualified voters within their respective cities. Am'd '11, p. 225.

Mayor, chairman of board of commissioners, § 550.

535. (184.) Id. How Chosen. The mayor, commissioners, and auditors of cities of the first and the second class, and the mayors of cities of the third class, shall be chosen by the qualified voters of their respective cities. Am'd '11, p. 225.

Municipal elections, general provisions, §§ 2330-2334.

536. (185.) Id. Mayor. Commissioners. The chief executive of cities of the third class shall be the mayor of said cities, and during his temporary absence or disability the city council shall elect one of its number to act as mayor pro tem, who, during such absence or disability, shall possess the power of mayor. In cities of the first and the second class the rights, powers, duties, and privileges as are now provided by law for the mayors of said cities respectively shall be vested in the board of commissioners of said cities of the first and the second class. Am'd '11, p. 225.

Qualifications of mayor, § 534; by whom chosen, § 535.

537. (186.) Id. Vacancies. Whenever a vacancy shall happen in the office of mayor of cities other than cities of the first and the second class, the city council shall elect a mayor, who shall possess all the rights and powers of mayor until the next municipal election and until his successor is elected and qualified. Am'd '11, p. 225.

538. (187.) Id. Removal. If a mayor, at any time during his term of office, shall remove from the limits of the city, his office shall thereby become vacant.

539. (188.) Id. To preside over council, when. In cities of the third class, the mayor shall preside at all meetings of the city council, but shall not vote except in case of a tie, when he shall give the casting vote.

540. (189.) Id. Powers, generally. He may exercise within the city limits the powers conferred upon him to suppress disorder and keep peace; and he may remit fines and forfeitures and release any person imprisoned for violation of any city ordinance, and shall report such remittance or release, with the cause thereof, to the city council at its next session.

541. (190.) Id. Duties. He shall perform all duties which are or may be prescribed by law, or by ordinance, and shall see that the laws and ordinances are faithfully executed.

542. (191.) Id. May examine books. He shall have power at all times to examine and inspect the books, records, and papers of any officer or agent employed by the city.

543. (192.) Id. Messages. The mayor shall from time to time give the council information relative to the affairs of the city, and shall recommend for their consideration such measures as he may deem expedient.

544. (193.) Id. May call out inhabitants. He shall have power, when necessary, to call upon every male inhabitant of the city over the age of twenty-one years to aid in enforcing the laws and ordinances, in suppressing riots and other disorderly conduct, or in carrying into effect any law or ordinance of the city.

545. (194.) Id. Revision of ordinances. He may appoint, by and with

the advice of the city council, one or more competent persons to prepare and submit to the city council for their adoption or rejection, an ordinance in revision of the ordinances of such city, and for the government of such city, the compensation of such revisers to be determined and fixed by the city council and paid out of the city treasury.

547. (196.) Map of city to be recorded. It shall be the duty of the mayor of each city in the state to have recorded in the recorder's office of the county in which such city is located, a plat or map describing the correct boundaries of such city, if the said records do not contain a record of such boundaries.

548. (197.) Vacancies, how filled. If any vacancies shall occur in the office of councilman by death, resignation, removal, or otherwise, such vacancy shall be filled for the unexpired term by appointment of the city council from the ward in which the vacancy occurs. If any vacancy shall occur in the office of mayor, commissioner, or auditor for cities of the first and the second class by death, resignation, removal, or otherwise, such vacancy shall be filled for the unexpired term by appointment of the board of commissioners. Should the board of commissioners fail for thirty days to fill the vacancy in the board, then the auditor shall sit as a member of the board, for the purpose only of choosing some person to fill said vacancy. Am'd '11, p. 226.

General powers of commission and council, §§ 570-570x87.

Commissioners and Councilmen in cities of various classes, § 533.

Qualification of councilmen and commissioners, § 534; by whom chosen, § 535.

Where a de facto councilman has been re-elected prior to the expiration of his first term, the person appointed to fill the vacancy caused by his death, and duly qualifying, is entitled to hold the office until the election of a successor by the people. The expiration of the first term of the deceased does not create a vacancy.

State, ex rel. Lloyd v. Elliott, 13 U. 471; 45 P. 346.

549. (198.) Rules. Disorderly conduct. Expulsion. The council shall determine its own rules of proceedings, punish its members for disorderly conduct, and, with the concurrence of two-thirds of the members of the council, may expel a member for cause.

550. (199.) Chairman of board. Powers and duties of commission. In cities of the first and the second class, the mayor shall be chairman of the board of commissioners. The mayor shall preside at all meetings of the board, and shall have the right to vote upon all questions coming before the board, and in case of his absence or inability to act, the members present must, by an order entered in the records, select one of their number to act as chairman temporarily. The board of commissioners shall have power to enforce the attendance of witnesses, the production of books and papers, and power to administer oaths in the same manner and with like effect and under the same penalties as in the case of judges of the district court exercising civil or criminal jurisdiction under the laws of Utah. In cities of the first class not less than three members shall constitute a quorum for the transaction of business, and no act of the board shall be valid or binding unless three members concur therein. In cities of the second class not less than two members shall constitute a quorum for the transaction of business, and no act of the board shall be valid or binding unless two members concur therein. Upon every vote the yeas and nays shall be called and recorded, and every motion, resolution, or ordinance shall be reduced to writing and read before the vote is taken thereon. The mayor shall have no power to veto any measure, but every resolution or ordinace passed by the board must be signed by the mayor, or, if he be absent from the meeting, by the temporary chairman, or by two commissioners, and be recorded before the same shall be in force. The commissioners shall each month print in pamphlet form a detailed and itemized statement of all receipts and disbursements of the city, and a summary of their proceedings and expenses during the preceding month, and furnish printed copies thereof to the newspapers of the city and to persons who shall apply therefor at the office of the recorder. At the end of each year the commissioners shall cause a full and complete examination of all the books and accounts of the city to be made by competent account-

ants, and shall publish the result of such examination in the manner above provided for monthly statements. Am'd '11, p. 226.

Mayor presides over council in cities of third class, § 539.

551. (200.) Quorum. The majority of the council elected shall constitute a quorum to do business, but a smaller number may adjourn from time to time, and may compel the attendance of absentees under such penalties as may be prescribed by ordinance.

Under provisions of this section, and §§ 553, 601 and 602, where office of chief of police was previously created and the salary fixed by city ordinance, the confirmation by a majority of the council was necessary. State, ex rel, v. Sheets, 26 U. 105; 72 P. 334.

552. (201.) Meetings. Departments. The city council in cities of the third class shall prescribe the time and place of holding its meetings; *provided,* that at least one meeting shall be held each month, and the mayor or any two members of the council may call a special meeting by giving notice of it to each of the members of the council, served personally or left at his usual place of abode.

In cities of the first and the second class, the board of commissioners shall prescribe the time and place of holding its meetings; *provided,* that at least four public meetings a week shall be held by said board and one of said meetings shall be held in the evening. If at any time the business of the city requires a special meeting of the board of commissioners, such meeting may be ordered by a majority of the board or by the mayor or temporary chairman thereof. The order must be signed by the members or mayor or chairman calling such meeting, and must be entered in the minutes of the board. Not less than three hours' notice of such special meeting must be given by the recorder to each member not joining in the order, said notice to be served personally or left at his usual place of abode. All meetings of the board of commissioners, to which any person not a city officer is admitted, must be public, the books, records, and accounts must be kept at the office of the city recorder and open at all times during the business hours for public inspection.

The board of commissioners shall have power to make and enforce such rules and regulations for the government of the board, the preservation of order and the transaction of business as may be necessary.

The said board of commissioners shall have, possess, and exercise all executive, administrative, and legislative powers and duties now had, possessed, and exercised by the mayor, city council, and board of public works in cities of the first and the second class. The executive and administrative powers, authority, and duties in such cities of the first and the second class shall be distributed into and among five departments as follows:

1. Department of public affairs and finance;
2. Department of water supply and water works;
3. Department of public safety;
4. Department of streets and public improvements;
5. Department of parks and public property.

The said board of commissioners shall, at the first regular meeting after the election of its members, designate by a majority vote one commissioner to be superintendent of the department of public affairs and finance; one to be superintendent of the department of water supply and waterworks; one to be superintendent of the department of public safety; one to be superintendent of the department of streets and public improvements, and one to be superintendent of the department of parks and public property, but such designation shall be changed whenever it appears that the public service shall be benefited thereby; *provided,* that in cities of the second class no member of the board shall be superintendent of more than two departments. Said board of commissioners shall also determine the powers and duties to be performed by said superintendents of departments and of all officers and employes; it may assign any particular member, officer, and employe to one or more of the departments; it may require a member, officer, or employe to

perform duties in two or more departments, and may make such other rules and regulations as may be necessary or proper for the efficient and economical conduct of the business of the city. '11, p. 227.

553. (202.) Id. Passage of ordinances. It shall sit with open doors and keep a journal of its own proceedings. The yeas and nays shall be taken upon the passage of all ordinances and all propositions to create any liability against the city, and in all other cases at the request of any member, which shall be entered upon the journal of its proceedings. The concurrence of a majority of the members elected to the city council shall be necessary to the passage of any such ordinance or proposition; *provided,* that in cities where there are an even number of councilmen the consent or concurrence of one-half of the councilmen elected shall be sufficient to confirm an appointment or concur in the removal of an appointive officer. Am'd '11, p. 222.

Number of meetings, § 552.
Meetings to be public, § 552.
The session of the council sitting as a committee of the whole must be public. Acord v. Booth, 33 U. 279; 93 P. 734.

554. (203.) Reconsideration of vote. No vote of the city council shall be reconsidered or rescinded at a special meeting, unless at such special meeting there be present as large a number of councilmen as were present when such vote was taken.

555. (204.) Deferring action on reports. Any report of a committee of the council shall be deferred for final action thereon to the next regular meeting of the council after the report is made, by request of any two members of the council.

556. (205.) When ordinances take effect. Publication. Proof. All ordinances, before taking effect, shall be deposited in the office of the city recorder and published at least once in some newspaper published within the city, or if there is no newspaper published in the city, then by posting in three public places therein, and shall go into effect on the twentieth day after its publication, unless provided in the ordinance that it shall take effect at an earlier or later date; *provided,* that whenever a revision is made and the revised ordinances are published by authority of the board of commissioners or city council, no further publication shall be deemed necessary. The city recorder shall record all ordinances in a book kept for that purpose, together with the affidavits of publication by the publisher, or his agent, or if posted, with the certificates of the due posting thereof; and said book, or a certified copy of the ordinances, under the seal of the city, shall be received as evidence in all courts and places without further proof, or if printed in book or pamphlet form by authority of the board of commissioners or city council, they shall be so received; *provided,* that in cities of the third class the city council may, at its option, order that a certified copy of any ordinance be posted in three public places within the city, and thereafter no further publication shall be deemed necessary. R. S. '88, § 1754. Am'd '11, p. 228.

Power to pass ordinances, § 570x87, and § 587.
Initiation and referendum, § 2310-2314.
The requirement for the posting of an ordinance is mandatory, but no form of order or resolution need be passed by the city council in order to render the posting of the order effective. Salina City v. Lewis, Salina City v. Neilson, 50 U. —; 172 P. 286, 290.

CHAPTER 3.

POWERS OF COMMISSIONERS AND CITY COUNCILS.

570. (206.) Declaration. The boards of commissioners and city councils of cities shall have the powers in the following sections enumerated. Am'd '17, p. 422.

570x1. (206x1.) Public finances and property. To control the finances and property of the corporation.

This section (570x-570x87, inclusive), was amended and re-enacted in '01, pp. 133-141; '03, pp. 191-200; '05, pp. 42-53; '11, pp. 206-217; '15, pp. 156-169.

570x2. (206x2.) Powers. Objects. To appropriate money for corporate purposes only, and provide for payment of debts and expenses of the corporation; and to purchase, receive, hold, sell, lease, convey, and dispose of property, real and personal, for the benefit of the city, both within and without its corporate boundaries; to improve and protect such property, and to do all other things in relation thereto as natural persons; *provided,* that it shall be deemed a corporate purpose to appropriate money for any purpose which, in the judgment of the board of commissioners or city council, will provide for the safety, preserve the health, promote the prosperity, and improve the morals, peace, order, comfort, and convenience of the inhabitants of such city. Am'd '17, p. 422.

May assist in erecting armory, § 3385.

May furnish armory with light and water free, § 3385.

570x3. (206x3.) Taxes. To levy and collect taxes for general and special purposes on real and personal property as provided by law.

General taxes, § 670; special taxes, §§ 673-700.

570x4. (206x4.) Licenses. To fix the amount, terms, and manner of issuing licenses.

Licenses, § 570, subs, 38, 41, 86.

The board of commissioners may regularly license a rooming house or a hotel, and if they refuse to issue a license the presumption is that there is good cause therefor and will not be compelled to issue the license unless it is shown that they refuse for insufficient reasons.

Larsen et al. v. Salt Lake City, 44 U. 437; 141 P. 98.

570x5. (206x5.) Public buildings. To erect all needful buildings for the use of the city.

Construct buildings, etc., § 570, subs. 61, 72.

570x6. (206x6.) Borrowing money. To borrow money on the credit of the corporation for corporate purposes, in the manner and to the extent allowed by the constitution and the laws, and to issue warrants and bonds therefor, in such amounts and forms and on such conditions as the council shall determine. The council shall provide for the payment of interest on such bonds as the same shall become due and for a sinking fund for the payment of the principal thereof, within twenty years after issuing the same.

Limitation on creating indebtedness, con, art. 14, secs. 3, 4.

May bond for water, light, or sewers, § 792.

570x7. (206x7.) Issuing bonds. To issue bonds in place of or to supply means to meet maturing bonds or for the consolidation or refunding of the same.

570x8. (206x8.) Streets. Parks. Recreation and bathing places. To lay out, establish, open, alter, widen, narrow, extend, grade, pave, or otherwise improve streets, alleys, avenues, boulevards, sidewalks, parks, and public grounds, and to vacate streets, alleys, avenues, and boulevards or parts thereof, by ordinance; and to establish, maintain, and provide for the supervision of bath houses, public playgrounds, recreation places, and swimming pools. Am'd '17, p. 422.

Establishment and improvement of streets, etc., special taxes, §§ 673-700; street tax, § 570x81.

Notice of letting of contracts, § 819.

Duties of board of public works, cities of first class, § 749.

Where a municipal corporation in making street improvements adopted and followed a plan prepared by a competent engineer, it is not liable for injuries, the test of the liability being whether the plans were drawn by a competent person.

Ward v. Salt Lake City, 46 U. 616; 151 P. 905.

Shugren v. Salt Lake City, 48 U. 320; 159 P. 530.

A city may establish street grades and improve the street so as to conform thereto, if grades are established for the purpose of making the streets safe and more convenient for travel.

Gray v. Salt Lake City, 44 U. 204; 138 P. 1177.

A city may establish street grades and make the streets and sidewalks conform thereto, subject only to an action for damages to abutting property; and the city is not liable for any defect in the planning of a public improvement, though it may be liable for a defective or negligent execution of such plans.

Morris v. Salt Lake City, 35 U. 474; 101 P. 373.

The courts will not ordinarily review the acts of city authorities in their determination of what the improvements shall be and how its plans shall be executed, unless the plans were conceived in bad faith, or are oppressive, or clearly unreasonable.

Id.

On the vacation of a street by city the title of the land reverts to the owner of the fee whether the fee is in the city or an adjoining owner.

Knight v. Thomas, 35 U. 470; 101 P. 383.

The legislature or a municipality when authorized by the legislature, may authorize encroachment on public streets to a reasonable extent, subject to the right of any aggrieved person to recover damages sustained.

Lewis v. Pingree Natl. Bank, 47 U. 35; 151 P. 558.

Where a contractor for a sidewalk cut the

roots of trees standing in the public street, and the trees were left without support, and five or six days thereafter they blew down against a dwelling, damaging the same, the city had constructive notice of the dangerous condition of the trees, rendering it liable for the damages sustained.
Morris v. Salt Lake City, 35 U. 474; 101 P. 373.

570x9. (206x9.) Trees. To plant, or direct and regulate the planting of, ornamental shade trees in streets, avenues, sidewalks, parks, and public grounds.
Duties and powers of park commissioners, § 763.

570x10. (206x10.) Use of streets and public places. To regulate the use of streets, alleys, avenues, sidewalks, crosswalks, parks, and public grounds.
State roads, tax for, § 2857.

570x11. (206x11.) Id. Obstructions. To prevent and remove obstructions and encroachments upon the same.
The city council may prohibit the moving of buildings on streets without permission, and may designate an officer or committee to grant permission.
City of Eureka v. Wilson, 15 U. 53; 48 P. 41.

570x12. (206x12.) Id. Lighting, sprinkling. To provide for the lighting, sprinkling, and cleaning of the same; *provided*, that the city council shall have the power to create sprinkling districts and levy a special tax therefor on the property to be benefited thereby.
May contract for lighting, § 577. Special tax for lighting, §§ 720-734.

570x13. (206x13.) Id. Gas and water mains, sewers. To regulate the opening and use thereof for the laying of gas or water mains and pipes, and the building and repairing of sewers, tunnels, and drains.

570x14. (206x14.) Public utilities. To construct and maintain waterworks, gas works, electric light works, telephone lines, street railways, or bath houses, or to authorize the construction and maintenance of the same by others, or to purchase or lease any or all of said works from any person or corporation; and to sell and deliver the surplus product or service of any such works, not required by the city or its inhabitants, to others beyond the limits of the city.
May borrow money for water, light, sewers, § 792.
May construct waterworks, § 570x75.
When may sell light plant, §§ 810-813.
May make ordinances for management of waterworks, § 804.
Provide insurance for employees, §§ 3110, 3111, 3119.
Regulations for water users, §§ 800-804.

570x15. (206x15.) Water supply. Territorial limits. Ordinances for protection. Expenses. Stock drives. Police regulation. To construct or authorize the construction of waterworks within or without their limits; and, for the purpose of maintaining and protecting the same from injury and the water from pollution, their jurisdiction shall extend over the territory occupied by such works; and over all reservoirs, streams, canals, ditches, pipes, and drains used in and necessary for the construction, maintenance, and operation of the same, and over the stream or source from which the water is taken, for fifteen miles above the point from which it is taken, and for a distance of three hundred feet on each side of said stream, and over highways along said stream or water course within said fifteen miles and said three hundred feet; and to enact all ordinances and regulations necessary to carry the power herein conferred into effect; and in this behalf all cities are authorized and empowered to enact ordinances preventing pollution or contamination of the streams or water courses from which the inhabitants of such cities derive their water supply, in whole or in part, for domestic and culinary purposes; and also to enact ordinances prohibiting and regulating the construction or maintenance of any closet, privy, outhouse, or urinal within two hundred feet of any stream or water course from which culinary and domestic water for the inhabitants of such cities is derived, and providing for permits for the construction and maintenance of the same, and in granting said permit, such city may annex thereto such reasonable conditions and requirements for the protection of the public health as it deems proper, and may, if deemed advisable, require that all closets, privies, and urinals along such streams shall be provided with effective septic tanks or other germ-destroying appli-

ances; *provided,* that when rights have been acquired and buildings constructed along any creek or water course prior to the time the right to the water thereof vested in the city, such city shall bear the expense of such septic tanks or germ-destroying appliances; and *provided, further,* that each city of the first class shall provide a highway in and through its corporate limits and so far as its jurisdiction extends, which shall not be closed to cattle, horses, sheep, or hogs which are being driven through any such city, or through any territory adjacent thereto over which the said city has jurisdiction, but the board of commissioners or city council of such city may enact ordinances placing under police regulations the manner of driving such cattle, sheep, horses, and hogs through such city, or any territory adjacent thereto over which the said city has jurisdiction. Am'd '17, p. 422.

This provision is constitutional.
Salt Lake City v. Young, 45 U. 349; 145 P. 1047.

570x16. (206x16.) Tax districts. To divide the city into districts for the purpose of local taxation, or to create districts for that purpose, as occasion may require.

570x17. (206x17.) Control of water and water courses. To control the water and water courses leading to the city, and to regulate and control the water courses and mill privileges within the city; *provided,* that the control shall not be exercised to the injury of any rights already acquired by actual owners; and *provided, further,* that when the city council of any city is acting as distributing agent of the water, not the property of the corporation, outside of, or within the corporate limits of such city, such council may, and is hereby authorized to, levy such a tax as may be necessary annually, for the purpose of controlling, regulating, and distributing such water, and constructing and keeping in repair the necessary means for diverting, conveying, and distributing the same; *provided,* that the funds derived from the levy of said tax shall not be appropriated or used for any other purpose, and in the event that, if more tax is levied and collected in any one year than is necessary for said purpose the excess thereof or balance shall be carried to the account of the year next following and applied to the purpose for which it was collected. Said tax shall be levied and collected as provided by ordinance, and, until collected, the same shall be a lien upon such water rights, and the land irrigated thereby.

Control of water and special tax, § 697.
The right of a municipality to the exclusive control and regulation of water within its limits, to which water others have acquired paramount title and ownership prior to incorporation of the municipality, is based upon acquiescence of such owners, and without such acquiescence, the municipality can acquire no rights therein as against such owners.
Fisher v. Bountiful City, 21 U. 29; 59 P. 520.
City ordinance required persons running irrigation water across streets to flume same, under a penalty; held, that such ordinance did not give the city a right of recovery for putting in flumes.
Bountiful City v. Lee, 27 U. 183; 75 P. 368.

570x18. (206x18.) Id. Canals, reservoirs. Sources of supply. Special tax. To construct, purchase, or lease, and maintain canals, ditches, and artesian wells, and reservoirs; and to purchase or lease springs, streams, or sources of water supply for the purpose of providing water for irrigation, domestic, or other useful purposes; and to prevent all waste of water flowing from artesian wells; and, if necessary to secure said sources of water supply, to purchase or lease the land from which said water has been appropriated or applied; also to purchase, acquire, or lease stock in canal companies and water companies for the purpose of providing water for said city or town and the inhabitants thereof.

Whenever a city council or city is acting as distributing agent of the water, not the property of the corporation, outside of or within the corporate limits of such city, as provided by law, such city, upon written petition of the owners of such water, may increase the supply of said water owned by said persons by any means provided in this subdivision, and for that purpose may levy and collect from the owners of such water a tax not exceeding such sum per acre of land owned by such persons as may have been agreed

upon and designated in said petition, said tax, when so collected, to be appropriated exclusively to said purposes, except such part thereof as is necessary to pay the expense of levying and collecting the same. Said tax shall constitute a lien upon the water rights of said persons and the land irrigated thereby, and shall be levied and collected as provided in § 570x17.

Prohibition against leasing or selling water supply, Con. art. 11, sec. 6.
May exchange water rights, Con. art. 11, sec. 6.
May purchase, lease, or condemn water rights, §§ 570x2, 570x3.
May construct waterworks, etc., §§ 570x14, 570x76.
Regulations for use of water, §§ 800-804.
May make rules for waterworks, § 804.
City as employer, subject to industrial commission, §§ 3110, 3111.
May insure directly with industrial commission, §§ 3110, 3111.

Under the charter right to provide the city with water and lay pipes, the city was authorized to acquire water rights by appropriation and use, or in any other lawful way.
Springville v. Fullmer, 7 U. 450; 27 P. 577.
Though a city was forbidden to lease or sell its waterworks, yet, where a so-called lease was made and acted on for years by both parties, at great expenditure by lessee, the contract will not be set aside.
Ogden City v. Bear Lake Co., 28 U. 25; 76 P. 1069.
Contra, same case, dictum, 16 U. 440; 52 P. 697.

570x19. (206x19.) Contracts for public lighting. To contract with and authorize any person, company, or association to construct gas works, electric or other ligting works in said city, and give such persons, company, or association the privilege of furnishing light for the public buildings, streets, sidewalks, and alleys of said city, for any length of time not exceeding three years.

May contract for lighting, § 577.

570x20. (206x20.) Lighting streets. Sale of light and power. To provide for the lighting of streets, laying down of gas pipes, and erection of lamp posts; to regulate the sale and use of gas, natural gas, and electric or other lights, and electric power, the charge therefor, and the rent of meters within the city, and to regulate the inspection thereof; to prohibit or regulate the erection of telegraph, telephone, or electric wire poles in the public grounds, streets, or alleys, and the placing of wires thereon; and to require the removal from the public grounds, streets, or alleys of any or all such poles, and the placing underground of any or all telegraph, telephone, or electric wires.

Levy special tax for street lighting, §§ 720-734.
May contract for lighting, § 577.

570x21. (206x21.) Water rates. To fix the rate to be paid for the use of water furnished by the city, or by any person or corporation.

In the absence of a showing to the contrary, it will be presumed that the water rates agreed upon between a city and a water company are fair and reasonable.
Brummitt v. Ogden Waterworks Co., 33 U. 289; 93 P. 828.

570x22. (206x22.) Use of sidewalks. Removal of weeds, snow and ice. To regulate and control the use of sidewalks and all structures thereunder or thereover; and require the owner or occupant, or the agent of any owner or occupant, of any property to remove all weeds and noxious vegetation from such property, and in front thereof to the curb line of the street, and to keep the sidewalks in front of such property free from snow, ice, and other obstructions. Am'd '17, p. 423.

570x23. (206x23.) Garbage. Obstructing streets. To regulate and prevent the throwing or depositing of ashes, offal, dirt, garbage, or any offensive matter in, and to prevent injury or obstruction to, any street, avenue, alley, park, or public ground.

570x24. (206x24.) Curbs and gutters. To provide for and regulate crosswalks, curbs, and gutters.

570x25. (206x25.) Use of public property for private purposes. Bill posting. To regulate or prevent the use of streets, sidewalks, public buildings, and grounds for signs, sign posts, awnings, telegraph, or telephone poles, horse troughs, or racks, or for posting hand bills or advertisements.

570x26. (206x26.) Hand bills. To regulate or prohibit the exhibition, distribution, or carrying of placards or hand bills in the streets, public grounds, or upon the sidewalks.

570x27. (206x27.) Flags, banners, signs. To regulate or prevent the flying of flags, banners, or signs across the streets or from houses.

570x28. (206x28.) Street traffic and vending. To regulate or prohibit traffic and sales upon the streets, sidewalks, and public places.

570x29. (206x29.) Speed of horses and vehicles. To regulate the speed of horses and other animals, bicycles, automobiles, and other vehicles, and cars and locomotives within the limits of the corporation; and to prevent horse racing, immoderate driving or riding in the streets.

570x30. (206x30.) Numbering houses. To regulate the numbering of houses and lots.

570x31. (206x31.) Naming streets. To name streets, avenues, and other public places, and to change the names thereof.

570x32. (206x32.) Railway franchises. To permit, regulate, or prohibit the locating, constructing, or laying the tracks of any railroad or tramway in any street, alley, or public place; and to grant franchises to railroad companies, and to union railroad depot companies, to lay, maintain, and operate in any street or part or parts of streets of said cities, or other public places therein, railroad tracks, and union railroad depot connecting and terminal tracks, but such permission shall not be for a longer time than one hundred years.

Street railroads must have consent of the city, Con. art. 12, sec. 8.

Council may require unused tracks to be removed, § 573.

Council may require gates to be placed, § 574.

Under a city charter not authorizing the city council to grant exclusive franchises, the city council cannot grant an exclusive right of way upon streets in the city, nor had the territorial legislature the right to grant such power to the city council.

Henderson v. Ogden Street Railway Company, 7 U. 199; 26 P. 286.

The act of a city council in granting to individuals a franchise to lay railways in the streets of the city, under power conferred upon them by a general law of the territory, is not a local or special law under act of congress, July 30, 1886.

Id.

Municipal authorities cannot devote to street railways the whole width of the street, or so large a portion thereof as to seriously and unreasonably interfere with the equitable easement of abutting owners, nor can the legislature grant such power to the municipality.

Dooly Block v. Rapid Transit Company, 9 U. 31; 33 P. 229.

Where the municipality owns the fee of the streets, having acquired the same under the townsite law, the abutting owners have equitable rights by way of easements in the streets, of which equitable rights they cannot be deprived by the municipality except in a manner provided by law.

Id.

A city council cannot authorize a permanent switch track, for a private business only, along a street and across a sidewalk, from a steam railroad in the street, to the detriment of people residing on the street and to the damage of their abutting property, the streets being dedicated to public use.

Cereghino v. O. S. L. R. R. Co., 26 U. 467; 73 P. 634.

The power of a city council to grant franchises to railroad companies to maintain a track in a street can only be exercised by ordinance duly passed, or resolution or by-law enacted in the same way; a resolution conferrin the right, to be valid, must be passed in accordance with the formalities provided by law.

Id.

This section does not authorize the city council to give a railroad or depot company the exclusive right to occupy a street for railroad purposes for 100 years.

Knight v. Thomas, 35 U. 470; 101 P. 383.

The city council may authorize the laying of tracks in a street to enable an electric railway which is a common carrier to reach its car barns.

Whitmeyer v. Salt Lake & Ogden Ry Co., 46 U. 491; 151 P. 48.

570x33. (206x33.) Railway grades and crossings. To provide for or change the location, grade, or crossing of any railroad; and to declare a nuisance and to take up and remove, or cause to be taken up and removed, the tracks of any street railway company which shall have been laid upon the streets or highways of the city and which such railway company has failed to operate with cars for public use for a period of nine months after the laying thereof.

The public utility commission has the exclusive jurisdiction to grant franchise for railroads to cross public highways.

D. & R. G. v. Public Ut. Com., 51 U. —; 172 P. 479.

570x34. (206x34.) Railway fencing. To require railroad companies to fence their respective railroads or any portion of the same, and to construct cattle guards, crossings of streets and public roads, and keep the same in repair within the limits of the corporation.

570x35. (206x35.) Flagmen at railway crossings. Grades to conform to streets. To require railroad companies to keep flagmen at railroad crossings of streets, or otherwise to provide protection against injury to persons or property; to compel such companies to raise or lower their railroad tracks to

conform to any grade which at any time may be established by such city, so that such tracks may be crossed at any place on any street, alley, or highway; to compel railway companies to make and keep open, and to keep in repair, ditches, drains, sewers, and culverts along and under their railroad tracks, so that the natural or artificial drainage of adjacent property shall not be impaired.

570x36. (206x36.) Bridges and viaducts. To construct and keep in repair bridges, viaducts, and tunnels, and to regulate the use thereof.

Contract for public works, how let, § 749.

570x37. (206x37.) Culverts, drains, sewers. To construct and keep in repair culverts, drains, sewers, catch basins, manholes, and cesspools, and to regulate the construction and use thereof.

570x38. (206x38.) General license powers. To license, tax, and regulate hawking, peddling, pawnbrokers, loan agencies, employment agencies, the keeping of ordinances, theatricals, and other exhibitions, shows, and amusements, and the business conducted by ticket scalpers, distilleries, breweries, money changers, brokers, keepers of public scales, runners for stages, cars, public houses, or other persons or things, and to revoke such license at pleasure; to license, tax, and regulate banks, bath houses, livery stables, skating rinks, smelters, crushers, express companies, restaurants, hotels, taverns, theatres, opera houses, music halls, boarding houses, eating houses, chop houses, lodging houses, laundries, barber shops; second hand or junk stores, and to forbid the owners or persons in charge of said stores from purchasing or receiving any articles whatever from minors without the written consent of their guardians or parents; and storage houses, and to require bond to the city for the benefit of bailers therein; to license, tax, and regulate the business conducted by hackmen, draymen, omnibus drivers, carters, cabmen, porters, expressmen, watermen, and all others pursuing like occupations, and to prescribe their compensation; to license, tax, and regulate the business conducted by merchants, retailers, shop and store keepers, butchers, druggists, photographers, assayers, confectioners, furniture dealers, coal dealers, lumber dealers, fruit peddlers, and solicitors; to license, tax, and regulate bill boards, bill-posting, and the distribution of advertising matter; to license, tax, and regulate the running of automobiles, street railway and steam cars, bicycles, and other vehicles.

Annual state license for peddlers, §§ 4392-4403.

General licensing power, §§ 570x4, 570x87.

Power to license distilleries and breweries repealed, §§ 3341-3373.

Employment offices, §§ 2440-2458

Where an ordinance imposes a license upon sewing machine agents, and a penalty upon any person who within the city limits engages in peddling without first obtaining a license therefor, and a sewing machine agent sold machines from sample without obtaining any license; held, that he violated the ordinance.

Spanish Fork v. Mortensen, 7 U. 33; 24 P. 620.

City authorized to pass an ordinance for purpose of raising revenue by leving and collecting a license fee for each telephone instrument operated by defendant and used exclusively for local business, but such power does not extend to authorizing the city to license or tax interstate business of defendant.

Ogden City v. Bell Tel Co., 17 U. 66; 53 P. 985.

A city has no power to exact a license fee from a lawyer. (Ogden City v. Bell Tel. Co. 17 U. 66; 53 P. 985, distinguished.)

Ogden City v. Boreman, 20 U. 98; 57 P. 843.

The board of commissioners may regularly license rooming houses and hotels, and if they refuse to issue a license the presumption is that there is good cause therefor and they will not be compelled to issue a license unless it is shown that they refused for insufficient reasons.

Larson et al. v. Salt Lake City, 44 U. 437; 141 P. 98.

570x39. (206x39.) License and regulation of games, dance halls, etc. To license, tax, regulate, and suppress billiard, pool, bagatelle, pigeon hole, or any other tables or implements kept or used for similar purpose; also pin alleys, or tables, or ball alleys; also to license, tax, regulate, prohibit, or suppress dancing halls, dancing resorts, dancing pavilions, and all places or resorts to which persons of opposite sexes may resort for the purpose of dancing or indulging in any other social amusements.

570x40. (206x40.) Disorderly houses. Obscene literature. To suppress or prohibit the keeping of bawdy and other disorderly houses, houses of ill fame or assignation, or houses kept by, maintained for, or resorted to or used by, one or more females for lewdness or prostitution within the limits

of the city, and within three miles of the outer boundaries thereof, and to prohibit the resorting thereto for any of the purposes aforesaid; and also to suppress and prohibit gambling houses and gambling, lotteries, and all fraudulent devices and practice, and all kinds of gaming, playing at dice, cards, and other games of chance, and to prohibit music, or the sale or exhibition of obscene or immoral publications, prints, pictures, or illustrations.

A house of ill fame is a house kept for persons desiring unlawful sexual intercourse, and in which such intercourse is practiced.

People v. Hampton, 4 U. 258; 9 P. 508.

Ogden City could not punish for resorting to house of ill fame under former charter.

Ogden City v. McLaughlin, 5 U. 387; 16 P. 721.

Power of city authorities to suppress all kinds of gaming hereunder is not limited to the precise games mentioned in § 8162, as amended, and the operation of a slot machine used by merchants to stimulate trade under a scheme by which the customer upon depositing money in the machine is bound in any event to get the value in merchandise or the money deposited, and may by chance obtain very much more, may be forbidden by city ordinance passed under the authority of this subdivision.

Salt Lake City v. Doran, 42 U. 401; 131 P 636.

570x41. (206x41.) Manufacture and sale of intoxicating liquors. To license and regulate, or prohibit the manufacturing, selling, giving away, or disposition in any manner of any intoxicating liquors; *provided,* no license for such purpose shall be issued by the city council of any city where the qualified electors of such city have voted "against sale" of intoxicating liquors, and where the qualified electors have voted "against sale" of intoxicating liquors, the city council of such city shall prohibit the manufacturing, selling, giving away, or disposition in any manner, of any intoxicating liquors, except the manufacture thereof as provided by law, and in any city where the qualified electors have voted "for sale" of intoxicating liquors, such city council shall have the right to determine the amount to be paid for liquor licenses, as provided by law, and said licenses shall be subject to the same regulations as are required by the general laws of the state, and to provide such other reasonable regulations as such city council may deem advisable.

Am'd '13, p. 143.

Powers concerning liquor licenses repealed, §§ 3341-3381.

Neither under its general police powers, nor under a clause in the city charter authorizing the city to license, regulate, and restrain the sale of fermented and spirituous liquors within its limits, has the city authority to exact a license fee of $100 per quarter from a dealer who is within the city limits but three miles from the settled portions of the city, and without police supervision.

Salt Lake City v. Wagner, 2 U. 400.

A city charter which authorizes the city "to license, regulate, prohibit, or restrain the manufacturers, sellers, or vendors of spirituous or fermented liquors," does not authorize such city to prohibit the sale of such liquors.

Logan City v. Buck, 3 U. 301; 2 P. 706.

Under a provision of a city charter giving the city council power to "license, regulate, prohibit, or restrain houses or places for the selling or giving away of wines or other liquors, whether ardent, vinous, or fermented," an ordinance prohibiting druggists from selling such liquors, except for medicinal purposes, is valid.

Provo City v. Shurtliff, 4 U. 15; 5 P. 302.

The city council of Salt Lake City, under its charter granting it power to license, regulate, and tax the manufacturing, selling, giving away, or disposing of, in any manner, intoxicating liquors, has a reasonable discretion as to the person to whom the license may be granted, and as to the place of business.

Perry v. Salt Lake City Council, 7 U. 143; 25 P. 739.

Defendant issued plaintiff a liquor license, and the latter paid for three months; within a month after issuance, the defendant revoked the license without preferring charges, upon informal notice of the hearing, but without citing him to show cause; held, that the revocation without giving plaintiff an opportunity to be heard was void.

Pehrson v. City Council, 14 U. 147; 46 P. 657.

Equity will not enjoin a city from enforcing a liquor ordinance as against a hotel keeper, on the ground that the ordinance is invalid, plaintiff having an adequate remedy at law by pleading the invalidity of the ordinance as a defense to the prosecution, and by appealing from a conviction.

Holmes v. Salt Lake City, et al., 43 U. 253; 134 P. 571.

The burden is on one charged with selling intoxicants without a license to show that he had a license to sell.

Salt Lake City v. Robinson, 40 U. 448; 125 P. 657.

An ordinance which provides that a person violating it shall be guilty of a misdemeanor and punished by fine or imprisonment, or both, is not invalid as discriminatory because containing no provision punishing corporations violating the law.

American Fork City v. Charlier, 43 U. 231; 134 P. 739.

The liquor prohibition act, §§ 3341-3381, does not take from the municipality the power to prohibit the sale of intoxicating liquors by ordinance.

Zanata v. Browning, 50 U. —; 170 P. --.

570x42. (206x42.) Public markets. To establish markets and market houses, and provide for the regulation and use thereof.

570x43. (206x43.) Regulation of markets. To provide for the place and the manner of sale of meats, poultry, fish, butter, cheese, lard, vegetables, and all other provisions, and regulate the selling of the same.

It is within the power of a city to impose a general merchandise license tax upon one who is engaged in a general merchandise business, including the sale of meats, and further to impose a license tax upon his business of selling meats.

Provo City v. Provo Meat & Packing Co., 49 U. 528; 165 P. 477.

570x44. (206x44.) Inspection of provisions. To provide for and regulate the inspection of meats, fruit, poultry, fish, butter, cheese, lard, vegetables, flour, meal, and all other provisions.

A municipality may enact an ordinance regulating the sale and inspection of milk, and making it an offense to sell milk in the city limits without a permit, and where it does not prohibit and punish the same act as does the state statute, they are not conflicting, and the ordinance is valid. Salt Lake City v. Howe, 37 U. 170; 106 P. 705.

570x45. (206x45.) Inspection of merchandise. To provide for the inspection, measurement, or graduation of any merchandise, manufacture, or commodity, and to appoint the necessary officers therefor.

570x46. (206x46.) Weights and measures. Inspection. To provide for the inspection and sealing of weights, measures, computing scales, and all weighing and measuring devises indicating the arithmetical value as well as weight.

Weights and measures, §§ 6273-6304.

570x47. (206x47.) Id. Regulation. To enforce the keeping of proper weights, measures, computing scales, and all weighing and measuring devices indicating arithmetical values as well as weight.

Weights and measures, §§ 6273-6304.

570x48. (206x48.) Plumbing. To regulate the construction, repair, and use of vaults, cisterns, areas, hydrants, pumps, sewers, gutters, and plumbing, and to provide for a board of examiners to examine into the fitness and qualifications of persons following the plumbing trade; and to prescribe what qualifications are necessary of persons following said trade.

570x49. (206x49.) Disorderly conduct, false pretense, sale of liquor and narcotics to minors. To prevent intoxication, fighting, gambling, quarreling, dog-fights, cock-fights, prize-fights, bull-fights, and all disorderly conduct, and to provide against and prevent the offenses of assault and battery, petit larceny, to restrain riots, routs, noises, disturbances, or disorderly assemblies in any street, house, or place in the city; to regulate and prevent the discharge of firearms, rockets, powder, fireworks, or any other dangerous or combustible material in the streets, lots, grounds, alleys, or about or in the vicinity of public buildings; to provide against and prevent the offense of obtaining money or property under false pretenses, or the offense of embezzling money or property; in all cases where the money or property embezzled or obtained by false pretense does not exceed in value the sum of $50, and to prohibit the sale, giving away, or furnishing of tobacco, intoxicating liquors, opium, or other narcotics to any person under 21 years of age; and to prohibit the buying, accepting, or having in his possession any of the aforesaid narcotics by any person under 21 years of age. Am'd '13, p. 144.

Intoxicating liquors, prohibition of, §§ 3341-3381.

Opium dens, §§ 8439-8442.

570x50. (206x50.) Concealed weapons. To regulate and prohibit the carrying of concealed weapons.

570x51. (206x51.) Vagrants To arrest, fine, or set to work on the streets or elsewhere all vagrants, mendicants, and persons found in said city without visible means of support or some legitimate business; to establish and maintain municipal lodging and eating houses.

570x52. (206x52.) Disturbing the peace. To provide for the punishment of persons disturbing the peace and the good order of the city or any lawful assembly, by clamor or noise, or by intoxication, fighting, or using obscene or profane language, or otherwise violating the public peace, by indecent or disorderly conduct, or by lewd or lascivious behavior, and to punish for interfering with any city officer in the discharge of his duty. Also to provide for the punishment of trespass and such other petty offenses as the city council may deem proper.

Imprisonment at labor, § 588, and notes.

570x53. (206x53.) Tramps, prostitutes, swindlers, sharpers. To provide for the punishment of tramps, common street beggars, common prosti-

tutes, habitual disturbers of the peace, pickpockets, gamblers, thieves, or persons who practice any game, trick, or device with intent to swindle.

570x54. (206x54.) Fire limits and prevention. To define the fire limits and prescribe limits within which no building shall be constructed except of brick, stone, or other incombustible material, without permission, and to cause the destruction or removal of any building constructed or repaired in violation of any ordinance, and to cause all buildings and enclosures which may be in a dangersous state to be put in a safe condition or removed.

An ordinance providing that "the committee on buildings" is empowered to grant permission to erect any building with combustible material within the fire district, under such "regulations and restrictions" as that committee, may provide; held, invalid, so far as such provisions were concerned, and that the remaining provisions of such action and ordinance were valid; held further, that the provisions of the ordinance extended to all vacant places within the fire limits, and prohibited the removal of a wooden building within the same, or from one part of the fire district to another.
City of Eureka v. Wilson, 15 U. 67; 48 P. 150.

570x55. (206x55.) Id. Fire escapes, etc. To prescribe the manner of constructing stone, brick, and other buildings, and the construction of fire escapes; and to cause all buildings used for public purposes to be provided with sufficient and ample means of exit and entrance, and to be supplied with necessary and appropriate appliances for the extinguishment of fire, to prevent the overcrowding thereof, and to regulate the placing and use of seats, chairs, benches, scenery, curtains, blinds, screens, or other appliances therein.

570x56. (206x56.) Id. Chimneys, boilers, etc. To prevent the dangerous construction and condition of chimneys, fireplaces, hearths, stoves, stove pipes, heaters, ovens, furnaces, boilers, and apparatus used in and about buildings and manufactories, and cause the same to be removed or placed in a safe condition.

570x57. (206x57.) Id. Factories, ashes. To regulate and prevent the carrying on of manufacturing likely to cause fires, and to prevent the deposit of ashes in unsafe places.

570x58. (206x58.) Fire department. Except as otherwise provided by law, to provide for the organization and support of a fire department; to procure fire engines, hooks, ladders, buckets, and other apparatus, and to organize fire engine and hook and ladder companies; and to prescribe duties, rules, and regulations for the government thereof, with such penalty as the council may deem proper, and to make all necessary appropriation therefor; and to establish regulations for the prevention and extinguishing of fires.

Police and fire departments, §§ 654-665.
The police and fire bills of 1894 and 1896 were repealed by laws of 1898.
Pratt v. Swann, 16 U. 483; 52 P. 1092.
Everill v. Swan, 17 U. 514; 55 P. 68.
Moreton v. Swan, 20 U. 79; 57 P. 718.

570x59. (206x59.) Combustibles and explosives. To regulate or prevent the storage of gunpowder, tar, pitch, resin, coal, oil, benzine, turpentine, nitroglycerin, petroleum, or any of the products thereof, and other combustible or explosive materials, and the use of lights in stables, shops, and other places, and the building of bonfires.

Lumber and other combustivles, § 570x74.
The violation of an ordinance regulating the storage of dangerous explosives, designed for the safety of life, limb, and property, constitutes negligence per se.
Smith v. Mine & Smelter S. Co., 32 U. 21; 88 P. 683.

570x60. (206x60.) Steam boilers, engineers, elevators. To provide for the inspection and to regulate the use of steam boilers; to provide for the examination, regulation, and licensing of stationary engineers and others having charge or control of stationary engines, boilers or steam generating apparatus, or elevators within the corporate limits of the city.

570x61. (206x61.) Jails, work houses. To establish, erect, and maintain the city jails, houses of correction, and work houses for the confinement of persons convicted of violating any city ordinances, and to make rules and regulations for the government of the same, and to appoint necessary jailers and keepers; and to use the county jail for the confinement or punishment of offenders, subject to such conditions as are imposed by law, and with the consent of the board of county commissioners.

570x62. (206x62.) Cruelty to animals. To prohibit cruelty to animals.

570x63. (206x63.) Abatement of nuisance. To declare what shall be a nuisance, and to abate the same, and to impose fines upon parties who may create, continue, or suffer nuisances to exist.

570x64. (206x64.) Health and quarantine. To make regulations to secure the general health of the city, to prevent the introduction of contagious, infectious, or malignant diseases into the city, and to make quarantine laws and enforce the same within the corporate limits, and within twelve miles thereof. To create a board of health and prescribe the powers and duties of the same.

570x65. (206x65.) Care of grounds for hospitals and cemeteries. Police jurisdiction. Investment of funds. To purchase, hold, and pay for lands within or without the corporate limits for the burial of the dead, and all necessary grounds for hospitals; to have and exercise police jurisdiction over the same, and over any cemetery used by the inhabitants of said city; to contract for the care and improvement of such cemeteries and cemetery lots therein, and for the compensation to be made therefor; to receive deposits under rules, as may be provided by ordinances, for the care of such lots; to invest the same in securities approved by the city commissioners or councils; to pay therefrom the cost of such care; to survey, plat, map, fence, ornament, and otherwise improve all public burial and cemetery grounds; to convey cemetery lots owned by said city; and to pass rules and ordinances for the protection and governing of said grounds. Am'd '17, p. 26.

Jurisdiction over county hospitals, § 2783.

570x66. (206x66.) Births and deaths. To regulate the burial of the dead and the registration of births and deaths; to direct the returning and keeping of bills of mortality, and to impose penalties on physicians, sextons, and others for default therein.

570x67. (206x67.) Estrays. To regulate or prohibit the running at large, within the limits of the city, horses, mules, asses, cattle, swine, sheep, goats, geese, and all kinds of poultry; to establish a pound and appoint a poundkeeper and prescribe his duties, and to distrain and impound animals running at large, and to provide for the sale of the same in the same manner provided by the laws of the state for the sale of estrays and trespassing animals. The proceeds rising from the sale of such animals, after the payment of all costs, shall go to the city treasurer to be disposed of according to law.

General statute on estrays, §§ 50-73

570x68. (206x68.) Dogs. To license, tax, regulate, or prohibit the keeping of dogs, and to authorize the destruction of the same when at large contrary to ordinance.

Damages for injuries by dogs, §§ 112-113.
A city ordinance providing for dog tax and the killing of unregistered dogs is due process of law.
Jenkins v. Ballantyne, 8 U. 245; 30 P. 760.

570x69. (206x69.) Packing houses, breweries, factories, livery stables, etc. To direct the location and regulate the management and construction of packing houses, tanneries, canneries, renderies, bone factories, slaughter houses, butcher shops, soap factories, foundries, breweries, distilleries, livery stables, and blacksmith shops in and within one mile of the limits of the corporation.

570x70. (206x70.) Offensive trades and places. To prohibit any offensive, unwholesome business or establishment in and within one mile of the limits of the corporation; to compel the owner of any pigsty, privy, barn, corral, sewer, or other unwholesome or nauseous house or place, to cleanse, abate, or remove the same, and to regulate the location thereof.

570x71. (206x71.) Census. To provide for the taking of census, but no census shall be taken oftener than once in five years, except as provided in chapter 1 of this title.

Census and certification, § 526.

570x72. (206x72.) Public buildings. To provide for the construction and care of all public buildings necessary for the use of the city.

Erection of buildings, § 570x5, 570x61.

570x73. (206x73.) Annoying amusements. To prevent or regulate the rolling of hoops, playing of ball, flying of kites, riding of bicycles or tricycles, or any other amusements or practice having a tendency to annoy persons passing in the streets, or on sidewalks, or to frighten teams or horses.

570x74. (206x74.) Lumber and coal yards. To regulate or prohibit the keeping of any lumber yard, and the placing or piling or selling of any lumber, timber, wood, or other combustible material within the fire limits of the city.

Powder and other combustibles, § 570x59. To define fire limits, § 570x54.

570x75. (206x75.) Waterworks, fire signals. To purchase, construct, lease, rent, manage, and maintain any system or part of any system of waterworks, hydrants, and supplies of water, telegraphic fire signals, or fire apparatus, and to pass all ordinances, penal or otherwise, that shall be necessary for the full protection, maintenance, management, and control of the property so leased, purchased, or constructed.

Authority of city to purchase or lease water, etc., § 570x18; to condemn water rights, § 570x2.
Ordinances generally, § 570x87.
Decisions on sale of waterworks, note to § 570x18.
Prohibition against leasing or selling water supply, Con. art. 11, sec. 6.
City as employer is subject to industrial commission, §§ 3110, 3111.
City may insure directly with industrial commission, § 3119.
Statutes regulating, §§ 800-804.

570x76. (206x76.) Public libraries. To establish, maintain, and regulate free public libraries and reading rooms, as provided by law, and to perpetuate such free libraries and reading rooms as may have been heretofore established in said cities.

Libraries in cities, §§ 3710-3721.
When third class cities may levy tax for libraries, § 3719.
Third class city may co-operate with school authorities for public library and gymnasium, § 3721.

570x77. (206x77.) Public demonstrations and processions. To regulate or prohibit all public demonstrations and processions which interfere with the public traffic.

570x78. (206x78.) Burial of indigent dead. To provide for the burial of the indigent dead, and pay the expenses thereof.

570x79. (206x79.) Orphans and neglected children. To authorize the taking and to provide for the safe keeping and education, for such periods of time as may be expedient, of all children who are destitute of proper parental care.

570x80. (206x80.) Inspection of liquors. To regulate the inspection of malt, vinous, fermented, and spirituous liquors.

570x81. (206x81.) Street tax. To provide by ordinance for the annual levy and collection of a street tax to be assessed upon the property, real and personal, within the city, which tax, if levied and collected, shall be in lieu of the tax provided for in subdivision 3 of § 671. Said tax shall not in any one year exceed one-half of 1 per cent, and shall be expended for the opening, widening, grading, and improving of the streets, sidewalks, avenues, and alleys of the city.

Tax for state roads in city, § 2857.

570x82. (206x82.) Street noises. To prevent the ringing of bells, blowing of horns and bugles, crying of goods by auctioneers and others, and the making of other noises, for the purpose of business, amusement, or otherwise, and to prevent all performances and devices tending to the collection of persons on the streets or sidewalks of the city.

570x83. (206x83.) Fastening animals. To compel persons to fasten animals attached to vehicles standing or remaining in the street.

570x84. (206x84.) Official bonds and reports. To require all municipal officers and agents, elected or appointed, to give bond and security for the faithful performance of their duties, and to require from every officer of the

city, at any time, a report in detail of all transactions in his office or any matters connected therewith.

Bonds of officers, §§ 603-605.

570x85. (206x85.) Creation of offices. Vacancies. To create any office that may be deemed necessary for the good government of the city, and to provide for all vacancies in elective and appointive offices; to regulate and prescribe the powers, duties, and compensation of all officers of the city except as otherwise provided by law.

Commission and council to appoint commissioners, § 601.

Compensation of officers, § 612.

Councilmen not to hold created offices, § 613.

Appoint probation officers, § 1826.

Duties and powers of officers prescribed by ordinance, § 614.

Under § 312, C. L. U. 1888, the municipality of Salt Lake City had the right to create the office of inspector of provisions, and, in the absence of legislative restraint, had the right to abolish it.

McAllister v. Swan, 16 U. 1; 50 P. 812.

The city council, having authority to create an office, had the right to abolish it.

Heath v. S. L. City, 16 U. 374; 52 P. 602.

570x86. (206x86.) Licenses and taxes. To raise revenue by levying and collecting a license fee or tax on any private corporation or business within the limits of the city, and regulate the same by ordinance. All such license fees and taxes shall be uniform in respect to the class upon which they are imposed.

Decisions on licenses, note to §§ 570x38, 570x41.

General power to license, §§ 570x4, 570x38-570x41.

An ordinance providing that corporations engaged in generating and selling electricity and using meters shall pay a license tax of $1 per year for each and every meter used, was not a valid basis of classification; it lacks uniformity, but does not violate the contract franchise right.

Salt Lake City v. Utah Light & Ry Co., 45 U. 50; 142 P. 1067.

A city ordinance may impose an occupation or license tax, and one which divides the merchants and bankers into twenty-two classes, taxing them according to the stock or capital, is constitutional, and it is not invalidated by a provision for an illegal penalty.

Salt Lake City v. Christensen, 34 U. 38; 95 P. 523.

An ordinance requiring a $100 license fee for peddling "wares and merchandise of a general character" and a fee of $7 a quarter for peddling "small articles for household use" is discriminatory because of the uncertainty of its terms, since the same articles might be construed to be included within the ordinance by one court or jury and to be excluded by another, and also it is invalid because it discriminates in favor of the local merchants of the city engaged in selling tne same articles.

Park City v. Daniels, 46 U. 554; 149 P. 1094.

570x87. (206x87.) Ordinances. To pass all ordinances and rules, and make all regulations, not repugnant to law, necessary for carrying into effect or discharging all powers and duties conferred by this chapter, and such as are necessary and proper to provide for the safety, and preserve the health, and promote the prosperity, improve the morals, peace, and good order, comfort, and convenience of the city and the inhabitants thereof, and for the protection of property therein; and to enforce obedience to such ordinances with such fines or penalties as the city council may deem proper; *provided*, that the punishment of any offense shall be by fine in any sum less than $300 or by imprisonment not to exceed six months, or by both such fine and imprisonment.

When ordinances take effect; publication, § 556.

Revision of ordinances, how made, § 545.

Action for violation of ordinances, how conducted, §§ 585-595.

Powers of council to be enforced by ordinance, § 577.

Duties and powers of officers to be defined by ordinance, § 614.

Penal ordinances to protect property, § 570, subs. 15, 75.

Decisions on licenses, note to 570, subs. 38, 41.

A municipal corporation has power to pass an ordinance for the punishment of an offense, notwithstanding the same was provided against by general law.

Ex parte Douglass, 1 U. 108.

ORDINANCES GENERALLY:

A city by-law or ordinance is not a "known law of the land," but a soldier who, when off duty, violates it, may be arrested in the act and restrained by the civil authorities, but may not be tried and punished by them.

Ex parte Bright, 1 U. 145.

An ordinance punishing assault and battery under its power to regulate the police, or creating an offense for which no express authority is given in its charter, is void.

People v. Brown, 2 U. 462.

Where an ordinance and an act of the legislature relate to the same subject matter, the ordinance is not repealed by the act unless repugnant to the latter, since repeals must be clear, particularly of special or local laws or ordinances.

Ogden City v. Hamer, 12 U. 337; 42 P. 1113.

An ordinance has the force and effect in favor of the municipality and against persons bound thereby, of a legislative enactment.

City of Eureka v. Wilson, 15 U. 53; 48 P. 41.

Where a municipal corporation may prohibit a thing altogether, it may prohibit it conditionally, and confer upon some officer or officers power to determine whether a fact or state of things exists which will authorize the doing of it.

Id.

A municipal corporation engaged in the distillation of spirits is liable to the U. S. for the revenue tax on all such spirits so distilled, even though the acts are unauthorized by its charter.

Salt Lake City v. Hollister, 3 U. 200; 2 P. 200; affirmed, 118 U. S. 256.

An ordinance providing that the regular police force of a city shall be fixed at not to exceed 41 men, including the captain, is not void for uncertainty.

Heath v. S. L. City, 16 U. 374; 52 P. 602.

The authority of a municipal corporation is limited to such powers as are expressly granted to it, and such as may become necessary to their exercise.

Ogden City v. Bear Lake W. Co., 16 U. 440; 52 P. 697.

It is not competent to prove the unreasonableness of a city ordinance by the conclusions of witnesses. The regulation by ordinance is left to the city council. It should be a plain case to justify the court interfering with that determination.

Ogden City v. Bell Tel. Co., 17 U. 66; 53 P. 985.

In a proceeding not to collect a license, but to enforce a penalty for its violation, it may be enforced by fine or imprisonment, under the ordinance.

Id.

The powers exercised by a city council are limited strictly to those contained in the statutory grant.

Neiden v. Clark, 20 U. 382; 59 P. 524.

To be valid, an ordinance must be passed in accordance with the formalities provided by law.

Cereghino v. O. S. L. R. R. Co., 26 U. 467; 73 P. 624.

A contract between a city and defendant for the construction and maintenance of a system of waterworks by defendant was valid, though made by resolution and not by ordinance.

Ogden City v. Bear Lake & R. W. W. & I. Co., 28 U. 25; 76 P. 1069.

The word "butcher" includes the occupation of a retail meat dealer.

Provo City v. Provo Meat & Packing Co., 49 U. 528; 165 P. 477.

Where an ordinance as published provided for a fine and imprisonment for violation of liquor ordinance and as published provided for imprisonment "for not less than thirty days nor more than fifty," held, the ordinance permitted judgment for the fine to be entered on prosecution and imprisonment for not more than thirty days.

Logan City v. Steadman, 47 U. 611; 155 P. 445.

A taxpayer cannot sue to enjoin enforcement of an ordinance even though it is invalid, unless his rights are affected.

Brummitt v. Ogden Water Works Co., 33 U. 285; 93 P. 928.

In the absence of a showing to the contrary it will be presumed that water rates agreed upon between a city and a water company are fair and reasonable.

Id.

A municipal ordinance need not contain a title fully expressing the subject matter of the ordinance.

Salt Lake City v. Howe, 37 U. 170; 106 P. 705.

CHAPTER 4.

MISCELLANEOUS POWERS OF CITIES AND TOWNS.

573. (206x.) City council may require tracks of railway company to be removed. The city council of any city shall have the power to require the tracks of any steam or street railway company to be taken up and removed which shall have been laid upon the streets, alleys, or highways of the city, and which tracks remain in said streets, alleys, and highways of the city contrary to the terms of the franchise of the company, or which are declared by the city council a nuisance, or which said railway company has failed to operate for a period of nine months prior to the time when such nuisance shall be declared, and shall have the power to declare any of the acts specified in this section a nuisance. '99, p. 44.

Power of council to regulate railroad tracks, § 570x32.

574. (206x1.) May require gates. The city council of any city shall have power to require any steam or street railway company to place gates at any place along its tracks, and is hereby authorized to designate the places where such gates shall be placed, and the nature, kind, and quality of such gates. '99, p. 44.

Crossings, flagmen, etc., §§ 570x34, 570x35.

575. (206x2.) Purchase or lease of waterworks. Condemnation. That it shall be lawful for the city council or board of trustees of any city or town in this state to purchase or lease all or any part of any water, waterworks system, water supply, bonds, stocks, or property connected therewith; or, whenever such city council or board of trustees shall deem it necessary for the public good, they shall have the right to bring condemnation proceedings to condemn water, water rights, and all rights and privileges of any person or corporation; *provided,* that in all condemnation proceedings, the value of all land must be considered in connection with said water or water rights used for the purpose of supplying any city or town, or the inhabitants thereof, with water; *provided,* that if, within thirty days after the passage and publication of a resolution or ordinance for the purchase, or lease, or condemnation herein provided, one-third of the resident taxpayers of any city or town, as shown by the assessment roll thereof, shall protest against the purchase, or lease, or

condemnation proceedings contemplated, then said proposed purchase, lease, or condemnation shall be referred to a special election and if confirmed by a majority vote thereat, shall take effect; otherwise it shall be void. '03, p. 109.

Council to control waters in a city, § 570x17.
Council to purchase or lease water, canals, etc., § 570x18.
Council to construct waterworks, etc., § 570x75.

Before a town may commence proceedings to condemn a spring, it was necessary for the board first to adopt an ordinance or resolution declaring it necessary that the spring be condemned and the waters appropriated for the the use of the inhabitants of the town, thus giving the taxpayers the statutory opportunity to protest, and the passage of such resolution is jurisdictional.
Town of Tremonton v. Johnston, 49 U. 307; 164 P. 190.

576. (206x3.) What unlawful. Revenues. It shall not be lawful for any city or town to lease or purchase any part of such waterworks less than the whole; or to lease the same, unless the contract thereof shall provide that the city or town shall have control thereof, and that the net revenues therefrom shall be divided proportionate to the interest of all parties thereto; and said contract shall also provide a list of water rates to be enforced during the term of such contract. '03, p. 110.

577. May contract for lighting public places. Terms. The board of commissioners or city council of any city in this state or the board of trustees of any incorporated town in this state, may enter into a contract on behalf of such city or town for the lighting of its public buildings, streets, alleys, and other public places, for such period of time as such board of commissioners, city council, or board of trustees may deem advisable, not to exceed three years. '15, p. 125.
See §§ 570x19, 570x20.

578. (207.) Powers to be enforced by ordinance. When by this title power is conferred upon the city council to do and perform any act or thing, and the manner of exercising the same is not specifically pointed out, the city council may provide by ordinance the manner and details necessary for the full exercise of such power.

CHAPTER 5.

ACTIONS FOR VIOLATIONS OF ORDINANCES.

585. (208.) Actions in corporate name. All actions brought to recover any fine or to enforce any penalty under any ordinance of any city shall be brought in the corporate name of the city as plaintiff; and no prosecution, recovery, or acquittal for the violation of any such ordinance shall constitute a defense to any other prosecution of the same person for any other violation of any such ordinance, although the different causes of action existed at the same time and if united would not have exceeded the jurisdiction of a justice of the peace.
Ordinances, power to pass, § 570x87.

586. (209.) Money paid into treasury. All fines and forfeitures for the violation of ordinances, and all money collected for licenses or otherwise, shall be paid into the treasury of the corporation at such times and in such manner as may be prescribed by ordinance.
Payment into treasury, § 634.

587. (210.) Pleading and imprisonment. In all actions for the violation of any ordinance, it shall be sufficient if the complaint refer to the title and section of the ordinance under which such action is brought. Any person upon whom any fine or penalty shall be imposed, may, upon the order of the court before whom the conviction is had, be committed to the county jail or the city prison, or to such other place as may be provided by the city for the incarceration of offenders until such fine, penalty, and costs shall be fully paid.
Summons for accused corporation, § 591. Ordinances, how proved, § 556.

588. (211.) Imprisonment at labor. The city council shall have power to provide by ordinance that every person so committed shall be required to

work for the corporation at such labor as his strength will permit, not exceeding eight hours each working day; and for such work the person so employed shall be allowed one dollar for each day's work on account of such fine and costs.

May work vagrants, § 570x51.

Authority granted by resolution of a city council, directing the marshal to work prisoners, does not confer the right to require those in custody, but illegally imprisoned and not sentenced to hard labor, to be thus employed. Royce v. Salt Lake City, 15 U. 401; 49 P. 290.

The plaintiff was sentenced to imprisonment, but not to hard labor; he was put to work by the chief of police and received an injury from a fellow prisoner; held, that the corporation was not liable for such unlawful act of its chief of police; held further, that a resolution of the city council directing the marshal to work prisoners does not confer the right to require those not sentenced to hard labor to be thus employed. Id.

Torts of an agent or officer of a municipal corporation not resting upon contract, which are ultra vires, will not create an implied liability on the part of the corporation. (But see S. L. City v. Hollister, 118 U. S. 256; affirming 3 U. 200; 2 P. 200.) Id.

589. (212.) Serving process. Arrests. Any constable or sheriff of a county may serve any process or make any arrest authorized to be made by any city officer.

Powers of policemen, §§ 635, 647.

ACTION AGAINST CORPORATION.

590. (212x.) Complaint against corporation. A corporation violating any of the provisions of a city ordinance may be complained against the same as a natural person.

591. (212x1.) Summons. Whenever complaint is made against a corporation for violation of a city ordinance, a summons shall be issued thereon, substantially in the following form:

State of Utah,
County of .....

In the ..... court, in and for the city of ....., county of .....

.....city,

vs.

.....

Summons.

The state of Utah, to the (naming the corporation):

You are hereby summoned to be and appear before the above entitled court at the court room thereof, on the ..... day of ....., at the hour of ..... o'clock ..... m., then and there to answer a charge made against you upon the complaint of ..... for (designating the offense in general terms), a copy of which complaint is hereto attached.

Dated this ..... day of ....., 19.....

Witness:

The Honorable .....

Judge of said court.

..... Clerk,

By ..... Deputy Clerk.

In courts having a clerk the summons, with a copy of the complaint attached, shall be signed by the clerk thereof, and in courts having no clerk the summons shall be signed by the judge or justice thereof. '03, p. 24.

592. (212x2.) Id. Service. The summons and copy of complaint must be served at least twenty-four hours before the hour of appearance fixed therein, by delivering to and leaving a copy thereof with the president or other head of said corporation, or the secretary, cashier, or managing agent thereof, and by showing to him the original summons. '03, p. 24.

593. (212x3.) Corporation must appear. At the time appointed in the summons, the corporation must appear, by agent or attorney, and plead thereto, the same as a natural person. In case no appearance is made on or before the hour appointed, the court may issue a bench warrant for the person served as the officer or agent of said corporation, requiring him to be brought forthwith before the court to plead on behalf of said corporation. '03, p. 24.

594. (212x4.) Time for hearing. After the plea of the corporation is entered the court must fix a time for the hearing of the cause, and thereafter the proceedings in said cause shall be the same as in the cases of natural persons charged with violating a city ordinance; except that, in cases of conviction, the penalty imposed in all instances shall be by way of fine. '03, p. 25.

595. (212x5.) Judgment collected. Whenever a fine and costs, either or both, shall be imposed upon a corporation, upon conviction, for a violation of a city ordinance, judgment therefor may be collected on execution issued out of the court in the same manner as an execution in a civil action. '03, p. 25.

CITY ATTORNEY TO PROSECUTE APPEALS.

596. (212x6.) City attorney to prosecute appeals. Whenever a criminal action for the violation of a city ordinance is appealed to the district court for the county in which such city is situated, it shall be the duty of the city attorney of such city to appear and prosecute said action in the district court. '03, p. 26.

597. (212x7.) City to pay costs. Whenever a criminal action arising out of the violation of a city ordinance is tried on appeal in the district court for the county in which such city is situated, the per diem and mileage of witnesses for the prosecution shall be paid out of the city treasury of the city in which such action originated. '03, p. 26.

CHAPTER 6.

OFFICERS—POWERS AND DUTIES.

600. (213.) Certain city officers to be elected. Appointive officers. In all cities of the state, except cities of the first and the second class, there shall be elected, in addition to the mayor and city councilmen, a city recorder and a city treasurer; *provided,* that in cities of the third class, the city recorder shall be ex officio city auditor, and shall perform the duties of such office without extra compensation therefor; *provided, further,* in cities of the third class a city marshal and a city justice of the peace shall be appointed by the mayor, subject to the confirmation of the city council, on or before the first Monday of February following a municipal election, whose term of office shall be for two years, or until removed for cause; *provided, further,* that in cities having a population of over 15,000 the office of city justice of the peace is hereby abolished, and no election for said office shall be held. In all cities of the first class in this state there shall be elected at large a mayor and four commissioners, who shall constitute the board of commissioners of the city for which they are elected, and there shall also be elected a city auditor. In all cities of the second class in this state there shall be elected at large a mayor and two commissioners, who shall constitute the board of commissioners of the city for which they are elected, and there shall also be elected a city auditor. In cities of the first and the second class, the offices of mayor and city councilmen as now provided by law are hereby abolished, and no election shall be held for said offices, nor shall any election be held for the office of city recorder, city treasurer, or city attorney, and the terms of said respective officers in said cities of the first and the second class shall terminate and cease on the first Monday in January, 1912, at 12 o'clock meridian. All elective officers shall hold their respective offices for the term for which they are elected, and until their successors are elected and qualified. Every elective officer of cities of the first and the second class shall, within thirty days after qualifying, file with the city recorder, and publish at least once in a daily newspaper of general circulation within the city, the sworn statement of all of his election and campaign expenses, and by whom such funds were contributed. Upon failure so to do, the office of said officer shall become vacant, and he shall, upon failure so to do, be guilty of a misdemeanor.

Am'd '09, p. 230; '11, p. 228.

This section was amended by laws of 1909, Ch. 107, to provide for the appointment of a marshal by the mayor; held, that where the marshal, elected under this section, continued to serve after the expiration of his term, no appointment having been made by the mayor, he was a de facto officer and, there being no adverse contestant or de jure officer, he was entitled to the compensation attached to the office.

Peterson v. Benson, 38 U. 286; 112 P. 801.

601. (214.) City officers enumerated. Appointment. In cities of the first and the second class, the board of commissioners shall appoint a qualified person to each of the offices of city recorder, city treasurer, and city attorney, and in such cities having a population of less than 15,000 a city justice of the peace, who shall have such powers and perform such duties as are now provided by law for such officers, and they may create any other office that may be deemed necessary for the good government of the city, and regulate and prescribe the powers, duties, and compensation of all officers of the city, except as otherwise provided by law. The board of commissioners may appoint all such officers and agents as may be provided for by law or ordinance, and fill all vacancies occuring therein. In cities of the third class the mayor, by and with the advice and consent of the council, may appoint all such officers and agents as may be provided for by law or ordinance, and in like manner fill all vacancies among the same, except as otherwise provided by law; *provided,* that elective officers shall have the sole right to appoint all their deputies and assistants, who shall be confirmed by the city council.

Am'd '11, p. 223, 229; '15, p. 152.

Council may create offices, § 570x85.

Appointment of special police by marshal, § 649.

Terms of appointive officers, § 602.

Appointment of fire and of police chiefs, § 665.

Appoint probation officers, § 1826.

An appointment to an office by a city council at a time when the office has been declared not vacant by the supreme court, and made without first removing the incumbent declared to be legally entitled thereto, is void.

McAllister v. Swan, 16 U. 1; 50 P. 812.

Under provisions of this section and §§ 551-553, 602, where office of chief of police was previously created and the salary fixed by city ordinance, the confirmation by a majority of the council was necessary.

State, ex rel. v. Sheets, 26 U. 105; 72 P. 334.

Under this section and section 2330 the office of the justice of peace in a city of the second class is terminated on the date designated in § 2330, and the commissioners have authority to appoint a justice of the peace.

Morck v. White, 41 U. 480; 126 P. 330.

602. (215.) Id. Terms. Except as otherwise provided by law, the term of office of all appointive officers shall be until the municipal election next following their appointment and until their successors are duly appointed and qualified, unless sooner removed by the board of commissioners of cities of the first and the second class, or in cities of the third class by the mayor, with the concurrence of a majority of the members of the city council, or by the city council with the concurrence of the mayor. Am'd '11, p. 229.

Terms of appointive officers, § 2331.

Salaries, § 612, and note.

Appointments, how made, § 601.

The power of removal of appointive officers exists as a sound and necessary rule as incident to the power of appointment unless restricted by constitutional provisions or statutory regulations.

People, ex rel. Murphy v. McAllister, 10 U. 357; 37 P. 578.

The legislature may place the power of appointment in one person or body of persons, and the power of removal in another person or body of persons, and this is a rightful subject of legislation.

Id.

Under § 313, C. L. 1888, appointive officers can only be removed by the council for cause and after hearing.

Id.

Under the laws of 1892, p. 17, authorizing the mayor of Salt Lake City to appoint all officers theretofore appointed by the council, the mayor has no power of removal.

Id.

Under § 1764, C. L. 1888, the term of an appointive officer expires whether a successor is appointed or not.

State, ex rel. Weber v. Beardsley, 13 U. 502; 45 P. 569.

Appointive officers hold until their successors are appointed and have qualified.

State v. Elliott, 13 U. 471; 45 P. 346.

Pratt v. Swan, 16 U. 483; 52 P. 1092.

Henrold v. Church, 51 U. —; 172 P. 701.

A de facto incumbent of a public office is subject to removal at any time, and cannot complain of an act by which such office is abolished.

McAllister v. Swan, 16 U. 1; 50 P. 812.

As a rule the unqualified repeal of a statute creating an office abolishes the office.

Pratt v. Swan, 16 U. 483; 52 P. 1092.

Policemen appointed under police and fire bill of 1896, continued in office under the tenure thereof, after the repeal of such law.

Everill v. Swan, 17 U. 514; 55 P. 68.

Firemen appointed under police and fire bill of 1896, did not continue in office under the tenure thereof, after the repeal of that law.

Moreton v. Swan, 20 U. 79; 57 P. 718.

The power creating an office has the right at any time to abolish it, if done in good faith; but where the incumbent is entitled to hold the office during good behavior, and, before the ordinance abolishing the office takes effect, another ordinance is passed re-creating the office and another person is appointed to the place, the removal was ineffective and the first incumbent is entitled to the emoluments of the office.

Silvey v. Boyle, 20 U. 205; 57 P. 880.

City council may abolish such offices in police department as it sees fit, and employes discharged thereby are not thereafter entitled to be paid any salary.

Meissner v. Boyle, 20 U. 316; 58 P. 1110.

Where the office of city justice of the peace was abolished and the election of a successor to the justice then in office prohibited by an act of the legislature, the incumbent could

not continue to hold the office after the expiration of the term for which he was elected.
State v. Howell, 26 U. 53; 72 P. 187, 334.
Appointive officers hold their offices until their successors are appointed and qualified.
Henroid v. Church, 51 U. —; 172 P. 701.
A mayor cannot remove an appointive officer without the concurrence of the council.
Id.

603. (216.) Oaths required. Amount of bonds fixed. Premiums paid by city. All officers of any city, whether elected or appointed, shall, before they enter upon the duties of their respective offices, take and subscribe the constitutional oath of office, and every such officer shall, before entering upon the duties of his office, execute a bond, with good and sufficient sureties to be approved by the mayor, payable to the city, in such penal sum as may, by resolution or ordinance, be directed, conditioned for the faithful performance of the duties of his office and the payment of all moneys received by such officer according to law and the ordinances of said city; *provided,* that the bond of the mayor shall be approved by the board of commissioners or city council; *provided, further,* that the treasurer's bond in cities of the first class shall be fixed at a sum not less than $150,000; nor less than $25,000 in cities of the second class; nor less than $2,500 dollars in cities of the third class; *provided, further,* that in cities of the first and second class the mayor and each commissioner shall give a penal bond, with approved corporate surety, in the sum of $10,000, and the auditor in cities of the first and the second class shall give a penal bond, with approved corporate surety, in the sum of $20,000, conditioned as above, to be filed with the recorder and approved by the board of commissioners, and that the bond of all other officers of cities of the first and the second class shall be filed with the recorder and approved by the board of commissioners of such cities. The premium charged by corporate surety for any official bond shall be a legal charge against the funds of the city.
Am'd '11, p. 230; '17, p. 27.

Bonds of officers generally, §§ 4266-4271.
Bonds of city officers, § 570x84.
A bond omitting the clause "The payment of all moneys received by such officer according to law and the ordinance of such city," but providing that he shall "Well and truly and justly perform all the duties enjoined upon him by virtue of his office," is not defective in form.
Henriod v. Church, 51 U. —; 172 P. 701.
Where a bond is filed and the officer performs the duties the failure to approve the bond cannot be a defense to the officers recovering his salary.
Id.

604. (217.) Bonds of first officers. Whenever the inhabitants of any territory incorporate under this title, the officers first elected shall give bonds as mentioned in the preceding section, in the penal sum of not less than $500, such bonds to remain in force until the passage of ordinances or resolutions by the council of such corporation providing for the giving of bonds by said officers.

605. (218.) Additional bonds. The board of commissioners in cities of the first and the second class and the city council in other cities may at any time require further and additional bonds of any or all officers elected and appointed. All bonds given by the officers of any city, except as otherwise provided by law, shall be filed with the recorder, except the bond of the recorder, which shall be filed with the treasurer. Am'd '11, p. 230.

606. (219.) Malconduct. In case the mayor or any municipal officer shall, at any time, wilfully omit the performance of any duty, or wilfully and corruptly be guilty of oppression, malconduct, or misfeasance in office, he shall be liable to indictment, and, on conviction thereof, fined in a sum not exceeding $1000, and the court under which such conviction shall be had shall enter an order removing such officer from office; nor shall he be eligible to any municipal office thereafter.

607. (220.) Delivery to successor. Every officer of the city shall, within five days after notification and request, deliver to his successor in office all properties, books, and effects of every description in his possession belonging to the city or appertaining to his said office; and, upon his refusal to do so, shall be liable for all damages caused thereby and to such penalty as may be by ordinance prescribed.

608. (221.) Who not eligible to office. No person shall be eligible to

any office who is not a qualified elector of the city; nor shall any person be eligible to any office who is a defaulter to the corporation.

A policeman is an officer within this section, and the city council cannot appoint as chief of police one who is not a qualified elector of the state.
State v. Shores, 48 U. 76; 157 P. 225.

609. (222.) Officer not to have interest in public contracts. Acceptance of franks and favors prohibited. Exceptions. Penalty. No officer of any city, town, or municipal corporation shall be directly or indirectly interested in any contract, work, or business, or in the sale of any article the expense, price, or consideration of which is paid from the treasury, or by any assessment levied by any act or ordinance, nor in the purchase of any real estate or any other property belonging to the corporation or which shall be held for taxes, or assessments, or by virtue of legal process, at the suit of said corporation, mayor, or other officer of said city, town, or municipal corporation, and no officer or employe of any city, town, or municipal corporation shall accept or receive directly or indirectly from any person, firm, or corporation, operating within the territorial limits of said city, any railroad, interurban railroad, street railroad, gas works, waterworks, electric light or power plant, heating plant, telegraph line, telephone exchange, or other business using or operating under a public franchise any frank, free ticket, or free service, or accept or receive, directly or indirectly, from any such person, firm, or corporation any other service upon terms more favorable than is granted to the public generally. Any violation of the provisions of this section shall be a misdemeanor, and every such contract or agreement shall be void. Such prohibition of free transportation shall not apply to policemen, firemen, or health officers, nor shall any free service to any city officers or to the municipal corporations heretofore provided by any franchise be affected by this section. Am'd '11, p. 224; '15, p. 88.

610. (223.) Id. Bribery. Penalty. Any officer of the city or member of the city council who shall, by himself or agent, become a party to or in any way interested in any contract work or letting, under the authority of the city, or who shall, either directly or indirectly, by himself or another, accept or receive any valuable consideration or promise for his influence or vote, shall be fined in any sum not exceeding $1000, one-half of which shall go to the informer and the balance be paid into the city treasury by the officer collecting or receiving the same, and the said contract shall be null and void.

611. (224.) Holding more than one office. In cities of the first and of the second class, no mayor, councilman, recorder, or treasurer shall hold any other office under the city government during his term of office.

612. (225.) Salaries of commissioners and auditors. Other officers. Time of payment. Each member of the board of commissioners of cities of the first class shall receive the sum of $3600 per annum as compensation for his services; *provided,* that the mayor of such cities shall receive the sum of $4200 per annum for his services, and the Auditor of cities of the first class, having a population over 90,000, shall receive the sum of $3600 per annum as compensation for his services. In cities of the first class having a population of less than 90,000 the auditor shall receive $2400 per annum for his services. Each member of the board of commissioners of cities of the second class having more than 20,000 inhabitants shall receive the sum of $3600 per annum as compensation for his services; *provided,* that the mayor in such cities shall receive a salary of $4200 per annum for his services, and the auditor in such cities of the second class shall receive the sum of $2400 per annum as compensation for his services. Each member of the board of commissioners of cities of the second class having less than 20,000 inhabitants shall receive not less than $500 nor more than $1500 per annum as compensation for his services; *provided,* that the mayor in such cities shall receive a salary of not less than $600 nor more than $2000 per annum for his services, and the auditor in such cities of the second class shall receive not less than $300 nor more than $1200 per annum as compensation for his services. All other

officers of cities of the first and the second class and all officers of other cities shall receive such compensation as may be fixed by ordinance; but the compensation of any such elective officers shall not be increased or diminished to take effect during the time for which any such officer was elected. The compensation of all city officers shall be paid monthly out of the city treasury. The city council of the several cities of the second class having less than 20,000 inhabitants shall, at least fifteen days before the primary, fix by ordinance, within the limits above provided, the salaries of the elective officers to be elected at the next municipal election in said cities and biennially thereafter; the board of commissioners for said cities shall, by ordinance, fix the salaries, within said limits, of the elective officers to be elected at the next municipal election. Am'd '11, p. 231; '17, p. 125.

Compensation of officers, § 570x85.
To be paid fixed salaries, Con. art. 21, sec. 1.
Fees to be paid over, Con. art. 21, sec. 2.
When officer removed, salary, § 602, and note.
Decisions on payments of salaries of state officers, note to § 5070; county officers' salaries, note to § 5087.

Where the person who was the incumbent of a public office assumes to continue to act and render services after the office has been abolished, he has no legal claim against the municipality.
McAllister v. Swan, 16 U. 1; 50 P. 812.

Where salary of public officer has once been fixed and determined at a definite sum, no other appropriation is required; and application for a writ of mandamus to compel a special appropriation for a fixed salary must be denied.
Silvey v. Boyle, 20 U. 205; 57 P. 880.

Where a public officer or policeman entitled to a fixed salary is unlawfully removed and prevented through no fault of his own from performing the duties of his office, he is entitled to recover the salary, and the amount earned by him in other employment during his unlawful removal should not be deducted.
Everill v. Swan, 20 U. 56; 57 P. 716.

Any attempt by city council to abolish or alter the salary of a city justice provided for by ordinance at time of his election, is void and of no effect as to plaintiff.
Hulaniski v. Ogden City, 20 U. 233; 57 P. 876.

Provisions of this section prohibit any change of salary of city officer after his election or appointment to take effect during time for which he was elected or appointed.
Meissner v. Boyle, 20 U. 316; 58 P. 1110.
Kendall v. Raybould, 13 U. 226; 44 P. 1034.

Where mayor's salary was diminished during his term of office and he received his warrant for the reduced salary without objection, he was estopped after expiration of his term from recovering the difference between the salary as existing before the passage of the ordinance, and that fixed therein.
Boyle v. Ogden City, 24 U. 443; 68 P. 153.

A city marshal, elected for a term of two years, took office January 6, 1908, and continued to serve after the expiration of his term, no appointment of marshal having been made by the mayor under the amended law requiring such appointment. A city ordinance increased the compensation of marshal for a term beginning with 1910; held that for services rendered after the expiration of the term for which he was elected the marshal was entitled to an increased compensation being a de facto officer and not a "hold-over."
Peterson v. Benson, 38 U. 286; 112 P. 801.

613. (226.) Councilman not to hold created office. No member of any city council shall hold or be appointed to any office which shall have been created, or the salary or emoluments of which shall have been increased while he was a member, during the term for which he was elected and for one year after the expiration of such term.

614. (227.) Defining duties of officers. The duties, powers, and privileges of all officers in any way connected with the city government not herein defined shall be defined by the city council, and the defining by this title of the duties of city officers shall not preclude the city council from defining by ordinance further and additional duties to be performed by any such officer.

Prescribing powers, etc., § 570x85.
Duty of attorney under prohibition act, §§ 3360, 3374.

CHAPTER 7.

CITY RECORDER.

617. (228.) Office, where. Keep records. Certify copies. The city recorder shall keep his office at the place of meeting of the city council, or some other place convenient thereto, as the council may direct. He shall keep the corporate seal and all papers and records of the city, and keep a record of the proceedings of the city council, whose meetings it shall be his duty to attend. Copies of all papers filed in his office, and transcripts from all records of the city council certified by him under the corporate seal, shall be evidence in all courts, as if the original were produced.

Recorder's record is not the only evidence of the proceedings of the council.
Salina City v. Lewis, Salina City v. Neilson, 50 U. —; 172 P. 290, 286.

618. (229.) Countersign contracts. He shall countersign all contracts made in behalf of the city, and every contract made in behalf of the city or to which the city is a party shall be void unless signed by the recorder.

619. (230.) Duties in relation to finance. City auditor. The city auditor, in cities having an auditor, and in all other cases the city recorder, shall draw and countersign all orders upon the treasurer in pursuance of any order or resolution of the city council, and keep a full and accurate account thereof in books provided for that purpose; shall make to the city council from time to time, upon the order of the council, reports of the financial condition of the city; shall make and keep a list of outstanding bonds, to whom issued, for what purpose, when and where payable, and the rate of interest they respectively bear, and recommend such action to the city council as shall secure the payment of the principal and interest of such bonds; shall report annually, on or before the 1st day of June, to the city council, an estimate of the expenses of the city and the revenue necessary to be raised for the current year; shall keep regular books of account in which he shall enter all indebtedness of the city, and which shall at all times show the financial condition of the city, the amount of bonds, orders, certificates, or other evidences of indebtedness issued by the city council, the amount of all bonds, orders, certificates, or other evidences of indebtedness which have been redeemed, and the amount of each outstanding; shall keep accounts with all receiving and disbursing officers of the city, showing the amount they have received from the different sources of revenue and the amount which they have disbursed under the direction of the city council; shall examine all reports, books, papers, vouchers, and accounts of the city treasurer; shall audit all claims and demands against the city before they are allowed by the city council; and shall keep a record of claims presented and the action of the council thereon; shall keep a book properly indexed in which he shall enter all contracts, which book shall be open to the inspection of all persons interested; and shall perform such other duties as the city council may provide by ordinance.

Shall certify bonds and warrants, §§ 466-469.

620. (231.) Financial statement of cities to be published annually. Contents. The city auditor, in cities having an auditor, and in all other cases the city recorder, shall prepare and publish, on or before the first Monday in February of each year, in some newspaper having a general circulation in the city, a detailed statement of the financial condition of the city, and of all the receipts and expenditures for the previous year, ending December 31st; *provided,* that, upon the expiration of his term of office, and before his successor enters upon his duties, said auditor, or recorder, shall make and prepare said statement, properly attested, for the use and benefit of his successor in office, showing:

1. The total receipts of the city, stating particularly the source of each portion of the revenue;
2. The amount of cash on hand at the date of the last report;
3. The amount of sinking fund, and how invested;
4. The number, date, and amount of every bond issued or redeemed, and the amount received or paid therefor;
5. The indebtedness of the city, funded and floating, stating the amount of each class and the rate of interest borne by such indebtedness or any part thereof;
6. The amount of cash in the city treasury, and in its several funds;
7. The total expenditures of the city, as shown by the warrants issued, giving in total the amount expended in each department.

Am'd '99, p. 34; '01, p. 95; '07, p. 77.

CHAPTER 8.

CITY TREASURER

621. (232.) Duties, generally. The city treasurer shall receive all money belonging to the city, including all taxes, licenses, and fines, and keep an accurate and detailed account thereof, in such a manner as provided in this title, or as the city council from time to time may by ordinance direct, and he shall collect special taxes and assessments as provided by law and ordinance. He shall make a settlement with the recorder, or auditor, as the council may direct, at the end of every month, and turn over all warrants, interest coupons, bonds, or other evidence of the indebtedness of the city which may have been redeemed by him during the month, taking the receipts of the recorder, or auditor, therefor, and all such warrants, orders, or other evidence of indebtedness shall be canceled by him and have written or stamped thereon the date of their payment or redemption.

Collect tax for lighting streets, § 726. Treasurer park commission, § 768.
Custodian light fund, § 730.

622. (233.) Payments. He shall pay no money out save upon lawful warrant, except bonds and interest coupons, which, when due, may be paid upon presentation, or in case the same are payable at some other place, then the money for their redemption shall be sent to the place where they are payable in time to meet such payment when due.

623. (234.) Warrants paid in order. All warrants shall be paid in the order in which they shall be presented, and the treasurer shall note upon the back of each warrant presented to him the date of such presentation and, when payment is made, the date of such payment; *provided,* that any warrant shall be paid by the treasurer in case a sufficient amount of money shall remain in the treasury to pay all warrants issued previous to such warrant.

624. (235.) Receipts. The treasurer shall give every person paying money to the city treasury a receipt therefor, specifying the date of payment and upon what account paid; and shall also file the duplicate of such receipt with the auditor, or recorder, as the council may direct, at the date of his monthly report.

625. (236.) Public money to be kept separate. The treasurer shall keep all money belonging to the city separate and distinct from his own money. Whenever it shall appear to the mayor that the treasurer is making profit out of public money, or is using the same for any purpose not authorized by law, he shall suspend him from office, and upon his conviction for such offense his office shall become vacant.

626. (237.) Reports. Registry of warrants. The treasurer shall report to the city council at such times as may be prescribed by ordinance, giving a full and detailed account of all receipts and expenditures since his last report, and the state of the treasury. He shall also keep a registry of all warrants redeemed and paid during the year, describing such warrants, their date, amount, number, the fund from which paid, and the person to whom paid, specifying also the time of payment. And all such warrants shall be examined by the city council at the time of making such report.

627. (238.) Special funds. All moneys on any special assessment shall be held by the treasurer as a special fund, to be applied to the payment of the improvement for which the assessment was made, and said money shall be used for no other purpose whatever.

Sinking fund may be invested, § 5200.

CHAPTER 9.

CITY AND TOWN JUSTICE OF THE PEACE.

630. (239.) Jurisdiction of city and town justices. The city or town justices of the peace shall have exclusive original jurisdiction of cases arising under or by reason of the violation of any city or town ordinance, and shall have the same powers and jurisdiction as justices of the peace in all other actions, civil and criminal. Am'd '15, p. 154.

Municipal judge to be ex officio city justice of the peace, § 1771.
Actions for violations of ordinances, §§ 585-597.
City court has exclusive jurisdiction of cases under city ordinances in cities of first class, § 1713.
City justice of the peace elected only in cities of less than 15,000, § 600.
General jurisdiction of justices' courts, §§ 1791-1794.
Jurisdiction of bastardy proceedings, §§ 380-381.
Docket and enforce certain court martial judgments, § 3858.
Issue search and seizure warrants, §§ 3354-3358.
City justice has jurisdiction over poll tax cases, though not exclusive.
Timmony v. S. L. City, 28 U. 302; 78 P. 799.

631. (240.) Practice in justice's court. Appeals. The rules of practice and mode of procedure in a city or town justice's court shall be the same as are or may be prescribed by law for justices' courts in like cases, except as herein otherwise expressly provided. From all final judgments of a city or town justice's court an appeal may be taken by either party in a civil case, or by the defendant in a criminal case, to the district court of the county, in the manner provided by law for appeals from justices' courts in similar cases. Am'd '15, p. 154.

Appeal in criminal cases, procedure, §§ 9455-9460.
Appeal in civil cases, procedure, §§ 7514-7520.
Appeal to supreme court, Con. art. 8, sec. 9, and note.

632. (241.) Jury trial. All actions before a city or town justice arising under the city or town ordinance shall be tried and determined by such justice without the intervention of jury, except in cases where imprisonment for a longer period than thirty days is made a part of the penalty, or where the maximum fine may exceed $50. The defendant shall demand a trial by jury before the commencement of the trial, and when such a demand shall be made a jury shall be impaneled, in the same manner as provided for the impaneling of a jury in other justices' courts. Am'd '15, p. 154.

N. Dak. (1895) § 2206*.

633. (242.) Vacancy. Disqualification. Salary. Fees. If a vacancy shall occur in the office of a city or town justice, the mayor or president of the town board, by and with the consent of the city council or town board, shall forthwith fill such vacancy by appointment for the unexpired term. The person so appointed shall qualify in the manner as a city or town justice, and shall have and exercise all the powers conferred by law upon such city justice. In case any city or town justice shall, for any reason, be unable or disqualified to perform the duties of his office, or shall be absent, the mayor or president of the town board shall appoint some other justice of the peace residing within the county to act as city or town justice of the peace pro tem, and he shall have the powers and shall discharge the duties of such city or town justice during the existence of such disability or absence only, in the same manner and to the same extent as the city or town justice might have done. The city justice shall receive such salary for his services while exercising jurisdiction under the ordinance and by-laws of the city as may be prescribed by ordinance. A town justice shall receive such fees for his services as are now prescribed by law for precinct justice of the peace. The city council may further prescribe, by ordinance, the compensation which the city justice shall receive while exercising the civil powers and jurisdiction of justice of the peace as prescribed by law; and when such compensation is determined by ordinance, as aforesaid, all fees paid the city justices in civil cases shall be paid by the justice receiving the same to the city treasurer.

Am'd '07, p. 47; '15, p. 154.

May be paid a salary, Con. art. 21, sec. 1.
A city justice of the peace is entitled to fees from the city for poll tax cases brought before him.
Timmony v. S. L. City, 28 U. 302; 78 P. 799.
A showing of prejudice on the part of the city justice was a disqualification within the meaning of this section, and defendant in a criminal case was required to proceed hereunder and not under § 9427.
Brooks v. First Judicial Dist. Ct., 43 U. 499; 136 P. 785.

634. (243.) Fines and forfeitures. All fines, penalties, and forfeitures for violation of any city or town ordinance shall be paid by the officer receiving the same to the city or town treasurer. Am'd '15, p. 154.

Payment into treasury, § 586.

635. (244.) Warrants, to whom issued. All warrants issued by the city or town justice for the violation of any general law of the state or ordinance of the city or town shall run to the sheriff or any constable of the county, or to the marshal or any policeman of the city or town. Am'd '15, p. 154.

Authority to sheriff or constable to serve process, § 589.

CHAPTER 10.

CITY ENGINEER.

640. (244x.) City engineer's office, office of record. Custodian. The city engineer's office in cities of the first and the second class is hereby created an office of record for all maps, plans, plats, profiles, drawings, deeds, dedications, final estimates, specifications, and contracts which in any way relate to the affairs of the city. The city engineer shall be custodian of, and must keep, all the drawings and documents above mentioned on file and record. '07, p. 225.

Furnish plans and estimates for street lighting, § 721.

641. (244x1.) Supplies. Records and files. The city engineer's office shall be supplied with all necessary books, cases, and supplies for recording and filing as herein required. The city engineer shall record and file all drawings and documents pertaining to public lands and improvements of cities of the first and the second class; and those made in his office shall be placed on record as soon as completed, and shall then be open for public inspection, and any person copying the same, or taking notes therefrom, may do so in pencil only. He shall keep the records and files in good condition and turn the same over to his successors in office. He shall allow no alteration, mutilation, or changes to be made in any matter of record and shall be held strictly accountable for same. '07, p. 226.

642. (244x2.) Must not enter on record until fees are paid. The city engineer shall not record any drawings or instruments, or file any papers or notices, or furnish any copies, or render any service connected with his office until the fees for same are paid or tendered as prescribed by law or ordinance. '07, p. 226.

643. (244x3.) Seal. The city engineer shall be provided with a seal by the city for his use containing the words ".....City, Utah. Engineering Department." Said seal shall be affixed to every certification or approval. '07, p. 226.

644. (244x4.) Shall not conflict. The recording or filing of any drawing or instrument in the city engineer's office shall not interfere or conflict in any way with the recording or filing of same in other offices of record. '07, p. 226.

645. (244x5.) Penalty. Any city engineer who fails to comply with the preceding sections shall be guilty of a misdemeanor. '07, p. 226.

CHAPTER 11.

MARSHAL AND POLICE.

646. (245.) Chief of police. Duties. The chief of police shall, in the discharge of his duties, have like powers and be subject to like responsibility as sheriffs and constables in similar cases; and he shall suppress riots, disturbances, and breaches of the peace, and apprehend all persons committing any offense against the laws of the state or the ordinances of the city. And at all times he shall diligently and faithfully discharge his duties and enforce all ordinances and regulations of the city for the preservation of peace and good order, and the protection of the rights and property of all persons.

Police and fire departments in general, §§ 654-665.

Enforce liquor prohibition act, § 3360.

Preserve peace at public meetings, § 8587.

It is the right of the military authorities to station a provost guard in a city to arrest any soldier who shall violate any city ordinance.

Ex parte Bright, 1 U. 145.

For decisions concerning the power and method of removal under the fire and police act of 1896, since repealed, see

Eslinger v. Pratt, 14 U. 107; 46 P. 763.

Gilbert v. Com'rs, 11 U. 378; 40 P. 264.

Pratt v. Com'rs, 15 U. 1; 49 P. 747.

Under § 2482, R. S. 1898, the chief of police was continued in office, and is entitled to hold the same as therein provided.

Pratt v. Swan, 16 U. 483; 52 P. 1092.

647. (246.) Police officers. Powers and duties. All police officers of any city shall possess the powers conferred upon constables by law. They shall execute and serve all warrants, process, commitments, and all writs whatsoever, issued by the city justice of the peace. It shall be the duty of the police force in any city at all times to preserve the public peace, prevent crime, detect and arrest offenders, suppress riots, protect persons and property, remove nuisances existing in the public streets, roads, and highways, enforce every law relating to the suppression of offenses, and perform all duties enjoined upon them by ordinance.

Police officers' powers and duties, § 659.

Enforce liquor prohibition act, § 3360.

648. (247.) Id. Arrests. The several members of the police force shall have power and authority without process to arrest and take into custody any person who shall commit or threaten or attempt to commit in the presence of such officer, or within his view, any breach of the peace, or any offense directly prohibited by the laws of this state or by any ordinance.

649. (248.) Marshal. Duties. Special policemen. In cities of less than 12,000 inhabitants, the marshal shall be ex officio chief of police and shall perform the duties and exercise the authority thereof. He shall, under the direction of the council, direct and control the police of the city, and whenever the interests of the city demand, by and with the consent of the mayor, appoint such number of special policemen as may be required, and perform such other duties as may be prescribed by ordinance.

General appointive power in cities, § 601.

650. (249.) Bail commissioners. The mayor of any city in this state may, by and with the consent of the city council, appoint, from among the officers and men in the police department of said city, one or more discreet persons, to be known as bail commissioners, who shall have and exercise all the powers which are now, or hereafter may be, conferred by law upon justices of the peace or judges of the city court in respect to the fixing of bail of persons arrested within the corporate limits of said city for misdemeanors under the laws of this state, or for violation of the city ordinances, and taking and approving the same; *provided,* that any person who has been ordered by any such bail commissioner to give bail may deposit the amount thereof in money with such bail commissioner. Am'd '03, p. 59.

651. (249x.) Id. Receipt for moneys. In addition to their duties in respect to the fixing of bail, bail commissioners shall have power on non-judicial days, and after the hour of five o'clock p. m. and before the hour of nine o'clock a. m. on judicial days, to collect and receipt for moneys tendered in payment of the fine of any person serving sentence, in default of the payment of such fine. All moneys collected by bail commissioners shall be accounted

for at least once a month to the clerk of the city court in cities where such court exists; and in cities where such court does not exist, then such accounting shall be made to the city treasurer, or to the county treasurer in respect to cases arising under state laws. '03, p. 59.

652. (250.) Id. Oath and bond. Commissioners appointed under this chapter shall serve at the pleasure of the mayor; they shall receive no compensation as such, and, before entering upon their duties as bail commissioners, shall take and subscribe an oath to faithfully and impartially discharge the duties of their office, and shall give bond to the city wherein they are appointed, with two good and sufficient individual sureties, or with a single corporate surety to be approved by the mayor, which bond shall be in the sum of $2500, conditioned for the faithful performance of their duties as such commissioners, and that they will well and truly account for and turn over to the clerk of the city court, in cities where such court exists, or to the treasurer of their respective cities or counties, as the case may be, at such times as may be designated by the city council, all moneys, bonds, property, and records coming into their hands as such commissioners, and that, at the expiration of their term of office, they will surrender and turn over as aforesaid all funds, bonds, property, papers, and records pertaining to their respective offices, then in their hands. Suit upon any such bond may be brought by any county, city, or person injured. Am'd '03, p. 59.

653. (251.) Id. Filing. The oaths of office and bonds of said commissioners shall be filed with the city recorders of their respective cities.

CHAPTER 12.

POLICE AND FIRE DEPARTMENTS.

654. (251x.) Council may create and maintain. The city council of each city of 12,000 and more inhabitants in this state is hereby authorized to create, support, maintain, and control a police department and a fire department in their respective cities. '99, p. 45.

Council to provide for the fire department, § 570x58.
Powers of council and mayor vested in commission, §§ 533, 601.
Heads of police and fire departments appointed under provisions of this chapter cannot be removed in proceedings under § 8640. Skeen v. Browning, 32 U. 164; 89 P. 642.

655. (251x1.) Police department. The police department of each city of 12,000 and more inhabitants of this state shall consist of a head of the department and such officers, men, employes, and agents as the city council of said cities may by ordinance prescribe. '99, p. 45.

Chief of police, duties, etc., § 646.
To enforce liquor prohibition act, § 3360.

656. (251x2.) Fire department. The fire department of each city of 12,000 and more inhabitants of this state shall consist of a head of the department, and such officers, men, employes, and agents as the city council of said cities may by ordinance prescribe. '99, p. 45.

657. (251x3.) Mayor to appoint heads of departments. The mayor of each city of 12,000 and more inhabitants of this state shall, with the advice and consent of the city council, appoint such heads of said departments, and in like manner fill all vacancies in the same. '99, p. 45.

Powers of mayor and council, vested in commission, §§ 533, 601.

658. (251x4.) City council to provide number of each department and fix salaries. The city council of cities of 12,000 and more inhabitants shall have full power to provide by ordinance the number and grade of officers, men, employes, and agents in each department, and their respective salaries, and to increase or decrease the number of officers, men, employes, and agents in each department, and at any time to increase or decrease the salaries to be paid. In case the city council shall at any time decrease the number of officers, men, employes, or agents of either of said departments, the head

of such department shall immediately remove such number of officers, men, employes, or agents as are required to comply therewith. '99, p. 45.

659. (251x5.) Police officers' powers. All police officers and policemen shall possess the powers conferred upon constables by law; they shall execute and serve all warrants, process, commitments, and all writs whatsoever issued by the city justice of the peace. '99, p. 45.

Police officers' powers and duties, §§ 647-649.

660. (251x6.) Head of department to appoint subordinates. Removals. The head of each department shall, by and with the advice and consent of the city council and approval of the mayor, appoint all subordinate officers, employes, men, or agents in his department, and in like manner fill all vacancies in the same. Any subordinate officer, employe, man, or agent may at any time be removed, without cause, and without charges being preferred, and without a trial, hearing, or opportunity to be heard, by the head of either department, with the consent of the council, or by the mayor, with the consent of the city council, whenever in their opinion the good of the service will be subserved thereby, and the same shall be final and conclusive, and shall not be reversed or called in question before any court. The city recorder shall forthwith notify in writing the removed person of his removal, and it shall not be necessary to state any cause for such removal, and, from the time of such notification, the person so removed shall not in any case be entitled to any salary or compensation whatsoever. '99, p. 45.

In cities of the class legislated for by this section, a policeman may be removed by the city government at any time, with or without cause. The method of removal is immaterial, and no removal is reviewable by the courts.

Glenn v. Park, 48 U. 160; 158 P. 425.

See also Skeen v. Browning, 32 U. 164; 89 P. 642.

661. (251x7.) Heads of departments, removal of. The head of the police or fire department of such cities may at any time be removed without cause, and without charges being preferred, and without a trial, hearing, or opportunity to be heard, by the mayor, with the consent of the city council, whenever in their opinion the good of the service will be subserved thereby. The action of the mayor and of the city council in removing the head of either department shall be final and conclusive, and shall not be reviewed or called in question before any court. The city recorder shall forthwith notify in writing the removed head of either of said departments of his removal, and it shall not be necessary to state any cause for such removal, and, from the time of such notification, the person so removed shall not in any case be entitled to any salary or compensation whatever. '99, p. 46.

662. (251x8.) Subordinates may be suspended. The head of each department may at any time suspend any subordinate officer, employe, man, or agent employed therein, when in his judgment the good of the service demands it, for a period of time not exceeding fifteen days, and, during the time of such suspension, the person or persons so suspended shall not be entitled to any salary or compensation whatsoever. '99, p. 46.

663. (251x9.) Council to prescribe qualifications and duties. The city council shall have the power by ordinance to prescribe and define the qualifications and duties of the officers and employes of said departments. '99, p. 46.

664. (251x10.) Council to create police and fire departments. The city council of cities of 12,000 and more inhabitants of this state shall, within fifteen days after March 9, 1899, by an ordinance, create a police department and a fire department to comply with the provisions of §§ 654 and 658. '99, p. 46.

665. (251x11.) Mayor to appoint heads of departments. The mayor of each city of 12,000 and more inhabitants shall forthwith, after the ordinance referred to in § 664 shall have gone into effect, appoint and submit to the mayor and city council for their confirmation the names of the heads of the police and fire departments, and the head of each department shall, within

ten days after having been appointed, confirmed, and qualified as such, submit to the mayor and city council for confirmation the names of the subordinates selected by him. '99, p. 46.

Appointment of special police, § 649.
General appointive power, § 601.
Powers of mayor and council vested in commission, §§ 533, 601.

CHAPTER 13.

GENERAL TAXES.

670. (252.) Fiscal year. The fiscal year of cities shall commence on the 1st day of January.

Con. art. 13, sec. 1, says fiscal year shall begin on 1st day of January unless changed by legislature; legislature changed date to December 1st, as to the state, § 5992.

671. (253.) Annual tax levies in cities. Limit. Purposes. During the month of July of each year, the city council, or the city commission, at a regular meeting thereof, shall, by ordinance or resolution, levy on the real and personal property within the city made taxable by law:

1. Not to exceed 2 mills on the dollar to defray contingent expenses;
2. Not to exceed 4 mills on the dollar to purchase water sources, streams, and the land upon which said streams are appropriated, and canals; to construct waterworks, and to supply water for irrigation and other purposes;
3. Not to exceed 2 mills on the dollar to open, improve, and repair the streets and sidewalks;
4. Not to exceed 2 mills on the dollar to construct and repair sewers and drains;
5. Not to exceed 3.5 mills on the dollar to construct and maintain gas works, electric light works, telephone lines, street railways, or bath houses. Am'd '15, p. 192.

Power to levy taxes, § 570x3.
Street tax, § 570x81.
License tax, § 570x86.
Legislature not to levy tax for city purposes, Con. art. 13, sec. 5.
Poll tax, § 4465.
Special taxes generally, §§ 673-700
Special or local taxes for water, § 697.
Special tax for street lighting, §§ 720-734.
Powers of council and mayor vested in commission, §§ 533, 601.

Where defendant lived on a farm outside the city, and beyond the benefit of municipal expenditures, an act of the legislature subjecting his property to municipal taxation was not rightful legislation, and was in violation of the constitution of the U. S., amendment 5, providing that private property shall not be taken for public use without just compensation.
People v. Daniels, 6 U. 288; 22 P. 159.

A city has authority to assess and collect taxes for municipal purposes on property within its limits, without regard to the benefits that the individual taxpayer may derive from the municipal government and expenditure. (Overruling People v. Daniels, 6 U. 288; 22 P. 159; Cook v. Crandall, 7 U. 344; 26 P. 927; and criticising Kaysville v. Ellison, 18 U. 163; 55 P. 386.)
Kimball v. Grantsville City, 19 U. 368; 57 P. 1.
Wooley v. Grantsville City, 19 U. 409; 57 P. 10.
Boothe v. Grantsville City, 19 U. 410; 57 P. 10.
Mandamus will issue to compel a city to levy a tax for the purpose of paying a judgment.
Shepard v. Kaysville City, 16 U. 340; 52 P. 592.

672. (254.) Certification of levy. The city recorder shall certify the ordinance or resolution making the levy to the county auditor, or clerk, as the case may be, immediately after the passage of the same.

CHAPTER 14.

SPECIAL TAXES

673. (255.) Local improvements. The city council of each city in the state of Utah shall have the following powers: To lay out, establish, open, alter, extend, widen, and improve streets, alleys, avenues, sidewalks, parks, and public grounds, and vacate the same; and to grade, curb and gutter, park and beautify, or otherwise improve and keep in good repair, or cause the same to be done in any manner it may deem proper, any park, street, avenue, or alley within the limits of the city; and may grade partially or to the established grade or park, or otherwise improve any part of any street, avenue,

or alley; and may also construct and repair, or cause and compel the construction and repair, of sidewalks in such city, of such material and in such manner as it may deem proper.

Power to establish and improve streets, etc., § 570x8.
Special tax for street lighting, §§ 720-734.
Powers of council and mayor vested in commission, §§ 533, 601.
Funds kept separate and how disbursed, §§ 744-748.

674. (256.) Special taxes. Ordinary repairs. Paving districts. To defray or cause to be defrayed the cost and expense of such improvements or any of them, the city council shall have power and authority to levy and collect special taxes and assessments upon the blocks, lots, or parts thereof, and pieces of ground adjacent to or abutting upon the street, avenue, alley, or sidewalk thus in whole or in part opened, widened, curbed and guttered, graded, parked, extended, constructed, or otherwise improved or repaired, or which may be especially benefited by any of said improvements; *provided,* that the above provisions shall not apply to ordinary repairs of streets or alleys, and that one-half of the expense of bringing streets, avenues, alleys, or parts thereof to the established grade shall be paid out of the general fund of the city; and such council shall have power to pave, repave, or macadamize any street or alley or part thereof in the city, and for that purpose to create suitable paving districts, which shall be consecutively numbered, such work to be done under contract.

The legislature has no power to levy or authorize a municipality to levy a local tax for general purposes.
Bromley v. Reynolds, 2 U. 525.
Where a city has power to levy taxes by local assessment for certain purposes, permanent in their nature, and for other like purposes, but street sprinkling, not being included in the enumeration, and not being a "like purpose" to those enumerated, is excluded, and a local tax levy to provide for street sprinkling is void.
Pettit v. Duke, 10 U. 311; 37 P. 568.

675. (257.) Paving taxes, how levied. The cost of paving, macadamizing, or repaving of the streets and alleys within any paving district, except the intersection of streets and space opposite alleys within such district, shall be assessed upon the lots and lands abutting upon the streets and alleys in such district, in proportion to the square feet, or feet front, or both, so abutting upon such streets and alleys.

676. (258.) Id. When delinquent. Collection. Supplemental assessment. The assessments of special taxes for paving purposes herein provided for shall be made as follows: The total costs of the improvements shall be levied at one time upon the property, and become delinquent as herein provided: one-tenth of the total amount shall be delinquent in fifty days after such levy, one-tenth in one year, one-tenth in two years, one-tenth in three years, one-tenth in four years, one-tenth in five years, one-tenth in six years, one-tenth in seven years, one-tenth in eight years, and one-tenth in nine years. Each of said instalments, except the first, shall draw interest at the rate of seven per cent per annum from the time of levy aforesaid until the same shall become delinquent, and after the same shall become delinquent, interest at the rate of ten per cent per annum shall be paid thereon; *provided,* the total cost of the improvemnts shall become delinquent at such time and in such instalments, or the entire sum at one time, as the city council of such city may prescribe; but such entire sum shall not become delinquent in a less time than one year. Such taxes shall be collected and enforced as in other cases of special taxes. In cases of omission, errors, or mistakes, in making such assessment or levy in respect of the total cost of the improvements, or deficiencies, or otherwise, it shall be competent for the council to make a supplemental assessment and levy to supply such deficiencies, omissions, errors, or mistakes.

Stinson v. Godbe, 46 U. 468; 150 P. 967.

677. (259.) Intersections. Duties of railway companies. The cost of paving, macadamizing, or repaving the intersections of streets and spaces opposite alleys in any paving district shall be paid by the city as hereinafter provided; but nothing herein contained shall be construed to exempt any street railway company from keeping every portion of every street, avenue, and alley used by it, upon or across which its tracks shall be constructed at or near

the grade of such streets, in good and safe condition for public travel, but it shall keep the same planked, paved, macadamized, or otherwise in such condition for public travel as the city council of such city may from time to time direct, keeping the plank, pavement, or other surface of the street or alley level with the top of the rails of the track of such street railway. The portions of the streets or alleys to be so kept and maintained by all such street railway companies shall include all the space between its different rails and tracks and also a space outside of the outer rail of each outside track of at least two feet in width, and the tracks herein referred to shall include not only the main tracks but also all side tracks, crossings, and turnouts constructed for the use of such street railways.

678. (260.) District paving bonds. For the purpose of paying the cost of paving, macadamizing, or repaving the streets and alleys in any paving district, exclusive of the intersections of streets and spaces opposite alleys therein, the council shall have power, and may by ordinance cause to be issued bonds of the city, to be called "district paving bonds of district number .....," payable in not exceeding ten years from date, and to bear interest, payable annually, not exceeding the rate of six per cent per annum, and in such case shall also provide that said special taxes and assessments shall constitute a sinking fund for the payment of said bonds and interest, and said bonds shall not be sold for less than their par value; *provided,* that the entire cost of paving, repaving, or macadamizing any such streets, avenues, or alleys, properly chargeable to any blocks, lots, or lands, or part thereof, within any such paving district, may be paid by the owner of such lots or lands within fifty days from the levy of such special taxes, and thereupon such lots or lands shall be exempt from any lien or charge therefor.

679. (261.) City paving bonds. Whenever the council deems it expedient, it shall have power, for the purpose of paying the cost of paving, repaving, or macadamizing the intersections of streets and spaces opposite alleys in the city, to issue bonds of the city, to run not more than twenty years, and to bear interest payable semi-annually at a rate not exceeding six per cent per annum, to be called "paving bonds," and which shall not be sold for less than their par value, and the proceeds of which shall be used for no other purpose than paying the cost of paving, repaving, or macadamizing the intersections of streets and alleys in the city; *provided,* that the aggregate amount of such bonds issued in any one year shall not exceed the sum of $100,000; and if in any such city there shall be any real estate not subject to assessment of special taxes for paving purposes, the council shall have the power to pave in front of the same and to pay the cost thereof that would otherwise be chargeable on such real estate, in the same manner as herein provided for the paving of intersections of streets and paving therefor. The word "lot" as in this chapter used shall be taken to mean any subdivided real estate. The word "lands" shall mean any unsubdivided real estate. The word "street" shall be deemed to include boulevard and avenue.

680. (262.) Special tax according to benefits accruing. If the lots and real estate abutting upon that part of the street ordered paved, repaved, or macadamized, as shown upon any recorded plat or map, are not of uniform depth, or if for any other reason it shall appear just and proper to the council, the council is authorized and empowered to determine and establish the depth to which the real estate shall be charged and assessed with the cost of the improvement, and such depth shall be determined and established according to the benefits accruing to the property by reason of the improvement. The council shall include in the paving district all the real estate to be benefited by such improvement, and shall cause it to be charged and assessed with the cost of such paving or improvement as in this chapter hereinafter provided. The provisions of this chapter in regard to the depth to which real estate may be charged and assessed, shall apply to all special taxes that may be levied, except for sidewalk, in proportion to the front or square feet.

681. (263.) District curbing and guttering bonds. Whenever curbing, or curbing and guttering, is done upon any street or avenue in any paving district in which paving has been ordered, and the council shall deem expedient so to do, it shall have power and authority, for the purpose of paying the cost of such curbing and guttering, to cause to be issued bonds of the city, to be called "curbing and guttering bonds of paving district number .....," payable in not exceeding ten years from date, and to bear interest payable annually, not exceeding the rate of six per cent per annum, and in such case shall assess at one time the total cost of such curbing and guttering, or curbing, as the case may be, upon the property abutting or adjacent to the portion of the street or avenue so improved, according to special benefits; such assessment to become delinquent the same as the assessment of special taxes for paving purposes, and to draw the same rate of interest and be subject to the same penalties, and may be paid in the same manner as special taxes for paving purposes; and the special taxes so assessed shall constitute a sinking fund for the payment of said bonds and interest; and said bonds shall not be sold for less than their par value.

682. (264.) Errors not to avoid tax. Action to recover. Certain special taxes confirmed. No such special tax shall be declared void, nor shall any such assessment or part thereof be set aside in consequence of any error or irregularity committed or appearing in any of the proceedings under this chapter; but any party feeling aggrieved by any such special tax, assessment, or proceeding may pay the said special taxes assessed or levied upon his property, or such instalments thereof as may be due, at any time before the same shall become delinquent, under protest, and with notice in writing to the city treasurer that he intends to sue to recover the same, which notice shall particularly state the alleged grievance and grounds thereof, whereupon such party shall have the right to bring civil action within sixty days thereafter, and not later, to recover so much of the special taxes paid as he shall show to be illegal, inequitable, and unjust, the cost to follow the judgment to be apportioned by the court as may seem proper, which remedy shall be exclusive. The city treasurer shall promptly report all such notices to the city council for such action as may be proper. No court shall entertain any complaint that the party was authorized to make, and did not make, to the city council sitting as a board of equalization, nor any complaint not specified in said notice fully enough to advise the city of the exact nature thereof; nor any complaint that does not go to the groundwork, equity, and justice of the tax. The burden of proof to show such tax or part thereof invalid, inequitable, or unjust shall rest upon the party who brings such suit. And in any instance where such special tax, or the levy or assessment or notice thereof, or any step or proceeding affecting or concerning the same, is annulled, set aside, or declared void, either in whole or in part, by any court or in any proceeding whatsoever, at any time after a contract for the improvement to be paid for by said special tax is let or entered into, or at any time after work on such improvement has begun, the city council may by ordinance make a new levy of such tax to the same amount and extent as such original tax was declared invalid or was annulled, whether such tax was held void for jurisdictional or other defects or irregularities. No notice of such ordinance need be given, and no protest against the same need be considered. All special taxes heretofore levied or attempted to be levied in cities which have not heretofore been adjudicated void, and all notices, assessments, equalizations, and proceedings taken in relation thereto, whether void, defective, or valid, in all cases where the improvements contemplated thereby have been made or contracted for, are hereby confirmed, validated, and made sufficient to the same extent as if the same were perfect in the first instance. Am'd '05, p. 83.

This section does not apply to an attempted assessment of exempt property and does not preclude a suit to annul such an assessment.
Wey v. S. L. C., 135 U. 504; 101 P. 381.

Failure to make an order, required by municipal ordinance, directing the improvement to be made, is not jurisdictional, and does not deprive the council of jurisdiction to assess and levy a tax therefor.
Stott v. Salt Lake City, 47 U. 113; 151 P. 988.

Where a contract is entered into to build

a "mortar wearing surface sidewalk," but subsequently the contractors were ordered to construct a monolithic sidewalk, such departure does not constitute an abandonment of the contract, the two kinds of construction differing only in the mixture of materials.
Id.

Where the construction of a sidewalk has been completed, and the work accepted by the city council, and the abutting owners have failed to effectually protest, they are estopped, in the absence of fraud or mistake, on a collateral attack in a proceeding to restrain the assessment and collection of taxes to pay for the improvement, to assert that the work was not done in accordance with the contract.
Id.

683. (265.) Board of equalization. Whenever the city shall levy any tax under the provisions of this chapter, in cities other than cities of the first and the second class, the city council shall appoint a board of equalization and review, to consist of five of its members. In cities of the first and the second class, the board of commissioners shall constitute a board of equalization and review, which said board shall, upon the completion of the lists of property in any of the districts taxed, give public notice of the completion of said lists. Such notice shall state the time and place of meeting of said board, and the same shall be during the usual business hours and for not less than five consecutive days, and during the time specified said lists shall be open to public inspection, and any person feeling aggrieved shall have a hearing, and it shall have authority to make corrections of any tax deemed unequal or unjust. Am'd '11, p. 231.

Branting v. Salt Lake City, 47 U. 296; 153 P. 995

684. (266.) Railways to pave and repair. All horse, cable, steam, electric, or other railway companies now existing or hereafter created in any city already incorporated or hereafter organized shall be required to pave or repave at their own cost all the space between their different rails and tracks and also a space two feet wide outside of the outer rails of the outside tracks, and the tracks herein referred to shall include not only the main tracks but also all side tracks, crossings, and turnouts used by such companies. Where two or more companies occupy the same street or alley with separate tracks, then each company shall be responsible for its proportion of the surface of the street or alley occupied by all the parallel tracks as herein required. Such paving or repaving by such railway companies shall be done at the same time and shall be of the same material and character as the paving or repaving of the streets or alleys upon which said railway track or tracks are located, unless other material be specially ordered by the city council or board of public works. Such railway companies shall be required to keep that portion of the street which they are herein required to pave or repave in good and proper repair, using for said purpose the same material as the street upon which the track or tracks are laid at the point of repair or such other material as the city council or board of public works may require and order; and as streets are hereafter paved, or repaved, street railway companies shall be required to lay, in the best approved manner, a rail to be approved by the city council or board of public works. The tracks of all railway companies, when located upon the streets or avenues of the city, shall be kept in repair and safe in all respects for the use of the traveling public, and said companies shall be liable for all damages resulting by reason of neglect to keep such tracks in repair, or for obstructing the streets or avenues of such city. For injuries to persons or property arising from the failure of such company to keep its tracks in proper repair and free from obstructions, such company shall be liable and the city shall be exempt from liability. The word "companies" as used in this chapter shall be taken to mean and include any persons, companies, corporations, or associations owning or operating any street or other railway in any such city.

685. (267.) Id. Levy on railroad. In the event of the refusal of such company to pave, repave, or repair as required in the foregoing sections, when so directed by the council, upon the paving or repaving of any street upon which its track is laid, the council shall have power to pave, repave, or repair the same, and the cost and expense of such paving, repaving, or repairing may be collected by levy and sale of any property of said street railway company in the same manner as special taxes are now or may be collected.

Special taxes for the purpose of paying the cost of any such paving or repaving, macadamizing, or repairing of any such street railway, may be levied upon the track, including the ties, iron, roadbed, right of way, side tracks, and appurtenances, including buildings and real estate belonging to any such company or person and used for the purpose of such street railway business, all as one property; or upon such parts of such track, appurtenances, and property, or any part thereof, as may be within the district paved, repaved, macadamized, or repaired, and shall be a lien upon the property levied upon from the time of the levy until satisfied. No mortgage, conveyance, pledge, transfer, or incumberance of any such property or of any rolling stock or personal property of any such company, created or suffered by a company after the time when any street or part thereof upon which any street railway shall have been laid, shall have been ordered paved, repaved, macadamized, or repaired, shall be made or suffered except subject to the lien of such special taxes, if such levy be in contemplation.

686. (268.) Seizure and sale. The city treasurer shall have the power and authority to seize any personal property belonging to any such person or company for the satisfaction of any such special taxes when delinquent, and to sell the same upon advertisement and in the same manner as constables are now or may be authorized to sell personal property, upon execution at law; but failure so to do shall in no wise affect or impair the lien of the tax or any proceeding allowed by law for the enforcement thereof. The railroad track or any other property upon which such special taxes shall be levied, or so much thereof as may be necessary, may be sold for the payment of such special taxes in the same manner and with the same effect as real estate, upon which such special taxes may be levied, may be sold.

687. (269.) Action against railway. Defense. It shall also be competent for any such city to bring a civil action against any party owning or operating any such street railway, and liable to pay said taxes, to recover the amount thereof, or any part thereof delinquent and unpaid, in any court having jurisdiction of the amount, and obtain judgment and have execution therefor, and no property, real or personal, shall be exempt from any such execution; *provided,* that real estate shall not be levied upon by execution except by execution out of the district court on the judgment therein, or transcript of judgment filed therein, as is now or hereafter may be provided by law. No defense shall be allowed in any such civil action except such as goes to the groundwork, equity, and justice of the tax, and the burden of proof shall rest upon the party assailing the tax. In case part of such special tax shall be shown to be invalid, unjust, or inequitable, judgment shall be rendered for such amount as is just and equitable.

688. (270.) Railway tax payable in instalments. It shall be competent for the council, upon the written application of any company, or persons owning any such street railway, to provide that such special taxes shall become delinquent and be payable in instalments, as in case of taxes levied upon abutting real estate as hereinafter provided, but such application shall be taken and deemed a waiver of any and all objections to such taxes and the validity thereof. Such application shall be made at or before the final levy of such taxes. The provision of this chapter in regard to the levy, collection, and enforcement of special taxes to pay the costs of paving, repaving, macadamizing, or repairing between the rails of street railways shall apply to such special taxes hereafter levied.

689 (271.) Water, gas, and sewer connections. The council shall have power, in any paving district, and it shall be its duty before the work of paving or repaving is done therein, to require water, gas, and sewer connections to be made under such regulations and at such distances from the street mains to the line of the property abutting upon the street ordered paved or repaved as may be prescribed by ordinance, and shall require that such water pipe connections may be made by any waterworks company owning the water

pipe main, and that such gas pipe connection may be made by any gas pipe company owning the gas pipe main. And upon neglect or failure of the water or gas companies to do the same, the city council or board of public works may cause the same to be done, and the cost thereof shall be deducted from any indebtedness of the city to such companies, and no bills shall be paid to the said companies by the city until all such expense for pipe laying shall have been liquidated. The council shall also have power, at any time, to assess the cost of any sewer connections and also of any water connections, when the city owns the water and water pipe main, upon the property opposite such connections, and to such depth as the council shall deem just and equitable.

690. (272.) Limit of bonded indebtedness. Nothing in this chapter shall be construed or held to authorize any city to issue bonds of the city, either as district bonds, for paving the streets, or for paving said street intersections, or spaces opposite alleys in said city, or for any purpose whatever to any amount beyond that fixed as the limit of the bonded indebtedness of said city by law.

691. (273.) Notice of intention to tax. In all cases before the levy of any taxes for improvements provided for in this chapter, the city council shall give notice of intention to levy said taxes, naming the purposes for which the taxes are to be levied, which notice shall be published at least twenty days in a newspaper published within such city. Such notice shall describe the improvements so proposed, the boundaries of the district to be affected or benefited by such improvements, the estimated cost of such improvements, and designate a time when the council will consider the proposed levy. If, at or before the time so fixed, written objections to such improvements signed by the owners of two-thirds of the front feet abutting upon that portion of the street, lane, avenue, or alley to be so improved, be not filed with the recorder, the council shall be deemed to have acquired jurisdiction to order the making of such improvements. Am'd '01, p. 153.

A notice of intention to pave, given under § 13, p. 64, of the law of 1890, which shows the intention to levy the tax, its purposes, a general description of improvements, the boundaries of the paving district proposed, the estimated cost, and the time set for hearing written objections to such tax, is sufficient; and where, before the hearing, the owners of more than one-half of the abutting property liable for such tax filed written objections, the city council acquired no jurisdiction to proceed with the paving.

Armstrong v. Ogden City, 9 U. 255; 34 P. 53.

A notice of intention to create a certain curb and gutter district, and to "build therein concrete curbs and gutters," and to do "the necessary grading therefor," was not notice of an intention to change the grade of the whole street, and, as such notice or intention was jurisdictional, the tax assessed for lowering the grade of the entire street was invalid, but a court of equity will restrain only the invalid portion of such taxes.

Gwilliam v. Ogden City, 49 U. 555; 164 P. 1022.

The notice of intention is jurisdictional, and property not necessarily included in the general description and expressly excluded by the specific description cannot thereafter be legally assessed by amendment of tax ordinance so as to include it, without a new notice of intention.

Jones v. Foulger, 46 U. 419; 150 P. 933.

A railroad owning the right of way across which a street is to be paved may validly protest against improvement.

Cave v. Ogden City, 50 U. —; 169 P. 163.

This section contemplates protest only by owners of legal title, and the prior owner of property where the county owns it under a tax deed or a corporation occupying frontage owned by individuals may not validly protest.

Id.

692. (274.) Tax to be equitable. How levied All special taxes to cover the cost of any public improvement herein authorized shall be levied and assessed on all blocks, lots, parts of blocks and lots, lands, and real estate bounding, abutting, or adjacent to such improvement or within the districts created for the purpose of making such improvement, to the extent of the benefits to such lots, parts of lots, lands, and real estate by reason of such improvement; such benefits to be equal and uniform. Such assessments may be according to the square foot or foot frontage, and may be prorated and scaled back from the line of such improvement and an allowance made for corner lots so that they shall not be assessed at full rate on both streets, according to such rules as the council shall consider fair and equitable; and all such assessment and finding of benefits shall not be subject to review in any legal or equitable action, except for fraud, gross injustice, or mistake; *provided,* that when any public improvement shall extend into or through any undivided tract

or parcel, or parcels, of land, said taxes shall be levied so as not to be charged against the real estate adjoining such improvement for a greater depth than the average distance through the subdivided real estate to be taxed for said purpose.

Taxpayers are not required to protest, before the city council sitting as a board of equalization, against the levying of a tax to pay for sidewalk construction as a condition precedent to bringing suit to restrain such collection where the protest, if made, would have been unavailing.

Stott v. Salt Lake City, 47 U. 113; 151 P. 988.

Where the lowest bid greatly exceeded the estimated cost and before the assessment was made notice was published as required by § 683, and no protest being made the contract was let; held, that as an estimate is merely an approximate judgment, the city did not lose jurisdiction to levy an assessment in excess of the estimated cost of the improvement.

Branting v. Salt Lake City, 47 U. 296; 153 P. 995.

An assessment for local improvements cannot exceed the benefit.

Id.

693. (275.) Description in levy. It shall be sufficient, in any case, in making a levy or assessment of any tax, to describe the lot or piece of ground as the same is platted and recorded, although the same may belong to several persons; but in case any lot or piece of ground belongs to different persons, the owner of any part thereof may pay his proportion of the tax on such lot or piece of ground, and his proper share may be determined by the city treasurer.

694. (276.) Total cost in one levy. The cost and expense of grading, filling, culverting, curbing, guttering, or otherwise improving, constructing, or repairing streets, avenues, alleys, and sidewalks at their intersections, may be included in the special tax levied for the construction or improvement of any one street, avenue, alley, or sidewalk, as may be deemed best by the council.

695. (277.) When levied. Special taxes may be levied as the improvements are completed in front of, or along, or upon any block, or lot, or part thereof, or piece of ground, or at the time the improvement is entirely completed, as shall be provided in the ordinance levying the tax; *provided,* that any levy of a special tax for special improvements shall not be made until the cost of such improvement shall first have been ascertained by contract, duly let to the lowest responsible bidder, after publication of notice for at least twenty days in a newspaper of general circulation published in the city where such improvements are to be made, and the cost of such improvements shall not exceed to the property owner the amount of the contract entered into for the performance of the work; *provided further,* that bids for the doing of all work contemplated by each special improvement shall be separately solicited and a separate contract be let therefor as above provided. Am'd '07, p. 194.

696. (278.) Notice of delinquency. When any special tax is levied it shall be the duty of the city recorder to deliver to the city treasurer a certified copy of the ordinance levying such tax, and such treasurer shall, without delay, give at least five days' notice in one or more newspapers having general circulation in said city, of the time when such tax will become delinquent.

697. (279.) Special taxes may be levied. Special or local taxes may be levied by the city council or board of trustees of any city or town in this state for the purpose of constructing, reconstructing, extending, or maintaining waterworks, reservoirs, canals, and ditches, laying pipes and mains, erecting hydrants and keeping the same in repair; for the purpose of supplying water for domestic and irrigation purposes, or either, and for the purpose of regulating, controlling, and distributing the same, and for the purpose of regulating and controlling water and water courses leading into the city or town; for constructing and maintaining gas, electric, or other plants for illumination, and the necessary means and cost of distribution; and for constructing, extending, and repairing sewers and drains; and for constructing and paving of sidewalks; such taxes to be levied on the real estate lying and being within the district in which such improvements may be made, or for the benefit of which such taxes are to be expended, to the extent of the benefits to such property, by reason of such improvement or expenditure, the benefits to such property to be determined by the council or board of trustees; *provided,* that in cases where the council or board of trustees shall find such

benefits to be equal and uniform, such levy may be made according to the front feet or square feet of lots or real estate within said district or according to such other rule as the council or board of trustees may adopt for such distribution or adjustment of such costs upon the lots or real estate in such district benefited by such improvement or expenditure, and all taxes or assessments made for such purposes shall be collected in the same manner as other special assessments, and shall be subject to the same penalty; *provided*, that a tax levied for supplying water for irrigation, and for distributing and regulating the same, may be levied upon real estate according to the amount or water used thereon, or may be levied as an acreage tax. Am'd '11, p. 218.

Special tax for street lighting, §§ 720-734.
Funds kept separate and how disbursed, §§ 744-748.
Waterworks, canals, etc., §§ 570x15-570x18.
City scrip against special tax funds, § 740.
Special tax funds and warrants, §§ 744-748.
As amended in 1911 does not authorize the levying of such tax for the paving of streets.
Woodring v. Straup, 45 U. 173; 143 P. 592.

698. (280.) Repairs. The foregoing provisions of this chapter shall apply to the repaving of streets and sidewalks, but not to repairs thereon. The council shall, by ordinance, define what constitutes repaving, what repairs, and what extraordinary repairs. The cost of ordinary repairs shall be borne by the city; and the council may levy and collect special taxes upon the abutting property for the purpose of defraying the cost of repairs defined to be extraordinary without previous notice of intention, or any right of the property owners to protest. The right of protest shall not exist in cases where, for any reason, any part of a street or sidewalk lying within a paving district or any extension thereof, shall not have been paved when the remainder of such district or extension was paved, and the council shall afterward levy a tax upon the abutting property for the payment of the same.

699. (281.) Special assessment a lien. Special assessments made and levied to defray the cost and expenses of any work contemplated by the provisions of this chapter, and the cost of collection thereof, shall constitute a lien upon and against the property upon which such assessment is made and levied, from and after the date thereof, and such assessment shall be collected in the manner prescribed by ordinance.

This lien is superior to a mortgage lien.
Lannan v. Waltenspiel, 45 U. 564; 147 P. 908.

700. (282.) Change of grade. Damages. Whenever by the grading of any street, alley, or other public ground in a city, pursuant to the action of the city authorities in changing the established grade of such street, alley, or public ground, after valuable improvements have been made upon real property abutting thereon, such real property is injured or diminished in value, the owner of such real porperty or improvements may recover from such city the amount of such damagaes or diminution in value in a civil action brought for that purpose. This section shall be held to cover and apply to all cases wherein a change of established grades of streets, alleys, or public grounds may have been heretofore determined upon, but has not been carried into actual effect.

Claims for damages to be presented to council, § 816.
Where a street grade was established, but not carried into effet, and thereafter buildings were erected, the city was liable for damages resulting from a new change of grade.
Kimball v. S. L. City, 32 U. 253; 90 P. 395.
Hempstead v. S. L. City, 32 U. 261; 90 P. 397.
Felt v. S. L. City, 32 U. 275; 90 P. 402.
The right of an abutting owner to recover for damages caused by change of street grade is given by Con. art. 1, sec. 22, and not by this section.
Webber v. Salt Lake City, 40 U. 221; 120 P. 503.
Where a city increases the difference in levels between plaintiff's property and the adjoining street one to three feet, took a strip of his adjoining property and dumped material thereon, the city cannot be said, as a matter of law, to have merely corrected the surface irregularity without injuring plaintiff's property.
Richards v. Salt Lake City, 49 U. 28, 161 P. 680.

CHAPTER 15.

LIGHTING OF PUBLIC STREETS IN MUNICIPALITIES.

('13, p. 136; '15 p. 143.)

720. Lighting public streets and places. Powers of city councils and town boards. The board of commissioners or city council of any city, and the board of trustees of any incorporated town, in the state of Utah shall have full power to order poles, posts, wires, pipes, conduits, and lamps, or any of said appliances, or any other suitable and necessary appliances, to be installed in and along the whole or any part of one or more public streets, alleys, courts, or places in such city or town, for the purpose of lighting the same; and to acquire the use of poles, posts, wires, pipes, conduits, and lamps, or of any of said appliances located or installed in or along the whole or any part of one or more public streets, alleys, courts, or places in such city or town, for the purpose of lighting the same, and to order any such appliances installed or otherwise provided under this chapter to be maintained, and also to order gas, electric current, or other illuminating agent to be furnished for such lighting, and to defray or cause to be defrayed the cost and expense of such improvements, or any of them, by levying and collecting special taxes and assessments upon the blocks, lots, or parts thereof, and pieces or subdivisions of ground fronting or abutting upon the public streets, alleys, courts, or places so lighted and benefited by such improvement, either to the full depth of such blocks, lots, or subdivisions of ground or to such depth as may be determined by such city commission, city council, or board of town trustees; *provided,* that where less than full depth of such lots, blocks, or subdivisions thereof is asssesed for such improvement, the depth thereof to be assessed shall be determined and established according to the benefits accruing to the property by reason of the improvement.

Fund kept separate and how disbursed, §§ 744-748.

721. Proposed improvements to be described in resolution. City engineer to furnish plans and specifications, and estimate of cost. Before making any improvement authorized by § 720, the board of commissioners or city council of any city, or the board of trustees of any town, shall pass a resolution declaring its intention to do so, briefly describing the proposed improvement and specifying the exterior boundaries of the district to be benefited by said improvement and to be assessed to pay the costs and expenses thereof; and the board of commissioners or city council of any city, and the board of trustees of any town, may, in their discretion, prescribe in said resolution of intention that a certain part or percentage of the cost and expense of said improvement, which part or percentage shall be specified in said resolution, shall be paid out of the treasury of the city or town from such funds as said authorities may designate. Such proposed improvements may include any or all of the different kinds mentioned in § 720; *provided,* that the use of maintenance of appliances for the furnishing of an illuminating agent shall be for a period stated in such resolution of intention not exceeding three years. Such resolution shall also refer the proposed improvement to the city engineer, if there be one, and if not, to some competent person employed by the municipality for that purpose, and named in said resolution, and shall direct him to make and file with the city recorder or the clerk of the town board a report in writing, which shall present:

1. Plans and specifications for the work required in order to make such improvement;

2. An estimate of the cost of said improvement, and of the incidental expenses in connection therewith;

3. A diagram showing the proposed improvement district and the boundaries and dimensions of the respective lots, parcels, or subdivisions of the land within said district, each of which subdivisions shall be given a separate number in red ink upon said diagram;

4. The proposed assessment of the total amount of the costs and expenses of the proposed improvement upon the several subdivisions of land in said district in proportion to the estimated benefit to be received by such respective subdivisions from such improvement.

And whenever any part or percentage of the cost and expense of such improvement is ordered to be paid out of the treasury of the municipality as hereinabove provided, the amount of such part or percentage shall first be deducted from the total estimated costs and expenses of such improvement, and the proposed assessment upon property shall include the remainder of such estimated costs and expenses. Such assessment shall refer to the subdivisions upon said diagram by the respective red ink numbers thereon, and shall show the names of the owners thereof, if known, otherwise designating them as unknown. No mistake in the name of the owner of any lot or subdivision of land shall affect the validity of the assessment thereon.

722. Engineer's report to be filed. Date for hearing protests. Upon the filing of the report provided for in § 721, the city recorder or clerk of the town board shall present the same to the board of commissioners or city council, or board of town trustees, who thereupon, after considering the same, shall, by resolution, appoint a time and place for hearing protests in relation to such proposed improvement, which time shall not be less than twenty days from the date of the passage of such resolution, and shall direct the city recorder or town clerk to give public notice of such hearing.

723. Notice of proposed improvement to be published. After the passage of the resolution mentioned in § 722, the city recorder or town clerk shall cause a notice to be published on five separate days in a daily newspaper published in such municipality, or if there is no daily newspaper published therein, then by two successive insertions in a weekly newspaper published therein, which notice shall state the fact and date of the passage of the resolution of intention, and of the filing of said report, and the date fixed for the hearing of said protests, and shall briefly describe the improvement proposed, and shall refer to said resolution of intention and report for further particulars. The last publication of such notice shall be at least ten days before the date set for the hearing of such protests.

724. Who may protest. Hearing. Majority of property owners may stay proceedings. Confirmation of assessment. Modification and approval of plans. Notice to contractors. Any person owning property in the proposed improvement district may object, either to said improvement generally, or to the extent of the improvement district, or the proposed assessment fixed in the report provided for in § 721, and may file a written protest setting forth such objection, with the city recorder or the town clerk, at or before the time set for the hearing referred to in § 722. Such officer shall endorse on every such protest the date of its receipt by him, and at the time appointed for the hearing hereinabove provided for shall present to the board of commissioners or city council or board of town trustees, all protests so filed with him. If the board of commissioners or city council or board of town trustees shall find that protests against said improvement generally are signed by the owners of a majority of the front feet located by blocks, lots, and subdivisions of the property fronting or abutting on the public streets, alleys, courts, or places within said improvement district, all proceedings under said resolution of intention shall cease, and no new resolution of intention for the same improvement shall be passed within six months after the hearing of such protests, unless the owners of a majority of the front feet of the property in said proposed improvement district shall in the meantime petition therefor. If the board of commissioners or city council or board of town trustees shall find that protests against the improvement generally are not signed by the owners of a majority of the front feet of the property fronting or abutting on the public streets, alleys, courts, or places within the proposed improvement district, or if there are any protests against the extent of the

proposed improvement district, they shall hear and consider such protests at the time appointed therefor, or at any time to which such hearing may be adjourned, and pass upon the same, and their decision shall be final and conclusive; and if such protests are sustained, the proceedings shall cease, but may be renewed at any time; and if such protests are denied, the proposed assessment shall be confirmed. If such protests are against the proposed assessment, the board of commissioners or city council or board of town trustees shall hear such protests at the time appointed therefor, or at any time to which such hearing may be adjourned, and may confirm, correct, or modify said proposed assessment. When no protests are filed, or when upon the hearing such proposed assessment is confirmed, corrected, or modified, the report provided for in § 721 shall be adopted with any modification or correction that shall have been made therein, and the board of commissioners or city council or board of town trustees shall, by resolution, order such proposed improvement to be made, and shall direct the city recorder or town clerk to give fifteen days' notice to contractors for the filing of bids with such recorder or clerk for the furnishing of the appliances or illuminating agent, or other work required by the plans and specifications of the aforesaid confirmed report, which notice shall be published for five days in a daily newspaper, published in such municipality, or if there is no daily newspaper published therein, then by two successive insertions in a weekly newspaper published therein.

725. Awarding of contract. Sum not to exceed estimate. Such contract shall be let to the lowest responsible bidder, but the board of commissioners or the city council of any city, or the board of trustees of any town, may reject any or all bids. If the contract as executed shall be for a less sum than that named in the estimate contained in the confirmed report, the assessment upon the property in the improvement district and the amount, if any, to be paid from the treasury of the municipality shall be proportionately reduced. In no case shall the property in the improvement district be assessed in a greater sum than that named in the estimate contained in the confirmed report, but a contract, if it be that of the lowest responsible bidder, may be let for a larger sum than that named in the said estimate, provided the excess over said estimate be paid from the treasury of the municipality.

726. Levy to be made by ordinance, when. Assessment a lien against property. Immediately upon the execution of the contract provided for in § 725, and the final correction, if any be required, of the assessment contained in the confirmed report, the board of commissioners or city council of any city, or the board of trustees of any town, shall by ordinance levy the said assessment upon the respective lots, parcels, and subdivisions of land comprised in such improvement district, and every such assessment shall, from the date of levy thereof, be a lien upon the land on which it is levied, which lien shall be superior to the lien of any mortgage or other lien or encumberance, whether prior in time or not, except the lien of a general tax, and shall continue until paid, notwithstanding any sale of said property for or on account of a general tax; and said ordinance shall also fix the amount, if any, to be paid for the costs and expenses of said improvement from the treasury of such municipality.

727. Tax becomes delinquent, when. To bear interest. Default. If the contract for such improvement be for a longer period than one year (not exceeding three), the assessment levied to defray the costs and expenses shall become delinquent in equal annual instalments, the first of which shall become delinquent in thirty days after the ordinance levying such assessment becomes effective, and the second in one year from said date, and the third in two years from said date; if such contract be for one year only, the assessment shall become delinquent in thirty days after the ordinance levying it becomes effective. Such tax shall bear interest on the whole sum unpaid at the rate of six per cent per annum, payable annually, but the whole

tax or one or more instalments thereof may be paid without interest within thirty days after the ordinance levying it becomes effective. Unless default has been made in the payment of any instalment of such tax, one or more instalments in the order in which they are made payable, or the whole special tax, may be paid on the day any instalment becomes due by paying the amount therof and interest to date of payment. Default in the payment of any such instalment, whether of principal or interest, when due, shall cause the whole of the unpaid principal to become due and payable immediately, and the whole amount of the unpaid principal and accrued interest shall thereafter draw interest at the rate of eight per cent per annum until the date of sale, as hereinafter provided; but at any time prior to the day of sale the property owner may pay the amount of all unpaid instalments then due with interest at the rate of eight per cent per annum, and all accrued costs, and shall thereupon have the right thereafter to pay any instalment in the same manner as if default had not been made.

728. Treasurer to collect taxes. Publication of delinquent list. Tax sales. Redemption. All taxes levied under the provisions of this chapter shall be collected by the treasurer of the city or town levying such tax. Within ten days after the date of delinquency, the treasurer shall make a list of all property upon which such tax or any instalment thereof remains due and unpaid, and shall cause the same to be published for ten days in a daily newspaper published in such city or town, and if there be no daily newspaper published therein, then by two successive insertions in a weekly newspaper published therein. This delinquent list shall contain a description of the property upon which such tax is delinquent according to lots, blocks, parcels, or subdivisions thereof, together with the owner's name or names, if known, and if not known, in lieu thereof the words "unknown owner," with the amount of taxes due on each separate parcel, exclusive of costs, and shall give a notice of sale to the effect that if such delinquent taxes be not paid within fifteen days from the first publication of such notice, the said property, or so much thereof as may be necessary to satisfy such tax, with interest and the costs and expenses of sale, will be publicly sold at a time and place therein specified. On the day fixed for the sale the treasurer, in person or by deputy, shall appear at the hour and the place named in the notice of sale, and shall there offer sufficient of the delinquent real estate to pay the taxes and costs at public auction to the highest responsible bidder for cash. The offer of sale shall be substantially in the following language:

There is delinquent upon .....(here describe the piece of property as in the notice) special taxes amounting to $....., with costs and expenses of $..... What is the smallest portion of his property which you will take and pay the taxes, costs, and expenses?

If the sale is not concluded upon the date named in the notice the same may be continued from day to day thereafter until completed, and at such sale the city or town may be a purchaser.

The treasurer shall keep a record of all such tax sales made by him, and shall issue, to the purchaser or purchasers at such sale, certificates of sale, which certificates shall be in such form as may be prescribed by ordinance. Real estate sold for such special taxes may be redeemed by any person interested therein at any time within four years after the date of the sale thereof by such person paying into the city or town treasury for the use of the purchaser or his legal representative, the amount paid by such purchaser and all costs and expenses, including the costs of a certificate of sale and redemption certificate, and all special taxes that have been accrued thereon which have been paid by the purchaser after such purchase to the time of redemption, together with interest at the rate of eight per cent per annum on the whole thereof from the date of payment to the date of redemption; *provided,* that where such property has been sold to such city or town, and general taxes thereon have been thereafter paid by such city or town, it shall be necessary also for the redemptioner to pay the amount of such general taxes so paid

as aforesaid, with interest thereon from the date of payment to the date of redemption at the rate of one per cent per month.

When property is redeemed from such tax sale the treasurer of the city or town shall issue to the redemptioner a certificate of redemption, and shall make proper entry of such redemption in the tax sale record in his office.

729. Issuance of a tax deed at expiration of redemption period. At the the expiration of the period of redemption the treasurer shall certify to the city recorder or clerk of the board of town trustees a list of all properties in any such improvement district upon which no redemption has been made. Thereupon and thereafter it shall be the duty of such city recorder or clerk of the board of town trustees, upon presentation of the certificate of sale and upon payment of such reasonable fee as may be prescribed by ordinance, to issue and deliver to the holder of such certificate of sale a tax deed to the property covered thereby. Such deed shall recite substantially the amount of tax for which the property was sold, the particular purpose for which the tax was levied, the date of such levy, the date of sale, the amount for which such property was sold, the description of such property, and the name of the purchaser at such sale or of his assignee. Such deed shall be issued in the name and under the seal of the city or town levying such tax, and shall be executed and acknowledged by the city recorder or clerk of the board of town trustees.

730. Disposition of special funds. Bonds may be issued against fund. All money paid into the city treasury or town treasury, as the case may be, in payment of said special tax levies or assessments, or interest thereon, shall be deemed to be part of and constitute a fund for the payment of the costs and expenses of making such local improvement, and for no other purpose. The costs and expenses aforesaid shall include the contract price, engineering, inspecting, publishing notices, making of the tax levy, and other incidental expenses.

The fund created by such levy or assessment shall be in the custody of the city treasurer or town treasurer, as the case may be, and each fund so created shall be kept separate and intact from all other funds and moneys of the city or town, as the case may be, and shall be paid out only on special tax bonds as hereinafter provided, and for no other purpose than paying the costs and expenses of making the improvement for which the special tax or assessment was levied.

The city auditor in cities having an auditor, the city recorder in cities not having an auditor, or the clerk of the board of town trustees, as the case may be, upon being so directed by the city commission, city council, or board of town trustees, thirty days after the levy of such tax or assessment, may issue bonds in payment of the cost and expense of said local improvement, and against the funds created by said special tax levy or assessments. Said bonds shall be drawn on the treasurer of the city or town and against the special tax funds as hereinbefore provided; such bonds shall be known as lighting bonds, shall be consecutively numbered, and shall be made in form, wording, and color different and to distinguish them from other bonds of the city or town, and shall be drawn payable to bearer, and issued only in denominations of $1000, $500, $100 and $50; *provided,* that the last bond of an issue may be drawn for any sum under $100.

All such bonds shall be dated thirty days after the ordinance levying the tax becomes effective, and shall bear interest at the rate of six per cent per annum from date, interest to be paid annually, and to be evidenced by annual interest coupons attached to such bonds, and attested by the facsimile signature of the city auditor, city recorder, or clerk of the board of town trustees.

Such bonds shall be made payable on or before three years from the date of their issue; *provided,* that whenever considered prudent by the treasurer of the city or town issuing such bonds, he may, and whenever funds may be in his hands to the credit of any improvement sufficient to pay one or more

bonds he shall, by advertisement in the manner provided for publication of notice of intention in § 723, call in a suitable number of such bonds for payment, and at the expiration of thirty days from the first publication of notice of such call, interest on the bond so called shall cease. The notice shall specify the bonds so called by number, and all such bonds shall be called and paid in their numerical order.

Such bonds shall be issued to the contractor doing the work in any such improvement district, for the full amount of the contract price due at the time of their issuance.

731. Assessment not to be annulled. Proviso. No such special tax shall be declared void, nor shall any such assessment or part thereof be set aside in consequence of any error or irregularity committed or appearing in any of the proceedings under this chapter; but any party feeling aggrieved by any such special tax, assessment, or proceeding may pay the said special taxes assessed or levied upon his property, or such instalments thereof as may be due, at any time before the same shall become delinquent, under protest, and with notice in writing to the city treasurer or town treasurer that he intends to sue to recover the same, which notice shall particularly state the alleged grievance and grounds thereof, whereupon such party shall have the right to bring a civil action within sixty days thereafter, and not later, to recover so much of the special taxes paid as he shall show to be illegal, inequitable, and unjust, the costs to follow the judgment to be apportioned by the court as may seem proper, which remedy shall be exclusive. The city treasurer or town treasurer shall promptly report all such notices to the city commission, city council, or board of town trustees for such action as may be proper. No court shall entertain any complaint that the party is required by § 724 to make, and did not make, to the city commission, city council, or board of town trustees, nor any complaint not specified in said notice fully enough to advise the city or town of the exact nature thereof; nor any complaint that does not go to the ground work, equity, and justice of the tax. The burden of proof to show such tax or part thereof invalid, inequitable, or unjust shall rest upon the party who brings such suit. And in any instance where such special tax, or the levy or assessment or notice thereof, or any step or proceeding affecting or concerning the same, is annulled, set aside, or declared void, either in whole or in part, by any court or in any proceeding whatsoever, at any time after a contract for the improvement to be paid for by said special tax is let or entered into, or at any time after work on such improvement has begun, the city commission, city council, or board of town trustees may by ordinance make a new levy of such tax to the same amount and extent as such original tax was declared invalid or was annulled, where such tax was held void for other than jurisdictional defects; *provided*, that in the event any property shall be illegally assessed, or any property which is by law exempt from assessments for local purposes, shall be so assessed, then and in such event, the city or town so assessing such property shall be liable to the holders of the bonds issued against the funds created by such assessments for the amount of such assessments, which amount shall be paid from the general fund of the city or town.

732. Liability of city or town. The city or town, as the case may be, shall not be held liable for the payment of such lighting bonds, except to the extent of the funds created and received by special tax levies or assessments, and the amount ordained to be paid from the treasury of such city or town for such improvement; but the city or town shall be held responsible for faithful accounting, collection, settlements, and payments of the moneys of said funds, and when such accounting, collecting, settlements, and paying is faithfully performed, all further liability on the part of the city or town shall cease.

733. Notices to be posted, when. In case no newspaper is published in any town desiring to avail itself of the provisions of this chapter, the board

of trustees of such town shall publish all notices required by this chapter by posting written copies of the same in at least three public places within the proposed improvement district, such notices to remain posted for at least ten days.

734. Supplementary ordinances. The board of commissioners or the city council of any city, and the board of trustees of any incorporated town, shall have power to pass any ordinances necessary or proper to aid, supplement, or effectuate the provisions of this chapter.

CHAPTER 16.

CITY SCRIP.

740. (282x.) May issue scrip, when. In any instance where any city of the first or of the second class may levy a special tax or assessment for the purpose of making any local improvement or improvements, the city treasurer, upon being so directed by the city council, at any time after the improvement is completed, may issue scrip against the fund to be raised by such special tax or assessment, and said scrip may be sold by said treasurer on order of the council at either private or public sale, either with or without advertisement, at any price not less than the face value of such scrip, and the profits or premiums of such sale, if any, shall be placed in the fund raised by such scrip, and shall be used for no purposes except those for which said fund may be used. '05, p. 86; '07, p. 74.

741. (282x1.) How Issued. Interest. Such scrip shall be so issued that there shall be a separate certificate for each lot, part of lot, or parcel of land affected by said special tax or assessment. Such certificates shall contain a description, sufficient for identification, of the particular lot, part of lot, or parcel of land against which it is issued, and also give the block and plat in which the same is situate, and shall also state the amount of the special tax or assessment levied thereon, the date and purpose of such levy, and the name of the person supposed to be owner of the land taxed or assessed, and shall further state the date or dates on which said special tax or assessment, or the several instalments thereof, shall be delinquent, and also the interest payable on the same both before and after delinquency, which interest shall be provided for in the ordinance levying such tax or assessment, and shall further state that all interest on said certificate or any instalment mentioned therein shall cease when such tax or such instalment is paid to the treasurer. No special tax or assessment or any instalment thereof shall draw a greater rate of interest than six per cent per annum from date of issue of said scrip. '05, p. 86; '07, p. 74.

742. (282x2.) Redemption of scrip. Any owner or agent or person interested in any lot or parcel of land against which any scrip may have been issued as aforesaid for any special tax or assessment, may pay said tax or assessment, or any instalment thereof, with interest, to the city treasurer at any time after levy of such special tax or assessment, and thereupon the interest upon the amount so paid ceases, and the scrip standing against said land is thereby canceled and redeemed to the extent of such payment, and the lien of such scrip against said land is thereby canceled to the extent of such payment, and it becomes the duty of the record holder of said scrip, upon being notified by mail by the city treasurer, to present such scrip to said treasurer and receive the amount paid thereon. When any payment upon any scrip is made by the treasurer, he shall stamp or write a description of the said partial payment and date thereof on said scrip, and keep a record of the same in his office, and whenever a complete redemption of such scrip is made, he shall write or stamp a statement of the date when said tax was paid, and when such scrip was presented, on such scrip, and file the same in his office. '05, p. 87; '07, p. 74.

743. (282x3.) Scrip a lien on property. Property may be sold. All scrip issued hereunder shall be a lien against the property described therein from the date of the levy of the special tax or assessment for which the said scrip was issued, and, at any time after delinquency of the last instalment, the property described in such scrip shall be sold by the city treasurer, as agent for the holder of such scrip, in the same manner as provided by law or ordinance for the sale of land for delinquent special taxes, to make the sum delinquent on said scrip and the costs and expenses of such sale. After the issue of said scrip all liability of the city thereon, except for faithful accounting for funds received to redeem the same, shall cease. '05, p. 87; '07, p. 75.

CHAPTER 17.

SPECIAL TAX FUNDS IN CITIES.

744. (282x4.) Improvement fund, how constituted. In each case where a city or town levies or assesses any special or local tax for the making and paying for any local improvement or improvements, all money paid into the city treasury or town treasury, as the case may be, in payment of said special tax levies or assessments, or interest thereon, shall be deemed to be part of, and constitute a fund for, the payment of the costs and expense of making such local improvement or improvements, and for no other purpose. The cost and expenses aforesaid shall include the contract price, engineering, inspecting, publishing notices, and making of the tax levy. '07, p. 215; Am'd '13, p. 79.

745. (282x5.) Each fund to be kept separate. How paid out. In any instance where a city or town may levy a special tax or assessment for the purpose of making and paying for any local improvement or improvements, the fund created by such levy or assessment shall be in the custody of the city treasurer or town treasurer, as the case may be, and each fund so created shall be kept separate and intact from all other funds and moneys of the city or town, as the case may be, and shall be paid out only on special tax warrants, as hereinafter provided, and for no other purpose than paying the costs and expenses of making the improvement or improvements for which the special tax or assessment was levied. '07, p. 215; Am'd '13, p. 79.

746. (282x6.) Coupon warrants. In any instance where any city or town may levy a special tax or assessment for the purpose of making or paying for any local improvement or improvements, the city auditor in cities having an auditor, the city recorder in cities not having an auditor, and the clerk of the town, as the case may be, upon being so directed by the city council, or board of trustees of the town, at any time after the levy of such tax or assessment, shall issue coupon warrants in payment of the cost and expense of said local improvement or improvements, and against the funds created by said special tax levies or assessments. Said warrants shall be drawn on the treasurer of the city or town and against the special tax funds as hereinbefore provided; such warrants shall be known as special tax warrants, and shall be made in form, wording, and color, different and to distinguish them from other warrants of the city or town, and shall only be drawn in amounts of $100, $500, and $1000, except that the last warrant drawn in settlement in full of any claim against any special tax fund may be drawn in any sum under $100. '07, p. 215; Am'd '13, p. 79.

City scrip against special tax fund, § 740.

Under this section and under C. L. 1907, § 282x8 (repealed Laws '09, Ch. 41), the power and duty of a city treasurer to sell assessed property upon delinquency of an instalment, before the whole tax was due and delinquent, were not sufficiently certain to justify the direction of such action on the part of the treasurer by mandamus.

Stinson v. Godbe, 46 U. 468; 150 P. 967.

747. (282x7.) Tax Warrants Due and Payable. When. All special tax warrants shall be due and payable as follows:

If issued on account of paving improvements, in ten equal yearly instalments; if issued on account of sidewalk, sewer, or curbing and guttering

improvements, in five equal yearly instalments. Said warrants shall indicate the time when each instalment is due, and provide that interest at the rate of six per cent per annum on the whole sum unpaid shall be due and payable at the time each instalment is due, and that in case of failure to pay any instalment at the time the same is payable, the unpaid principal due at said time shall draw interest at the rate of eight per cent per annum, and that one or more instalments in the order in which they are payable, or the whole warrant, may be paid on the day any instalment becomes due by paying the amount thereof and interest to date of payment. '07, p. 216; '09, p. 45.

The city treasurer may be compelled to collect the whole tax when but one instalment was delinquent. Stinson v. Godbe, 48 U. 444; 160 P. 280.

The fact that during the first year the city collected sufficient to pay three instalments at the end of the first year, does not relieve it from the necessity of paying the interest on the remaining portion annually instead of at the time the next instalment shall be due. Stinson v. Godbe, Treas., 51 U. —; 170 P. 782.

748. (282x9.) Extent of liability. The city or town, as the case may be, shall not be held liable for the payment of any special tax warrant, except to the extent of the funds created and received by special tax levies or assessments; but the city or town shall be held responsible for faithful accounting, collection, settlements, and payments of the moneys of said funds, and when such accounting, collecting, settlements, and paying is faithfully performed, all further liability on the part of the city or town shall cease.

'07, p. 216; Am'd '13, p. 79.

CHAPTER 18.

PUBLIC WORKS.

749. (286.) Duties of board. It shall be the duty of the board of public works (the board of city commissioners), and it shall have power, to make contracts on behalf of the city for the performance of all such work and the erection of all such improvements as may be ordered by the council, but all such contracts shall be subject to the approval or rejection of the council; to superintend the performance of all such work and the erection of such improvements, except the supervision of the construction of city halls, market houses, jails, or other public buildings. It shall also be the duty of said board to approve the estimates of the city engineer which may be made from time to time, of the value of work as the same may progress; to accept any work done or improvement made, when the same shall be fully completed according to contract, subject, however, to the approval of the council; and to perform such other duties as may be devolved upon them by ordinance.

Secs. 283-285, Compiled Laws, 1907, creating a board of public works were repealed by Ch. 125, Laws, 1911, p. 233, which act provided "that all the rights, duties, powers, and priviledges as are vested in the board of public works of cities of the first class shall be exercised by and vested in the board of commissioners of cities of the first and the second class."

Contractors for public work must give bond, § 3753.

Under this section (as repealed and amended in part by the laws of 1911, ch. 125, sec. 2), and under § 819, a city of the first class could not construct a dam for a water supply without entering into contract therefor.

Utah Savings & Trust Co. v. Salt Lake City et al., 44 U. 150; 138 P. 1165.

The law providing for a board of public works and prescribing its duties and powers impliedly repealed the statutes placing those duties and powers on the mayor and council. Nelden v. Clark, 20 U. 382; 59 P. 524.

A city board of public works may accept a sidewalk built under contract though it is not literally completed according to the contract. Stott v. Salt Lake City, 47 U. 113; 151 P. 988.

CHAPTER 19.

BOARD OF PARK COMMISSIONERS IN CITIES OF SECOND CLASS.

760. (286x.) Board created. How appointed. For the purpose of giving more time, care, attention to beautifying and parking the public grounds, streets, and sidewalks of cities of the second class having over 15,000 inhab-

itants in the state of Utah, there shall be in each of said cities a board of park commissioners, which shall consist of three members, residents and taxpayers of the city, appointed by the mayor, with the consent of the council, the members of which, except the first, shall be appointed for the term of six years. '07, p. 140.

Powers of mayor and council vested in commission, §§ 533, 601.

761. (286x1.) Terms. The mayor, with the consent of the city council or board of trustees of such city, shall, as soon after the passage of this chapter as practicable, appoint the members of said board of park commissioners; one member shall be appointed for the term ending December 31, 1907; one member shall be appointed for the term ending December 31, 1909; and one for the term ending December 31, 1911, and successively thereafter as vacancies occur, said vacancies shall be filled as hereinbefore provided. '07, p. 140.

762. (286x2.) Shall serve without compensation. Bond. The members of the board shall serve without compensation; and each member of said board shall, before entering upon the discharge of the duties of his office, enter into a bond to such city, the amount of which shall be fixed by the city council, with two or more good and sufficient sureties to be prescribed and approved by the council, conditioned for the faithful performance of his duties as such commissioner; the expense, if any, for such bond shall be paid by said city. '07, p. 140.

763. (286x3.) Powers and duties. Said board of park commissioners shall have power, and it shall be its duty, to have entire charge of all city parks, and new parks that may be established, street and sidewalk parking and any and all parking of every nature whatsoever, either under special or general tax, and, by and with the consent of the mayor and council or board of trustees, to establish new parks; to have entire charge of the regulation and management of all parking, and to have entire charge of the selecting, planting, condemning, and trimming of all trees located upon the streets or public grounds of such city. '07, p. 140.

764. (286x4.) Id. It shall be the duty of such board, and it shall have power, to make contracts, in behalf of said city, for the performance of all such work as shall be necessary to carry out the purpose of this chapter, and such board shall superintend all such work; *provided, however,* that its contracts so made shall not exceed the amount annually appropriated for the use of said board of park commissioners by the city council or board of trustees. '07, p. 141.

765. (286x5.) Report. The said board of park commissioners shall render an itemized account and report of all transactions and expenditures of said board, on January 1st of each year, and oftener, if required by the city council or board of trustees. '07, p. 141.

766. (286x6.) Appropriation. The city council or board of trustees shall make such appropriations, during the month of January (except as to the year 1907) of each year, as may be necessary to carry out the purposes and recommendations of said board of park commissioners for the current year; after such appropriation has been made, the city auditor shall draw a warrant upon the city treasurer for the amount of said appropriation, in favor of, and deliver the same to, the treasurer of said board of park commissioners, which said fund shall be known as the park improvement fund, and shall be drawn upon and paid out only upon the order of said board; and the amount of the money expended by said board of park commissioners shall not exceed in any year the amount so appropriated by the city council. '07, p. 141.

767. (286x7.) May employ agents, servants, and employes. The said board of park commissioners shall have the power and is hereby authorized to employ agents, servants, and employes necessary to perform all the work in taking care of, improving, beautifying, establishing, and maintaining the parks and public grounds of such city, and all necessary work pertaining to the duties of said board. '07, p. 141.

768. (286x8.) Organization. Rules and by-laws. The members of said board shall, on the first Monday after their appointment, meet and organize by the election of one of its members as chairman of said board, whose term of office shall be for two years thereafter (except as to the year 1907), or until his successor is duly elected by said board. The city recorder and the city treasurer shall be ex officio the secretary and treasurer of said board respectively, and their duties shall be as defined by the rules and by-laws of said board. The board is empowered to make such rules and by-laws as shall be necessary for its government. '07, p. 141.

CHAPTER 20.

EXTENSION OF CORPORATE LIMITS.

770. (287.) Petition. Proceedings. Whenever a majority of the owners of real property of any territory lying contiguous to the corporate limits of any city shall desire to annex such territory to any city, they shall cause an accurate plat or map of said territory to be made, under the supervision of the city engineer or of a competent surveyor, and a copy of said plat or map, certified by said engineer or surveyor, as the case may be, shall be filed in the office of the recorder of the city, together with the petition in writing, signed by a majority of the real property owners of the territory described in said plat; and the city council, at the next regular meeting thereof, shall vote upon the question of such annexation. If two-thirds of all the members of the council vote for such annexation, an ordinance shall be prepared and passed, declaring the annexation of said territory and the extension of the limits of said city accordingly. A copy of the map or plat hereintofore referred to, duly certified and acknowledged as provided by law in such cases, shall at once be filed in the office of the recorder of the proper county, together with a certified copy of the ordinance declaring such annexation, and thereupon such annexation shall be deemed complete, and the said territory shall be deemed and held to be a part of said original city, and the inhabitants thereof shall thereafter enjoy the privileges and benefits of such annexation and be subject to the ordinances and regulations of said city.

Neb. (1895) § 1448*.
Powers of council and mayor vested in commission, §§ 533, 601.
School property on annexing territory to a city, §§ 4745-4747.

A law extending the limits of a city so as to include ranches and unoccupied lands fifteen or twenty miles away would be unreasonable.
People v. Daniels, 6 U. 288; 22 P. 159.

CHAPTER 21.

RESTRICTION OF CORPORATE LIMITS.

771. (288.) Petition. Proceedings. Whenever a majority of the real property owners of any territory within and lying upon the borders of any incorporated city or town shall file, with the clerk of the district court of the county in which such territory lies, a petition praying that such territory be disconnected therefrom, and such petition sets forth reasons why such territory should be so disconnected from such city or town, and is accompanied with a map or plat of the territory sought to be disconnected, and designates no more than five persons who are empowered to act for such petitioners in such proceedings, such court shall cause a notice of the filing of the same to be served upon said city or town, in the same manner as a summons in a civil action, and shall also cause notice to be published in some newspaper having a general circulation in such city or town, for a period of ten days. Issue shall be joined and the cause tried as provided for the trial of civil causes, as nearly as may be. The proper authorities of such city or

town, or any person interested in the subject matter of said petition, may appear and contest the granting of the same. Am'd '11, p. 255.

Iowa, McClain's An. C. (1888) § 593*.
Neb. (1895) §§ 1450*, 1452*.
The provisions of this chapter are not violative of Con. Art. 5, sec. 1, and art. 6, secs. 1, 29, as delegating power to court and commissioners to legislate.
Young v. Salt Lake City, 24 U. 321; 67 P. 1066.
It will be presumed from a judgment disconnecting certain territory from a city, that the city was served with notice of the filing of the petition for division, as required by provisions of this section.
Gillmor v. Dale, 27 U. 372; 75 P. 932.
Evidence that territory consisted entirely of agricultural land which received no appreciable benefit from being within the corporate limits justifies a finding that justice and equity require a severance.
In re Fullmer, 33 U. 43; 92 P. 768.

772. (289.) Adjustment of terms. If the court finds that the petition was signed by a majority of the real property owners of the territory concerned, and that the allegations of the petition are true, and that justice and equity require that such territory or any part thereof should be disconnected from such city, it shall appoint three disinterested persons as commissioners to adjust the terms upon which such part shall be so severed as to any liabilities of such city or town that have accrued during the connection of such part with the corporation, and as to the mutual property rights of the city and town and the territory to be detached. Am'd '11, p. 255.

Iowa, McClain's An. C. (1888) § 596*.
These provisions are not construed as delegating power to the court to legislate, since they merely require the court to judicially determine whether facts found by it entitle the petitioners to relief for causes determined by the legislature; the terms upon which the territory shall be severed are for the commission to determine, and not the court, and the appointment of commissioners for such purpose is mandatory.
In re Fullmer, 33 U. 43; 92 P. 768.

773. (290.) Report of commissioners. Decree. The commissioners shall, at a time by them fixed, hear the agents named in the petition, and also the proper authorities of the city or town, in regard to the subject matter so submitted, and as soon as practicable report their findings in the premises to the court. Upon the filing of which report, the court shall decree in accordance therewith, and with the prayer of the petition, unless for good cause shown the court shall modify the same, or shall reject or set aside the report and appoint new commissioners, and continue the cause for further action to be had thereon. Am'd '11, p. 256.

Where the court findings are in conformity with the commissioners' findings and there is evidence to sustain the findings the judgment must be sustained.
Barton v. Manti, 33 U. 50; 92 P. 970.

774. (291.) Court may levy taxes. The court shall have power to order such taxes levied from time to time on the property included within the detached territory, as may be requisite for the purpose of paying its just proportion of the municipal obligations; the board of county commissioners shall levy such taxes under the direction of the court, and the same shall be collected by the county treasurer as other taxes.

Iowa, McClain's An. C. (1888) §§ 602, 606*.
Where land was disconnected from a city before levy of taxes had been made, such tax did not become a lien.
Gillmor v. Dale, 27 U. 372; 75 P. 932.

775. (292.) Recording decree. Costs. Upon the entering of a decree detaching said territory, or any part thereof, the clerk shall file a certified copy of the same and of the plat, in the office of the recorder of the county and in the office of the secretary of state; and when so filed, the severance shall be complete. Each party shall pay its own witnesses, and the petitioners shall pay all other costs.
Iowa, McClain's An. C. (1888) §§ 598, 599*.

CHAPTER 22.

DISINCORPORATION.

776. (293.) Petition. Notice of election. Whenever one-fourth of the legal voters of any city shall petition the district court of the county wherein such coporation is situated for the discontinuance of the said city, it shall cause to be published, for at least thirty days, a notice stating that the ques-

tion of discontinuing such corporation will be submitted to the legal voters of the same at the next municipal election, and the form of the ballot shall be "for disincorporation," and "against disincorporation." Not more than one such election shall be held in two years.

Iowa, McClain's An. C. (1888) §§ 600, 601, 603*.

777. (294.) Canvass. Judgment. Notice to file claims. The vote shall be taken and canvassed in the same manner as in other municipal elections, and return thereof made to the district court. If it finds that a majority of the legal votes cast for and against such proposition were cast "for disincorporation," then a judgment shall be entered discontinuing the same, and upon the entry of said judgment its corporate powers shall cease, and the court shall cause notice to be given in a manner to be prescribed by it, requiring all claims against the corporation to be filed in said court within a time fixed in the notice, not exceeding six months, and all claims not so filed shall be forever barred. At the expiration of the time so fixed, the court shall adjudicate said claims which shall be treated as denied, and any citizen of such city at the time the vote was taken may appear and defend against any claim so filed, or the court may in its discretion appoint some person for this purpose.

Iowa, McClain's An. C. (1888) §§ 602, 603*.

Claims cannot be allowed without evidence; courts should give notice allowing citizens a hearing before allowing claims and an order allowing claims on an ex parte hearing should be set aside.

Nielsen v. Utah Commr. Bank, 40 U. 95; 120 P. 211.

778. (295.) Powers of court. The court shall have power to wind up the affairs of the corporation, to dispose of its property, and to make provision for the payment of all indebtedness thereof, and for the performance of its contracts and obligations, and shall order such taxes levied from time to time as may be requisite therefor, which the board of county commissioners shall levy against the property within the corporation. Said taxes shall be collected by the county or city treasurer like other taxes and paid out under the orders of the court, and any surplus shall be paid into the school fund for the district where the same is levied; and all property remaining after the winding up of the corporate affairs of such corporation, both real and personal, shall revert to such school district, which is empowered to enforce all claims for the same and to have the use of all property so vesting.

Iowa, McClain's An. C. (1888) §§ 602, 606*.

779. (296.) Report of records. The books, documents, records, papers, and corporate seal of any city so discontinued shall be deposited with the county clerk of the county in which the council last held its sessions, for safe keeping and reference in future. All court records of any officer shall be deposited with the nearest justice of the county, who shall have authority to execute and complete all unfinished business standing on the same.

Iowa, McClain's An. C. § 604*.

780. (297.) Notice of disincorporation. When the incorporation of any city shall have been discontinued, the clerk of the court shall cause a notice thereof to be published for four consecutive weeks in a newspaper published in said county, but if none is published therein he shall give such notice as the court may prescribe, and shall also certify the fact to the secretary of state and to the recorder of the county.

Iowa, McClain's An. C. § 605*.

781. (298.) Expenses. All expenses of the election and of winding up the affairs of the corporation shall be paid by it.

Iowa, McClain's An. C. § 603*.

CHAPTER 23.

BOUNDARY LINES OF OGDEN CITY.

782. (298x.) Boundary lines of Ogden City fixed. For the purpose of fixing definitely the boundary lines of Ogden City, it is hereby enacted, that all that district of country in Weber county embraced in the following boundaries, to wit: Beginning at the southeast corner of the northeast quarter of section three, township five north, of range one west, of Salt Lake base and meridian; and running thence westerly following the government subdivision survey lines to the southwest corner of the northeast quarter of section six, township five north, of range one west, Salt Lake base and meridian, and running thence northerly along the government subdivision survey lines to the northwest corner of the southwest quarter of the southeast quarter of section seven, township six north, of range one west, of Salt Lake base and meridian; and running thence easterly following the government subdivision survey lines to the northeast corner of the southeast quarter of the southeast quarter of section ten, of township six north, of range one west, of Salt Lake base and meridian; and running thence southerly following the government subdivision survey lines to the northeast corner of the southeast quarter of the southeast quarter of section twenty-two, of township six north, range one west, of Salt Lake base and meridian; thence east three hundred feet; thence southerly to a point three hundred feet east of the southeast corner of said section twenty-two; thence west three hundred feet to the said southeast corner of section twenty-two; thence southerly following the government subdivision survey lines to the point of beginning, shall be known and designated by the name of Ogden City, and the boundaries shall be as herein provided. '07, p. 93.

CHAPTER 24.

TOWNS.

783. (299.) Incorporation. Suits. A majority of the electors of any town having a population of not less than 300 desiring to incorporate, may, on petition for that purpose to the board of county commissioners of the county in which said town is situated (said petition to set forth the section, township, entry, and boundary lines proposed, and to be approved by said board, and a copy thereof filed in the office of the county recorder), and on compliance with the provisions of this title, be constituted a body corporate and politic under the name and style proposed. Such town may have and use a common seal, which it may change at pleasure, and may sue and be sued in its corporate name.

784. (300.) Board of trustees. President. There shall be a board of trustees in said town, to be appointed by the board of county commissioners, to consist of a president and four trustees, who shall have the qualifications of electors of said town, and who shall hold their offices until the next municipal election and until their successors are elected and qualified; thereafter the said president and trustees of said town shall be chosen by the qualified voters thereof, and shall hold their office for two years, and until their successors shall be elected and qualified. The president and each trustee shall, before entering upon the duties of his office, execute a bond with good and sufficient sureties, to be approved by the president, payable to the town, in such penal sum as may, by ordinance or resolution, be directed, conditioned for the faithful performance of the duties of his office, and the payment of all moneys received by him according to the laws and ordinances of said town; *provided,* that the bond of the president shall be approved by the board of trustees. A majority of the board of trustees shall form a quorum to do

business at all special or general meetings, due notice of which shall have been given, and the president shall preside at all meetings when present, and have the casting vote. When the president is absent, one of the trustees may be appointed by the board to act in his place during his absence, and any vacancy in any of the offices of such corporation, occasioned by death, resignation, removal, or otherwise, may be filled for the unexpired term of such office by a majority vote of the whole board. Am'd '03, p. 67.

785. (301.) Oaths. The president and trustees in each town, before entering upon the duties of their offices, shall take and subscribe the constitutional oath of office.

786. (302.) Powers of town trustees. The board of trustees in each town shall have the powers in the following sections enumerated:

Secs. 786-786x19 amended '03, pp. 86, 87; '07, pp. 147-149, re-enacted '11, p. 219.
May make three-year contract for lighting, § 527.
Special tax for street lighting, §§ 720-734.
May co-operate with schools for public library and gymnasiums, § 1371.

786x1. (302x1.) Acquire and hold property. To purchase, hold, or convey all necessary estate, real or personal, for the use and benefit of the corporation.

786x2. (302x2.) Health regulations. Abatement of nuisances. To make regulations to secure the general health of the town; to prevent the introduction of contagious, infectious, or malignant diseases therein and to make quarantine laws and enforce the same within the corporate limits and within one mile thereof; to prevent, abate, and remove nuisances, and to adopt such other measures for the preservation of the public health as it may deem proper.

Boards of health, §§ 2720-2725.

786x3. (302x3.) Burials and cemeteries. To purchase, hold, own, and lay out graveyards or cemeteries, and regulate the burial of the dead.

786x4. (302x4.) Estrays and trespassing animals. To regulate or prohibit the running at large of horses, mules, asses, cattle, swine, sheep, goats, geese, and all kinds of poultry within the limits of the town; to establish a pound and appoint a poundkeeper and prescribe his duties, and to distrain and impound animals running at large, and to provide for the sale of the same in the same manner as provided for sale of estrays by the laws of the state; the proceeds arising from the sale of such animals, after the payment of costs, shall go to the town treasury.

Rights of towns reserved in estray law, § 73. State estray law, §§ 50-73.

786x5. (302x5.) Trees, etc. To provide for the protection of shade trees, monuments, and other public property in such town.

786x6. (302x6.) Liquor and other licenses. Regulation of liquor traffic. To license, tax, regulate, suppress, and prohibit billiards, pool, bagatelle, pigeonhole, and any other table or implement kept or used for similar purposes, and to license and regulate hotel and tavern keepers, eating houses, restaurants, theaters, picture shows, merchants, grocery peddlers, butchers, slaughterers, druggists, apothecaries, and photographers, and the business of corporations and companies, and to license and regulate, or prohibit the manufacturing, selling, giving away, or disposition in any manner, of any intoxicating liquor; and to prohibit the keeping for sale, or disposition contrary to law, or being concerned in so keeping, or the maintaining of places where such liquors are being kept for such purpose, or the obtaining of such liquors by fraud from any practicing physician or druggist, or in any manner aiding in the selling, giving away, manufacturing, keeping, distributing, or disposition of such intoxicating liquor contrary to law; *provided,* no license for such purpose shall be issued by the town board of any town where the qualified electors of such town have voted "against sale" of intoxicating liquors, and the town board of such town shall prohibit the manufacturing, selling, giving away, keeping for sale, or the disposition in any manner, of any intoxicating liquors, except the manufacture and sale thereof as provided

by law, and in any town where the qualified electors have voted "for sale" of intoxicating liquors, such town board shall have the right to determine the amount to be paid for liquor licenses, as provided by law, and said licenses shall be subject to the same regulations as are required by the general laws of the state, and may provide such other reasonable regulations as such town board may deem advisable. Any town may provide for and enforce obedience to all ordinances or regulations adopted or passed pursuant to the authority hereby granted by fixing such penalties as local conditions may to such town board seem to require, provided that such penalties shall be within the limitations set forth in § 787. Am'd '13, p. 134.

State license for peddlers, §§ 4392-4403.
Decisions on licenses, note to §§ 570x38-570x41.
Part authorizing regulation of intoxicating liquor repealed, §§ 3341-3381.
License employment offices, §§ 2440-2456.
The liquor prohibition act, §§ 3341-3381, does not take from the municipality the power to prohibit the sale of intoxicating liquors by ordinance.
Zanata v. Browning, 50 U. —; 170 P. 1057.

786x7. (302x7.) Id. Shows. To license and regulate all exhibitions of showmen, concerts, theatricals, circuses, traveling shows, public dances, and amusements, and to suppress any of the foregoing which are indecent.

786x8. (302x8.) Public morals. Peace and order. Sale of narcotics to minors. To restrain and punish vagrants, prostitutes, and libertines; to prevent intoxication, fighting, gambling, quarreling, dog-fights, cock-fights, and all disorderly conduct, and to provide against and prevent the offense of assault and battery, and petit larceny; to restrain riots, routs, noises, disturbances, or disorderly assemblies, in any street, house, or place in the town; to regulate or prevent the discharge of firearms, rockets, powder, fireworks, or any other dangerous or combustible material, in the streets, lots, grounds, alleys, or about or in the vicinity of public buildings, and to prohibit the sale, giving away, or furnishing of tobacco, opium, or other narcotics to any person under twenty-one years of age. Am'd '13, p. 135.

Sale of opium, narcotics and tobacco to minors prohibited, § 8442.

786x9. (302x9.) Policemen and watchmen. To appoint policemen and watchmen, and prescribe their duties, powers, and qualifications.

Police, etc., in cities, §§ 646-665.

786x10. (302x10.) Gambling, etc. To prohibit and suppress disorderly, lewd, or gambling houses, and all devices for gambling, and to suppress all drunkenness, rout, riot, noise, disturbance, or disorderly assemblage.

786x11. (302x11.) Levy for general purposes in towns. Limit. To levy an annual tax for general corporation purposes on all such property as shall be subject to county and state taxes and such tax shall, when so levied, constitute a lien on all such property and shall be collected as county and state taxes are collected; *provided,* that all taxes for such purposes in one year shall not exceed 4 mills on the assessed valuation of the property assessed, unless two-thirds of the electors voting at a special election called for that purpose shall vote a larger per cent to be levied, but in no case shall said tax exceed, nor electors be allowed to levy, more than 6 mills on the dollar of the assessed valuation aforesaid in one year. Am'd '15, p. 195.

Legislature not to impose taxes for town purposes Con. art. 13, sec. 5.
General tax in cities, § 671 and note.
Election to levy tax for public library, §§ 3719-3720.
Poll tax, § 4465.
Special taxes in cities, §§ 673-700.
Levy tax for library and gymnasium, § 3719.

786x12. (302x12.) Streets, sidewalks, etc. To lay out, construct, open, grade, pave, and otherwise improve streets, lanes, alleys, sidewalks, and crosswalks, and to prohibit incumbering the same with any materials whatever, and to prohibit riding or driving on sidewalks, except to cross the same.

Levy special tax for street lighting, §§ 720-734.
Bond required from public work contractors, § 3753.
Does not authorize a town to levy a special tax to pay for paving of the streets even though the amount which can be raised under the general tax is admittedly insufficient for that purpose.
Woodring v. Straup, 45 U. 173; 143 P. 592.

786x13. (302x13.) Powers and jurisdiction of towns over water sources. Conduits. Power plants. Special taxes. To lay out, construct, open, and

keep in repair canals, water ditches, or water pipes to conduct water for artificial light and power purposes, and to construct, own, and operate such artificial light and power plants; or water pipes for irrigation, domestic, or other use for the inhabitants of such town. For the purpose of protecting the water that is used for culinary and domestic uses from pollution, their jurisdiction shall extend over the stream or source from which the water is taken for ten miles above the point from which it is taken from the natural stream, and to annually assess and collect a special tax, of not to exceed 4 mills, for such purposes upon all the property in said town

Am'd '13, p. 78; '17, p. 393.

Control, etc., of water, in cities, § 570x18, and note.
Levy special tax for street lighting, §§ 720-734.
Regulations of use of water, §§ 800-804.
Town may sell light and power plant, §§ 810-813.
May make contract for lighting, § 527.
Jurisdiction over county hospitals, § 2783.

786x14. (302x14.) Prosecution and defense of actions duty of town attorney. Costs of appeal. To direct in the prosecution and defense of actions at law in which said town may be a party. Whenever a criminal action for the violation of any town ordinance is appealed to the district court for the county in which said town is situated, it shall be the duty of the town attorney of such town to appear and prosecute said action in the district court. Whenever a criminal action arising out of a violation of a town ordinance is tried on appeal to the district court of the county in which said town is situated, the per diem and mileage of witnesses for the prosecution shall be paid out of the town treasury of the town in which said action originated. Am'd '15, p. 86.

Actions for violations of ordinances in cities, § 585 et seq.

786x15. (302x15.) Salaries. To fix and establish the compensation of the officers made elective or appointive by the board. '11, p. 219.

786x16. (302x16.) Fast driving, etc. To prevent horse racing and immoderate driving or riding in the streets of said town. '11, p. 219.

786x17. (302x17.) Dogs. To prevent the running at large of dogs, by imposing a tax on the same, or otherwise, or to authorize their destruction in a summary manner, when running at large contrary to the ordinances of such town.

Dogs in cities, § 570x69, and note.

786x18. (302x18.) Ordinances, passage and publication. Clerk to record. To make, ordain, pass, establish, and enforce such ordinances and regulations, not repugnant to the laws of this state, for the purpose of carrying into effect the provisions of this title, as it may deem proper; and to repeal, alter, or amend the same at pleasure; *provided, however,* that all ordinances, before taking effect, shall be deposited in the office of the town clerk and published at least once in some newspaper within the town, or by posting in three public places therein, and shall go into effect on the twentieth day after its publication, unless provided in the ordinance that it shall take effect at an earlier date; *provided,* that whenever a revision is made and the revised ordinances are published by authority of the board of trustees of such town, no further publication shall be deemed necessary. The clerk of the town board shall record all ordinances and resolutions passed by the town board in a book kept for that purpose, together with the affidavits of publication by the publisher or his agent, or, if posted, with the certificates of the due posting thereof; and said book, or a certified copy of the ordinances and resolutions under the seal of the town, shall be received as evidence in all courts and places without further proof, or, if printed in a book or pamphlet form by authority of the board of town trustees, they shall be so received; *provided,* that the board of town trustees may, at its option, order that a certified copy of any ordinance be posted in three public places within the town, and when so posted no further publication shall be deemed necessary. Am'd '15, p. 86.

786x19. (302x19.) Town officers, appointment and removal. Compensation to be fixed. To appoint a clerk, marshal, attorney, treasurer, and

justice of the peace, and such other officers as may be necessary for the good order and well being of such town; define their duties, remove them from office at pleasure, and require them to take and subscribe an oath and give bond as shall be provided by ordinance, which oath and bond shall be filed with the clerk of the board of trustees, except the bond of the clerk, which shall be filed with the treasurer; *provided,* that the said justice of the peace shall have and exercise all of the powers which are provided by law for other justices of the peace, and shall receive therefor such fees for such services as are provided by law for precinct justices of the peace; *provided, further,* that all other officers of the town shall receive such salary as may be fixed by ordinance. Am'd '15, p. 86.

Secs. 786-786x19 amended '03, pp. 86, 87; '07 pp. 147-149.
General provisions as to bonds, §§ 4266-4271.
Appointment and removal of officers in cities, § 602, and note.

787. (303.) Fines and imprisonment. Jurisdiction of Justice. To enforce obedience to the ordinances of the town, the board of trustees may ordain and provide such fines, forfeitures, and penalties as it may deem proper, to be prosecuted before the justice of the peace of the precinct in which such town may be situated, in the name of the corporation, and all expenses incurred in prosecutions for the recovery of any fine, forfeiture, or penalty shall be paid by the corporation, and all fines and forfeitures when collected shall be paid to the corporation as may be provided by ordinance; *provided,* that the fine or penalty for any offense shall be less than $100, and the imprisonment shall not exceed three months; and, *provided, further,* that in case the fine and costs, or either, are not paid, the court before whom the conviction is had may order the person committed to the county jail at hard labor until such fine or penalty and costs are fully paid, but under no circumstances shall a person be imprisoned upon one conviction for more than three months. The expense of boarding such prisoner shall be paid by the corporation. A justice of the peace before whom any case is tried shall hold court in the town where the offense was committed. The board of trustees are hereby authorized to erect a jail for said town, and when erected, persons committed for violation of said ordinances shall be imprisoned in said jail.

Prosecution, etc., under city ordinances, § 585 et seq.
Justices' courts, §§ 1791-1794.
An offense against a town ordinance must be tried before a justice of the peace of the town where offense was committed, and a justice of any other precinct has no jurisdiction.
Town of Garland v. Maughan, 35 U. 426; 100 P. 934.

788. (304.) Clerk. Duties. The clerk of the board of trustees in each town shall have the custody of and safely keep the corporate seal, records, books, and papers thereof entrusted to him by the board of trustees, and shall attend all meetings of the board, and record all its proceedings; and he shall audit all accounts allowed by the board, and shall annually make, and keep posted in his office, a statement showing the financial condition of the town, including all receipts and disbursements, debts due to or owing by the town, the names of the parties to or from whom such debts are due, and on what account such debts were contracted, the source from which all receipts were received and upon what accounts such expenditures were made; and he shall perform such other duties as may be required of him by the board of trustees.

789. (305.) Marshal. Duties and powers. The marshal of each town shall possess the same powers, be subject to like liabilities, and exercise the same privileges as are possessed and conferred by law upon constables, to execute such legal orders as may be required of him.

City marshal, § 646.

790. (306.) Administering oaths. The president, or any trustee appointed by the board of trustees to act as such president in his absence, may administer oaths to any person when necessary in the performance of his official duties.

791. (307.) Change of limits. The provisions for disincorporating

cities and for annexing territory thereto, and for detaching territory lying within but on the borders thereof, as provided in chaps. 20, 21, and 22 of this title (§§ 770-781), so far as may be, are hereby made applicable to towns.

Change of class, etc., §§ 525-531.

CHAPTER 25.

BONDING FOR WATER, LIGHT, OR SEWERS.

792. (308.) Authority. Purposes. Rate. Vote. Any city or town in this state is hereby authorized to incur an indebtedness not exceeding in the aggregate, with all other indebtedness, eight per centum of the value of the taxable property therein for the purpose of supplying such city or town with water, artificial light, or sewers when the works for supplying such water, light, and sewers shall be owned and controlled by the municipality; *provided*, that cities of the third class and towns may become indebted to an amount not exceeding in the aggregate, with all other indebtedness, twelve per centum of the value of the taxable property for the purpose of supplying such city or town with water, artificial light, or sewers when the works for supplying such water, light, and sewers shall be owned and controlled by the municipality, when the proposition to create such debt shall have been submitted to the vote of such qualified electors as shall have paid a property tax in the year preceding such election and a majority of those voting thereon shall have voted in favor of incurring such debt. Am'd '11, p. 61; '17, p. 288.

Authorized indebtedness for water, light, etc., Con. art. 14, sec. 4.

City council may borrow money, § 570x6.

Under Con. art. 14, sec. 4, the two limited debt-creating powers of municipalities are separate and independent; the special limited power to incur indebtedness for water, light, and sewer purposes is absolute within its own limits, and a debt created by virtue thereof is additional to that restricted and limited for general purposes and fully authorized.

State, ex rel. v. City Council, 23 U. 13; 64 P. 460.

Under Con. art. 14, secs. 3 and 4, the legislature has power to authorize cities to create an additional indebtedness for light, water, and sewer purposes, not exceeding four per cent of the value of taxable property therein.

State ex rel. v. Quayle, 26 U. 26; 71 P. 1060.

A bonded indebtedness of four per cent may be incurred for general city purposes, which would include the supply of lights, water, and sewers; and an additional indebtedness of the same amount for lights, water, and sewers alone.

Willis v. Heber City, 36 U. 1; 102 P. 309.

793. (309.) Proposition to be submitted to voters. Notice. When the city council of any city or the town board of trustees of any town shall have decided to submit the question of incurring a bonded indebtedness, it shall, by order, specify the particular purpose for which the indebtedness is to be created and the amount of bonds which it is proposed to issue, and shall further provide for submitting the question of the issue of such bonds to the qualified electors of the city or town at the next general election, or at a special election to be called for that purpose by the council or the board, as the case may be. If the question is submitted at a special election, it shall be held, except as herein otherwise provided, as nearly as possible in conformity with the general election laws of the state. Notice shall be given of such election by publication in some newspaper or newspapers published in the city or town for four weeks prior thereto; or if there be no newspaper, then by posting notices. The council or the board, as the case may be, shall cause ballots to be printed and furnished to the qualified electors, which shall read: "For the issue of bonds: Yes. No." If a majority of the qualified electors voting thereon shall have voted in favor of incurring such indebtedness, the city council or board may proceed to issue the amount of bonds specified. If, however, the qualified electors shall have voted in favor of incurring an indebtedness in excess of the amount permitted by the constitution and laws of the state, such vote shall be full authority for the city council or board of trustees to issue bonds to the amount permitted by the constitution and laws of the state. Am'd '09, p. 3.

Municipal elections, general provisions, §§ 2330-2334.

Registration for municipal election, § 2136.

Without a notice no election can be legally held.

Utah Sav. & Trust Co. v. Salt Lake City, 35 U. 25; 99 P. 255.

This section has nothing to do with condemnation proceedings, which are controlled by § 575.

Town of Tremonton v. Johnson, 49 U. 307; 164 P. 190.

On an election for an issue of bonds which were intended to supply the city with lights, the resolution and published notice, merely stating that the indebtedness was to be created and the bonds issued for general corporate purposes of the city, are insufficient.

State ex rel. Willis v. Heber City, 36 U. 1; 102 P. 309.

794. (310.) Bonds, how issued and disposed of. Tax. The city council or the board of trustees, as the case may be, shall provide by ordinance for the issuance and disposal of such bonds; *provided,* that no such bonds shall be sold for less than their face value. The city council or board of trustees, as the case may be, shall annually levy a sufficient tax to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof within twenty years from the time of contracting the same.

Bonds certified to be within debt limit, §§ 466-469.

The fact that an ordinance provides that the net revenue from the water system should be set aside for a sinking fund for the payment of the bonds does not affect the validity of the bonds; for the erroneous statement in the ordinance was, at most, an irregularity which did not affect the validity of the election in the absence of a showing that any of the voters were, in fact, induced by reason of such improper statement in the ordinance to vote for bonds.

Utah. S. & T. Co. v. Salt Lake City, 35 U. 25; 99 P. 255.

CHAPTER 26.

REGULATION OF USE OF WATER BY INHABITANTS OF TOWNS AND CITIES.

('17, p. 38.)

800. Liability of owners for use of water. No city or town in this state, which is the owner or in control of a system for furnishing water to its inhabitants, shall be required to furnish water for use in any house, tenement, apartment, building, place, premises, or lot, whether such water is for the use of the owner or tenant, unless the application for water shall be made in writing, signed by such owner or his duly authorized agent, in which application such owner or agent shall agree that such owner will pay for all water furnished such house, tenement, apartment, building, place, premises, or lot, according to the ordinances, rules, and regulations enacted or adopted by such city or town. In case an application for furnishing water shall be made by a tenant of the owner of any such house, tenement, apartment, building, place, premises, or lot, such city or town may require, as a condition of granting the same, that such application contain an agreement signed by the owner thereof, or his duly authorized agent, to the effect that in consideration of the granting of such application said owner will pay for all water furnished such tenant or any other occupant of the place named in the application, in case such tenant or occupant shall fail to pay for the same according to the ordinances, rules, and regulations enacted or adopted by such city or town.

801. On failure to pay, municipality may shut off water. In case the owner of any of the premises mentioned in § 800, or the tenant, or occupant, shall fail to pay for water furnished such owner, tenant, or occupant, according to the ordinances, rules, or regulations enacted or adopted by said city or town, said city or town may cause the water to be shut off such premises, and shall not be required to turn the same on again until all arrears for water furnished shall be paid in full.

802. Proclamation as to scarcity of water. In the event of scarcity of water, whenever it shall, in the judgment of the board of commissioners or city council of any city or the board of trustees of any town, be necessary, the mayor of said city or the president of such board of trustees may, by

proclamation, limit the use of water for any purpose other than domestic purposes to such extent as may be required for the public good.

803. Examination of premises permitted. All authorized persons connected with the waterworks of any city or town shall have the right to enter upon any premises furnished with water by such city or town, to examine the apparatus, the amount of water used, the manner of use, and to make all necessary shut-offs for vacancy, delinquency, or violation of this chapter, or of ordinances, rules, or regulations enacted or adopted by such city or town.

804. Regulations authorized. Every city and town in this state may enact ordinances, rules, and regulations for the management and conduct of the waterworks system owned or controlled by it.

CHAPTER 27.

CITIES AND TOWNS MAY SELL POWER PLANTS.

('13, p. 110.)

810. When deemed advisable to sell, property appraised. Question submitted to taxpayers. Election. Whenever in the judgment of the board of commissioners or city council of any city, or board of trustees of any town, it shall be deemed advisable to sell the works or plant, constructed, purchased, or used by said city or town for the purpose of generating or distributing electrical energy for light, heat, or power purposes, such board of commissioners, city council, or board of trustees, as the case may be, shall cause an appraisement of the property proposed to be sold or leased to be made by three resident taxpayers of such city or town, to be appointed by said commissioners, city council, or board of trustees, and shall provide for submitting the question of the sale or lease of such property to the qualified electors of such city or town as shall have paid a property tax in the year preceding such election, at the next general election, or at a special election called for that purpose. Such election shall be called and conducted in the same manner as provided by statute for the sale of bonds in § 793, the necessary changes in the form of the ballot being made.

Though the provisions as to lease and sale are commingled in an artificial manner, the section is not void for uncertainty.
McDonald v. Price, 45 U. 464; 146 P. 550.
A city, to lease a lighting plant, must appraise the property, submit the question to the voters, advertise for bids, and award to the highest bidder; that is, to the bidder who will pay the highest amount of rent or render the greatest amount of service, under the terms and conditions imposed by the city, and the consideration must be used for city purposes.
Id.

811. Id. Board to advertise for bids. In case a majority of the qualified voters of any city or town, voting at any general election or special election called for that purpose, shall vote in favor of selling or leasing any property mentioned in § 810, the board of commissioners, city council, or board of trustees, as the case may be, shall cause notice to be given by publication thereof for at least twenty days in a newspaper of general circulation, printed and published in said city or town, giving a general description of the property to be sold or leased, and specifying the time when sealed bids for the said property, or for a lease thereon, will be received, and the time when and place where the same will be opened.

812. Property not to be sold for less than appraised value. At the time and place mentioned in the notice mentioned in § 811, all bids received for the property sought to be sold or leased shall be opened and considered, and the commissioners, city council, or trustees, as the case may be, shall accept the bid of the highest responsible bidder; *provided,* that such bid shall be for an amount equal to the appraised value of said property, and, in the judgment of said commissioners, city council, or board of trustees, is an adequate price for the said property; and *provided, further,* that no offer

shall be accepted which does not amount to the total outstanding bonds sold for the purpose of erecting said plant or works, together with any accumulated interest thereon.

813. Disposition of moneys derived from sale. All moneys received from the sale of property, as in this chapter provided, shall be kept in a separate fund, and shall not be expended or mixed with other funds of such city or town until all bonds sold for the purchase or erection of such plant or works, together with the accumulated interest thereon, shall have first been paid; *provided, however,* that where the property so sold shall bring an amount in excess of the outstanding bonds issued for the erection or construction of the property so sold, such excess shall be deposited under direction of the board of commissioners, city council, or board of trustees, as the case may be, at the highest rate of interest obtainable, in any bank in this state, and may not thereafter be expended except for some municipal purpose, and by authority given by the qualified electors of such city or town, at a general or special election called and conducted in the manner set forth in §§ 792-794.

This act, as published in the session laws, says the election shall be conducted in the manner set forth in chap. 24, laws of Utah, 1911, while the original act simply says chap. 24, laws of Utah; §§ 792-794 were chap. 24, Title 13, Compiled Laws, 1907.

CHAPTER 28.

REPEALS.

815. (311.) Repeal of special charters. Effect. The special charters of all cities and towns in this state, and all amendments thereto, are hereby repealed; but all of such cities and towns are hereby perpetuated as such respectively under their present names and boundaries and subject to the provisions of this title. The officers of such cities and towns now in office shall continue in their respective offices until the election and the qualification of the officers herein provided for; and shall perform such duties as may be imposed by law and such other duties conformable with this title as may be prescribed by ordinance. All rights and property of every kind and description now vested in any municipal corporation under its present organization shall be deemed and held to be vested in the same municipal corporation upon its becoming subject to the provisions of this title; but no rights or liabilities either in favor of or against such corporation now existing, and no action or prosecution of any kind, shall be affected by such change, but the same shall stand and progress as if no change had been made. The ordinances and resolutions now in force in any city or town shall continue in full force and effect until repealed or amended, notwithstanding the change herein provided for, so far as such ordinances and resolutions are not in conflict with the provisions of this title.

Similar sections, §§ 528-529.
Legislature shall provide for municipal incorporation by general law, Con. art. 11, sec. 5.

CHAPTER 29.

CLAIMS FOR DAMAGES.

816. (312.) Claim, time for presenting. Action on. Every claim against an incorporated city or town for damages or injury alleged to have been caused by the defective, unsafe, dangerous, or obstructed condition of any street, alley, crosswalk, sidewalk, culvert, or bridge of such city or town, or from the negligence of the city or town authorities in respect to any such street, alley, crosswalk, sidewalk, culvert, or bridge shall, within thirty days

after the happening of such injury or damage, be presented to the city council of such city, or board of trustees of such town, in writing, signed by the claimant or by some person by claimant authorized to sign the same, and properly verified, stating the particular time at which the injury happened, and designating and describing the particular place in which it occured, and also particularly describing the cause and circumstances of the said injury or damages, and stating, if known to claimant, the name of the person, firm, or corporation, who created, brought about, or maintained the defect, obstruction, or condition causing such accident or injury, and also stating the nature and probable extent of such injury, and the amount of damages claimed on account of the same; such notice shall be sufficient in the particulars above specified to enable the officers of such city or town to find the place and cause of such injury from the description thereof given in the notice itself without extraneous inquiry, and no action shall be maintained against any city or town for damages, or injury to person or property, unless it appears that the claim for which the action was brought was presented as aforesaid to the city council, or the board of trustees of the town, and that such council or board did not within ninety days thereafter audit and allow the same. Every claim, other than claims above mentioned, against any city or town, must be presented, properly itemized or described and verified as to correctness by claimant or his agent, to the city council or board of trustees within one year after the last item of such account or claim accrued, and if such account or claim is not properly or sufficiently itemized, or described or verified, the city council or board of trustees may require the same to be made more specific as to the itemization or description, or to be corrected as to the verification thereof. Am'd '03, p. 12; '05, p. 5.

N. Dak. (1895) §§ 2172, 2173*.
City liable for change of grade, § 700.
City not liable for unlawful acts of its officers, note to § 588.

CLAIMS FOR DAMAGES:

The complaint should show that a verified claim has been filed, a letter written to the board of public works is not sufficient.
Moran v. Salt Lake City, 51 U. —; 173 P. 702.
Defects in a claim in that it was not verified and did not sufficiently describe the extent of claimant's injury were waived, where the city council did not decline to consider the claim but acted upon it.
Bowman v. Ogden City, 33 U. 196; 93 P. 561.
The presentation of a claim to the city council is a condition precedent to maintance of a suit.
Brown v. S. L. City, 33 U. 222; 93 P. 570.
The complaint should show that the claim was presented.
Moran v. S. L. City, 51 U. —; 171 P. —.
Action by an abutting owner for injuries to his property caused by changing of street grade is not barred by this section where the abutting owner filed a claim within thirty days after tne completion of the street improvements.
Webber v. Salt Lake City, 40 U. 221; 120 P. 503.
A complaint containing an item of $1,000 damages not included in the original claim presented to the city council was not open to a general demurrer, inasmuch as it stated a good cause of action upon other items included in such original claim.
Sweet v. Salt Lake City, 43 U. 306; 134 P. 1167.
Where damages were claimed "for general impairment" of an automobile the description was insufficient.
Id.
An injured person may recover the actual damages sustained, even if in excess of the amount included in the claim, when they are the necessary and proximate consequence of the injury described in the claim.
Id.
Where a plaintiff in his complaint claimed damages, in addition to those included in his claim presented to the city, it was incumbent on him to plead and prove some reason why such damages were not included, and why the terms of the statute should not control.
Id.
Plaintiff, before suing a city to quiet title to premises claimed by the city as part of a street for damages and for injunctive relief, is not required to present such claim for damages to the city council.
Wall v. Salt Lake City, 50 U. —; 168 P. 766.
A claim for injuries as sustained on or about Jan. 15, 1902, while walking on sidewalk along 1st West, between 7th and 8th South streets, through negligence of the city in suffering a fence to be on said sidewalk, not having misled the city, is sufficiently definite.
Connor v. S. L. City, 28 U. 248; 78 P. 479.
The mere fact that a claimant for damages for injuries resulting from the defective condition of a bridge demands a less sum than he is entitled to recover does not, on rejection of his claim, preclude him from recovering by action his actual damages, though they exceed the amount of his claim on file.
Mackay v. S. L. City, 29 U. 247; 81 P. 81.

DEFECTS IN ROADS, BRIDGES, ETC.; LIABILITY OF CITY:

It is the duty of municipal officers to use reasonable diligence in keeping streets and sidewalks reasonably safe for persons using them with reasonable care.
Scott v. Provo City, 14 U. 31; 45 P. 1005.
In Utah, where snow and ice, although not unusual, are by no means continuous, it is not unreasonable to require municipalities to keep their walks free from ice and snow.
Scoville v. Salt Lake City, 11 U. 60; 39 P. 481.
Respondent's horse, while being driven along the street, stepped through a hole caused by a break in the water pipe, which had occurred a day or two before the injury; held, that a verdict for the respondent was not so clearly against the weight of the evidence as to require a new trial.
Hopkins v. Ogden City, 5 U. 390; 16 P. 596.
Where the plaintiff's wife was driving a gentle horse across a bridge of the defendant city, and the horse, becoming frightened at a place that had been negligently repaired, backed off the bridge and precipitated the

plaintiff's wife in the stream, from which accident she suffered injuries; held, negligence on the part of the defendant.

Thomas v. Springville City, 9 U. 426; 35 P. 503.

Where an obstruction had remained in the street a sufficient length of time to give the city notice thereof, and the same was left without guard or light, a finding of negligence on the part of the city will not be disturbed.

Naylor v. Salt Lake City, 9 U. 491; 35 P. 509.

A municipal corporation is liable for a defect in a sewer caused by an obstruction placed in the sewer by workmen of the city under the direction of the city engineer; knowledge on the part of the city is presumed.

Kiesel v. Ogden City, 8 U. 237; 30 P. 758

A claim for damages to crops caused by seepage of water from a city's canal is barred unless the claim is presented within a year.

Dahl v. Salt Lake City, 45 U. 544; 147 P. 622.

An action cannot be maintained against a municipal corporation for a failure to construct improvements or for injuries from inadequate improvements; but if injuries result from defective or inadequate improvements and the municipal authorities neglect to use reasonable care to remedy the defects when discovered, an action will lie.

Id.

A municipal corporation which by its charter has power to manage, regulate, and control the water flowing into the city for irrigation and other purposes, is liable for the damage resulting from a negligent exercise of the power in distributing water to the inhabitants of the city. Such liability exists though the city does not own, or claim to own the water.

Levy v. S. L. City, 3 U. 63; 1 P. 160.

Levy v. S. L. City, 5 U. 302; 16 P. 598.

Is liable for damages caused by floods which should have been anticipated.

Jordan v. City of Mt. Pleasant, 15 U. 449; 49 P. 746.

Where a person working out his poll tax was injured by the caving of a gravel bank, and the evidence showed that he was notified of the danger of the work on account of the ground being frozen and having cracks in it; held, that he assumed the risk incident to the employment.

Allen v. Logan City, 10 U. 279; 37 P. 496.

The question of notice to a city of a defect in a sidewalk is for the jury; there being evidence that the walk was old, and the lumber in it old and decayed.

Johnson v. Park City, 27 U. 420; 76 P. 216.

In an action for damages sustained from obstructions in a street, the question of notice to the city is not alone determined from the length of time a defect existed, but also from the nature and character of the defect, the extent of the travel, and whether it is a populous or sparsely settled part of the city.

Jones v. Ogden City, 32 U. 211; 89 P. 1006.

Kiesel v. Ogden City, 8 U. 237; 30 P. 758.

Naylor v. S. L. City, 9 U. 491; 35 P. 509.

A city is under no duty to keep a stream which courses through it in a safe condition and free from obstruction.

Sehy v. Salt Lake City, 41 U. 535; 126 P. 691.

A small stream of warm mineral water running into a ditch and through a culvert at a street crossing is not an attractive nuisance so as to make the city liable for a child's death therein.

Charvoz v. Salt Lake City, 42 U. 455; 131 P. 901.

817. (313.) Claim barred if not presented. It shall be a sufficient bar and answer to any action or proceeding against a city or town, in any court, for the collection of any claim mentioned in § 816, that such claims had not been presented to the city council of such city, or to the board of trustees of such town, in the manner and within the time in § 816 specified; *provided,* that in case an account or claim, other than a claim made for damages on account of the unsafe, defective, dangerous, or obstructed condition of any street, alley, crosswalk, way, sidewalk, culvert, or bridge, is required by the council or board to be made more specific as to itemization or description, or to be properly verified, sufficient time shall be allowed the claimant to comply with such requirement. Am'd '03, p. 12; '05, p. 5.

N. Dak. (1895) § 2174.

CHAPTER 30.

DEPOT SITES.

818. (313x.) Cities and towns may grant depot sites. Vote of people thereon. The city council of any city, or board of trustees of any incorporated town of this state is authorized to aid and encourage the building of railroads by granting to any railroad company, for depot or other railroad purposes, real property of such city or incorporated town, not necessary for municipal or public purposes, upon such limitations and conditions as said council or board of trustees may prescribe; *provided, however,* that no such grant shall be made to any railroad company, unless the question of making said grant has been submitted to the qualified electors of the city or town at the next municipal or special election to be called for that purpose by the city council or town board. If the question is submitted at a special election, it shall be held as nearly as possible in conformity with the general election laws of the state. Notice shall be given of such election by publication in some newspaper or newspapers published in the city or town for four weeks prior

thereto; or if there be no newspaper, then by posting notices. The city council, or town board, shall cause ballots to be printed and furnished to the qualified electors, which shall read: "For the proposed grant for depot or other railroad purposes: Yes. No." If a majority of the qualified electors voting thereon shall have voted in favor of such grant, the city council, or town board, shall then proceed to convey the property to the railroad company. '01, p. 42.

A proposed grant to a railroad of an exclusive right to occupy a street in which the city owns a fee and which it was proposed to vacate for 100 years was a grant of real property within this section and cannot lawfully be made without submitting the question to the electors.

Knight v. Thomas, 35 U. 470; 101 P. 383.

CHAPTER 31.

CONTRACTS FOR PUBLIC IMPROVEMENTS.

819. (313x1.) Contract to lowest bidder. Publication. No contract of any city, town, or municipal corporation for any public improvement shall be awarded except to the lowest responsible bidder, after publication of notice for at least twenty days in a newspaper of general circulation, printed and published in such city, town, or municipal corporation. '07, p. 21.

Officer not to be interested in contract, § 609.

Municipal authorities may meet an emergency by having work done without complying with provisions hereunder, but it must appear that the emergency was such as to prevent compliance with such provisions; and the fact that the city operates its own waterworks in its private and not in its governmental capacity does not authorize it to make improvements thereon without making contracts for that purpose hereunder.

Utah Savings & Trust Co. v. S. L. City 44 U. 150; 138 P. 1165.

A contractor may recover the reasonable value of extra labor improperly and unnecessarily required of him to be performed under protest by direction of the city's duly authorized agents and officers.

Wilson v. S. L. City, 51 U. —; 173 P. —.

TITLE 17.

COLLECTION AGENCIES REQUIRED TO GIVE BOND.

('13, p. 18.)

830. Bond to be given. No person, partnership, association, or corporation shall conduct a collection agency, collection bureau, or collection office in this state, or engage in this state in the business of soliciting the right to collect or receive payment for another of any account, bill, or other indebtedness, or advertise for or solicit in print the right to collect or receive payment for another of any account, bill, or other indebtedness, unless at the time of conducting such collection agency, collection bureau, collection office, or collection business, or of doing such advertising or soliciting, such person, partnership, association, or corporation, or the person, partnership, association, or corporation for whom he or it may be acting as agent, shall have on file with the secretary of state a good and sufficient bond as hereinafter specified.

831. Provisions of bond. Said bond shall be made in the sum of $5000, payable to the state of Utah, and shall provide that the person, partnership, association, or corporation, giving the same shall, upon written demand, pay and turn over to or for the person, partnership, association, or corporation for whom any account, bill, or other indebtedness is taken for collection the proceeds of such collection in accordance with the terms of the agreement upon which such account, bill, or other indebtedness was received for collection. Said bond shall be in such form and shall contain such further provisions and conditions as the secretary of state shall deem necessary or proper for the protection of the persons, partnerships, associations, or corporations, for whom said accounts, bills, or other indebtedness are taken for collection. Whenever any bond herein provided for shall become forfeited, or the sureties thereon shall become liable upon such bond, any per-

son, injured by the acts of forfeiture or by the bringing about of such liability, or who by law is entitled to the benefit of the security, may maintain an action at law thereon in his own name against the person, partnership, association, or corporation giving such bond and the sureties, to recover the amount to which he may by reason thereof be entitled, and one recovery shall not bar recoveries for other breaches of said bond; *provided,* that the sureties can be made liable in the aggregate only to the extent of an undertaking.

832. Term of bond. Said bond shall be for the term of one year, from the date thereof, unless the secretary of state and the person, partnership, association, or corporation giving the same shall agree on a longer period. No action on said bond shall be begun after two years from the expiration of said bond.

833. Sureties. Secretary of state to approve. Said bond shall be executed by said persons, partnerships, associations, or corporations as principal, with at least two good and sufficient sureties as provided by law. Said bond shall not be accepted unless approved by the secretary of state, and upon such approval, it shall be filed in his office. The bond of a surety company may be received if approved as aforesaid; or cash may be accepted in lieu of sureties.

834. Record of bonds. The secretary of state shall keep a record of such bonds filed with him under the provisions hereof, with the names, places of residence, and places of business of the principals and sureties, and the name of the officer before whom the bond was executed or acknowledged, and the record shall be open to public inspection.

835. Penalty. Any person, member of a partnership, or officer of any association or corporation who fails to comply with any of the provisions of this title shall be deemed guilty of a misdemeanor and subject to a fine of not more than $500 or to imprisonment for not more than three months in the county jail, or to both such fine and imprisonment.

836. Exemptions. This title shall not apply to an attorney-at-law duly authorized to practice in this state, to a national bank, or to any bank or trust company duly incorporated under the laws of this state.

TITLE 18.

UNIFORM COLD STORAGE.

('17, p. 213.)

840. Terms defined. For the purpose of this title, "cold storage" shall mean the storage or keeping of articles of food at or below a temperature above zero of 45 degrees Fahrenheit in a cold storage warehouse; "cold storage warehouse" shall mean any place artificially cooled to or below a temperature above zero of 45 degrees Fahrenheit, in which articles of food are placed and held for thirty days or more; "articles of food" shall mean fresh meat and fresh meat products and all fish, game, poultry, eggs, and butter.

841. Warehouse license. Applications. Inspection. Fee. No person, firm, or corporation shall maintain or operate a cold storage warehouse without a license so to do issued by the state dairy and food commissioner. Any person, firm, or corporation desiring such a license shall make written application to the state dairy and food commissioner for that purpose, stating the location of the warehouse. The state dairy and food commissioner thereupon shall cause an examination to be made of said warehouse, and, if it be found by him to be in a proper sanitary condition and otherwise properly equipped for its intended use, he shall issue a license authorizing the appli-

cant to operate the same as a cold storage warehouse during one year. The license shall be issued upon payment by the applicant of a license fee of $10 to the treasurer of the state.

Dairy and food commissioner, § 1920.

842. Revocation of license. In case any cold storage warehouse, or any part thereof, shall at any time be found by the state dairy and food commissioner to be in an insanitary condition, or not properly equipped for its intended use, he shall notify the licensee of such condition, and upon the failure of the licensee to put such cold storage warehouse in a sanitary condition or to properly equip the same for its intended use, within a time to be designated by the state dairy and food commissioner, he shall revoke such license.

843. Records of storage. Reports. Access. Every such licensee shall keep accurate records of the articles of food received in and of the articles of food withdrawn from his cold storage warehouse, and the state dairy and food commissioner shall have free access to such records at any time. Every such licensee shall submit a monthly report to the state dairy and food commissioner, setting forth in itemized particulars the quantities and kinds of articles of food in his cold storage warehouse. Such monthly report shall be filed on or before the 5th day of each month, and the reports so rendered shall show the conditions existing on the last day of the preceding month, and a summary of such reports shall be prepared by the state dairy and food commissioner, and shall be open to public inspection on or before the 10th day of each month.

844. Supervision by state dairy and food commissioner. The state dairy and food commissioner shall inspect and supervise all cold storage warehouses and make such inspection of articles of food therein as he may deem necessary to secure the proper enforcement of this title, and he shall have access to all cold storage warehouses at all reasonable times. The state dairy and food commisssioner may appoint such persons as he deems qualified to make any inspection under this title.

Dairy and food commissioner, § 1920.

845. Articles not subject to storage. No article of food intended for human consumption shall be placed, received, or kept in any cold storage warehouse, if diseased, tainted, otherwise unfit for human consumption, or in such condition that it will not keep wholesome for human consumption. No article of food; for use other than for human consumption, shall be placed, received, or kept in any cold storage warehouse unless previously marked, in accordance with forms to be prescribed by the state dairy and food commissioner, in such a way as to indicate plainly the fact that such article of food is not to be sold or used for human food.

846. Deposits. Markings. Removals. No person, firm, or corporation shall place, receive, or keep in any cold storage warehouse in this state articles of food unless the same shall be plainly marked, stamped, or tagged, either upon the container in which they are packed or upon the article of food itself, with the date when placed therein; and no person, firm, or corporation shall remove, or allow to be removed, such article of food from any cold storage warehouse unless the same shall be plainly marked, stamped, or tagged, either on the container in which it is inclosed or upon the article of food itself, with the date of such removal, and such marks, stamps, and tags shall be prima facie evidence of such receipt and removal and of the dates thereof. All articles of food in any cold storage warehouse at the time this title goes into effect shall, before being removed therefrom, be plainly marked, stamped, or tagged with the date when this title goes into effect and the date of removal therefrom.

847. Period of storage. Extension. Reports. Limitations. No person, firm, or corporation shall hereafter keep or permit to remain in any cold storage warehouse any article of food which has been held in cold storage,

either within or without the state, for a longer aggregate period than twelve months, except with the consent of the state dairy and food commissioner, as hereinafter provided. The state dairy and food commissioner shall, upon application during the twelfth month, extend the period of storage beyond twelve months for any particular article of food, provided the same is found upon examination to be in proper condition for further cold storage. The length of time for which such further storage is allowed shall be specified in the order granting the permission. A report on each case in which such extension of storage may be permitted, including information relating to the reason for the action of the state dairy and food commissioner, the kinds and amounts of the articles of food for which the storage period was extended, and the length of time for which this continuance was granted, shall be filed, open to public inspection, in the office of the state dairy and food commissioner, and shall be included in his annual report. Such extension shall be not more than sixty days; a second extension of not more than sixty days may be granted upon a re-examination, but the entire extended period shall be not more than one hundred and twenty days in all.

848. Sale of articles. Notice. Limitations. It shall be unlawful to sell, or to offer for sale, any article of food which has been held for a period of ninety days or more in cold storage, either within or without the state, without notifying the persons purchasing or intending to purchase the same, that it has been so held, by the display of a placard plainly and conspicuously marked, "cold storage goods," on the bulk mass or articles of food; and it shall be unlawful to represent or advertise as fresh any article of food which has been held in cold storage for a period of ninety days or more.

849. Restorage. Change of warehouses. Conditions. It shall be unlawful to return to any cold storage warehouse any article of food which has been once released from storage for the purpose of placing it on the market for sale. It shall be unlawful to transfer any article of food from one cold storage warehouse to another if such transfer is made for the purpose of avoiding any provision of this title, and such transfer shall be unlawful unless all prior stampings, markings, and taggings upon such articles shall remain thereon.

850. Rules and regulations. The state dairy and food commissioner may make all necessary rules and regulations to carry this title into effect. Such rules and regulations shall be filed in the commissioner's office, and shall take effect five days after such filing.

851. Punishments. Any person, firm, or corporation violating any provisions of this title shall be guilty of a misdemeanor and shall upon conviction be punished for the first offense by a fine not exceeding $100, and for the second or any subsequent offense by a fine not exceeding $299, or by imprisonment of not more than six months, or by both such fine and imprisonment in the discretion of the court.

852. Construction. This title shall be so interpreted and construed as to effect its general purpose to make uniform the law of those states which enact it.

853. Citation. This title may be cited as the uniform cold storage act.

854. Repeal. All acts or parts of acts inconsistent with this act are hereby repealed.

TITLE 19.

CORPORATIONS.

CHAPTER 1.

GENERAL INCORPORATION.

860. (314.) Purpose. Incorporators. Name. Private corporations may be formed in the manner prescribed in this chapter for any purpose for which individuals may lawfully associate. The number of incorporators shall not be less than five, one of whom must be a resident of this state. No corporation shall take the name of a corporation theretofore organized under the laws of this state, nor of a foreign corporation having complied with the laws of this state so as to entitle it to do business within this state, nor one so nearly resembling the name of any such corporation as to be misleading. The secretary of state may refuse to issue a certificate of incorporation to any association violating the provisions of this section.

Am'd '99, p. 75.

Banking corporations formed under this chapter, § 979.
This chapter applicable to land mortgage banks, § 1034.
Restrictions as to names, §§ 1022, 1063.
This chapter applicable to co-operative banks for personal credit, § 1062.
Banking commissioner to approve bank corporations, § 1017.
At least one of directors must be a resident, except in certain cases, § 871.

Corporations, powers and limitations, Con. art. 12, sec. 1-20.
Term "corporation" includes what, Con. art. 12, sec. 4.
Before the enactment of the prohibition law, a corporation could not be legally organized to sell liquor at retail, but could be organized to manufacture or sell liquor at wholesale, and a sale of liquor by a corporation other than at wholesale was ultra vires.
American Fork City v. Charlier, 43 U. 231; 134 P. 739.

861. (315.) Articles of agreement. Contents. The incorporators shall enter into an agreement in writing, signed by each of them, and sworn to by at least three of their number, as hereinafter provided, before the county clerk or any notary public of the county in which they have established, or intend to establish, their principal place of business, stating:

1. The name of the corporation;
2. The precinct or city where it is organized;
3. The names of the incorporators and their places of residence;
4. The time of its duration, which shall not in any case be less than three nor more than 100 years;
5. The pursuit or business agreed upon, specifying it in general terms;
6. The place of its general business;
7. The amount of stock each party has subscribed;
8. The amount of each share, and the limit of capital stock agreed upon;
9. The number and kind of officers, their qualifications and term of office, and the time and manner of their election, removal, and resignation, with the names of the officers to serve until the first general election; *provided,* that in no case shall the number of directors be less than three or more than twenty-five; *provided, further,* that any corporation organized or existing, or hereafter organized and existing, under the laws of this state, may, instead of electing its entire board of directors annually, provide in its articles of association, or by amendment to its articles of association, for the election, as near as may be, of one-third of the number of its directors for a term of one year, one-third thereof for a term of two years, and one-third thereof for a term of three years, and thereafter at each succeeding annual meeting of the stockholders, one-third thereof for a term of three years;
10. How many of the entire board of directors shall be necessary to form a quorum and be authorized to transact the business and exercise the corporate powers of the corporation; *provided,* that a quorum shall be not less than one-fourth of the entire number;
11. Whether or not the private property of the stockholders shall be liable for its obligations;

12. Such additional clauses as the incorporators deem necessary for conducting the business of the corporation and for its future safety and welfare.

Am'd '01, p. 79; '05, p. 18.

Corporations limited to business expressly authorized, Con. art. 12, sec. 10.

County insurance companies incorporate under this section, § 3252.

Liability of stockholders for corporate debts, § 879, and note.

Annual corporation license, §§ 1270-1277.

Articles of incorporation under the general law of the state, with the provisions defining their effect, constitute the character of a corporation, and from them the purposes of the corporation and the uses to which its property may be put, must be ascertained and limited.

North Point C. I. Co. v. Utah & S. L. C. Co., 16 U. 246; 52 P. 168.

Corporation formed to construct and manage ditches and canals not authorized to construct reservoirs for storing water and assessment levied for the purpose is void.

Seeley v. Huntington Canal Co., 27 U. 179; 75 P. 367.

A corporation's charter is a contract between the state and the corporation, between the corporation and the stockholders, and between the stockholders and the state.

Garey v. St. Joe M. Co., 32 U. 497; 91 P. 369.

A hospital corporation formed after the manner of a business corporation held to be one for pecuniary profit and not a charitable association.

Gitzhoffen v. Holy Cross Hosp., 32 U. 46; 88 P. 691.

A stockholder may not be sued by a corporation for an unpaid assessment levied on full-paid stock and his property taken to pay the same, but the assessment may only be enforced by a forfeiture of his stock or so much thereof as may be necessary to pay the assessment and by a public sale thereof.

Dotson v. Hogan, 44 U. 295; 140 P. 128.

In order that a subscription contract for capital stock of a corporation may be enforcible it is not required that the subscribers sign the articles of incorporation or that the contract be incorporated into the articles of incorporation.

Utah Hotel Co. v. Madsen, 43 U. 285; 134 P. 577.

862. (316.) Oath to agreement. Subscriptions paid in property. To the agreement prepared in accordance with the provisions of the preceding section, there shall be added the oath or affirmation of three or more of the incorporators, taken before any officer duly authorized to administer an oath, to the effect that they have commenced, or it is bona fide their intention to commence and carry on, the business mentioned in the agreement, and that the affiants verily believe that each party to the agreement has paid or is able to and will pay the amount of the stock subscribed for by him; *provided,* that said affidavit shall not be made until at least ten per cent of the stock subscribed by each stockholder and not less than ten per cent of the capital stock of the corporation has been paid in; but this proviso shall not apply to any water users' association which is organized in conformity with the requirements of the United States under the reclamation act of June 17, 1902, and which, under its articles of incorporation, is authorized to furnish water only to its stockholders; *provided, further,* that where subscriptions to the capital stock of any corporation formed under the provisions of this chapter shall consist, in whole or in part, of property necessary to the pursuit agreed upon, there must appear in the articles of incorporation a description of the property so taken, with a statement of the fair cash value thereof, which statement, except in the case of corporations organized for mining or irrigating purposes, shall be supplemented by the affidavits of three persons, to the effect that they are acquainted with said property, and that it is reasonably worth the amount in cash for which it was accepted by the corporation; and the owners of such property shall be deemed to have subscribed such amount to the capital stock of such corporation as will represent the fair estimated cash value of so much of such property, or of such interest therein, as they may have conveyed to such corporation by deed actually executed and delivered.

Am'd '01, p. 80; '05, p. 169.

Limitation on issue of stock, Con. art. 12, sec. 5.

Fraud in stock subscription a crime, § 8368.

Unauthorized use of name in prospectus a crime, § 8367.

Liability of stockholders for corporate debts, § 879, and note.

Oath to agreement of bank corporation, § 980.

Oath to agreement of county insurance company, § 3252.

A corporation cannot be held liable for anything done by its promoters before its existence.

Long v. Bank, 8 U. 104; 29 P. 878.

On the grounds of public policy the court will hold to strict account all those who engage in creating business corporations that are insolvent from their inception.

Henderson v. Turngren, 9 U. 432; 35 P. 495.

Where mining property taken in payment for stock is worthless, the holders will be liable as on unpaid subscriptions. (Distinguished in Richardson v. Treasure Hill M. Co., 23 U. 366; 65 P. 74.)

Salt Lake Hardware Co. v. Tintic Milling Co., 13 U. 423; 45 P. 200.

Henderson v. Turngren, 9 U. 432; 35 P. 495.

Where mining property is taken in payment of capital stock at the inception of a corporation the question is what was the fair estimated cash market value of the property at the date of incorporation and not at a time when, through the expenditure of large sums of money, the property has been demonstrated to possess no value. (S. L. Hard. Co. v. Tin-

tic M. Co., 13 U. 423; 45 P. 200, and Henderson v. Turngren, 9 U. 432, 35 P. 495, distinguished.)

Richardson v. Treasure Hill M. Co., 23 U. 366; 65 P. 74.

Stock of mining corporation may be full paid by conveyance of mining property in compliance with the statute.

Id.

Where a corporation is formed on certain mining claims by the owners, and thereafter for years possesses and develops them, it will be deemed to have title by operation of law, in a case where no formal transfer was made.

Murray Hill M. & M. Co. v. Havenor, 24 U. 73; 66 P. 762.

A deed executed and recorded by the owners of a mining claim, naming as grantee a corporation then contemplated and actually organized a few days thereafter, and placed in the hands of a promoter of the corporation to be delivered to it when it should be fully organized and afterwards delivered to it, is valid.

Santaquin M. Co. v. High Roller M. Co., 25 U. 282; 71 P. 77.

Capital stock of corporations, except mining and irrigation, must represent full actual value.

Rolapp v. Ogden N. W. R. Co., 37 U. 540; 110 P. 364.

Any arrangement by which the subscriptions of the stockholders to the stock in a corporation are diverted from their natural and legal purposes as a fund for the benefit of creditors of the corporation is void, as against public policy.

Id.

In a suit by a creditor upon stock subscription, stockholders may be credited with value of property turned in upon their subscriptions, notwithstanding failure to make a statement of such property and its value in the articles of incorporation.

Union Pacific R. R. Co., v. Blair, 48 U. 38; 156 P. 948.

The fact that the subscriber had failed and refused to pay 10 per cent of his subscription to the capital stock of the incorporation was no defense to him in an action to recover his subscription, inasmuch as the proviso is a condition imposed for the protection of creditors of the corporation.

Utah Hotel Co. v. Madsen, 43 U. 285; 134 P. 577.

863. (316x.) Former corporations validated. Corporations or companies having hertofore filed their articles of incorporation without having formally acknowledged the same, but the same having been sworn to by three or more persons as provided in § 862, said act of filing and swearing to said articles shall be deemed equivalent to having acknowledged and sworn to such articles, and such companies, having otherwise substantially complied with the law, shall be deemed, and are hereby declared to be, bodies corporate. '01, p. 81.

864. (317.) Oath of office. Before the first or any other officers shall enter upon the duties of their respective offices, they shall take and subscribe an oath of office, that they will discharge the duties of such office to the best of their judgment, and that they will not do nor consent to the doing of any matter or thing relating to the business of the corporation with intent to defraud any stockholder or creditor or the public, which oaths shall be filed in the office of the county clerk.

Oath of office, banking corporation, § 1000.

Individuals who have been elected directors of a corporation, but who fail to take the oaths of office in accordance with this section, are not de jure officers.

Schwab v. Frisco M. Co., 21 U. 258; 60 P. 940.

Where directors of a mining corporation had subscribed to, but not filed their oaths, as required by this section, an assessment on stock made by them will not be set aside, no one appearing to have been mislead by the irregularity.

Hatch v. Lucky Bill M. Co., 25 U. 405; 71 P. 865.

Holdover directors continue in office until their successors are elected and have qualified.

Hatch v. Lucky Bill M. Co., 25 U. 405; 71 P. 865.

Jones v. Bonanza Con. M. Co., 32 U. 440; 91 P. 273.

865. (318.) Agreement to be recorded. The agreement, with the oath or affirmation, shall, within ten days from its due execution, be deposited with the county clerk of the county in which the general business is to be carried on, and shall be by him recorded in a book to be prepared for that purpose and kept in his office.

866. (319.) Clerk's certificate. Certificate of incorporation. Evidence. As soon as the agreement and oath or affirmation and oaths of office are filed, the county clerk shall issue, under his seal, a certificate to the effect that the agreement and oath or affirmation and oaths of office have been filed in his office, which certificate, together with a copy of the articles of agreement and oath or affirmation, must be filed in the office of the secretary of state, who shall issue under the great seal of the state a certificate that a copy of the articles of agreement and oath or affirmation, containing the required statement of facts, has been filed in his office, which shall be sufficient to constitute the association a body corporate with succession as specified in the agreement, which certificate, or certified copy of the same, shall be evidence of the due incorporation of the corporation.

867. (320.) Certified copies as evidence. It shall be the duty of the county clerk and of the secretary of state, upon payment of the lawful fee

therefor, to make certified copies of corporation papers recorded or filed in their respective offices, which copies shall be prima facie evidence of the facts therein stated.

868. (321.) Non-use of franchise. Non-use for a period of two years of a franchise acquired under the provisions of this title shall be deemed a forfeiture of the corporate rights, privileges, and franchises.

May continue for purpose of winding up its affairs, § 870.

Revoked for unfair competition and discrimination, § 8334.

The attempt of a board of directors to grant an agent of the company an irrevocable power of attorney is a virtual dissolution of the corporation, and is void.

Davis v. Flagstaff Mining Co., 2 U. 74.

A sale of all the property of a corporation does not necessarily terminate its corporate existence, for corporations may exist without property.

Geddes et al. v Anaconda Mine, 245 Fed. 225.

The mere transfer by assignment of the corporate property to a trustee for the payment of debts does not per se work a dissolution of the corporation.

Weyeth Mfg. Co. v. James-Spencer-Bateman Co., 15 U. 110; 47 P. 604.

869. (322.) Powers enumerated. The corporation in its name shall have power to make all contracts necessary and proper to effect its purposes and conduct its authorized business; to sue and be sued; to have a seal, which it may alter at pleasure; to buy, use, mortgage, sell, or otherwise dispose of personal property; to buy, receive, use, sell, mortgage, lease or bond, or otherwise dispose of all such real estate as may be necessary, useful, or desirable for it to own, use, or dispose of for its purposes. Such corporation shall have the right to disburse out of profits actually earned and on hand such dividends, from time to time, as the directors may deem prudent. It may make all such by-laws, rules, and regulations, not inconsistent with law or with other corporate rights and vested privileges, as may be necessary to carry into effect the object of the association, and such by-laws, rules, and regulations may be made in a general meeting of the stockholders or by the board of directors. And any corporation now existing, or that hereafter may be organized under the laws of this state for the purpose of mining, or the exploration or development of mining property, including lands bearing metal, stones, limestone, oil, petroleum, asphalt, and other hydrocarbons, shall, in addition to the powers above enumerated, have the power to purchase, take on bond or lease, or in exchange, or locate, or otherwise acquire any lands, mines, options, territory, fields, or claims, and to sell, convey, lease, bond, mortgage, dispose of, or otherwise deal in the same to such extent as the board of directors may deem prudent, subject always to the provisions of the articles of incorporation and by-laws; *provided,* that in case the articles of incorporation do not provide for the sale or other disposition of the property of the corporation, then the act of the board of directors shall not be valid or binding on the corporation until confirmed by a vote of a majority in amount of the stock outstanding at a meeting of the stockholders duly called to consider such action of the board. When the articles of association provide that the property of the corporation may be sold, mortgaged, or otherwise disposed of by the directors or by the stockholders, sales made in accordance therewith shall be binding on the company.

Am'd '03, p. 78; '05, p. 247.

Decisions on powers of foreign corporations, note to § 917.

Limited to business expressly authorized, Con. art. 12, sec. 10.

Power of corporations not formed for pecuniary profit, § 894.

Powers of religious corporations, §§ 933-935.

Not to purchase or exchange stock in other corporations, § 8368; except in irrigating companies, § 3473; and railroad corporations, § 1228.

Decisions on authority of directors, note to § 871.

Dividends, except from surplus profits, forbidden, § 8368.

Division of capital stock among stockholders forbidden, § 8368.

Payment of unearned dividends a fraud. Where the evidence showed that the plaintiff loaned the corporation certain sums to pay unearned dividends, such loans, being forbidden, are fraudulent and void.

Davis v. Flagstaff Mining Co., 2 U. 74.

A corporation being limited in its power to negotiate loans by its articles of association, the directors had no authority to borrow money beyond that granted, and in the manner specified.

Id.

Under § 2272, C. L. 1888, providing the objects for which corporations may be formed and that no corporation shall have power to enter into as a business the buying and selling of real estate, but which affixes no penalty for the act, a foreign corporation which engages in the business of buying and selling real estate in Utah territory, but takes the title to the land in the name of a trustee, does not forfeit its title to such real estate or lose the right to enforce the trust.

Fisk v. Patton, 7 U. 399; 27 P. 1.

It is not necessary to prove by the laws of a state where a corporation is organized, that it is authorized to hold or transfer real estate; such power is determined by the laws of the government in which it is doing business.

Tarpey v. Des. Salt Co., 5 U. 494; 17 P. 631.

A resolution adopted at a stockholders' meeting, held to be a by-law, though not adopted with the required formalities.

Ogden Clay Co. v. Harvey, 9 U. 497; 35 P. 510.

Neither the constitution nor the laws affect the power of an insolvent corporation to make preferences among its creditors.

Weyeth Mfg. Co. v. James-Spencer-Bateman Co., 15 U. 110; 47 P. 604.

When a contract is made by and with promoters of a corporation, which is intended to inure to the benefit of a corporation about to be organized, such contract will be regarded as in the nature of an open offer which the corporation, upon complete organization, may accept and adopt or not as it chooses.

Wall v. Niagara M. & S. Co., 20 U. 474; 59 P. 399.

Long v. Bank, 8 U. 104; 29 P. 878.

A corporation has the same dominion over its property, with the same right of disposition, as a private person.

Hearst v. Putnam M. Co., 28 U. 184; 77 P. 753.

Weyeth H. & M. Co. v. James-S.-B. Co., 15 U. 110; 47 P. 604.

A corporation organized under laws of Utah is a citizen of the state.

Wilson v. Triumph M. Co., 19 U. 66; 56 P. 300.

Where there has been a bona fide attempt to create a corporation, and an assumption and exercise of corporate functions sufficient to constitute a corporation de facto, as a general rule its legal existence cannot be called in question collaterally.

Marsh v. Mathias, 19 U. 350; 56 P. 1074.

Any failure or omission by a corporation to comply with the provisions of a statute which falls short of justifying a direct proceeding by the state to forfeit its charter, is not fundamental, and third parties by their acts may be estopped from setting up such failure as a bar to the enforcement of their obligations to the corporation.

Jackson v. Crown Point M. Co., 21 U. 1; 59 P. 238.

Hatch v. Lucky Bill M. Co., 25 U. 405; 71 P. 865.

Mitchell v. Jensen, 29 U. 346; 81 P. 165.

Ogden Clay Co. v. Harvey, 9 U. 497; 35 P. 510.

A by-law of a de facto corporation which has been acquiesced in and acted upon for a period of more than eleven years by all the stockholders and officers must be presumed to have been regularly and duly adopted.

Marsh v. Mathias, 19 U. 350; 56 P. 1074.

Where associations or corporations are organized for the purpose of mutual benefit and relief, the terms of their by-laws must be interpreted liberally and reasonably.

Maynard v. Loc. E. M. L. & A. Assn., 16 U. 145; 51 P. 259.

Sec. 1976, R. S. 1898, provides that it shall not be necessary to use private seals on any instrument in the state; held, that the fact that a deed executed by a private corporation did not have a seal attached did not invalidate the conveyance.

Murray v. Beal, 23 U. 548; 65 P. 726.

Where a corporation acts within the scope of its general powers, and such acts are irregular, and performed in a manner not authorized by its charter, but are neither criminal, opposed to good morals, nor against public policy, they are voidable only, and a stockholder aggrieved thereby may acquiesce in and ratify what has been done, or may disaffirm and repudiate the voidable proceeding within a reasonable time.

Hatch v. Lucky Bill M. Co., 25 U. 405; 71 P. 865.

Generally a corporation having no public duties to perform has the same power as an individual to sell, with consent of its stockholders, all its property, including its franchise, except its franchise to be a corporation, but it has no more right than the individual to dispose of its property to the prejudice of creditors.

Cooper v. Utah L. & Ry. Co., 35 U. 570; 102 P. 202.

A corporation cannot sell its primary franchise, or its right to exist as a corporation; but it may sell its secondary franchise or its right to occupy and use streets and public places for the operation of its work.

Id.

If a corporation whose stock was exchanged for the property of another corporation was bound to distribute the stock among the stockholders of the latter corporation, it was not bound to recognize as such shareholder one whose stock appeared to have been sold several years before on a delinquent assessment, though the sale was void.

Kimball v. Success M. Co., 38 U. 78; 110 P. 872.

Before the enactment of the prohibition law, a corporation could not be legally organized to sell liquor at retail, but might be organized to manufacture or sell liquor at wholesale, and a sale of liquor by a corporation other than at wholesale was ultra vires.

American Fork City v. Charlier, 43 U. 231; 134 P. 739.

Corporations may exercise only such powers as are expressly or by necessary implication granted, and such as are necessary to effect those powers which are granted.

National Merc. Co. v. Mattson, 45 U. 155; 143 P. 223.

The proviso authorizing the sale of the entire property with the consent of the stockholders is applicable to a corporation organized before the enactment of this provision.

Geddes v. Anaconda Mine, 245 Fed. 226.

The directors of a mining company are entitled to dispose of its entire property with consent of a majority of the stockholders, though the corporation's property was worth far more than its debts.

Id.

Minority shareholders cannot complain of the sale of corporation property to a corporation in which the majority shareholders were interested where it offered the highest bid. The minority shareholders being only entitled to have the property sold free from any unfair combination on the part of the majority shareholders and the purchasing corporation; and if the sale was for an inadequate price it will not be unconditionally set aside; but a public resale will be ordered and the property will be sold to the highest bidder if thereby a greater amount should be realized, but otherwise the sale to remain undisturbed.

Id.

870. (323.) May continue, when. Any corporation, organized under the laws of the territory or state of Utah, whose franchise has heretofore expired or may hereafter expire by limitation or by forfeiture, may nevertheless continue for the purpose of winding up its affairs; and to effect this purpose may sell or otherwise dispose of real and personal property, sue and be sued, contract, and exercise all other incidental and necessary powers.

Am'd '09, p. 61; '13, p. 14.

Revoked for unfair competition and discrimination, § 8334.

The company may, in good faith in winding up its affairs, make preferences among its creditors so long as not interfered with in a proper equitable proceedings to subject its property to payment of creditors.

Passow & Sons v. Wetherbee, 50 U. —; 167 P. 350.

Where the charter has been revoked for failure to pay license tax, the directors are the trustees for the corporation and may dispose of the property and wind up the business of the company, no receiver is necessary.

Henriod v. East Tintic Development Co., 50 U. —; 173 P. 134.

OFFICERS—DUTIES AND REMOVAL.

871. (324.) Powers exercised by board of directors. The corporate powers of the corporation shall be exercised by the board of directors, who, if the corporation be domestic and with franchises limited to the state, shall be stockholders of the company, and at least one of whom shall be a resident of this state, but in cases of consolidated corporations with franchises in two or more states, or states and territories, or of corporations engaged in interstate commerce, no qualifications of residence or stock ownership shall be necessary unless required by the articles of incorporation. The number of directors named in the agreement of incorporation as being sufficient to form a quorum for the transaction of business shall constitute a board, and every decision of a majority of the board so formed shall be valid as a corporate act. In all cases where it is not otherwise provided by the articles, all meetings of the directors must be held at the principal office of the corporation in this state; but when so provided in the articles, meetings of the directors may be held, for the transaction of any business of the corporation, at such place outside of this state, or elsewhere within this state than at its principal office, as the directors may, by resolution or by-laws, provide. Am'd '03, p. 79.

But one incorporator need be resident, § 860.

Directors must qualify, § 864.

Acts of directors which constitute crimes, §§ 8365-8379.

Directors presumed to have knowledge, § 8375.

Directors' concurrence presumed, §§ 8376, 8377.

Deductions from salaries, etc., for elections prohibited, § 2379.

Violations corrupt practices act, § 2381.

Furnish information to att'y-general, § 211.

Quorum of board of directors not less than one fourth, § 861 sub. 10.

Number of directors not less than three nor more than twenty-five, § 861 sub. 9.

Decisions on powers of corporations, note to § 869.

AUTHORITY OF OFFICERS:

A corporation is not bound by a contract made by its board of directors ultra vires.

Flagstaff Mining Co. v. Patrick, 2 U. 304.

The power of the directors is not a delegated authority, and when the transaction of the business of the company will be facilitated by the appointment of one or more of the board, such appointment may be made.

Leavitt v. Oxford S. M. Co., 3 U. 265; 1 P. 356.

The majority of the board of directors may bind the corporation on any matter within the power of the board.

Id.

In an action by the vice-president to recover for services as general manager, it must be shown by a preponderance of evidence that the services were clearly outside of his duties as an officer of the company.

Toponce v. Corinne Canal & Stock Co., 6 U. 439; 24 P. 534; affirmed 152 U. S. 405.

A corporation may ratify a contract which it had the power to make, when entered into on its behalf without its authority, or voidable because not reduced to writing.

North Point C. I. Co. v. Utah & S. L. C. Co., 16 U. 246; 52 P. 168.

If an officer of a corporation openly exercises power which presupposes a delegated authority for the purpose, and the corporate acts show that the corporation must have contemplated the legal existence of such authority, the acts of such officer will be deemed rightful and the delegated authority will be presumed.

Moyle v. Congregational Soc., 16 U. 69; 50 P. 806.

An officer of a corporation has no inherent power to make a general assignment of the corporation's property. Such power rests only in the board of directors duly assembled.

Cupit v. Park City Bank, 20 U. 292; 58 P. 839.

Although a corporation, having permitted one no longer an officer to remain in control of the management of its affairs, cannot be heard to deny the validity of his acts, a different rule governs where those acts are challenged at the first opportunity by innocent third persons who have been damaged thereby.

Id.

Irregular acts of a board of directors, which are neither criminal nor opposed to public policy, are voidable merely; a stockholder who acquiesces is bound thereby.

Hatch v. Lucky Bill M. Co., 25 U. 405; 71 P. 865.

Jones v. Bonanza M. & M. Co., 32 U. 440; 91 P. 273.

In an action against a corporation on a promissory note signed by two of the corporate directors, where it appears that the money was loaned on the credit of the corporation, on the representations of the managing director that the corporation needed funds; that a check for a portion of the loan was made to and indorsed by the corporation; and that the interest was paid in merchandise out of the defendant company's store, a prima facie case is made out.

McGarry v. Tanner & B. Co., 21 U. 16; 59 P. 93.

The treasurer of a corporation wrote a letter accepting for the corporation plaintiff's offer to sell certain property at a specified price, in which letter he said, "I will guarantee you the money between thirty and forty days," and signed the letter with his name as treasurer; held, that this language was only an assurance that the company would pay, and not a personal guaranty.

Riter v. Sun Foundry & Machine Co., 10 U. 140; 37 P. 257.

See Armstrong v. Cache V. Co., 14 U. 450; 48 P. 690.

Where the president, who was also the general manager of the corporation, was authorized under its by-laws to transact its general business, his power to execute a note and mortgage and the legality of his acts will not be questioned, especially where he acts in good faith and there is no fraud.

Passow & Sons v. Wetherbee, 50 U. —; 167 P. 350.

The president of a corporation has ordinarily only the powers of a director; and he alone has no authority to extend the time of payment on a contract entered into by authority of the directors.

Lochwitz v. Pine Tree M. & M. Co., 37 U. 348; 108 P. 1128.

Where the secretary of a corporation issued its promissory note in accordance with his custom, which had the sanction of the board of directors, the corporation was bound, since, where an agent of a corporation has been permitted to transact its business, his authority to bind it will ordinarily be implied from the apparent power conferred upon him.

McCarrick v. Lenox M. Co., 49 U. 353; 164 P. 478.

Ordinarily, the secretary of a corporation has no right to execute and deliver its promissory note without authority being conferred upon him by its board of directors.

Id.

Where the board of directors refused to order the president and secretary to transfer shares of stock their act in transferring such shares was illegal although the stockholders had voted in favor of the transfer.

Anderson v. Grantsville, et al., 50 U. —; 169 P. 168.

Where the board of directors was adverse to bringing suit, and an application to them would have been of no avail, and the stockholders had been damaged by the acts upon which the suit was based, they could bring the action in their own names and in behalf of the corporation.

Id.

FIDUCIARY RELATION OF OFFICERS:

If a trustee for a corporation is violating his trust, any stockholder of the company may bring an action against the trustee, joining the corporation as a defendant, and cause the trustee to be removed and the property held by the trustee sold and the proceeds equitably applied.

Fisk v. Patton, 7 U. 400; 27 P. 1.

A president of a mining company could not bind the company by consenting to the sale of property to a third person, to be held for himself.

Victor G. & S. M. Co. v. Nat. Bank Rep., 15 U. 391; 49 P. 826.

An officer cannot bind it when acting for both at the same time. If he wrongfully takes its property in his name he will be deemed to hold it in trust.

Bear River Co. v. Hanley, 15 U. 506; 50 P. 611.

When an officer is acting partly for himself and partly for the corporation, notice to him will not affect the rights of the company.

Victor G. & S. M. Co. v. Nat. Bank Rep., 15 U. 391; 49 P. 826.

Contracts made by a corporation with officers are not void per se, but will be set aside if not made in the utmost good faith.

Singer v. S. L. Copper Co., 17 U. 143; 53 P. 1024.

There is no fiduciary relation existing between the director and a stockholder of a company in regard to transactions affecting the sale of its stock by a stockholder to the director, and as long as the director remains silent and does not actively mislead the stockholder, the transaction cannot be set aside for fraud, and an answer setting up such facts raises no issue of fraud.

Haarstick v. Fox, 9 U. 110; 33 P. 251.

In a controversy over the affairs of a corporation, between the directors and stockholders, directors will not be permitted to gain a pecuniary advantage over the stockholders because of their official positions and consequent superior knowledge of the affairs of the company.

McIntyre v. Ajax M. Co., 17 U. 213; 53 P. 1124.

A board of directors of a banking corporation is elected primarily for the management of the corporate affairs, and is responsible for good faith and diligence.

Warren v. Robison, 19 U. 289; 57 P. 287.

Same case, 25 U. 205; 70 P. 989.

The president and board of directors of a corporation are trustees, and act in a fiduciary capacity for its stockholders, and while doing so are forbidden, in equity, to acquire any interest in the property hostile to the interests of the stockholders.

Center Creek Irr. Co. v. Lindsay, 21 U. 192; 60 P. 559.

Director may rightfully purchase a bona fide existing claim against a corporation of which he is a director, if the rights of other creditors are not involved, and he is under no present duty to act in the transaction for the corporation.

McIntyre v. Ajax M. Co., 28 U. 162; 77 P. 613.

Where a person was a director and stockholder of a corporation which assigned its property for the benefit of creditors, and also a director and stockholder in a bank which was made a preferred creditor, and voted in favor of such preference, the double relation would not make the assignment void when the same result would have been reached had he refrained from voting.

Colorado F. & I. Co. v. Western H. Co., 16 U. 4; 50 P. 628.

An assignment is not invalidated because a director and stockholder voted to prefer certain creditors on whose notes he appeared as an accommodation indorser, when it appears that the result would have been the same whether he voted or not.

Wells, Fargo & Co. v. Scott & Co., 18 U. 127; 55 P. 81.

Nat. Bank Rep. v. Scott & Co., 18 U. 400; 55 P. 374.

The directors of a corporation are personally liable for deceit in representing the financial condition of the corporation and thereby inducing a person to become the agent of the corporation.

Alder v. Crosier, 50 U. —; 168 P. 83.

Where a corporation, accepting a conveyance of land in trust to sell at the best price obtainable and account for the proceeds, transferred the land to an officer for a price less than the price obtainable, the officer became a volunteer trustee, and, when he sold the land at an advance, he held the proceeds in trust for the beneficiary.

Gay v. Young Men's Co-op Merc. Inst., 37 U. 280; 107 P. 237.

Contracts between corporations having common directors, while not prohibited, are voidable; and the burden rests on those seeking to sustain them to show clearly that they were entirely fair and free from wrong.

Geddes v. Anaconda Min., 245 Fed. 226.

MEETINGS OF DIRECTORS:

Meetings of stockholders, § 882, and note.

In the absence of a statute or by-law fixing the times of the meetings of its directors, all meetings of the directors, of which due and legal notice was given, are presumed to be regular, unless the contrary affirmatively appears.

Leavitt v. Oxford M. Co., 3 U. 265; 1 P. 356.

Presumption is in favor of regularity of meetings of board of directors.

Singer v. S. L. Copper Co., 17 U. 143; 53 P. 1024.

Where a meeting of a quorum of directors is convened without notice to absent members, or the existence of such an emergency as would excuse notice, the acts done at such meeting are void.

Singer v. S. L. Copper Co., 17 U. 143; 53 P. 1024.

Cupit v. Park Bank, 20 U. 292, 58 P. 839.

Hatch v. Lucky Bill M. Co., 25 U. 405; 71 P. 865.

A provision in articles of incorporation that a new board of directors shall organize within a time specified after their election is directory merely.

Jones v. Bonanza M. &. M. Co., 32 U. 440; 91 P. 273.

All irregularities in a corporate election, the legality thereof, as well as the legal qualifications of the officers elected, are settled by the election as against a collateral attack.

Jones v. Bonanza M. & M. Co., 32 U. 440; 91 P. 273.

Hatch v. Lucky Bill M. Co., 25 U. 405; 71 P. 865.

A quorum of the board of directors must act as a unit when discharging, or authorizing anyone to execute, corporate powers.
Lockwitz v. Pine Tree M. & M. Co., 37 U. 349; 108 P. 1128.
A majority of the board, regularly convened, may exercise any corporate powers in the absence of a minority and bind the minority, and the minority are chargeable with knowledge of such acts, as where a corporation acquires property in trust every director was charged with knowledge of the trust relation.
Gay v. Young Men's Co-op Inst., 37 U. 280; 107 P. 237.

872. (325.) Duration of officers' authority. Officers, after having duly qualified, may continue to exercise the duties of their offices until their successors shall be duly elected or appointed and qualified, unless sooner removed in the manner prescribed by the articles of incorporation or by-laws, or, in case no provision be made therein for such removal, according to the provisions of this chapter.
Directors must qualify before taking office, § 864.
Holdover directors of a corporation are still in office and qualified to act, until their successors are elected and qualified.
Hatch v. Lucky Bill M. Co., 25 U. 405; 71 P. 865.
Jones v. Bonanza Con. M. Co., 32 U. 440; 91 P. 273.

873. (326.) Failure to hold regular election. If, from any cause, the officers shall not be elected at the time provided in the agreement or by-laws, such election may be held at a special meeting of the stockholders to be duly called at any time by the directors, or, upon their failure to call such a meeting for a period of three months after the regular time of such election, at the call of any two stockholders.
Stockholders' meetings; how called; § 882.

874. (327.) Removal of officers. A director or other officer may be removed from office as provided in the articles of incorporation or by-laws, or in case there is no such provision, then by a vote of the majority of the outstanding capital stock, at a meeting held after previous notice of the time and place and of the intention to propose such removal. Special meetings of stockholders for this purpose may be called by the president or by a majority of the directors, or by stockholders holding at least one-half of the shares of stock outstanding. Such calls must be in writing and addressed to the secretary, who must thereupon give notice of the time, place, and object of the meeting, and by whose order it is called. If the secretary refuses to give the notice, or if there be no scretary, the call may be addressed directly to the stockholders. In case of the removal of a director or other officer, the vacancy may be filled by election at the same meeting, or by the board of directors, unless otherwise provided in the articles or by-laws. Am'd '03, p. 79.

875. (328.) Correct books to be kept. It shall be the duty of the corporation to keep true and correct books of its proceedings and business.

876. (329.) Id. Access thereto by stockholders. The books of every corporation organized under the laws of this state must be so kept as to show the original stockholders, their interests, the amount paid on their shares, and all transfers thereof; all books of any corporation shall, at all reasonable hours, be subject to the inspection of any bona fide stockholder of record.
A misdemeanor to refuse inspection, § 8372.
The right of inspection is a common law right, and, unless restricted by statute or corporation's charter, will not be denied when sought by stockholders for a proper purpose. Visitorial powers and stockholders' rights of inspection are not one and the same thing.
Harkness v. Guthrie, 27 U. 248; 75 P. 624.

A stockholder's right of inspection of the books at reasonable times is absolute and not qualified. Such inspection may be made by an agent, and the business hours of the corporation are reasonable hours for such purpose.
Clawson v. Clayton, 33 U. 266; 93 P. 729.
A corporate stockholder has the right to inspect the books to ascertain the names of other stockholders in the absence of any reason for denying such right.
Brandl v. Silver King Con. M. Co., 37 U. 62; 106 P. 520.
The right of a bona fide stockholder to inspect the corporate books is absolute and not merely qualified or conditional, and exists regardless of his purpose in inspecting.
Kimball v. Dern et al., 39 U. 181; 116 P. 28.

877. Corporations to furnish information. Attorney general to have access to records. It shall be the duty of any corporation, incorporated under the laws of this state, to furnish the attorney general any information which may be requested by him regarding transfers of stock of any such corporation standing in the name of a decedent, and the attorney general is hereby authorized to have access to and examine all records of any such corporation for the purpose of acquiring information in connection with the col-

lection of inheritance taxes. Refusal on the part of any such corporation to furnish information, or to permit access to records, as herein provided, shall render such corporation liable for the payment of the inheritance taxes to which any such stock may be subject. '17, p. 21.

STOCK, STOCKHOLDERS, AND MEETINGS.

878. (330.) Stock. Transfer. Stock shall be deemed personal property, and the delivery of a stock certificate of a corporation, together with a written transfer of the same, signed by the owner, to a bona fide purchaser or pledgee for value, shall be deemed a sufficient transfer of the title as against any creditor of the transferer and all other persons whomsoever; *provided*, that for the purpose of voting, and of receiving dividends, and of levying and collecting assessments, and wherein the corporation is otherwise interested, the holder of record, as shown by its books, shall be treated and considered as the holder in fact, and the transferee shall have no rights or claims as against the corporation until transfer thereof be made upon the books of the corporation or a new certificate be issued to him. Am'd '03, p. 79.

Cited in Rasmussen v. Sevier Valley Canal Co., 40 U. 371; 121 P. 741.

The delivery of stock certificates as security for a loan does not constitute a mortgage, but a pledge, and the provisions of the chattel mortgage statute do not necessarily apply.

Barse Livestock Co. v. Range V. C. Co., 16 U. 59; 50 P. 630.

A judgment creditor who buys stock with full notice of prior liens obtains no greater interest than his debtor has.

Id.

Water rights represented by shares of stock in a water company are personal property, and may be sold and transferred independent of any land.

George v. Robison, 23 U. 79; 63 P. 819.

Where mining stock is deposited under a binding escrow agreement that it shall pass to a certain person on the payment of a certain price within a certain time, and the price is paid by such time, dividends declared before the price is paid do not belong to the purchaser.

Clark v. Campbell, 23 U. 569; 65 P. 496.

A contract, providing for the sale of stock, though it is recited that the sellers reserve the right to deliver the shares, cast on the sellers the duty to deliver to plaintiff the certificate for the shares.

Makris v. Melis, 50 U. —; 167 P. 802.

A corporation cannot inquire into the transaction which causes the transfer of stock.

Mundt v. Commercial National Bank of Ogden, 35 U. 90; 99 P. 454.

If a corporation has some claim upon a certificate of its stock sought to be transferred, or some rights against the assignor that would, or might, be affected or lost by the transfer, or if it is notified by a third person not to transfer the stock, upon the ground that he claims some interest in it which would, or might be, lost by the transfer, a corporation may refuse to make the transfer.

Id.

An action for damages lies for the wrongful withholding by a corporation of a stock certificate, and the form of the action is immaterial, if the complaint shows plaintiff entitled to any remedy, legal or equitable.

Coray v. Perry Irr. Co., 50 U. —; 166 P. 672.

A recital in a certificate that it was transferrable only on the books of the company by endorsement and surrender of the certificate does not restrict the right to otherwise sell, transfer, or pledge by endorsement and delivery.

Brown v. Wright, 48 U. 633; 161 P. 448.

The word "owner" means not only the actual and legal owner, but also the apparent owner.

Id.

It will be presumed that corporate stock registered in the name of the deceased belonged to him and descended to his heirs, there being no evidence that defendant, who claimed the stock, exercised any dominion over it until after the death of the deceased.

Rasmussen v. Sevier Valley Canal Co., 48 U. 490; 160 P. 444.

879. (331.) Liability of stockholders for corporate debts. The property of the corporation and the unpaid stock shall be liable for the debts of the corporation; but the individual property of any holder of full-paid capital stock of any corporation organized since March 8, 1894, or that hereafter may be organized, under the laws of this state, except as otherwise expressly provided in this title, shall not be liable for the corporate obligations, nor shall assessments be levied on such stock for any purpose whatever, except to such extent and in such manner as may be expressly provided in the articles of incorporation.

Liability may be changed only by consent of all, § 886.

Assessments, §§ 900-919, and notes.

Liability of holder of full-paid stock, § 930, and note.

Non-liability of member of corporation not formed for pecuniary profit, § 7898, and notes.

Liability for unpaid subscription, note to § 862.

Liability in banking corporations, § 988.

Liability in co-operative personal credit banks, § 1072.

The unpaid capital stock of a corporation becomes a trust fund for the payment of its liabilities, and a stockholder is liable for calls as long as he remains the owner of the stock until it is fully paid up.

Ogden Clay Co. v. Harvey, 9 U. 497; 35 P. 510.

The corporate assets of an insolvent corporation constitute a trust fund; first, for the payment of its creditors; second, for distribution among its stockholders.

Noble Mer. Co. v. Mount Pleasant co-op. Ass'n, 12 U. 213; 42 P. 869.

The assets of an insolvent corporation cannot be appropriated for purposes foreign to its business, or distributed among its stockholders, until all its debts are paid.

Weyeth Mfg. Co. v. James-Spencer-Bateman Co., 15 U. 110; 47 P. 604.

Where the attorneys of a corporation consent to a judgment against it upon an exorbitant claim of which the president is the real owner; held, that the judgment against the stockholders upon a creditor's bill should be reversed to permit the stockholders to contest the claim.

Wilson v. Kiesel, 9 U. 397; 35 P. 488.

An action upon the individual liability of stockholders, above the amount of their stock to the creditors of a corporation, under § 1, chap. 208, acts 18th Gen. Ass. Iowa, should be brought by the creditors and not by the corporation, or its receiver.

Steinke v. Loofbourow, 17 U. 252; 54 P. 120.

Where mining property is taken in payment of capital stock at the inception of a corporation, the question is, what was the fair estimated cash market value of the property at the date of the incorporation, and not at a time when, through the expenditure of large sums of money, the property has been demonstrated to possess no value. (S. L. Hdw. Co. v. Tintic M. Co., 13 U. 423; 45 P. 200, and Henderson v. Turngren, 9 U. 432; 35 P. 495, distinguished.)

Richardson v. Treasurer Hill M. Co., 23 U. 366; 65 P. 74.

When in the organization of a mining corporation, the several provisions of the statute are complied with in good faith by the incorporators, the stock is, in law, as fully paid as if payment therefore had actually been made in money, and the holders of the stock are not liable.

Id.

A stockholder may not be sued by a corporation for an unpaid assessment levied on full paid stock and his property taken to pay the same, but the assessment may only be enforced by a forfeiture of his stock or so much thereof as may be necessary to pay the assessment and by a public sale thereof.

Dotson v. Hoggan, 44 U. 295; 140 P. 128.

Corporations cannot issue bonds as a bonus to subscribers to the capital stock, and bonds so issued are void as against creditors while in the hands of stockholders.

Rolapp v. Ogden N. W. R. Co., 37 U. 540; 110 P. 364.

880. (332.) Mode of subscriptions. The stockholders of any corporation may regulate the mode of making subscriptions to its capital stock and of calling in the same by by-laws or by express contract.

Utah Hotel Co. v. Madsen, 43 U. 285; 134 P. 577.

881. (333.) Lien for unpaid subscriptions. The corporation shall have a lien on the amount paid in and the dividends thereon for any balance due for the stock of a delinquent stockholder.

A delinquent subscriber to the capital stock of a corporation, who is also a creditor, can, after the issuance of an execution upon his claim, maintain an action against the corporation and delinquent subscribers to capital stock, but a proportionate reduction to the amount delinquent on his stock must be made.

Wilson v. Kiesel, 9 U. 397; 35 P. 488.

882. (334.) Stockholders' meetings, how called. Unless required by the agreement or by-laws, no notice need be given of annual or stated meetings of the stockholders. Special meetings shall be called and notice thereof given in such manner as may be prescribed in the agreement or by-laws. When not otherwise specified in the agreement or by-laws, special meetings of the stockholders may be called by the president, by any three directors, or by any number of stockholders owning not less than one-third of the capital stock, and notice thereof shall be given by personal service of the notice upon each stockholder at least five days before the day fixed for the meeting, or by advertisement in some newspaper published in the state, having general circulation in the county in which the principal place of business of the corporation is located. If publication be made in a daily newspaper, the notice shall be published in each issue of the paper for a period of two weeks, and if in a weekly newspaper, for three successive issues next before the day of meeting.

Failure to hold regular election, special election, § 873.

Decisions on directors' meeting, note to § 871.

One who takes part in a stockholders' meeting may be estopped to question the legality of its action.

Jackson v. Crown Point M. Co., 21 U. 1; 59 P. 238.

All irregularities in a corporate election, the legality thereof, as well as the legal qualifications of the officers elected, are settled by the election as against a collateral attack.

Jones v. Bonanza M. &. M. Co., 32 U. 440; 91 P. 273.

Hatch v. Lucky Bill M. Co., 25 U. 405; 71 P. 865.

883. (335.) Voting power of stock. The articles of incorporation may provide that the capital stock shall be divided into different kinds and classes, and define the rights and privileges that each kind and class of stock shall possess, and the power to vote may be confined by the articles to such kinds and classes of stock as may be designated therein. When not otherwise provided in the articles, at all meetings, each shareholder shall be entitled to one vote for each share of stock which he or she may have in his or her own right, or held by him or her in trust for others, as shown by the books of the corporation, and such votes may be given in person, or by an authorized agent, or by proxy. Am'd '03, p. 53; '13, p. 52.

Stockholders owning a majority of the stock contracted with other stockholders, who were then directors of the corporation, placing the control of such stock in the hands of the lat-

ter, and authorized them to vote such stock but not in favor of any assessment or to incur any indebtedness not payable before the expiration of the contract; held, that as between the parties the contract was not void as against public policy.

White v. Snell, 35 U. 434; 100 P. 927.

A majority vote of the outstanding stock may amend the articles of incorporation so as to authorize an issue of preferred stock, which shall take precedence in rights over prior-issued preferred stock, and divide the whole stock into classes with such preferential rights, where no vested right is invaded nor contract obligation impaired.

Salt Lake Auto Co. v. Keith-O'Brien Co., 45 U. 218; 143 P. 1015.

884. (336.) Id. Stock representation. The articles of incorporation or by-laws may provide what proportion of the outstanding capital stock shall be represented at a stockholders' meeting as requisite to the holding of the same, and for adjournment from day to day in the absence of a sufficient representation, and what proportion of the stock so represented shall be necessary to determine any question or election; but in the absence of such provisions, a lawful meeting may be held by the stock represented at the meeting, whatever its amount, and every question or election thereat shall be decided by a majority of the votes cast.

885. (337.) Majority of stock, what constitutes. Whenever any portion of the capital stock of a corporation is held by the corporation, a majority of the remaining shares is a majority of the stock for all purposes of election or voting on any question at a stockholders' meeting.

886. (338.) Amendments. What permissible. The articles of incoroation of any corporation now existing or that hereafter may be organized under the laws of this state may be amended in any respect conformable to the laws of this state by a vote representing at least a majority in amount of the outstanding capital stock thereof at a stockholders' meeting called for that purpose as prescribed in § 887; *provided,* that, if all the stockholders vote in favor of such amendment at any meeting of the stockholders, the notice required by § 887 aforesaid need not be given; and, *provided, further,* that the original purpose of the corporation shall not be altered or changed without the approval and consent of all the oustanding stock; *provided further,* that the adding to the purposes or object, or extending the power and business of the corporation, shall not be deemed a change of the original purpose of the corporation; *provided further,* that the capital stock of the corporation shall not be diminished to an amount less than fifty per cent in excess of the indebtedness of the corporation; and, *provided further,* that the personal or individual liability of the holder of full paid capital stock for assessments or for the indebtedness or obligation of the corporation shall not be changed without the consent of all the stockholders.

Am'd '03, p. 80; '05, p. 29; '05, p. 248.

Amendments validated, § 1236.

Limitation on increase of stock, Con. art. 12, sec. 5.

The reduction of corporate stock below the amount of indebtedness is fraudulent as against creditors without notice.

Leedum v. Earls Furniture & Carpet Company, 12 U. 172; 42 P. 208.

There is no statutory time within which articles of incorporation may be amended, and where amendment was made seventeen years after filing of original articles, the provisions of § 1232, for the forfeiture of the franchise in certain cases, have no application except to the amended articles.

Dern v. S. L. C. R. R. Co., 19 U. 46; 56 P. 556.

Where the articles so provided, they could be amended as to assessments by a majority vote of the stockholders

Nelson v. Keith-O'Brien Co., 32 U. 396; 91 P. 30.

Under this section, as amended by laws of 1903, p. 80, providing that articles of incorporation may be amended by a vote representing two-thirds of the outstanding capital stock (in 1905 changed to a majority), provided the personal or individual liability of full-paid capital stock for assessments, etc., shall not be changed without the consent of all the stockholders, such majority stockholders may not amend the articles of incorporation of a company organized prior to 1903, against the consent of the minority, so as to make non-assessable full-paid capital stock assessable.

Garey v. St. Joe M. Co., 32 U. 497; 91 P. 369.

Articles may be amended to authorize the issue of preferred stock, which shall take precedence in rights over prior-issued preferred stock, and division of the whole stock into classes with such preferential rights.

Salt Lake Automobile Co. v. Keith-O'Brien Co., 45 U. 218; 143 P. 1015.

887. (339.) Id. How made. Notice of such meeting shall be given by the president or secretary of such corporation, in some newspaper printed in the English language and having a general circulation in the county where the corporation has the place of its general business in this state, for at least twenty-one days, stating the nature of the proposed change or amendment, and the time and place of such meeting. Such change or amendment, when

adopted, shall be signed by the president and secretary of such coporation, and be filed and recorded in the manner provided for the filing and recording of orignial articles. The secretary of state shall issue a certificate of amendment, which shall be evidence of the facts therein stated. In case the amendment changes the place of its general business from one county to another, the clerk of the county where such amendment is filed shall, in addition to certifying the copy of the amendment to be filed in the office of the secretary of state, also certify a copy of the articles of incorporation and all amendments thereto, and the same must be filed and recorded in the office of the clerk of the county to which the place of the general business has been so transferred. The certificate of the clerk that such certified copy of the articles and amendments thereto has been filed and recorded in his office shall be evidence of such fact. No amendment shall have any force or effect until it shall have been filed in accordance with the provisions hereof. Am'd '03, p. 80.

Notice need not be given if all the stock votes in favor of amendment, § 886.

A failure to file an amendment which is not fundamental, such as an increase of the number of directors, is not vital, and would form no basis for a direct proceeding by the state to forfeit its charter.

Jackson v. Crown Point M. Co., 21 U. 1; 59 P. 238.

888. (340.) Consolidation. What permissible. How made. Corporations of the same kind, engaged in the same general business, in the same vicinity, heretofore created under the laws of the territory or state of Utah, or hereafter organized under the laws of this state, may consolidate upon such terms and conditions conformable to the law as shall be agreed upon by a vote representing at least a majority in amount of the outstanding capital stock of each of said corporations, at a special meeting of each thereof, upon notice stating the time, place, and object of such meeting, published for at least thirty days prior thereto in a newspaper having general circulation within the county or counties where each corporation has its principal place of business; *provided,* that corporations organized for the purpose of owning and operating street or interurban railroads, and corporations organized for manufacturing, producing, and selling light, power, and heat by electricity, gas, steam, or other means, shall be, for the purpose of this section, deemed corporations of the same kind. Such consolidation may be effected either by joining two or more corporations together, or by the formation of a new corporation under the laws of this state for the purpose of buying in and taking over and operating the properties, rights, and franchises of the corporations desiring to consolidate. And if by purchase, such purchase may be made at any public sale or sales made by judicial proceedings, or in the enforcement of mortgages or liens, or at private sale; *provided,* that if such sale is made other than by judicial procedure or in the enforcement of mortgages or liens, the same shall be approved by at least a majority in amount of the outstanding capital stock of the selling companies, unless the articles of association provide how and by whose authority the sale of the company's property shall be made, then, in that event, in accordance with such provision. If such consolidation is effected by forming a new corporation to purchase, as aforesaid, the articles of association of such new company shall contain, in addition to the requirements of § 861, a provision that the company is formed for the purpose of purchasing in and taking over the properties, rights, privileges, and franchises of such corporations so desiring to consolidate, and if one or more of the corporations is a street, suburban, or interurban railroad, such articles shall contain a general statement of the termini of such road or roads, with their length respectively, as near as may be. Such articles of association of such new corporation organized to purchase the assets of the old companies shall be filed in the office of the secretary of state, and upon his filing such articles and issuing a certificate of incorporation to such company, the association shall without further act be deemed and held to have been duly formed and created a corporation with all the powers specified in such articles of association; *provided,* that they are not inconsistent with the terms of this act or the other existing laws of this state relating to corporations organized for general purposes, or the terms of the constitution of this state. If the consolidation is effected in the usual man-

ner of joining two or more companies together, without the previous formation of a new corporation for the purpose of purchasing in the properties of the corporations, such consolidation shall be evidenced by a certificate under the corporate seals of the respective corporations, signed by the president and secretary of each, briefly reciting the act or acts sought to be accomplished, and describing, in a general way, the property sought to be consolidated, together with the name of the corporation thus formed by amalgamation or consolidation, with such other provisions as the law may require to be inserted in the original articles of incorporation, and such others, being conformable to law, as may be deemed necessary to perfect such consolidation, which certificate shall be filed and recorded in the manner provided for the filing and recording of original articles of incorporation, and a copy thereof, duly certified by the county clerk, shall be filed in the office of the secretary of state, whose certificate shall constitute such consolidated corporations, a new corporation. Such new consolidated corporation, whether formed by organizing a new corporation to purchase or by strict consolidation, shall have the right to work, operate, and maintain the properties thus acquired, and all the rights, privileges, and franchises and powers named in such new articles of incorporation, including those formerly enjoyed by the original corporations.

Am'd '05, p. 249.

Consolidation of competing railroads forbidden, Con. art. 12, sec. 13.

Railroads may consolidate, § 1228.
Consolidations validated, § 1236.

889. (341.) Resulting rights and duties. Upon the consummation of such consolidation, all the rights, privileges, and franchises of each of said consolidating corporations, and all the property, real and personal, and all subscriptions and debts due on whatever account, shall be deemed to be transferred to and vested in such new corporation without further act or deed; and such consolidation shall not relieve the consolidating corporations, or either of them, or the stockholders, from any liabilities, nor shall it extinguish or limit any franchise or right; but all debts, liabilities, and duties of either of said corporations shall henceforth attach to such new corporation, and be enforcible against it to the same extent as if incurred or contracted by it.

A defendant street railway company, consolidating with another after the bringing of an action for personal injury, was not thereby discharged of liability or entitled to an abatement of the action.
Thomas v. Ogden Rapid Transit Co., 47 U. 595; 155 P. 436.

CORPORATIONS NOT FOR PECUNIARY PROFIT.

890. (342.) Incorporation. Societies and associations where pecuniary profit is not their object may be incorporated as hereinafter provided.

Incorporation of churches and religious societies, §§ 930-940.
Not required to pay annual license, § 1271.
A hospital corporation formed after the manner of business corporations, though largely doing charitable work, held not to be a charitable organization.
Gitzhoffen v. Holy Cross Hosp., 32 U. 46; 88 P. 691.

891. (343.) Id. Articles. The associates shall meet for organization, and the chairman or secretary of the meeting shall make an affidavit substantially in the following form:

State of Utah,
County of .....

I do solemnly swear (or affirm) that at a meeting of the members of (insert the name of the church or society as known before incorporation) residing in (insert the jurisdictional limits of the proposed corporation) held at ....., in the county of ....., state of Utah, upon notice to the incorporators by (insert a precise statement of the notice given, which in all cases shall be for not less than fifteen days, and in case of societies not previously existing shall be personal to each incorporator, and in case of societies already existing shall be by notice stating the time, place, and object of said meeting, published in some newspaper having a general circulation within the proposed jurisdiction of the corporation, and by notices posted upon the door of each of the usual places of meeting, if any, of the society) it was decided by a majority vote of the members present at said meeting to incorporate said society

within said limits into a corporation, with such rights and obligations as may be prescribed by law, to be known as .....; to exist for ..... years from the date of incorporation; for the purpose of (insert object); with principal office at .....; with a board of trustees (vestrymen, wardens, directors, or such other officers as may be decided upon, not less than three nor more than twenty-five in number), consisting of ..... members, of whom ..... shall form a quorum, to be elected (annualy or otherwise as may be determined, with time and place of election), in the following manner: ....., and to qualify by each giving bonds to the corporation, to be filed with the secretary thereof, in the sum of ..... dollars; and (insert the names of the officers for the first term, the method of adopting and amending by-laws, and of receiving and removing members, with such additional clauses conformable to law as the incorporators may deem necessary or desirable).

.....

(Signature of affiant.)

Subscribed and sworn to before me,
this ..... day of ....., 19.....

892. (344.) Id. Certificate. Such affidavit shall constitute the articles of incorporation of such society or association, and shall be filed and recorded in the manner provided for the filing and recording of the articles of incorporation of corporations for pecuniary profit. The secretary of state shall issue a certificate that a copy of the articles of incorporation containing the required statement of facts has been filed in his office, which shall be sufficient to constitute the association a body corporate.

893. (345.) Nomination of trustees by superior body. When the body corporate consists of the trustees or directors of any benevolent, charitable, literary, scientific, religious, or missionary institution, which may be established in the state, and which may be under the control or supervision of any conference, synod, association, committee, or other body, or of any president, bishop, or other officer, the articles of agreement may provide that such body, if it exists under the laws of this state, or such officer, if he be a resident thereof, may nominate and appoint the trustees or directors or any part thereof, or fill any vacancy among the same.

Iowa, McClain's An. C. (1888) § 1655*.

894. (346.) Powers of corporation. Corporations not for pecuniary profit shall have power to sue and be sued; to adopt a corporate seal, and change it at pleasure; to contract and be contracted with; and to receive and hold such property, real and personal, whether obtained by purchase, gift, or devise, as may be necessary to carry on or promote the objects of the corporation, society, or association.

Powers of corporations formed for pecuniary profit, § 869, and note.

895. (347.) Powers of trustees. The trustees shall have the care, custody, and control of the corporate property, subject to the provisions of the articles of incorporation and by-laws, and may, unless otherwise provided in the articles or by-laws, upon consent of two-thirds of the members of the corporation present at a meeting duly called and held, mortgage, incumber, lease, sell, or convey any real or personal property of the corporation, unless such property has been received as a gift or devise for some special purpose, and if so received it shall be used and applied only for such purpose. Unless otherwise provided in the articles or by-laws, a meeting for such purpose shall be called upon not less than fourteen days' notice, to be given by publication in some newspaper having general circulation in the place where such corporation has its principal office, or if there be no such newspaper, then by posting on the door of the usual meeting place or places; such notice shall state the time, place, and object of the proposed meeting.

896. (348.) Annual report. The trustees must make annually to the members of the corporation a full report of their transactions, of the condition of the company, and of all property, real and personal, held by them in trust for the corporation.

897. (349.) Other provisions made applicable. The provisions of this chapter relating to the non-use of the corporate franchise; to the right of officers to exercise the duties of their offices until the election and qualification of their successors; to the removal of officers and the filling of vacancies; to the holding of stated meetings and the calling of special meetings, except as hereinbefore prescribed; to the amendment of the articles of agreement and the filing of the affidavit thereof; and to the consolidation of corporations —are hereby made applicable to corporations not for pecuniary profit, with such modifications as are rendered necessary by the fact that such corporations have members and not stockholders.

898. (350.) Liability of members. Members of corporations not organized for profit and having no capital stock are not individually or personally liable for the debts or obligations thereof, unless such liability is imposed by the articles of incorporation or the by-laws, and then only to the extent thus imposed.

Liability of stockholders in corporations, generally, §§ 879-930, and notes.

CORPORATIONS HERETOFORE EXISTING.

899. (353.) Rights and duties continued. Every corporation heretofore lawfully organized under any law of Utah and existing at the time of the taking effect of this revision, shall continue in existence, with all the rights. privileges, powers, duties, and obligations conferred or imposed by the laws under which it has heretofore existed, as modified or controlled by the provisions of these statutes.

Existing corporations confirmed, Con. art. 12, sec. 1. Amendments validated, § 1236.

CHAPTER 2.

ASSESSMENTS.

900. (354.) Full-paid stock non-assessable. The full-paid capital stock of any corporation organized since March 8, 1894, or that may hereafter be organized under the laws of this state, shall not be assessable for any purpose whatever, except to such extent and in such manner as may be expressly provided in the articles of incorporation; *provided,* that if such stock is made assessable and the manner of levying the assessment is not provided for, it shall be levied in the manner and form hereinafter prescribed.

This chapter applicable to co-operative banks for personal credit, § 1062.

Liability of holder of full-paid stock, § 879.

Stock may be full-paid by transfer of property, § 862.

Annual corporation license, §§ 1270-1277.

Under laws of 1888 an assessment might be levied upon fully paid-up capital stock to pay debts, but unless the articles otherwise provide, the remedy is limited to a forfeiture and sale of the stock.

Gary v. York Mining Co., 9 U. 464; 35 P. 494.

The power of a corporation to levy an assessment on full-paid capital stock must be derived from the statute, the articles of incorporation, or some other express promise to pay.

Nelson v. Keith-O'Brien Co., 32 U. 396; 91 P. 30.

Full-paid non-assessable stock cannot be made assessable by amendment of articles without the consent of all the stockholders.

Garey v. St. Joe M. Co., 32 U. 497; 91 P. 369.

901. (355.) Assessment of stock not full-paid. The board of directors of any corporation, whose capital stock shall not be full-paid, may, for the purpose of paying expenses, conducting business, or paying debts, levy and collect assessments upon the subscribed and unpaid capital stock thereof in such a manner and at such times as may be prescribed in the articles of incorporation, or, if not therein provided for, in the manner and form and to the extent hereinafter prescribed.

Unpaid stock liable for debts, § 871, and note.

Liability of stockholders for corporate debts, § 871, and note.

Action to recover stock sold irregularly, § 947, and note.

Assessment of full-paid non-assessable stock forbidden, § 900, and note.

Calls on unpaid bank stock, § 983.

The word "assessment" includes both "calls" and statutory assessments.

Gary v. York Mining Co., 9 U. 464; 35 P. 494.

Where an assessment has been made by a board of directors de jure, and there is no question as to any irregularity in the levy, nor any want of authority on the part of the lawful board to make it, the assessment will be held valid and an injunction to restrain its collection denied.

Chandler v. Sheep R. Co., 15 U. 434; 49 P. 535.

An assessment levied at a meeting at which but four of seven directors were present, no notice thereof having been given to absentees, was void, and stockholders whose stock was sold under such assessment were entitled to recover, unless estopped by acquiescence or laches, as in this case.
Hatch v. Lucky Bill M. Co., 25 U. 405; 71 P. 865.

The validity of a forfeiture and sale of shares of stock depend, as a general rule, upon a formal compliance with the requirements of the statute; and a levy and sale of plaintiff's stock, not acquiesced in by him, by directors who had not filed their oaths of office, as required by law, are void.
Schwab v. Frisco M, Co., 21 U. 258; 60 P. 940.

Where directors had subscribed to, but not filed, their oaths, as required by § 864, an assessment on stock made by them will not be set aside, no one appearing to have been misled by the irregularity.
Hatch v. Lucky Bill M. Co., 25 U. 405; 71 P. 865.

A stockholder of a mining corporation, whose duty it was, as president, director, and business manager, to see that assessments on stock were regularly made and collected, and who knew that it was the uniform practice of the company to levy assessments though a majority of the stock was not represented at the meetings, and though small amounts of previous assessments remained uncollected, could not, after his own stock had been sold under such assessments, complain of their irregularity. (Certain stockholders acquiescing also estopped.)
Id.

Articles of incorporation of a mining company provided that no assessments should be levied while there was treasury stock remaining in the treasury. At the time of levy of an assessment, shares of such stock were undisposed of and in the treasury, but had no salable or other substantial value; held, that the fact alone that such stock was undisposed of did not render the assessment void.
Gary v. York M. Co., 9 U. 464; 35 P. 494.
Nelson v. K.-O'B. Co., 32 U. 396; 91 P. 30.
Jones v. Bonanza Co., 32 U. 440; 91 P. 273.

Corporation formed to construct and manage ditches and canals not authorized to construct reservoirs for storing water; and assessment levied for the purpose is void.
Seeley v. Huntington Canal Co., 27 U. 179; 75 P. 367.

902. (356.) Amount of assessment. No assessment shall exceed ten per cent of the outstanding capital stock of the corporation, unless the corporation is unable to meet its obligations or satisfy the claims of its creditors, in which case the assessment may be for the full amount unpaid upon its capital stock, or for any less amount that may be sufficient to meet such obligations or claims.
Cal. Civ. C., § 332*.

903. (357.) Subsequent assessment, previous one unpaid. No assessment shall be levied while a portion of a previous one remains unpaid, unless:

1. The power of the corporation has been exercised in accordance with the provisions of this chapter for the purpose of collecting such previous assessment;

2. The collection of such previous assessment has been enjoined or restrained; or

3. The assessment falls within provisions of the next preceding section.

Cal. Civ. C., § 333*.
No subsequent assessment can be levied upon the capital stock of a corporation under § 2376, C. L. 1888, until the power of the corporation has been exercised to collect any previous assessment, which remains unpaid. An order to show cause does not affect the validity of the assessment but suspends the power to collect it.
Miles v. Sheep Rock Co., 15 U. 436; 49 P. 536.

Where a stockholder loaned a corporation money, for which the corporation gave its note, a credit on the note of an assessment levied on the stock was a payment of such assessment so as to authorize a subsequent assessment, under this section.
Smith v. Sinaloa Land & Fruit Co., 42 U. 445; 132 P. 556.

904. (358.) Order levying. Every order levying an assessment, unless otherwise provided in the articles of incorporation, must specify the amount thereof, when, to whom, and where payable; fix a day subsequent to the full term of the publication of the assessment notice on which the unpaid assessment shall be delinquent, not less than thirty nor more than sixty days from the time of making the order levying the assessment, and a day for a sale of delinquent stock, not less than fifteen nor more than sixty days from the day the stock is declared delinquent.
Cal. Civ. C., § 334*.
Validity of assessments, note to § 901.
A levy of assessment of stock not made in substantial compliance with the statute is not validated by § 916, which provides that the levy of assessment shall not be void in certain cases.
Raht v. Sevier M. & M. Co., 18 U. 290; 54 P. 889.

905. (359.) Notice of assessment. Upon making the order, the secretary shall cause to be issued a notice thereof in the following form:

(Name of corporation in full. Location of principal place of business.) Notice is hereby given that at a meeting of the directors, held on the (date) an assessment of (amount) per share was levied on the capital stock of the corporation, payable (when, to whom, and where). Any stock upon which

this assessment may remain unpaid on the (day fixed) will be delinquent and advertised for sale at public auction, and unless payment is made before, will be sold on the (day appointed), to pay the delinquent assessment, together with the cost of advertising and expense of sale.

(Signature of secretary, with location of office). Am'd '05, p. 27.

Cal. Civ. C., § 335.

906. (360.) Id. How served. The notice must be served personally on each stockholder, or, in lieu of personal service, must be sent through the mail, addressed to each stockholder at his place of residence, if known, and if not known, at the place where the principal office of the corporation is situated, and be published once a week for four successive weeks, in some newspaper of general circulation in the place designated in the articles of incorporation as the principal place of business; *provided,* that corporations formed for irrigation purposes may omit publication of the notice of levy as above provided, but in other respects must comply with the provisions of this chapter. Am'd '05, p. 27.

Cal. Civ. C., § 336*.

907. (361.) Delinquencies. Notice of sale. If any portion of the assessment mentioned in the notice remains unpaid on the day specified therein for declaring the stock delinquent, the secretary shall, unless otherwise ordered by the board of directors, cause to be published in the same papers in which the notice hereinbefore provided for shall have been published, a notice substantially in the following form:

(Name of corporation in full. Location of principal place of business.) Notice.—There are delinquent upon the following described stock, on account of assessment levied on the ..... day of ....., 19....., (and assessments levied previously thereto, if any), the several amounts set opposite the names of the respective shareholders as follows: (Names, number of certificate, number of shares, and amount), and in accordance with law, (and an order of the board of directors made on the ..... day of ....., 19....., if any such order shall have been made), so many shares of each parcel of such stock as may be necessary, will be sold at the (particular place) on the ..... day of ....., 19....., at the hour of ....., to pay delinquent assessments thereon, together with the cost of advertising and expenses of the sale.

(Name of secretary, with location of office.)

Cal. Civ. C., § 337*.

908. (362.) Id. The notice must specify every certificate of stock, the number of shares it represents, and the amount due thereon, except where certificates may not have been issued to parties entitled thereto, in which case the number of shares, and amount due thereon, together with the fact that the certificates of such shares have not been issued, must be stated.

Cal. Civ. C., § 338.

909. (363.) Id. Publication. The notice, when published in a daily paper, must be published for ten days, excluding Sundays and holidays, previous to the day of sale; when published in a weekly or semi-weekly paper, it must be published in each issue thereof for two weeks previous to the day of sale. The first publication of all delinquent sales must be at least fifteen days prior to the day of the sale.

Cal. Civ. C, § 339*.

910. (364.) Id. Effect on sale. By the publication of the notice the corporation acquires jurisdiction to sell and convey a perfect title to all of the stock described in the notice of sale upon which any portion of the assessment or expenses of advertising remains unpaid at the hour appointed for the sale, but must sell no more of such stock than is necessary to pay the assessments due and expenses of advertising and sale.

Cal. Civ. C., § 340*.

That stock was sold under a void delinquent assessment does not entitle the shareholder to sue the corporation's successor, after eight years, to issue stock to him. Kimball v. Success Mining Co., 38 U. 78; 110 P. 872.

Defendant, a purchaser of corporate stock, which was sold to his transferror on a delinquent assessment, was not chargeable with

notice of the delinquent's rights, though the sale was void, where the books did not disclose the invalidity, and where the transferror had been recognized as the owner of the stock by the corporation, though defendant later became a director and officer, and the fact that no entry was made in the stock ledger of the certificate issued to the transferror is immaterial where the original certificate was not so entered.
Id.

911. (365.) Sale at auction. On the day, at the place, and at the time appointed in the notice of sale, the secretary shall, unless otherwise ordered by the board of directors, sell or cause to be sold at public auction to the highest bidder for cash so many shares of each parcel of the described stock as may be necessary to pay the assessment and charges thereon according to the terms of sale; if payment is made before the time fixed for sale, the party paying shall only be required to pay the actual expenses of advertising in addition to the assessment.
Cal. Civ. C., § 341.

912. (366.) Highest bidder. The person offering at such sale to pay the assessment and expenses for the smallest number of shares or fraction of a share is the highest bidder, and the stock purchased must be transferred to him on the stock books of the corporation, on payment of the assessment and expenses.
Cal. Civ. C., § 342.

913. (367.) Sale to corporation. If at the sale of stock no bidder offers the amount of the assessment and expenses due, the same may be bid in and purchased by the corporation through the secretary, president, or any director thereof, at the amount of the assessments and expenses due; and the amount of the assessment and expenses shall be credited as paid in full on the books of the corporation, and entry of the transfer of the stock to the corporation shall be made on the books thereof. While the stock remains the property of the corporation it is not assesssable nor shall any dividends be declared thereon, but all assessments and dividends shall be apportioned upon the stock held by the stockholders of the corporation.
Cal. Civ. C., § 343.

914. (368.) Effects of sale to corporation. All purchases of its own stock by the corporation vest the legal title to the same in the corporation; and the stock so purchased shall be treated as treasury stock, and, as well as all other stock held by the corporation, shall be held and disposed of in such manner as may be expressly provided in the by-laws of incorporation, and, in case there be no such provision, then the same shall be held subject to the control of the board of directors, who may make such disposition thereof as they may deem for the best interests of the corporation.
Am'd '03, p. 80.
Cal. Civ. C., § 344*.

915. (369.) Extension of time. The dates fixed in any notice of assessment or notice of delinquent sale, published according to the provisions hereof, may be extended from time to time by order of the directors entered on the records of the corporation for any priod or periods aggregating not more than six months; but no order extending the time for the performance of any act specified in any notice shall be effectual unless notice of such extension or postponement is appended to and published with the notice to which the order relates.
Cal. Civ. C., § 345*.

916. (370.) Errors and omissions. No assessment is invalidated by a failure to make publication of the notices herein provided for, nor by the non-performance of any act required in order to enforce payment of the same; but in case of any substantial error or omission in the course of proceedings for collection, all previous proceedings, except the levying of assessment, are void, and publication must be begun anew.
Cal. Civ. C., § 346.

917. (371.) Actions to recover stock sold irregularly. No action shall be sustained to recover stock sold for delinquent assessment upon the ground of irregularity or defect of the notice of the sale, or defect or irreg-

ularity in the sale, unless the party seeking to maintain such action first pays or tenders to the corporation, or the party holding the stock sold, the sum for which the same was sold, together with all subsequent assessments which may have been paid thereon and interest on such sums from the time they were paid; and no such action shall be sustained unless the same is commenced by the filing of a complaint and the issuing of a summons thereon within six months after such sale was made.

Cal. Civ. C., § 347.
Validity of assessments, note to § 901.
A compliance with the provisions of § 917 is necessary to maintenance of an action to recover stock irregularly sold for assessment. Raht v. Sevier M. & M. Co., 18 U. 290; 54 P. 889.

918. (372.) Proof of mailing, publication, and sale. Affidavits made by the secretary of the mailing of notices shall be prima facie evidence thereof. The publication of notices relating to assessments may be proved by the affidavit of the printer, foreman, or principal clerk of the newspaper in which the same was published; and the affidavit of the secretary or auctioneer shall be prima facie evidence of the time and place of sale, of the quantity and particular description of the stock sold, and to whom and for what price, and of the fact of the purchase money being paid. The affidavit shall be filed in the office of the corporation, and copies of the same certified by the secretary thereof shall be prima facie evidence of the fact therein stated. Certificates signed by the secretary and under the seal of the corporation shall be prima facie evidence of the contents thereof.

Cal. Civ. C., § 348.

919. (373.) Waiving proceedings for sale. Action. On the day specified for declaring the stock delinquent, or at any time subsequent thereto and before the sale of delinquent stock, the board of directors may elect to waive further proceedings under this chapter for the collection of delinquent assessments, or any part or portion thereof, and may elect to proceed by action to recover the amount of the assessment and the costs and expenses already incurred, or any part thereof.

Cal. Civ. C., § 349. Mont. Civ. C., § 508.

CHAPTER 3.

CHURCHES AND RELIGIOUS SOCIETIES.

930. (350x.) Incorporation of churches and religious societies. Corporations may be formed for acquiring, holding, or disposing of church or religious society property, for the benefit of religion, for works of charity and for public worship, in the manner hereinafter provided in this chapter.

'01, p. 78; '03, p. 62.

Incorporation of societies not for pecuniary profit, §§ 890-898.
Not required to pay annual license, § 1271.

931. (350x1.) Who may make articles. Any person being the archbishop, bishop, president, trustee in trust, president of stake, president of congregation, overseer, presiding elder, or clergyman, of any church or religious society, who shall have been duly chosen, elected, or appointed, in conformity with the constitution, canons, rites, regulations, or discipline of said church or religious society, and in whom shall be vested the legal title to the property of such church or religious society, may make and subscribe written articles of incorporation in duplicate, acknowledge the same before some officer authorized to take acknowledgment, and file one of such articles in the office of the secretary of state, and retain possession of the other.

'01, p. 78; '03, p. 62.

932. (350x2.) Articles. The articles of incorporation shall specify:

1. The name of the corporation by which it shall be known;
2. The object of said corporation;

3. The estimated value of the property at the time of the making of the articles of incorporation;

4. The title of the person making such articles.

Any corporation so formed shall have power from time to time to alter or amend its articles of incorporation; such amendment shall be made by the corporation sole, and executed by the same person who executed the original articles of incorporation, or by his successor in office, and shall be filed and recorded in the same office and in the same manner as is provided for filing the original articles. '01, p. 78; '03, p. 62; Am'd '17, p. 177.

933. (350x3.) Corporation perfected. Upon making and filing for record articles of incorporation as herein provided, the person subscribing the same, and his successor in office by the name or title specified in the articles, shall thereafter be deemed, and is hereby created, a body politic and a corporation sole, with continual perpetual succession, and shall have power to acquire and possess, by donation, gift, bequest, devise, or purchase, and to hold and maintain property, real, personal, and mixed, and to grant, sell, convey, rent, or otherwise dispose of the same as may be necessary to carry on or promote the objects of the corporation; and shall have authority to borrow money and to give written obligations therefor, and to secure the payment thereof by mortgage or other lien, upon real or personal property, when necessary to promote said objects. '01, p. 78; '03, p. '62.

934. (350x4.) Powers. Such corporation shall have the power to contract and be contracted with, to sue and be sued, plead and be pleaded in all courts of justice, and to have and use a common seal by which all deeds and acts of such corporation may be authenticated. '01, p. 79; '03, p. 62.

935. (350x5.) Deeds, how made. All deeds and other instruments of writing shall be made in the name of the corporation and signed by the person representing the corporation, in the official capacity designated in the articles of incorporation, and be sealed with the seal of the corporation, an impression of which seal shall be filed in the office of the secretary of state. '01, p. 79; '03, p. 63.

936. (350x6.) Articles to be filed. The articles of incorporation, or a certified copy of those filed and recorded in the office of the secretary of state, shall be evidence of the existence of such corporation. '01, p. 79; '03, p. 63.

937. (350x7.) Successor in office. In the event of the death or resignation of any such archbishop, bishop, president, trustee in trust, president of stake, president of congregation, overseer, presiding elder, or clergyman, or of his removal therefrom by the person or body having the authority to remove him, when such person is at the time a corporation sole, his successor in office, as such corporation sole, shall be vested with the title to any and all property held by his predecessor, as such corporation sole, with like power and authority over the same, and subject to all the legal liabilities and obligations with reference thereto. Such successor shall file in the office of the county recorder of each county wherein any of said real property is situated, a certified copy of his commission, certificate or letter of election or appointment. '03, p. 63.

938. (350x8.) Title to property in case of death, resignation, or removal of trustee. In case of the death, resignation, or removal of any such archbishop, bishop, president, trustee in trust, president of stake, president of congregation, overseer, presiding elder, or clergyman who, at the time of his death, resignation, or removal, was holding the title to trust property for the use or benefit of any church or religious society, and not incorporated as a corporation sole, the title to any and all such property held by him, of every nature and kind, shall not revert to the grantor, nor vest in the heirs of such deceased person, but shall be deemed to be in abeyance, after such death, resignation, or removal, until his successor is duly appointed to fill such vacancy, and upon the appointment of such successor, the title to all

the property held by his predecessor shall at once, without any other act or deed, vest in the person appointed to fill such vacancy.

'03, p. 63; Am'd '17, p. 177.

939. Power to convey—title to property outside of state. Any corporation sole created under this chapter, and any such archbishop, bishop, president, trustee in trust, president of stake, overseer, presiding elder, or clergyman of the state of Utah, who holds the title to trust property for the use and benefit of any church or religious society, and is not so incorporated, unless the articles of incorporation or deed under which such corporation or individual trustee holds such property provides otherwise, shall have power, without any authority or authorization from the members of such church or religious society, to mortgage, exchange, sell, and convey the same; and any such corporation sole, or individual trustee, residing in the state of Utah may hold the title to property, real or personal, which is situated in any other state or jurisdiction outside of the state of Utah, which holding shall be subject to the same conditions, limitations, powers, and rights, with the same trusts, duties, and obligations in regard to the property that like property is held for such purposes in the state of Utah. Am'd '17, p. 177.

940. (350x9.) Repeal limited. The repeal of the act of 1901 shall not affect the corporate existence or rights of any corporation created in pursuance of the provisions thereof.

CHAPTER 4.

FOREIGN CORPORATIONS.

945. (351.) Must file articles, etc. All corporations not organized under the laws of this state, before doing business within the state, shall file with the secretary of state and with the county clerk of the county wherein their principal office in the state is situated, a copy of their articles of agreement, certified by the secretary of state of the state in which the company was incorporated; a copy of its by-laws, and, in case of alteration or amendment of said articles of agreement or by-laws, or certificate of increase of capital stock, shall file certified copies of such alterations, amendments, or certificates of increase of capital stock with each of said officers, and shall also, before doing business within the state, by resolution of their board of directors, accept the provisions of the constitution of this state, and also designate some person residing in the county in which its principal place of business in the state is situated, upon whom process issued by authority of or under any law of the state may be served. A copy of such resolutions shall be certified by the president and secretary, under seal of the company, and filed in the office of the secretary of state and in the office of the county clerk of the county in which its principal office is situated. Am'd '11, p. 269.

Foreign corporations shall not be permitted to transact business under more favorable terms than local corporations, Con. art. 12, sec. 6, and note.

Annual corporation license, §§ 1270-1277.

Corporation must have process agent, Con. art. 12, sec. 9.

Corporation must file articles, Con. art. 12, sec. 9, and note.

Foreign Building & Loan Association, § 1109.

Foreign banking corporations, §§ 995, 1017.

Foreign insurance companies, §§ 1141, 1142, 1144, 1186.

Foreign fraternal societies, §§ 3283, 3286, 3287, 3298, 3300.

Exercise eminent domain, § 946.

Revocation for unfair competition and discrimination, § 8334.

Voluntary withdrawal, §§ 950-958.

Decisions on powers of foreign corporations, note to § 947.

In a suit by an employe against a foreign corporation for services performed, the corporation having held itself out as such and having so dealt with plaintiff, will not be permitted to deny its corporate existence. Liter v. Ozokerite Mining Co., 7 U. 487; 27 P. 690.

Corporations are not citizens within the meaning of art. IV, sec. 2, U. S. const., and any recognition of their existence in other states is a matter of comity, not of right. National Merc. Co. v. Mattson, 45 U. 155; 143 P. 223.

946. Eminent domain. Foreign corporations, upon complying with the provisions of the laws of this state prescribing the conditions upon which such corporations are authorized to do business in this state, shall have the

same powers of eminent domain as are granted by law to domestic corporations. '09, p. 16.

947. (352.) Failure to comply. Penalty. Any such corporation failing to comply with the provisions of the § 945 shall not be entitled to the benefits of the laws of this state relating to corporations, and shall not sue, prosecute, or maintain any action, suit, counterclaim, cross-complaint, or proceeding in any of the courts of this state, on any claim, interest, or demand arising, or growing out of, or founded on any contract, agreement, or transaction made or entered into in this state by such corporation or by its assignor, or by any person from, through, or under whom it derives its interest or title or any part thereof; and shall not take, acquire, or hold title, possession, or ownership of property, real, personal, or mixed, within this state; and every contract, agreement, and transaction whatsoever made or entered into by or on behalf of any such corporation within this state, or to be executed or performed within this state, shall be wholly void on behalf of such corporation and its assignees and every person deriving any interest or title therefrom, but shall be valid and enforcible against such corporation, assignee, and person; and any person acting as agent of a foreign corporation which shall neglect or refuse to comply with the foregoing provisions shall be deemed guilty of a misdemeanor, and shall be personally liable on any and all contracts made in this state by him for or on behalf of such corporation during the time that it shall be so in default; *provided,* that this section shall not be held to apply to persons acting as agents for foreign corporations for a special or temporary purpose or for a purpose not within the ordinary business of such corporations, nor shall it apply to attorneys-at-law as such. Am'd '15, p. 169.

The bringing of a suit by a foreign corporation not engaged in corporate business in the state, to secure its legal rights, is not "doing business," within the constitution and laws of this state.

Barse Livestock Co. v. Range V. C. Co., 16 U. 59; 50 P. 630.

A foreign corporation failing to comply with the provisions of this section is not entitled to the benefit of the laws of this state relating to corporations.

R. G. W. Ry. Co. v. Telluride Power Co., 23 U. 22; 63 P. 995; appeal dismissed 187 U. S. 569.

A foreign corporation coming into this state cannot bring with it powers with which it is not endowed in the state where created.

Id.

By complying with the requirements of the state laws, foreign corporations are accorded the same, and no other or greater, rights and privileges and the same protection of the laws, as domestic corporations, and the making and enforcement of their contracts are governed by the same rules.

Hiskey v. Pacific States S. L. & B. Co., 27 U. 409; 76 P. 20.

Contracts of a foreign corporation made while doing business in the state, without complying with the constitution and laws of the state respecting such corporations, can be enforced in the courts of this state, unless expressly declared unenforcible. (Overruling Booth & Co. v. Weigand, 28 U. 372; 79 P. 570.)

Booth v. Weigand, 30 U. 135; 83 P. 734.

CHAPTER 5.

VOLUNTARY WITHDRAWAL OF FOREIGN CORPORATIONS.

('15, p. 170.)

950. Foreign corporation may withdraw. Any foreign corporation, other than an insurance corporation, doing business in this state by virtue of the provisions of § 945 may be permitted to withdraw from the state by decree of the district court of the county wherein its office or principal place of business is situated, upon its voluntary application for that purpose.

951. Application. The application must be in writing, and must set forth:

1. That the withdrawal of the corporation from the state was resolved upon by a majority vote of the directors of the company;

2. That all claims of the state for fees, taxes, penalties, and costs against the corporation have been satisfied and discharged;

3. That all other claims and demands against the corporation have been satisfied and discharged.

952. Id. By whom made. Verification. The application must be made by or in behalf of the board of directors, and must be verified in the same manner as a complaint in a civil action.

953. Order to file. Notice by publication. If the judge is satisfied that the application is in conformity with the provisions of this chapter, he shall order that it be filed with the clerk, and that the clerk give not less than thirty nor more than sixty days' notice of the application, by publication in some newspaper having general circulation in the county; *provided,* that the clerk shall serve special notice of such application upon the secretary of state by registered mail.

954. Objections to application. At any time before the expiration of the time of publication, any person may file his objection to the application.

955. Hearing. Notice to objectors. Decree. After the time of publication has expired, the court may, upon five days' notice to the persons who have filed objections, or without further notice if no objections have been filed, proceed to hear and determine the application; and, if all the statements therein made are shown to be true, shall grant a decreè authorizing the corporation to withdraw from the state.

956. Judgment roll. Appeal. The application, notice, proof of publication, objections, if any, and decree shall constitute the judgment roll; and from the judgment an appeal may be taken as from judgments in other civil actions.

957. Certification of records to secretary of state. The clerk, upon the granting of such decree, shall certify a copy of the application, notice, proof of publication, objections, if any, and decree to the secretary of state; and, when an appeal is taken, he shall likewise certify a copy of such appeal and a copy of all subsequent instruments, orders, and records relating thereto.

958. Insurance companies may withdraw. Any foreign insurance corporation doing business in this state by virtue of the provisions of § 945, may withdraw from doing business in the state by filing with the insurance commissioner a written notice of its intention so to do. Such notice shall be in the form of a resolution regularly passed by the board of directors of such corporation, and shall be duly attested by the president or by some other executive officer of the corporation competent to make such attestation. Such notice shall also set forth the decision of the corporation to cease and discontinue from soliciting and writing new business within the state, and shall designate some person residing within the state upon whom process issued by authority of or under any law of the state may be served. Upon receipt of such notice, the insurance commissioner, if the withdrawing corporation is in good standing with the state and all claims of the state against it have been satisfied and discharged, shall receive and file the notice and make it a matter of record in his office; and shall certify a copy of such notice of withdrawal to the secretary of state, who shall file the same and make it a matter of record in his office.

CHAPTER 6.

STATE BANKING DEPARTMENT.

('11, p. 30.)

971. Bank commissioner. Appointment. Term. Bond. Salary. There is hereby created a state banking department. The chief officer of such department shall be the bank commissioner, who shall be appointed by the governor, by and with the advice and consent of the senate, and shall hold his office for four years and until his successor shall be appointed and qualified. Before entering upon his duties, he shall qualify by taking and sub-

scribing to the constitutional oath of office and execute to the state a good and sufficient bond in the sum of $10,000, to be approved by the state board of examiners; said oath and bond to be filed with the secretary of state. Said commissioner shall receive a salary of $2500 per annum, and his actual and necessary traveling expenses, payable quarterly as the salaries of other state officers. Am'd '13, p. 57.

§§ 971-978 are applicable to personal credit banks, § 1064.
This chapter applicable to land mortgage banks, § 1034.
Commissioner's duty respecting building and loan companies, §§ 1100-1108; land mortgage banks, §§ 1032-1036, 1050, 1051; personal credit banks, §§ 1062, 1064, 1066, 1082; loan trust and guaranty companies, §§ 1200, 1202; regulation of small loans, §§ 4380-4383, 4389.
Relations with national bank examiner, § 977.
Approves purchase of stock in another bank, § 976.
May require banks to pay borrowed money, § 1006.
Passes on reorganizations, § 1009.
Approves articles of incorporation, § 1017.

972. Id. Eligibility. No person shall be appointed bank commissioner who is interested, either directly or indirectly, in any commercial bank, savings bank, or trust company in this state. Am'd '13, p. 57.

973. Bank examiner. Appointment. Bond. Salary. The governor, by and with the advice and consent of the senate, shall also appoint one or more examiners who shall qualify by subscribing to the constitutional oath of office and giving a bond to the state in the penal sum of $5000, to be approved by the state board of examiners and filed with the secretary of state. He shall receive a salary of $2000 per annum, payable quarterly, and his actual and necessary traveling expenses. Such examiner shall not be interested, directly or indirectly, in any bank in the state, either as director or stockholder, officer or employe. He shall perform such duties as are prescribed by this chapter, or that may be assigned him by the commissioner. Am'd '13, p. 58.

974. Institutions subject to examination. All banks organized under the laws of this state, and all private banks doing business within the state, all loan, trust, and guaranty associations, and all building and loan associations doing business within the state, shall be subject to examination by the commissioner or examiner. Am'd '13, p. 58; '15, p. 12.

975. Duties of commissioner and examiner. The bank commissioner, or the examiner, shall visit and examine every savings bank at least once in each year, and every bank other than savings banks, and every building and loan association, at least twice in each year. At every such examination careful inquiry shall be made as to the condition and resources of the institution, the mode of conducting and managing its affairs, the official action of its directors, the investment and disposition of its funds; whether or not it is violating any of the provisions of law relating to banking corporations and banks, and as to such other matter as the commissioner may prescribe; it being understood that until otherwise provided by law, the commissioner shall personally assist in making the examinations provided for in this section. Am'd '13, p. 58; '15, p. 12.

976. Id. Power to administer oath. The bank commissioner, or bank examiner, in the performance of his duties, may examine on oath, which he is hereby empowered to administer, any of the bank officers, employes, proprietors, or other persons, and may compel the attendance of witnesses and the production of books and papers of the bank, association, or corporation. Upon the refusal of any such bank, association, or corporation to produce its books or papers, the commissioner or examiner may apply to the district court, which is hereby empowered to compel the attendance of such witnesses and the production of such books and papers. Am'd '13, p. 58.

977. Id. Relations with national bank examiner. Where state and national banks are closely affiliated the commissioner or examiner may disclose to the national bank examiner the true condition of the allied state bank, provided the national bank examiner is permitted to and will, upon request of the commissioner or bank examiner, disclose the same information respecting the allied national bank. Am'd '13, p. 58.

978. Fees for examinations. For each examination, as provided by this

chapter, the bank examined shall pay the commissioner or examiner making the examination, to be by the commissioner deposited in the state treasury to the credit of the general fund, a fee as follows: When the aggregate assets of the institution are $100,000 or less, $20; when more than $100,000, but not to exceed $300,000, $30; when more than $300,000, but not to exceed $500,000, $35; when more than $500,000, but not to exceed $1,000,000, $45; when more than $1,000,000, but not to exceed $3,000,000, $55; when more than $3,000,000, but not to exceed $10,000,000, $80; when more than $10,000,000, but not to exceed $15,000,000, $100; when more than $15,000,000, but not to exceed $25,000,000, $150; when more than $25,000,000, $200.

Am'd '13, p. 59; '15, p. 13.

979. (374.) Commercial and savings banks. Corporations to conduct commercial or savings banks or banks having departments for both such classes of business may be formed under the provisions of chap. 1, of title 19, Compiled Laws of Utah, 1917 (§§ 860-899), respecting corporations for pecuniary profit, and all the rights, privileges, and powers, and all the duties and obligations, of such corporations and the officers and stockholders thereof shall be as provided in said chapter, except as in this chapter otherwise provided; and whenever it may be necessary and lawful to assess the full paid stock of any banking corporation such assessment shall be made and enforced as provided in the articles or by-laws, or if not provided therein, in the manner prescribed in chap. 2 of title 19, Compiled Laws of Utah, 1917 (§§ 900-919). '11 p. 31.

Fraud in organization, § 8366. Restrictions on name, § 1022.

980. (375.) Capital stock. Banking corporations shall in no wise have to exceed $1,000,000 capital stock, nor shall the subscribed capital stock of any bank be less than $20,000, and in cities having from 5000 to 25,000 inhabitants not less than $50,000, and in cities having from 25,000 to 50,000 inhabitants not less than $75,000 and in cities having more than 50,000 inhabitants not less than $100,000; nor shall the certificate of incorporation issue until it shall appear to the secretary of state by affidavit of at least three of the incorporators that the proposed corporation has the requisite amount of subscribed capital stock and that at least fifty per cent of the capital stock of the corporation has been paid in cash; nor shall the secretary of state issue his certificate of amendment to any banking corporation until it shall be made to appear to him by affidavit that at least twenty-five per cent of the increased capital has actually been paid in cash; *provided,* that when banks shall acquire deposits exceeding $5,000,000 their capital and surplus shall not be less than $500,000.

Penalty for withdrawing capital stock, § 8368.
Fraud in subscriptions, § 8665.
Fraud in increase, § 8666.
May purchase land mortgage bank bonds, § 1059.
Penalty for insolvent bank's receiving money, § 8369.

981. (376.) Commercial bank defined. The term commercial bank, when used in this chapter, means any bank authorized by law to receive deposits of money, deal in commercial paper, or to make loans thereon, and to lend money on real or personal property, and to discount bills, notes, or other commercial paper, and to buy and sell securities, gold and silver bullion or foreign currency or bills of exchange.

A writing executed by the president of the bank guaranteeing the payment of rent by a drug company to the plaintiff was ultra vires. Tracy Loan & Trust Co. v. Merchants' Bank, 50 U. —; 167 P. 353.

Although the bank was not liable on the ultra vires contract of guaranty, it should be required to account for any securities which it holds to indemnify it against loss. Id.

982. Savings bank defined. The term savings bank, when used in this chapter, means a bank organized for the purpose of accumulating and loaning its funds; receiving deposits of money; loaning, investing, and collecting the same with interest and repaying depositors with or without interest and having power to invest said funds in such property, securities, and obligations as may be prescribed by its board of directors, and to pay a stipulated rate of interest on deposits made for a stated period or upon special terms.

May purchase land mortgage bank bonds, § 1057.

983. Unpaid subscriptions. Reduction of capital. The unpaid subscriptions of the stockholders of any bank shall be paid in cash in instalments of not less than ten per cent per month until the full amount of the subscribed capital stock shall be fully paid. Whenever any shareholder or his assignee fails to pay any instalment of stock when the same is required as provided above, the directors of such bank may sell at public auction, after giving two weeks' previous notice of such sale in a newspaper published in the county where the bank is located, or, if no newspaper be published therein, then in any newspaper having general circulation in such county, so much of the stock of such delinquent shareholder as may be necessary to pay the amount due thereon, with the expense of advertising the sale. The sale shall be made to the highest bidder, and the excess, if any, shall be paid to the delinquent shareholder. If such stock shall not bring the amount due thereon, with the costs of advertising the sale, the amount previously paid shall be forfeited to the association, and such stock shall be sold, as the board of directors may order, within six months from the date of forfeiture, and if not sold shall be canceled and deducted from the capital stock of the association; if such cancellation and reduction shall reduce the capital of the association below the minimum required by law, the capital stock shall, within thirty days from the date of such cancellation, be increased to the required amount, in default of which a receiver may be appointed, upon the application of the attorney-general, in the manner provided by law, to close up the business of the bank.

984. (379.) Loans to officers. No officer or director of any banking corporation organized or existing under the laws of Utah shall borrow money from such bank to exceed fifteen per cent of its capital stock and surplus; and the stock of the association shall not be taken as security for any such loan. The office of any officer who shall act in contravention of the provisions of this section shall thereupon become vacant; and any loan he shall have made in contravention thereof shall become immediately due and payable; *provided,* that no bank shall loan any of its funds to any of its officers or directors unless he furnishes security in at least double the amount of the loan made; *provided, further,* that such loan shall first have been approved by a two-thirds vote of its board of directors, or executive committee, on which vote the borrowing officer or director shall not participate.

985. (380.) Loans to persons, corporations, etc. The total liability to any banking corporation of any person or any one company, corporation, or firm, for money borrowed, shall at no time exceed fifteen per cent of the amount of the capital stock paid in and of the surplus earned and set aside as a surplus fund of such bank; but the discount of bills of exchange drawn in good faith against existing values, and the discount of commercial or business paper actually owned by the person negotiating the same, shall not be construed as borrowed money. Deposits of commercial banks, with commercial banks, or the commercial department of banks having commercial and savings departments, on open accounts to facilitate business transactions shall be permitted and shall not be construed as loans.

986. Stock in other corporations. Any bank or loan, trust, and guaranty company or association, organized under the laws of the state of Utah, may purchase, own, hold, and sell or otherwise dispose of any of the shares of the capital stock of any other bank, loan, trust, and guaranty association or other corporation; *provided,* such purchase shall be authorized by the executive committee and approved by the board of directors; and in case the purchase is of stock in any other banking corporation the approval of said purchase must also be had from the state bank commissioner; and *provided, further,* that nothing in this section shall be so construed as to permit the establishment, maintenance, or control of any branch bank or loan, trust, or guaranty company in the state. All acts or parts of acts in conflict with this section are hereby repealed to the extent of such conflict. '15, p. 53.

Giving note for stock purchased prohibited, § 8368.

987. (381.) Minors. Minors may in their own names make and draw deposits and draw dividends and give valid receipts therefor.

988. (382.) Liability of stockholders. The stockholders in every corporation and joint stock association for banking purposes, in addition to the amount of the capital stock subscribed and fully paid by them, shall be individually responsible for an additional amount equal to the amount of their stock in such corporation, for all debts and liabilities of every kind.

989. (383.) Amendments. No change shall be made in the articles of association of any banking corporation by which the rights, remedies, or securities of existing creditors of the association shall be impaired.

990. Borrowing by savings banks. No savings bank shall borrow money, or pledge or hypothecate any of its securities, except to meet the immediate demands of its own depositors, and then only in pursuance of a resolution adopted by a vote of a majority of its board of directors or executive committee duly entered upon their minutes, wherein shall be recorded the ayes and nays upon each vote; *provided, however,* that savings banks may borrow the public moneys of the state, counties, cities, and county school districts, and towns and receive such public moneys on deposit.

991. Certificates of deposit issued by savings banks. Savings banks may issue general certificates of deposit, which are transferable, as in other cases, by endorsement and delivery; may issue, when requested by the depositor, special certificates acknowledging the deposit by the person therein named of a specified sum of money, and expressly providing on the face of such certificate that the sum so deposited and therein named may be transferred only on the books of the bank; payment thereafter made by the bank to the depositor named in such certificate, or to his assignee named upon the books of the bank, or, in case of death, to the legal representative of such depositor, of the sum for which such special certificate was issued, shall discharge the bank from all further liability on account of the money so paid.

992. Withdrawal of savings deposits. Limitation on loans. Savings banks may prescribe by their by-laws, or by contract with depositors, the time and conditions on which repayment is to be made to depositors, except as in this chapter otherwise prohibited; but whenever there is any call by depositors for repayment of a greater amount than the bank may have disposable for that purpose, the directors or officers thereof must not make any new loans or investments of the funds of the depositors or of earnings thereof until such excess of call has ceased.

993. Deposits by savings banks with commercial banks. Deposits by savings banks with commercial banks on open account, to facilitate business transactions, as provided in this chapter, shall be permitted, and shall not be construed as loans.

994. Private or partnership banks prohibited. The establishing or maintenance of private or partnership banks is hereby expressly prohibited; *provided,* that all such banks now in operation shall retire from business or incorporate under the provisions of this chapter within a period of five years from and after the approval of this chapter. (Approved March 30, 1911.)

995. Foreign banks. No foreign corporation shall transact a banking business in this state without first complying with all the requirements of the laws of this state relating to banks, as defined in this chapter, and without having the capital paid up in this state, as required by this chapter and without having complied with the other laws of this state relating to foreign corporations.

996. (378.) Lawful reserve. Commercial banks. Commercial banks shall at all times have on hand in lawful money of the United States an amount equal to fifteen per cent of the aggregate amount of their deposits and demand liabilities. The amount thus to be kept on hand shall be called its lawful money reserve. Not less than one-eighth of such lawful money reserve

shall consist of lawful money of the United States on hand, and the remainder of such lawful money reserve in credits in solvent banks other than savings banks; *provided,* that in cities having a population of 50,000 or more a lawful money reserve of not less than twenty per cent shall be maintained. If the lawful money reserve of any bank shall fall below the amount required by this section, such bank shall not increase its loans or investments until its lawful money reserve has been restored, but may discount bills of exchange payable on sight. The bank commissioners shall notify any bank, whose lawful money reserve shall be below the amount herein required, to make good such reserve, and, if it shall fail for thirty days thereafter to make good such reserve, such bank may be deemed insolvent and may be proceeded against under the provisions of this chapter.

997. Id. Savings banks. Savings banks must carry in cash, or its equivalent, an amount equal to ten per cent of its deposit liabilities, of which at least one-fourth must be in lawful money of the United States and the remainder in credits in solvent banks other than savings banks. The amount thus carried shall be called the lawful money reserve. No new loans shall be made during any impairment of the lawful money reserve.

998. Id. Banks having commercial and savings departments. Banks having both commercial and savings departments shall maintain a lawful money reserve for each department as provided in the two preceding sections.

999. Directors. Eligibility. No person shall be eligible for election as a director of a bank unless he is a stockholder of the bank, owning, in his own right, shares thereof of the par value of at least $200, provided that no person shall be eligible for election as a director of a bank situated in cities of the first and the second class, unless he is a stockholder of the bank, owning, in his own right, shares thereof of the par value of $500; and every person elected to be a director, who, after such election, shall cease to be the owner, in his own right, of the amount of stock aforesaid, shall then cease to be a director of the bank, and his office shall then become vacant.

1000. Id. Oath of office. Each director of a bank, when appointed or elected, shall take an oath that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of such bank, and will not knowingly violate or wilfully permit to be violated any of the provisions of law applicable to such bank, and that he is the owner, in good faith and in his own right, of the shares of stock of the par value required by § 999, subscribed by him or standing in his name on the books of the bank, and that the same is not hypothecated or in any way pledged as security for any loan or debt; and, in case of re-election or reappointment, after July 1, 1912, such oath shall state that such stock was not hypothecated or in any way pledged as security for any loan or debt during his previous term. Such oath shall be subscribed by the director and shall be immediately filed in the office of the county clerk, as required by law.

1001. Id. Monthly examinations. The board of directors or a committee thereof consisting of not less than three members of any bank incorporated under this chapter shall meet at least once in three months, and shall at such meeting examine the loans and investments made by the officers thereof since the last meeting of such board or committee, and shall review the other transactions of such bank. It shall cause to be spread upon the records of such bank, in the record book thereof, which shall be kept for that purpose, the minutes of such meeting and all its actions thereat, including the approval of all loans required to be approved by the board of directors, which minutes shall be signed by at least the presiding officer and the secretary of such meeting.

1002. (388.) Id. Yearly examinations. Reports. It shall be the duty of the board of directors of every bank to examine, or cause to be examined, fully into the books, papers, and affairs of the bank of which they are directors, and particularly into the loans, discounts, and overdrafts thereof, with a

special view to ascertaining the value and security thereof, and of the collateral security, if any given, in connection therewith, and into such other matters as the bank commissioner or bank examiner may require, such examinations to be made at least once a year. No such subsequent yearly examination shall be made within three months of the next preceding yearly examination. Within ten days after the completion of such examination, a report in writing thereof shall be made to the board of directors of such bank and placed on file with the records of said bank, and shall be subject to examination by the bank commissioner or bank examiner.

1003. (389.) What reports shall contain. Such reports shall particularly contain a statement of the assets and liabilities of the bank examined, as shown by its books, together with any deductions from the assets or additions to liabilities which such directors, or committee or examiner, after such examination, may recommend. It shall also contain a statement, in detail, of loans, if any, which in their opinion are worthless or doubtful, together with their reasons for so regarding them; also a statement of loans made on collateral security, which in their opinion are insufficiently secured, giving in each case the amount of the loan, the name and market value of the collateral, if it has any market value, and if not, a statement of that fact, and its actual value, as nearly as possible. Such report shall also contain a statement of overdrafts, of the names and amounts of such as they consider worthless or doubtful, and a full statement of such other matters as affect the solvency and soundness of the bank. If the directors of such bank shall wilfully fail to make, or cause to be made, and file such report of examination in the manner and within the time specified, the directors of such bank shall be guilty of a misdemeanor.

1004. Dividends. Reserve fund. The board of directors of any bank may declare a dividend of so much of the net profits of the bank, after providing for all expenses, losses, interest, and taxes accrued or due from said bank, as they shall judge expedient; but before any such dividend is declared not less than one-tenth of the net profits of the bank for the preceding half year, or for such period as is covered by dividend, shall be carried to a surplus fund until such surplus shall amount to twenty per cent of its capital stock.

Misconduct in declaring dividends, penalty, § 8368.

1005. Branch banks prohibited. The business of every banking institution shall be conducted only at its banking house, and no bank in this state, or any loan, trust, or guaranty company or trust company conducting a banking business, or any officer, director, or agent thereof, shall open, establish, or maintain any branch bank or office, and shall receive deposits and pay checks only at its banking house; *provided,* that all branch banks or offices in operation at the time of the approval of this chapter shall be closed and discontinued within one year from the date this chapter goes into effect.

Any bank or officer thereof violating any of the provisions of this section is guilty of a misdemeanor.

1006. Borrowing restricted. Cannot borrow within state on certificates of deposit. Overdrafts. All certificates or evidences of deposit made by the proper officers of any bank shall be as effectual to bind any bank as if made under the common seal thereof; but said bank shall not issue any bill, note, or certificate intended to circulate as money, and no such bank shall issue post notes. No bank or bank officer shall give preference to any depositor or creditor by pledging the assets of the bank as collateral security; *provided,* that commercial banks may borrow money for temporary purposes, and may pledge assets of the bank not exceeding fifty per cent in excess of the amount borrowed as collateral security therefor; *provided, further,* that whenever it shall appear that a bank is borrowing habitually for the purpose of reloaning, the bank commissioner may require such bank to pay off such borrowed money. Nothing herein contained shall prevent any bank from rediscounting in good faith and endorsing any of its negotiable notes. It shall be unlawful

for any bank to issue its certificate of deposit for the purpose of borrowing money from any bank within this state. Neither shall any bank make partial payments upon certificates of deposit. In no case shall an overdraft of more than ninety days' standing be allowed as an asset of the bank unless amply secured; *provided,* that all outstanding demand certificates of deposit for money borrowed issued by any bank prior to the date this chapter goes into effect must be paid and canceled within three months from the date this chapter goes into effect, and all such outstanding time cerificates issued by any bank for the purpose of borrowing money must be paid at maturity; *provided,* that the bank commissioner may, in his discretion, permit an extension of time for such payment.

1007. (390.) Receiver. Grounds for application. How appointed. Duties. If the bank commissioner shall become satisfied that the capital of any bank has become impaired or reduced below the amount required by law, and such impairment or reduction shall not have been made good, as by him required, and the order and requisition of the bank commissioner in that regard shall not have been complied with, or if the bank commissioner shall have become satisfied that any bank has refused to pay its deposits in accordance with the terms on which such deposits were received, if received in accordance with the provisions of this chapter, or if any bank has violated any of the provisions of this chapter, or is conducting its business in an unsafe or unauthorized manner, or if any bank shall refuse to submit its books and papers and concerns to the inspection of the bank commissioner, his deputy, or any examiner, or if any officer of such bank shall refuse to be examined under oath touching the concerns of the bank, or if, from any examination made or report herein provided for, the bank commissioner shall conclude that such bank is in an unsound or unsafe condition to transact the banking business, so that it is unsafe and inexpedient to continue same, the bank commissioner shall communicate such facts to the attorney-general, and, with his concurrence, application may be made by the attorney-general, in behalf of the bank commissioner, to a court of competent jurisdiction for the appointment of a receiver of such bank. Upon presentation of said application to said court, and upon its being made satisfied that the capital stock of said bank has become impaired or reduced below the amount required by law, and that such impairment or reduction has not been made good or the order of the bank commissioner in that respect complied with, or that it has refused to pay its deposits as hereinbefore set forth, or that it has violated any provisions of this chapter, or is conducting its business in an unsafe or unauthorized manner, or that it has refused to submit its books, papers, and concerns to inspection as aforesaid, or its officer or officers have refused to be examined under oath touching its affairs, or that it is in an unsafe or unsound condition to transact the banking business so that it would be unsafe and inexpedient for it to continue same, the said court shall immediately appoint a competent person as receiver, and shall determine his bond and prescribe his duties, and may make such further order as shall seem proper; *provided,* that, pending such action if it shall be necessary, the bank commissioner, his deputy, or a bank examiner may forthwith take possession of the books, records, and assets of every description of such bank, and said books, records, and assets shall not be subject to any levies and attachments. The receiver, if any be appointed, shall, under the direction of the court, take possession of the books, records, and assets of every description of such bank, collect all debts, dues, and claims belonging to it, and sell or compound all bad or doubtful assets, and sell all the real and personal property of such bank on such terms as the court shall direct, and may, if necessary to pay the debts of such bank, enforce all individual liabilities of the stockholders, and shall make a report to the bank commissioner of all his acts and proceedings.

1008. Reorganization. Whenever arrangements shall be made by any such bank or the stockholders thereof by reorganization or otherwise, to the

satisfaction of the bank commissioner, to pay all creditors thereof, aside from the stockholders, and to make good the impairment of the capital stock in all particulars, and to pay the expenses of the receivership, if any have accrued, such facts shall be presented to the court, and the court may order the property to be turned over to the bank or to such stockholders, and shall discharge the receiver.

1009. Reports. Every banking corporation, private banker, or partnership bank, domestic or foreign, transacting a banking business in this state, shall make to the bank commissioner not less than four reports during each year, according to the form which may be prescribed by him, which report shall be verified, in the case of banking corporations, by the oath or affirmation of the president or cashier and attested by at least three directors, and, in the case of private or partnership banks, by the oath or affirmation of the proprietor, a partner, a member, or by the business manager. Such report shall state the condition of the bank at the close of business on any past day, within three months before the date of the call specified by the bank commissioner, and shall be transmitted to his office within five days after the receipt of the request therefor; and a copy thereof, duly certified by the bank commissioner, shall be published by the bank making the same, in some newspaper having general circulation in the county where such bank is situated, proof of such publication to be filed in the office of the bank commissioner within thirty days from the time of the receipt of the certified copy prepared by the bank commissioner. The bank commissioner shall have power to call for special reports from any such banking corporation, private or partnership banks whenever in his judgment the same shall be necessary.

1010. Failure to report. Every banking corporation, private or partnership bank which shall fail or neglect to make any report required by the provisions of this chapter shall be subject to a penalty of $50 for each day's delay in transmitting such report, to be recovered by and for the state in a civil action.

1011. Unauthorized banking. No person, firm, company, copartnership, or corporation, not subject to the supervision of the bank commissioner and not required to report to him by the provisions of this chapter, other than loan, trust, and guaranty companies, shall make use of any office sign in the place where such business is transacted having thereon any artificial or corporate name, or other words indicating that such place or office is the place or office of a bank, or that deposits are received there, or that payments are made on check, or that any other form of banking business is transacted; nor shall such person or persons, firm, company, copartnership, or corporation make use of or circulate any letter heads, bill heads, blank notes, blank receipts, certificates, or circulars, or any printed or written, or partly written and partly printed, paper whatever, having thereon any artificial or corporate name, or other word or words indicating that such business is the business of a bank, savings bank, or trust company. Every person, firm, company, copartnership, or officer of a corporation violating the provisions of this section shall be guilty of a misdemeanor.

1012. Id. Any individual, firm, or partnership, company, corporation, or foreign bank holding itself out to the public as receiving money on deposit, whether evidenced by certificate, promissory note, or otherwise, shall be considered as doing a banking business and subject to the provisions of this chapter as to such banking business.

1013. Conversion of national to state bank. Whenever any national bank, authorized to dissolve, has taken the necessary steps for that purpose, a majority of its directors upon authority in writing of the owners of two-thirds of the capital stock, and the approval of the bank commissioner, may reorganize under the provisions of this chapter, and in addition to the other requirements of law the articles of incorporation of such bank shall state the authority derived from the stockholders of such national bank, and after full compli-

ance with the other provisions of this chapter relating to the organization of corporate banks, it shall become a legal state bank, and thereupon the assets, real and personal, of said dissolved national bank, subject to its liabilities not liquidated under the federal law, shall vest in and become the property of such state bank.

1014. Reorganization of state bank as national bank. Any bank organized under this chapter may reorganize under the laws of the United States as a national bank. As soon as such bank shall have obtained the certificate from the comptroller of the currency authorizing it to commence business under the United States banking law, such reorganized bank shall take and hold all of the assets, real and personal, of such bank, organized under this chapter, subject to all liabilities existing against such bank organized under this chapter at the date of such reorganization, and shall immediately notify the bank commissioner of such reorganization and transfer.

1015. National banks. This chapter does not apply to banks organized under the national banking act of the United States.

1016. Construction. All the general powers and privileges, as well as the general restrictions and limitations provided in this chapter, and applied to the corporations to be organized under and regulated by this chapter, by the general designation of banks, shall be understood and construed to include commercial banks, savings banks, and those combining both branches of business, also private and partnership banks. '11, p. 30.

1017. Articles of association to be approved by bank commissioner. The secretary of state shall not issue a certificate of incorporation to any bank, authorizing it to do business in this state, until its articles of association or agreement shall have been approved by the bank commissioner; *provided,* that the bank commissioner may withhold his approval if he finds that the incorporators are not reliable and of good standing in their community, or are professional bank incorporators, or if the locality where the proposed bank is to operate is well supplied with banks, or if the incorporators have not fully complied with the provisions of this chapter; *provided, further,* that all persons feeling themselves aggrieved by the action, decision, or ruling of the bank commissioner may appeal to the state board of examiners, and the decision of said board shall be final. Am'd '13, p. 21.

BANK DEPOSITS IN TWO NAMES.

1020. Disposition of deposits. When a deposit has been made, or shall hereafter be made, in any bank, savings bank, banking institution, or trust company transacting business in this state, in the names of two persons, and payable to either or the survivor, such deposit, or any part thereof, or any interest or dividend thereon, may be paid to either of said persons whether the other be living or not; and the receipt or acquittance of the person so paid shall be valid and sufficient release and discharge to the bank for any payment so made. '13, p. 9.

CHAPTER 7.

CO-OPERATIVE LAND MORTGAGE BANKS.

('15, p. 221.)

1021. Definition. As used in this chapter, the phrase "land mortgage bank" shall mean a corporation organized as provided in this chapter, for the purpose of making loans upon irrigated agricultural lands in this state.

1022. Exclusive use of certain words. No person, partnership, association, or corporation, except corporations formed under the provisions of this chapter, shall hereafter transact any business under any name in which shall occur the words "land" and "bank" or the words "mortgage" and "bank."

1023. Who may organize. Capitalization. Loan of capital. Any number of adult resident freeholders of the state, not less than ten, may associate to establish a land mortgage bank on the terms and conditions and subject to the liabilities hereinafter prescribed. The aggregate amount of the capital stock of any such association shall be not less than $10,000; *provided,* that all moneys derived from the sale of capital stock may be loaned at a rate of interest not to exceed eight per cent per annum.

1024. Articles of incorporation. The persons so associating shall make, sign, and acknowledge written articles of incorporation containing:

1. The declaration that they are associated for the purpose of forming a land mortgage association under the provisions of this chapter.
2. The name of such association, which shall be in no material respect similar to any other association in the same county;
3. The name of the particular village, town, city, and county where such association is to be located;
4. The amount of capital stock, which shall be divided into shares of $10 each;
5. The period for which such association is organized.

1025. Organization. Board of trustees. Terms. Vacancies. The incorporators shall, at their first annual meeting, elect by ballot from their number a board of trustees, which shall consist of not less than six members, who shall be divided into three classes, as follows: One-third shall be elected for one year; one-third for two years, and one-third for three years. After the election of the first board of trustees, every subsequent trustee shall be elected by the stockholders at the annual meeting for the full term of three years, unless elected to fill a vacancy, in which case he shall be elected to serve the unexpired portion of the term in which such vacancy occurs.

1026. Officers. Committee on loans. The trustees shall, within ten days after their election, organize by electing from among their members a president, a vice-president, a treasurer, and a secretary. They shall also elect from among their members a committee on loans, consisting of three to five members, as they shall determine. All of said officers shall hold their offices for the term of one year, or until their successors are elected and qualified.

1027. Powers and duties of trustees. The board of trustees shall control the conduct of the business of the association. It is especially bound to perform the following duties:

1. To cause the accounts of the association to be audited once each quarter by the auditing committee;
2. To present to each annual meeting a statement of the activities of the association during the preceding year, and a summary of its financial condition, together with comments and recommendations for the future conduct of its business;
3. To cause all officers to perform their duties promptly and efficiently;
4. To cause all defaults in performance of obligations to the association to be penalized and continuation of defaults to cease so far as possible;
5. To administer the affairs of the company in the most efficient manner practicable.

1028. Committee to approve loans. The committee on loans shall approve in writing an application for a loan or advance before the same shall be granted by the land mortgage bank. Every application for a loan shall be made in writing, and shall state the purpose for which the loan is desired. No loan shall be made unless the committee on loans is satisfied that it promises to benefit the borrower, nor unless it has received the approval in writing of a majority of the members of the committee, but an applicant for a loan may appeal to the board of trustees from the decision of the committee on loans.

1029. Auditing committee. The incorporators shall, at their first annual

meeting, elect by ballot from their number an auditing committee, no one of whom shall be an officer of such association. Thereafter an auditing committee shall be elected by the stockholders at each annual meeeting.

1030. Id. Powers and duties. 1. The auditing committee shall quarterly inspect the securities, cash, and accounts of the corporation;

2. At the annual meeting of the stockholders the auditing committee shall submit their report, including the results of said audit, together with such recommendations as they have to offer, and an epitome of their proceedings since the last previous meeting. A copy of such report shall be forwarded to the bank commissioner.

1031. Id. Suspension of trustee or officer. Mismanagement. 1. At any time the auditing committee, by unanimous vote, may suspend any trustee, officer, or member of the committee on loans; and by a majority vote may call a meeting of the stockholders to consider any violation of statutes relative to such corporation or of the by-laws, or any practice of the corporation which in the opinion of said committee is unauthorized;

2. Within seven days after the suspension of any trustee, officer, or member of the committee on loans, the auditing committee shall cause notice to be given of a meeting of the stockholders to take such action relative to such suspension as may seem necessary. The auditing committee shall fill vacancies in their own number until the next annual meeting.

1032. Treasurer to give bond. Record. Custody. Surety. The treasurer shall give a bond for the faithful discharge of his duties, with such surety and in such amount as shall be approved by the trustees. All bonds so given shall be recorded at length in the books of the land association, and shall be subject at all times to the inspection of the stockholders. The bond itself immediately upon having been recorded shall be delivered to the bank commissioner, and shall remain in his custody. The trustees may, whenever it is necessary in the interests of the association, require additional bonds to be given. No officer, trustee, or member of the auditing committee of the company shall be a surety upon the bond of the treasurer.

1033. General powers. Said land mortgage association shall have power:

1. To make loans and to accept as security for any such loan a first mortgage upon irrigated agricultural lands within the state; *provided,* that loans are made for not more than thirty years. Such loans shall not exceed, however, sixty-five per cent of the value of such real estate so conveyed, if the same is improved, and not to exceed fifty per cent if wholly unimproved, according to the appraisal made as herein provided;

2. To issue bonds secured by the pledge of the mortgages so taken, and to provide for the investment of its surplus funds;

3. To pledge the mortgages so taken under the provisions of subdivision 1 hereof as security for the bonds of the land mortgage association referred to in subdivision 2 hereof.

1034. Laws applicable to land banks. The corporation and banking laws of Utah as far as applicable shall apply to banks organized under this chapter.

1035. By-laws. Bank commissioner to approve. Such corporation shall have the power to enact by-laws not inconsistent with the law and subject to the approval of the bank commissioner. In such by-laws may be provided:

1. The time and place of the annual meeting;
2. The methods of calling special meetings;
3. The conditions under which borrowers may make partial payments upon principal and interest of the debt owing by them in addition to the payments provided for in § 1042;
4. Penalties which may be affixed for default in the payment of principal or interest;
5. The nature of the evidence of title which must be furnished by a prospective borrower and the method in which such title may be approved;

6. The times and places of all meetings of the board of trustees and of the auditing committee, and the nature of the notices required for such meeting;

7. The number of stockholders who shall constitute a quorum at any general or special meeting, and the number of trustees and the number of members of the auditing and loan committees;

8. The duties of the officers and employes, and such other regulations as are necessary and as are not provided for by law or the articles of incorporation.

1036. Id. To be filed with bank commissioner. No such land mortgage bank shall issue any bonds or make any loans until a copy of its by-laws has been filed with and approved by the bank commissioner. No by-laws or amendments thereof subsequently adopted shall be operative until filed and approved in the same manner.

1037. Stockholders' meetings. Representation. At all stockholders' meetings each share of stock shall entitle the owner of record to one vote, but if any stockholder shall own more than ten per cent of the stock no such stock in excess of such ten per cent shall be voted. Each stockholder must vote in person, and no proxy or other power of attorney shall be effective to authorize any other person to cast a vote for a stockholder except that it is permitted:

1. For wives to authorize their husbands and husbands to authorize their wives by proper proxy to vote;

2. Minors or incompetents in whom stock is vested may be represented by guardian;

3. Joint owners of stock may authorize one of their number to represent them;

4. Corporations and other combinations of persons may be represented through a legally constituted attorney;

5. Widows and unmarried women may be represented through persons holding their power of attorney;

6. It shall be incompetent for any person to represent more than one interest.

1038. Elections. Elections shall be effected by ballot; election by acclamation shall be permissible if there be no objection thereto. An absolute majority of the stock voted shall be necessary for elections as well as for adopting resolutions. If the third ballot at any election gives no absolute majority, the voting among the candidates shall be narrowed in subsequent ballot by the dropping of the candidate who received the smallest number of votes on the previous ballot.

1039. Mortgages. Bonds. Trust Deeds. Approval of form. The mortgages to be given to the association, the bonds to be issued and the trust deed executed to secure the bonds shall be in such form and shall contain such conditions as will adequately protect all parties thereto. The trustees shall provide the forms subject to the joint approval of the bank commissioner and the attorney-general.

1040. Mortgages. Conditions Prescribed. All mortgage obligations acquired by the company shall be subject to the following restrictions:

1. Each such mortgage shall be a first and valid lien upon irrigated agricultural lands within the state of Utah;

2. Each such mortgage shall be a first and valid lien upon the whole and undivided fee and upon no lesser estate;

3. Each such mortgage shall be given to secure a principal indebtedness not exceeding in amount fifteen per cent of the capital and surplus of the company;

4. Each such mortgage shall state the rate of interest, which in no case shall exceed seven per cent;

5. All such mortgages on agricultural lands shall contain provisions for proper soil conservation;

6. All such mortgages shall contain provisions for the annual or semi-annual reduction of the indebtedness secured thereby;

7. The company shall make no loan secured by mortgage of any real estate in which any officer or trustee of the company is interested, either directly or indirectly, except upon the approval of two-thirds of all the trustees;

8. The proceeds of any loans made upon lands upon which are buildings in course of construction shall be retained by the company and paid out only upon construction vouchers countersigned by a duly authorized agent of the company.

1041. Appraisal of lands to be mortgaged. Upon application for a loan the prospective borrower shall cause the lands which he proposes to mortgage to the association to be appraised by two freeholders, resident in the town, city, or village in which such lands are situate, who shall be approved by the directors of the association.

1042. Examination of title. Periodical payments. The borrower shall pay all expenses incidental to the examination of title. The total amount to be paid periodically by the borrower shall include:

1. The rate of interest agreed upon;

2. An allowance for expenses of the land association to an amount not exceeding three and one-third per cent annually of the face of loan, and

3. A payment upon the principal (amortization) of not less than one per cent of the original amount thereof.

1043. Repayment of loan by instalments. Terms. A borrower may repay his loan by instalments of such frequency and amounts as may be agreed upon; *provided,* that not less than three and one-third per cent of the original amount of the mortgage shall be paid upon the principal thereof annually. The borrower may pay a larger instalment upon the principal, or the whole of it, at any interest date. Such payment may be made in cash, or by tendering at par bonds of the association. For failure to pay the interest or any instalment required by the terms of the loan, the borrower may be fined as the by-laws may prescribe. But the borrower shall never be required to pay more than the specified instalment, nor to pay the principal before it is due, except as provided in § 1046 or 1047.

1044. Repayment of total indebtedness. Notice. Settlement. The borrower may, upon sixty days' notice, repay to the association his total indebtedness, or without such notice upon payment of sixty days' interest upon the principal unpaid. The borrower shall be entitled to a receipt for all instalments as paid and, where the repayment is complete, to a satisfaction of his note and mortgage.

1045. Liability of person acquiring mortgaged lands. Written agreement. The acquirer of any lands mortgaged to a land mortgage association shall enter at once, on the acquisition of the land, into a written agreement with the association, attested by a notary, or a justice, and assume the personal responsibility for the indebtedness to the association attaching to such lands. This document must be presented to the trustees within fourteen days after demand.

1046. Call of loans upon sixty days' notice. Every land mortgage association shall have the power to call in loans upon sixty days' notice:

1. When the person acquiring the land upon which money has been loaned does not comply with the provisions of § 1045, and fulfill the obligation incumbent upon him;

2. When the debtor does not meet the obligation imposed upon him by his contract and by the by-laws of the land mortgage association;

3. When the mortgaged premises become subject to forced sale;

4. When the mortgaged premises are depreciating in value because of lack of care, failure properly to maintain and conserve, or from other cause.

The trustees of such association, whenever necessary, shall provide for an inspection of mortgaged premises, for an investigation of the care which is being given said premises, and may employ an expert to inspect the soil with a view of determining whether the same is being depleted.

1047. Partial repayment of loan when property depreciates. The association may require a suitable partial repayment of the debt, if the mortgaged premises may have at any time become depreciated in value from any cause whatsoever.

1048. Foreclosure. Liability of borrower. Whenever any loan is called in and the borrower shall fail to pay the principal and interest due to the association as required by law and the notices given him, the land mortgage association may then foreclose upon the mortgaged premises as for a past due loan. But in no case shall a borrower be liable for a sum greater than the amount of the unpaid portions of the loan with any accretions of interest thereon and expenses incidental to the collection thereof.

1049. Limit to bond issues. The aggregate amount of the principal of all bonds issued by a land mortgage association and outstanding at any one time shall not exceed twenty times the amount of the capital and surplus of the company.

1050. No creditor to be given preference. Habitual borrowing. No land mortgage association, and no officer or agent thereof, shall give any preference to any creditor by pledging any of the assets of such association as collateral security, except that any such association may borrow money for temporary purposes, and may pledge assets of the association as collateral security therefor. Whenever it shall appear that any land mortgage association has borrowed habitually for the purpose of reloaning, the bank commissioner may require such association to pay off such amount so borrowed.

1051. Bonds. Maximum interest. Registry. The bonds to be issued by any land mortgage association may be issued for such amounts, bearing such serial number and date or dates, and be payable at such time or times, bear such rate of interest, not over seven per cent, and be redeemable at maturity. Each land mortgage association shall keep a register for the registration and transfer of bonds issued by it, in which it shall register, or cause to be registered, all bonds, upon presentation thereof for such purpose; and such register shall contain the post office address of all registered holders of bonds, and shall, at all reasonable times, be open to the inspection of the bank commissioner or any of his deputies, and to the state treasurer.

1052. Id. Security for payment. To secure the payment of such bonds the land mortgage association shall issue a collateral deed of trust to the state treasurer pledging as security for such bonds the notes and mortgages taken as provided herein in an amount equal to or exceeding the aggregate amount of bonds issued or to be issued. The total amount of bonds actually outstanding shall not at any time exceed the total amount unpaid upon the notes secured by the mortgages belonging to the association and pledged for the payment of the bonds, plus such securities and money as may be on deposit with the state treasurer under the provisions hereof.

1053. Id. Securities. Deposited with state treasurer. Substitution. All mortgages pledged to secure the payment of the bonds issued hereunder shall be deposited and left with the state treasurer. The land mortgage association may, with the approval of the state treasurer, remove such mortgages from the custody of the state, substituting in place thereof other of its mortgages, or money or bonds of the state of Utah, or government bonds or certificates of deposit, endorsed in blank, issued by incorporated associations located and doing business in the state of Utah in an amount equal to or greater than the amount unpaid upon the notes secured by the mortgages withdrawn.

1054. Redemption of bonds. Notice. Notice of redemption of bonds may, on no account, be given on the part of the holder thereof, but may be given by the bank only for the purpose of effecting redemption in accordance with the conditions of the bond and as provided by law and the by-laws. If the land mortgage bank shall elect to redeem any bond prior to maturity, six months' notice of redemption shall be given and shall be effected by personal service upon the owner and holder of the bonds, by notice mailed to his address as registered or by advertising the same three times in a newspaper selected by the state treasurer. The numbers of the bonds of which notice of redemption is to be given shall be determined by lot, to be drawn by the president or the vice-president at a meeting of the trustees.

1055. Matured bond not presented for payment. Effect. In case the holder of any bond outstanding shall not have presented the same for payment within two years after its maturity or within two years after the date fixed for the redemption, as the case may be, then such bond shall cease to be a lien upon the mortgages, moneys, and securities pledged to the state treasurer and deposited with him as security therefor; but such bond shall still constitute, until the statute of limitations running against such bond shall have expired, a simple legal money claim or demand against the land mortgage association issuing the same, and be recoverable from it in a suit at law, and in no event shall any interest be collectible upon such bond after the maturity thereof or after the date fixed for its redemption.

1056. Mortgage loan repaid in cash or bonds. If the bank give notice to a debtor for repayment of the mortgage loan, the latter must pay to the bank in cash or in its bonds at par the face of the same so far as it has not yet been covered by his assets in the amortization and payments.

1057. Bonds constitute a legal investment. Exempt from taxation, when. The bonds of a land mortgage association shall be a legal investment for savings associations, trust companies, or other financial institutions chartered under the laws of this state, and shall also be a legal investment for trustees, executors, administrators, or custodians of public or private funds, or corporations, partnerships, or associations. Whenever the taxes upon the real estate subject to the mortgages pledged as security for any bonds of any land mortgage association shall be payable by either the mortgagee or the mortgagor, then such bonds shall be exempt from further taxation in the hands of their holders.

1058. Gross earnings. Disposition. Dividends. The gross earnings of the association shall be ascertained annually, and there shall first be deducted therefrom the expenses incurred by the association for the preceding year, and the balance thereof shall be set aside as a reserve fund for the payment of contingent losses, to an amount equal to two per cent of the capital stock outstanding, and until such reserve fund equals twenty per cent of the capital stock of such association. The balance of the earnings may be paid as a co-operative profit sharing dividend.

1059. When association may acquire real estate. No land mortgage association shall acquire real estate (other than for the occupation of its offices) except to protect its interest in case any of the mortgages owned by it are foreclosed and the property therein described sold to pay the indebtedness secured thereby. All real estate so acquired shall be promptly sold.

CHAPTER 8.

CO-OPERATIVE BANKS FOR PERSONAL CREDITS.

('15, p. 232.)

1060. Co-operative bank defined. In this chapter the words "co-operative bank" shall mean a co-operative association formed for the purpose of promoting thrift among its members, by affording means for saving money in small or large amounts, by securing deposits or loans of funds upon the associated liability of its members, by furnishing advances or loans for productive purposes, by making loans of a remedial character, by promoting in a co-operative spirit the ideals of help for self-help, and by transacting a general banking business in the interest of its members primarily.

1061. General powers of bank. A co-operative bank may receive the savings of its members in payment for shares or on deposit, may receive deposits from non-members, may lend to its members at reasonable rates, or otherwise employ its funds for carrying out its purposes, or invest its funds as hereinafter provided, and may undertake such other activities relating to its purpose as its by-laws may provide.

1062. Who may organize. Incorporation. Bank commissioner to approve. Ten or more persons of this state may associate themselves together by an agreement in writing and form a corporation to conduct a savings bank under the provisions of chapters 1 and 2, title 19, respecting corporations for pecuniary profits, and all the rights, privileges, and powers, and all the duties and obligations of such corporation, and the officers and stockholders, shall be as provided in said chapters, except as in this chapter otherwise provided. The bank commissioner is hereby authorized to grant such consent when he is satisfied that the proposed field of operation is favorable to the success of such co-operative bank, and that the standing of the proposed members is such as to give assurance that its affairs will be administered in accordance with the spirit of this chapter; *provided,* that such consent shall not be granted until 400 shares of the capital stock of the company shall be subscribed for and 50 per cent of each such subscription be paid in cash. The secretary of state shall furnish, free of cost, all the forms and blanks, to enable the people interested to organize the banks herein provided for.

1063. Exclusive use of certain words. No person, partnership, association, or corporation, except corporations formed under the provisions of this chapter, shall hereafter transact business under any name or title which contains the two words "co-operative" and "bank." If located in a rural community, the word "farmers" shall be used in, or immediately after or under the name of the co-operative bank; if in a city or town of 3000 or more population, the word "urban" shall be so used.

1064. Banking laws applicable. Bank commissioner to supervise. Fee for examination. The provisions of §§ 971-978 shall be applicable to such corporation, and they shall be subject to the supervision of the bank commissioner in the manner and to the extent set forth in said chapter; *provided,* that the fee shall be $10 for each examination.

1065. By-Laws. The by-laws shall prescribe:

1. The name of the corporation;
2. The purpose for which it is formed;
3. The conditions of domicile or vocation which qualify persons or co-operative societies for membership;
4. The system for encouraging members to increase their holdings of shares;
5. The conditions on which shares may be paid in, transferred, and withdrawn;
6. Conditions on which deposits may be received and withdrawn;

7. The method for receipting for money paid on account of shares or deposits;

8. The number of directors and number of members of the credit committee;

9. The duties of the several officers;

10. Date of the annual meeting of members;

11. The manner in which members shall be notified of meetings;

12. The number of members which shall constitute a quorum at meetings;

13. Such other regulations as may seem necessary.

1066. Id. Bank commissioner to approve. No such corporation shall receive deposits or payments on account of shares, or make any loans, until its by-laws have been approved in writing by the bank commissioner, nor shall any amendments to its by-laws become operative until they have been so approved.

1067. Fiscal year. Annual and special meetings. Powers of members. Dividends. The fiscal year of every such corporation shall end at the close of business on the 31st day of December. The annual meeting of the corporation shall be held at such time and place as the by-laws prescribe. Special meetings may be held by order of the directors or the supervisory committee, and the clerk shall give notice of special meetings upon request in writing of ten members. Notice of all meetings of the corporation shall be given in the manner prescribed by the by-laws. At the annual meeting the members may, upon recommendation of the board of directors, declare dividends and fix the the maximum amount of the entrance fee; *provided,* that the maximum dividend upon shares in any year shall not exceed two per centum over and above the average rate of interest received from borrowers during that year. At any meeting the members may decide upon any question of interest to the corporation; and upon appeal of two members may reverse decisions of the board of directors or any of the committees or decisions reached by the board of directors and committees in joint session; and by a three-fourths vote of those present, provided the notice of the meeting shall have specified the question to be considered, may amend the by-laws.

1068. Board of directors. Credit committee. Special Committee. Membership. Terms. At the annual meeting the members shall elect from their number a board of directors of not less than five members, a credit committee of not less than three members, and a special committee of two members. No person shall be a member of more than one committee, and no director shall be eligible for either of the three committees named, unless the total membership is so few as to require it. All directors and committee members, as well as all officers whom they may elect, shall be sworn and shall hold their several offices until others are elected and qualified in their stead; and a record of every such qualification shall be filed and preserved with the records of the corporation.

1069. Officers. Election. General powers of directors. At their first meeting the board of directors shall elect from their number a president, a vice-president, a clerk, and a treasurer, who shall be the executive officers of the corporation. The board of directors shall have the general management of the affairs, funds, and records of the corporation, and shall meet as often as may be necessary. It shall be their special duty:

1. To act upon applications for membership;

2. To act upon the expulsion of members;

3. To fix the amount of surety bond which shall be required of each officer having custody of the funds;

4. To determine the rate of interest which shall be allowed on deposits;

5. To determine the rate of interest which shall be charged on loans;

6. To fill vacancies in the board of directors or in the credit committee

of the corporation until the election and qualification of officers to fill said vacancies;

7. To make recommendations to meetings of the members relative to the maximum amount of entrance fee; the maximum amount which may be loaned to any one member; *provided,* that the maximum so fixed shall not exceed 15 per cent of the capital and surplus of the company; the dividend to be declared; amendments to the by-laws, and any other matters which, in their opinion, the members should decide;

8. To transact any other business of the bank.

1070. Credit committee to approve loans. Form of application for loans. The credit committee shall approve every loan or advance made by the corporation, except as set forth in § 1072. Every application for a loan shall be made in writing and shall state the purpose for which the loan is desired and the security offered. No loan shall be made unless the credit committee is satisfied that it promises to benefit the borrower, nor unless it has received the unanimous approval of those members of said committee who were present when it was considered, nor if any member of said committee shall disapprove thereof.

1071. Special committee to approve loans to officers and directors. The special committee shall act upon every loan or advance made by the corporation to any member of the board of directors, or of the credit committee, or of the supervisory committee. Every application for a loan to such individuals shall be made in writing, and shall state the purpose for which the loan is desired and the security offered. No such loan shall be made unless the special committee is satisfied that it promises to benefit the borrower, nor unless it has received the approval in writing of both members of the special committee.

1072. No limit to capitalization. Par value of stock. Manner of subscribing and paying for stock. Liability of stockholder. The capital of the corporation shall be unlimited in amount. Shares of the capital stock may be subscribed for and paid for in cash in such manner as the by-laws shall prescribe, but no certificate for shares shall be issued until the same have been fully paid. The par value of each share in the capital stock of a co-operative bank shall be $5, to be paid for in cash. Each shareholder shall be liable for the debts of the corporation to the amount of shares subscribed for by him, whether wholly or partly paid. As an initial payment for the privilege of membership, each member shall pay an entrance fee of at least $1, besides subscribing for not less than one share of the capital stock, which may be evidenced by a pass-book entry or by certificate as the by-laws may determine. A natural person, or a co-operative association organized under the laws of this state may be a shareholder, but no member may hold more than 200 shares.

1073. Stock and deposits belonging to minors or held in trust. Withdrawal. Shares may be issued and deposits received in the name of a minor, and such shares and deposits may, in the discretion of the directors, be withdrawn by such minor or by his parent or guardian, and in either case payments made on such withdrawals shall be valid. If shares are held or deposits made in trust the name and residence of the beneficiary shall be disclosed and the account shall be kept in the name of such holder as trustee for such person. If no other notice of the existence and terms of such trust has been given in writing to the corporation, such shares or deposits may, upon the death of the trustee, be withdrawn by the person for whom the amount of such shares was paid in or for whom such deposit was made, or by his legal representative.

1074. Loan and investment of capital, deposits, or surplus. Security. Terms. Interest on petty loans. The capital, deposits, and surplus funds of the corporation shall be either lent to the members for such purposes and upon such security and terms as the credit or special committee shall approve,

or may be partly invested in the land reserve certificates or land bonds of the land mortgage banking corporation, or deposited to the credit of this corporation in savings banks, or trust companies, or commercial banks, incorporated under the laws of this state, or in national banks located herein. In making petty loans of remedial character, a rate of interest not to exceed 12 per cent per annum may be charged upon the unanimous approval in writing by the directors; and loans to non-members on demand, or other liquid investments, may be made in like manner out of any funds in excess of fifteen per cent reserve, but the members shall always have first call upon the funds of the corporation for loans.

1075. Repayment of loan. Fine for failure to meet payments. A borrower may repay the whole or any part of his loan at any time at which the office of the corporation is open for the transaction of business. For failure to pay the interest or any instalment required by the terms of the loan, the borrower may be fined if the by-laws so prescribe.

1076. No compensation allowed directors and committeemen. Directors may fix compensation of officers. No member of the board of directors or of the credit or special committee shall receive any compensation for his services as a member of said board or committees, nor shall any member of the credit committee, either directly or indirectly, become surety for any loan or advance made by the corporation after its third annual meeting. But the officers elected by the board of directors may receive such compensation as said board shall authorize.

1077. Member may be expelled for cause. Procedure. The board of directors may expel from the corporation any member who has not carried out his engagements with the corporation, or has been convicted of a criminal offense, or neglects or refuses to comply with the provisions of this chapter or of the by-laws, or whose private life is a source of scandal, or who habitually neglects to pay his debts, or shall become insolvent or bankrupt, or shall have deceived the corporation with regard to his property, resources, credit, or use of borrowed money; but no member shall so be expelled until he has been informed in writing of the charges against him and an opportunity has been given to him, after reasonable notice, to be heard thereon.

1078. Settlement with one who has withdrawn or been expelled. The amounts paid in on shares or deposited by members who have withdrawn or have been expelled shall be paid to them with all accrued interest, but exclusive of other gains or profits, but in the order of withdrawal or expulsion and only as funds therefor become available and after deducting any amounts due by said members to the corporation; but such expulsion shall not operate to relieve a member from any remaining liability to the corporation.

1079. Dividends. How computed and distributed. At the annual meeting a dividend may be declared from income which has been actually collected during the fiscal year next preceding, or during the months which have elapsed since the corporation began business, and which remains after the deduction of all expenses, losses, interest on deposits, and the amount required to be set apart as a guaranty fund. Such dividend shall be paid on all fully paid shares outstanding at the close of the fiscal year, but shares which become fully paid during the year shall be entitled to only a proportional part of said dividend calculated from the first day of the month following such payment in full. Dividends due to a member shall be credited to the account of partly paid shares for which he has subscribed until same are paid up and then may be paid in cash.

1080. Guaranty fund. Immediately before the payment of each dividend there shall be set apart as a guaranty fund ten per cent of the net income which has accumulated during the fiscal year. Said fund and the investments thereof shall belong to the corporation and shall be held to meet contingencies or losses in its business. All entrance fees shall be added at once to the guaranty fund. But upon recommendation of the board of directors the members

at an annual meeting may increase, and whenever said fund equals or exceeds the amount of the capital stock actually paid in may decrease, the proportion of profits which is required by this section to be set apart as a guaranty fund.

1081. Corporation may be dissolved, when. Manner of liquidation. At any meeting specially called to consider the subject, the members, upon the unanimous recommendation of the board of directors, may vote to dissolve the corporation; *provided,* at least two-thirds of the members are present at such meeting; and *provided,* not more than ten members, either in person or by written notice, object thereto. A committee of three shall thereupon be elected to liquidate the assets of the corporation, and each share of the capital stock, according to the amount paid in thereon, shall be entitled to its proportion of the proceeds after all deposits and debts of the corporation have been paid.

1082. Annual report to bank commissioner. Within twenty days after the last business day of December in each year, every such corporation shall make to the bank commissioner a report in such form as he may prescribe, signed by the president and treasurer, who shall certify and make oath that the report is correct according to their best knowledge and belief. Any such corporation which neglects to make the said report within the time herein prescribed shall forfeit to the state $5 for each day during which such neglect continues.

CHAPTER 9.

ORGANIZATION AND SUPERVISION OF BUILDING AND LOAN ASSOCIATIONS.

1100. (392.) Incorporation. Approval of articles. Building and loan associations organized for the purpose of raising a fund by the collection of dues or stated payments from its members, to be loaned among its members, may be incorporated under the provisions of chap. 1 of this title, respecting corporations for pecuniary profit; *provided, however,* that the secretary of state shall not issue a certificate of incorporation to any such association, authorizing it to do business in this state, until its articles of association or agreement shall have been approved by the bank commissioner; and all the rights, privileges, and powers, and all the duties and obligations of such corporations, and the officers and stockholders thereof, shall be as provided in said chapter, except as in this chapter otherwise provided. In addition to the other facts required to be stated, the articles of incorporation of such company shall state the terms and plans of becoming and continuing a member, and of withdrawal, the plans of making loans, distributing profits, equalizing losses, providing for expenses, and of providing a fund with which to pay losses, and the maximum compensation of officers. Am'd '15, p. 14.

Bank commissioner to examine, § 974. Fees for examination, § 977.

1101. (393.) Capital. The capital named in the articles of incorporation shall be taken to mean the authorized capital, and the association may commence business when five per cent thereof is subscribed and the other requirements of the law have been complied with.

Annual corporation license, § 1271.

1102. (394.) Powers. Any such corporation shall have power, subject to the terms and conditions contained in the articles of incorporation and by-laws, to issue stock to its members; to assess and collect from its members reasonable membership fees, dues, premiums, and fines; to permit its members to withdraw any or all of their stock deposits upon equitable terms; to hold and convey such real and personal property as shall be necessary for its accommodation and the transaction of its business, such as shall be mortgaged

in good faith by way of security for debts duly contracted, such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings, such as it shall purchase at sales under judgments, decrees, or mortgages held by it, or shall purchase to secure debts due to it; to make loans to its members upon ample real estate security, unencumbered except by prior loans from the association, or upon the stock of such association to the extent of its withdrawal value; to make annual or semi-annual distributions of its earnings, and to do all other things that may be necessary to effect its purposes and conduct its authorized business.

LIABILITY TO STOCKHOLDERS:

The grantee of a borrower and stockholder in a building and loan company, who agreed to pay the debt in the manner specified, held not to be a stockholder but a mere purchaser, and money paid in as dues must be applied in reduction of the mortgage. Contract held to be such as not to commend itself to a court of equity.

Sawtelle v. N. A. Sav. Co., 14 U. 443; 48 P. 211.

Grantee of member of building and loan association has the right to have stock payments, whether paid in as dues or as premiums, credited on the loan.

People's Sav. Assn. v. Fowble, 17 U. 122; 53 P. 999.

Same case, 18 U. 206; 55 P. 57.

Hale v. Thomas, 20 U. 426; 59 P. 241.

When he attempts to withdraw, and brings suit to enforce his claim, he must allege and prove that there were funds in the treasury applicable to the payment of his claim.

Stillwell v. People's Assn., 19 U. 257; 57 P. 14.

Contract with building and loan company held unconscionable; loan treated as a simple loan, and all payments of dues and premiums applied in reduction of the debt. Stock held a cunning device to obsecure the harshness of the contract.

Howells v. Pac. St. Co., 21 U. 45; 60 P. 1025.

Ashton v. Pac. St. Co., 21 U. 59; 60 P. 1029.

Robinson v. Pac. St. Co., 21 U. 60; 60 P. 1134.

Snyder v. Fid. Sav. As., 23 U. 291; 64 P. 870.

Where bond and mortgage provided for payment of a stipulated sum per month as interest on the loan, plaintiff was entitled to credit against the principal for payments of dues and premiums only.

People's Bldg. & L. Assn. v. Kroeger, 22 U. 134; 61 P. 559.

A member of a building and loan association being entitled to share the profits, is equally bound to stand his proportion of the losses incident to its management.

Betz v. People's Bldg. & L. Assn., 22 U. 149; 61 P. 334.

Same case, 23 U. 604; 65 P. 592.

Contract regarded as a Utah contract.

Snyder v. Fidelity Assn., 23 U. 291; 64 P. 870.

Plaintiff, having made a settlement with the building and loan company, is estopped thereby.

White v. Pac. States Co., 21 U. 23; 59 P. 527.

In a suit to foreclose the mortgage, the original certificate having been canceled by the terms of its transfer to plaintiff, and the court having found that defendant at the time of the settlement had more than paid his loan, and that such settlement was without consideration, the transaction did not constitute a settlement behind which defendant could not go. All payments of dues and premiums must be applied in reduction of the debt.

Western L. & S. Co. v. Desky, 24 U. 347; 68 P. 141.

A stockholder whose stock has matured is entitled to book value of stock.

Western L. & S. Co. v. Garff, 27 U. 211; 75 P. 375.

A holder of matured stock should be regarded as a creditor and as having equities superior to those of subsequent purchasers and holders of stock.

Rogers v. Ogden B. & L. Co., 30 U. 188; 83 P. 754.

Under the provisions of § 1104, a borrower who complied with the by-laws up to time of remitting last payment, which wiped out the principal indebtedness, was dicharged from his contract and entitled to have the mortgage canceled, regardless of conscionableness or unconscionableness of the contract.

Hiskey v. Pacific States L. & B. Co., 27 U. 409; 76 P. 20.

Foreign building and loan associations are presumed to have entered into contracts with persons in this state with notice of the provisions of § 1104.

Id.

Building and loan contracts on divided mortgage plan held to be without consideration and unconscionable; stockholder entitled to credit on principal debt for all sums paid in, whether as dues, fines, or premiums.

Cain v. Col. Inv. L. Co., 30 U. 56; 83 P. 568.

Christensen v. Col. Inv. L. Co., 33 U. 1; 91 P. 581.

Where plaintiff borrowed $1,000 and gave a note and mortgage to the bank for $900 thereof, and a note with a second mortgage to the company for $1,000, and applicant is also required to pay for a life insurance for the benefit of the company, and the note to the bank provided for 7 per cent interest, and the association note 6 per cent interest and 30 cents on every hundred dollars thereof, and the association agreed to assume the bank debt, and where, after four years, the plaintiff had paid over $700, and the association claimed the entire indebtedness to the bank was due and also $46.98 due it, held the contract unconscionable.

Ensign v. Colorado Investment Co., 35 U. 255; 99 P. 1076.

1103. (395.) Bonds of secretary and treasurer. The treasurer and secretary, before entering upon their duties, shall give good and sufficient bonds for the faithful performance of the same and for the safe keeping and proper application of all money or property coming into their hands, and the same shall be approved by the board of directors. All such bonds shall be increased or additional sureties required by the board of directors when the same becomes necessary to protect the interests of the association or its members, but no directors shall be accepted as a surety on such bonds, and the directors shall be individually liable for loss to the association or members caused by their failure to comply with the provisions of this section.

1104. (396.) Payments. Withdrawals. A borrower may repay a loan at any time upon duly complying with the provisions of the charter and by-

laws in relation to the payment of loans; and any stockholder wishing to withdraw from the corporation shall have power to do so by giving thirty days' notice of his intenion to withdraw, when he shall be entitled to receive the amount paid in by him and such interest thereon, or such proportion of the profits thereon, less all fines and other charges, as the by-laws may determine: *provided,* that at no time shall more than one-half of the funds of the treasury of the corporation be applicable to the demands of withdrawing stockholders without the consent of the board of directors, and that no stockholder shall be entitled to withdraw whose stock is held by the association for security. Upon the death of a stockholder, his legal representative shall be entitled to receive the full amount paid in by him on all shares not borrowed upon or pledged to the association as collateral security and legal interest thereon after deducting all charges that may be due on the stock; but no fines shall be charged to a deceased member's account from and after his decease, unless the legal representative of such decedent assume the future payment of the dues.

Decisions on withdrawals, etc., note to, § 1102.

1105. (398.) Annual statement. Publication. On or before the 1st day of March of each year, every building and loan association doing business within this state, whether domestic or foreign, shall cause to be filed in the office of the bank commissioner a statement of its affairs, as is required in § 1109, and shall cause a copy thereof, duly certified by the bank commissioner, to be published at least four times in some newspaper in this state having a general circulation therein, such publication to be completed on or before the 1st day of May, and proof thereof filed in the office of the bank commissioner. Am'd '15, p. 14.

1106. (399.) Examination, refusal to submit to. If any domestic building and loan association shall refuse to submit to an examination by the bank commissioner or his agent, the bank commissioner shall advise the attorney-general thereof, who shall proceed to wind up its affairs; and if any foreign association shall refuse to submit to such examination, the bank commissioner shall so advise the secretary of state, who shall thereupon revoke its certificate of authority to do business in this state. Am'd '15, p. 14.

1107. (400.) Unlawful methods. Deception. Unsafe condition. When, in the opinion of the bank commissioner, any such corporation is conducting its business illegally, or in violation of its articles of incorporation or by-laws, or is practicing deception upon its members or the public, or is pursuing a plan that is injurious to the interests of such members, or if he is satisfied that its affairs are in an unsafe condition, he shall notify its directors or managers, and if it shall not immediately amend its course or put its affairs upon a safe basis, he shall, in the case of a domestic corporation, advise the attorney-general thereof, who shall take the necessary steps to wind up its affairs; and in the case of a foreign corporation, he shall so advise the secretary of state, who shall thereupon revoke its certificate of authority to do business in this state. Am'd '15, p. 14.

The remedy given hereunder is conclusive, and the courts cannot appoint a receiver to wind up the affairs of a building and loan association at the request of one or more of its shareholders; and before an action for dissolution of the association is brought hereunder, it should be given an opportunity to correct abuses in its management, unless its affairs are such that in the opinion of the secretary of state or attorney-general they cannot be corrected.

Union Savings & Inv. Co. v. District Court, 44 U. 397; 140 P. 221.

This decision was prior to the amendment giving the bank examiner supervisory power.

1108. (402.) Agents acting without authority. Liability. Any officer or agent of any building and loan association who shall do or attempt to do any business for any such association, which does not hold a certificate of authority therefor as in this chapter provided, or which shall fail or refuse to file with the bank commissioner the annual statement herein required, shall be guilty of a misdemeanor for each and every offense, and shall be personally liable on any and all contracts made in this state by him for and in behalf of such company during the time that it shall remain so in default. Am'd '15, p. 14.

CHAPTER 10.

FOREIGN BUILDING AND LOAN ASSOCIATIONS.

('11 p. 253.)

1109. (397.) Certificate of authority. It shall be unlawful for any building and loan association, not organized under the laws of this state, to transact business in this state unless such association or company shall have first complied with the provisions of § 945, relating to foreign corporations, and shall have submitted a statement of its condition and affairs subscribed and sworn to by the manager or an officer of the company, showing:

1. The amount of authorized capital, and the par value of each share;
2. The number of shares sold during the year;
3. The number of shares canceled and withdrawn during the preceding year;
4. A statement of receipts and disbursements during the preceding year;
5. Salaries paid each of its officers;
6. A statement of its assets and liabilities at the end of the year, and the nature thereof in general terms;
7. Any other fact which the secretary of state or the bank commissioner may require.

Upon receipt of all such instruments as are required, and the filing thereof, the secretary of state, if he believes that the association is properly managed, that its financial condition is satisfactory, and that its business is conducted upon a safe and reliable plan, shall thereupon issue a certificate authorizing such corporation to do business in this state; *provided, however,* that the secretary of state shall not issue a certificate of authority to any such company or association, authorizing it to do business in this state, until its articles of association or agreement, and by-laws, and acceptance of the provisions of the constitution, and designation of agent upon whom process may be served, and required statement of facts, shall have first been examined and approved by the bank commissioner; and *provided, further,* that the secretary of state shall certify a copy of all such instruments to the bank commissioner, who shall file the same in his office. Am'd '15, p. 14.

Must deposit cash or security, § 1110.

Where it is questionable whether a foreign corporation under its charter may or may not do building and loan business, the court will not mandamus the secretary of state to grant it the right to do business in this state unless it complies with provision required of foreign building and loan associations.

National Merc. Co. v. Matson, 45 U. 155; 143 P. 223.

1110. Must make deposit of cash or securities. No building and loan association heretofore or hereafter organized under the laws of any other state, or territory or foreign country, for the purpose of engaging in the building and loan business, shall be allowed to do business or sell its stock or certificates in the state of Utah without first having deposited with the state treasurer or responsible trust companies within or without the state designated by him, the sum of $50,000, either in cash or bonds of the United States, or bonds of any county or municipal corporation of the state of Utah, or in first mortgage upon real estate located within this state, as a guarantee fund for the protection and indemnity of the residents of the state of Utah with whom such association shall do business; the fund so deposited to be paid by the custodian thereof to the residents of Utah when proof of claim of final judgment has been filed with the custodian of such fund against such foreign association.

A foreign corporation, whose charter authorizes it "generally to engage in any business or transactions which might seem to the company directly or indirectly conducive to the interests or conveniences of the company," is authorized to enter into building and loan contracts.

National Merc. Co. v. Matson, 45 U. 155; 143 P. 223.

This section does not violate 14th amendment, par. 1, U. S. Const.

Id.

1111. Withdrawal and substitution of securities. Any of the securities so deposited may be withdrawn at any time upon others, herein provided for, of like amount being substituted in lieu thereof.

1112. Disposition of interest and dividends on securities deposited. All interest, dividends, premiums, and payments which may accrue or be paid on securities held by the state treasurer, and all dues or monthly payments which may become payable on stock pledged as security for loans, the mortgages for which are so deposited in accordance with the provisions of this chapter, may be collected and retained by the association depositing such securities or mortgages so long as such association remains solvent and faithfully performs all contracts with its members.

1113. Penalty for representing unauthorized company. Any person or persons who shall be found in this state as agent, or in any other capacity representing or soliciting business for such non-resident or foreign association, which has not complied with the provisions of this chapter, shall be deemed guilty of a misdemeanor.

1114. Companies not complying denied access to courts. Any association subject to the provisions of this chapter, which has not fully complied with the terms thereof, shall not be permitted to commence, maintain, or prosecute any action in any court in this state.

1115. Foreign companies must comply with laws governing domestic associations. Every such foreign building and loan association doing business in the state of Utah shall, in all other respects not herein provided for, conduct the same in accordance with the laws of this state governing domestic associations.

1116. "Foreign building and loan associations" defined. The name "foreign building and loan associations," as used in this chapter, shall include all foreign corporations, societies, organizations, or associations doing a saving and loan or investment business on the building society plan, whether mutual or otherwise, and whether issuing certificates of stock which mature at a time fixed in advance or not.

1117. Repeal. All acts or parts of acts in conflict herewith are hereby repealed.

CHAPTER 11.

INSURANCE DEPARTMENT, STATE.

('09, p. 289.)

1120. Definitions. In this chapter, unless the context otherwise requires, "company" or "insurance company" shall include all corporations, associations, partnerships, or individuals engaged as principals in the insurance business, excepting fraternal and benevolent orders and societies.

"Domestic" designates such companies when incorporated under the laws of the state of Utah. "Foreign," when used without limitations, designates such companies when organized or incorporated under authority other than the state of Utah.

The word "commissioner," as used in this chapter, shall designate the commissioner of insurance. Whenever, in the laws of Utah which are not repealed by this chapter, other titles are used to designate the chief officer and the second officer of the insurance department, such titles shall be understood as meaning the commissioner of insurance as hereinafter defined by this chapter.

This chapter not applicable to county insurance companies, § 1187.

1121. Insurance department. The insurance department of the state of Utah is hereby organized and established as hereinafter provided as a separate and distinct department charged with the execution of all laws in relation to insurance companies doing business in this state.

1122. Commissioner of insurance. Term. Salary. Removal. Upon

the approval of this chapter, the governor shall, by and with the consent of the senate, appoint a commissioner of insurance, who shall be the chief officer of the insurance department, whose term of office shall expire upon the last day of February, 1913, and then and thereafter the Governor shall appoint the Commissioner of Insurance, whose term of office shall be four years from the 1st day of March in the year of his appointment, and until his successor is appointed and qualified. The commissioner shall be an elector of the state of Utah, and actually experienced in the insurance business, and his salary shall be and is hereby fixed at $2500 per annum, payable quarterly. The governor shall have the power, and it is hereby made his duty, to remove the said commissioner for neglect of duty, breach of trust, incompetence, or malfeasance in office, upon reasonable cause shown; and in case of such removal, the governor shall file in the office of the secretary of state, and report to the next session of the legislature, the reason for such removal.

County insurance companies, §§ 3250-3265. Family protection, §§ 3311-3313.
Fraternal insurance companies, §§ 3271-3303.

1123. Clerical assistance. The commissioner, with the consent of the state board of examiners, shall, from time to time, employ such clerical help as will enable him to carry on the business of the department with accuracy and dispatch.

1124. Actuary. Whenever necessary, the commissioner shall employ an actuary, who shall be experienced and skilled and fully competent to perform the actuarial duties of the department, and to assist in or take charge of the examinations of insurance companies under the general direction of the commissioner.

1125. Commissioner and actuary not to be interested in any insurance company. Neither the commissioner, the actuary, nor any employe of the department shall be directly or indirectly employed by any insurance company, association, or society doing business in this state, in any capacity, or be directly or indirectly interested in any such insurance corporation, except as a policy-holder; nor shall they or any of them charge any such insurance corporation or official any fee or take any valuable thing in payment for any service whatsoever, unless payment for such service is specially authorized by law. The penalty for violation of this section shall be removal from office.

1126. Oath. Bond. The commissioner shall, before entering upon his duties, take and subscribe the oath required by the constitution of Utah, and shall give bonds to the state of Utah in the sum of $15,000, to be approved by the governor and attorney-general, conditioned for the faithful and impartial discharge of his duties, which oath and bonds shall be filed in the office of the secretary of state.

1127. Seal. The commissioner shall devise a seal, to be approved by the governor, the said seal to be surrounded by the words "commissioner of insurance for Utah," an impression of which shall be filed in the office of the secretary of state. Every certificate or other paper executed by said commissioner in pursuance of any authority conferred upon him by law, and sealed with his seal of office, and all copies of papers certified by said commissioner and authenticated by said seal, shall in all cases be evidence equally in like manner as the original thereof and shall have the same force and effect as the originals would in any suit or proceeding in any court of this state.

1128. Office at state capital. May employ persons to make examinations. The said commissioner shall have an office at the state capital, and shall procure necessary furniture, safe, stationery, postage, printing, and such other appliances as may be necessary for the transaction of the business of his office, and may employ persons to make personal examinations of the condition and affairs of insurance companies when necessary, as required by law, and whenever he may think necessary he shall call upon the attorney-general of the state for legal counsel and such assistance as may be necessary to enforce the provisions of this chapter.

1129. Records to be public. The office of said commissioner of insurance shall be deemed a public office, and the records, books, and papers thereof, or

on file therein, shall be deemed public records of the state. All books and documents and all other papers whatever in the office of any of the officers of the state relating to insurance except such papers as are mentioned in § 945, shall, on demand, be delivered and transferred to the commissioner of insurance, who shall give a receipt for same, which shall be a full release from all responsibility in connection with such documents, books, and papers.

1130. Duties of commissioner. Reports. It shall be the duty of the commissioner to file in his office and safely keep all books and papers required by law to be filed therein, and to keep and preserve in permanent form a full record of his proceedings, including a concise statement of the condition of such insurance companies reported and examined by him, to issue certificates of authority to transact insurance business to any insurance companies which have fully complied with the laws of this state, and to issue such other certificates as are required by law in the organization of insurance companies and the transaction of the business of insurance, and generally to do and perform with justice and impartiality all such duties as are or may be imposed on him by the laws in relation to the business of insurance in this state. He shall annually, at the earliest practicable date after the returns are received from the several companies, make a report to the governor of the affairs of the insurance department, which report shall contain a tabular statement and synopsis of the several statements as accepted by the commissioner, and such other matters as in his opinion may be of benefit to the public, and shall make such recommendations as he may deem proper in regard to the subject of insurance in this state, and shall set forth in a statement, verified by oath and the certificate of the auditor of the state, the various sums received and disbursed by him from and to whom and for what purpose. Copies of such report shall be published by and subject to the order of said commissioner at the expense of the department. The Commissioner shall furnish, within ninety days after entering upon the discharge of the duties of the office, all the insurance companies doing business in this state, a copy of this chapter, and shall annually, in November, furnish such companies blanks for the filing of statements as required by law. The commissioner, on retiring from office, shall deliver to his qualified successor all furniture, papers, and property pertaining to his office.

Duties under corporate surety chapter, §§ 1209-1211; firemen's friend chapter, §§ 2603-2613; fraternal insurance chapter, §§ 3282-3314; county insurance companies chapter, § 3265. Voluntary withdrawal filed with, § 958.

1131. Id. Securities. The commissioner shall receive and hold on deposit, in the manner provided in this chapter, the securities of domestic companies which are deposited by any such company to comply with the law of another state to enable such company to transact business in such state, and such other deposits as are required by this chapter. The commissioner shall furnish under his hand and official seal to such company a certificate, certifying that he holds said securities in trust for the benefit of the policy-holders of such company.

1132. Id. Securities, how kept. The commissioner of insurance shall give vouchers for all securities deposited with him to the company depositing them, the value and sufficiency of which such securities shall be determined by him. It shall be the duty of the commissioner, upon receipt of such securities from any insurance company to forthwith deposit the same, in the presence of the president or authorized agent of the company, in a strong iron box, which shall require two distinct and different keys to unlock the same; one key to be kept by the commissioner, and the other by the company; and the box shall not be opened except in the presence of the commissioner and the said president or authorized agent of the company. The boxes shall be placed in the vault of a safe deposit company or national bank in the city of Salt Lake, to be selected by the commissioner, and the insurance company shall pay the several fees for the safe keeping of the several boxes. So long as the company so depositing shall continue solvent, the commissioner shall permit such com-

pany to collect and receive the interest and dividends on its securities so deposited and transferred, and from time to time to withdraw any such securities on depositing other securities instead of those to be withdrawn, such new securities to be at least of equal value with those withdrawn. If the commissioner shall wilfully fail, refuse, or neglect to faithfully keep, deposit, account for, or surrender in the manner by law authorized or required any such securities as aforesaid transferred to and received by him, or under his custody under the provisions of this chapter, or shall wilfully fail, refuse, or neglect to furnish proper certificates of the securities so held by him, as herein provided, said commissioner shall be responsible upon his official bond, and suit may be brought upon said bond by any person injured.

1133. Id. Examinations. The commissioner of insurance shall examine and inquire into violations of the insurance laws of this state, and for this purpose, or to see if the laws are obeyed, or to examine the financial condition affairs, and management of any company, he may visit or cause to be visited by any competent person or persons he may appoint, the head office in the United States of any domestic or foreign insurance company applying for admission to or already admitted to do business in this state, and may for this purpose examine or investigate any company organized under the laws of Utah, and any agency of any company doing business in this state; *provided,* that the written consent of the state board of examiners must be obtained to all examinations, inquiries, or investigations made beyond the borders of the state of Utah. The cost of such examinations, when made beyond the borders of the state of Utah, shall be paid by the company examined, and shall include the reasonable expenses of the commissioner and assistants employed therein, whose services are paid for by the department, and the compensation and reasonable expenses of his assistants employed therein, whose services are not paid by the department. Duplicate receipts, showing the entire costs of the examination authorized by the commissioner, shall be taken and certified to by the company examined, and one shall be filed with the governor and the other shall be filed in and become a part of the public record of the insurance department. When insurance companies not admitted to do business in this state, or companies adjudged insolvent, or companies for any cause withdrawing from the state, neglect, fail, or refuse to pay the charges for examination, as approved by the commissioner, such charges shall be paid by the state treasurer upon the order of the commissioner, as provided in this chapter, and the amount so paid shall be a first lien upon all the assets and property of such company, and may be recovered by suit by the attorney-general on behalf of the state of Utah, and restored to the state treasury. The commissioner may also examine companies upon the request of five or more of the policy-holders, representing at least $100,000 insurance in force, who shall make affidavit of their belief, with specifications of their reasons therefor, in writing, showing reasonable grounds for such belief, that such company is in an unsound or insolvent condition; *provided,* that only the United States branches of companies incorporated in foreign countries shall be examined by said commissioner. For the purpose of examinations, inquiries, or investigations, as aforesaid, the commissioner or the person authorized to make them, shall have free access to all books and papers of an insurance company that relate to its business and the books and papers kept by any officer, agent, or employe, relating to or upon which any record of its business is kept, and may summon witnesses and administer oaths or affirmations in the examination of the directors, trustees, officers, agents, or employes of any such company and any other person in relation to its affairs, transactions, and condition. He may require and compel the production of records, books, papers, contracts, or other documents by attachment, if necessary. Any person knowingly or wilfully testifying falsely in reference to any matter material to said investigation, examination, or inquiry shall be deemed guilty of perjury, and punished accordingly; and any person who shall wilfully refuse or fail to attend, answer, or produce books or papers, or who shall refuse to give said commissioner

or the person authorized by him full and truthful information and answer in writing to any inquiry or question made in writing by said commissioner, or the person authorized by him, in regard to the business of insurance carried on by such person, or other matters under investigation, or refuse or wilfully fail to appear and testify under oath before the commissioner or person authorized by him, shall be deemed guilty of a misdemeanor, and, upon convicton thereof, shall be punished by a fine of not exceeding $500 or by imprisonment in the county jail not exceeding three months, or by both such fine and imprisonment. Any director, trustee, officer, agent, or employe of any insurance company, or any other person, who shall knowingly or wilfully make any false certificate, entry, or memorandum upon any of the books or the papers of any insurance company, or upon any statement filed or offered to be filed in the insurance deparment of this state, or used in the course of examination, inquiry, or investigation, with the intent to deceive the commissioner or any person employed or appointed by him to make such examination, inquiry, or investigation, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding $1,000, or by imprisonment not less than two months nor more than twelve months in the county jail, or by both such fine and imprisonment.

1134. May publish result of examination. Revocation of certificate. When the commissioner of insurance deems it to the interest of the public, he may publish the result of any examination or investigation in a daily newspaper published in and of general circulation in the state. If the commissioner finds, upon examination, hearing, or other evidence, that any foreign or domestic insurance company is in an unsound or insolvent condition, or has failed to comply with the law or with the provisions of its charter, or that its condition is, or its methods are, such as to render its operation hazardous to the public or its policy-holders, or that its actual assets, exclusive of its capital, are less than its liabilities, or if its officers or agents refuse to submit to examination or to perform any legal obligation relative thereto, or refuse on behalf of the company to pay the examination charges, he shall suspend or revoke all certificates of authority granted to said insurance company, and its officers or agents, and shall cause notice thereof to be published in one or more daily newspapers, which shall have a general state circulation, and no new business shall thereafter be done by it or its agent in this state, while such default or disability continues, nor until its authority to do business is restored. Before suspending or revoking the certificate of authority of any such company, the commissioner shall, unless it is insolvent or its capital impaired, grant it fifteen days in which to show cause why such action should not be taken. Any foreign or domestic insurance company, whose certificate of authority has been suspended or revoked by the commissioner, may, within fifteen days thereafter, appeal from said order to the district court of the district in which its principal place of business is located, which court, upon filing the proper petition, shall cause the record and orders of the commissioner to be brought before it, and upon a hearing of the case by the court de novo, the court shall either confirm or revoke the order of the commissioner, as the law and the facts of the case may warrant. Said court shall have the power to make an order suspending or revoking the license of a domestic company pending the appeal; *provided,* the company appealing shall give bond with the sureties satisfactory in court, in such penalty as the court may determine is just and proper, conditioned to pay to the state, and to any and all persons whomsoever, any and all loss that may be sustained by reason of the stay or suspension of such order of said commissioner; and *provided, further,* that, during the period allowed for taking such appeal, the publication of notice of the revocation or suspension of license of such domestic company as provided by this chapter, shall not be made, and if the order of said commissioner has been stayed or suspended by the order of said court, such publication shall not be made until after the discharge of such stay or until the affirmation of such order of revocation or suspension. Upon such appeal the domestic insurance company shall

be entitled to a trial by jury upon all issues of fact. If the trial is by jury, the court shall submit to the jury specific requests to find, covering the matters in issue separately, and the jury shall return special verdict upon each question submitted, and if by such verdict it shall be found the corporation, association, or society is insolvent because of matured death claims or other obligations due and unpaid exceeding its assets as herein provided, or its capital has been impaired, the court may render judgment that it and each officer thereof be perpetually enjoined from exercising any corporate rights, privileges, or franchises and that it be dissolved, and that a receiver be appointed, an account taken, and an equitable distribution of its property among its creditors and members be made. If no charge of insolvency is made, or if made is not established by the verdict of the jury, but it shall be found by such verdict that the corporation, association, or society has exceeded its corporate powers, or failed to comply with any provisions of this chapter, or has done or committed any act for which its license may be revoked or suspended under any of the provisions of this chapter, or has conducted its business unlawfully or fraudulently, the court may make and enter judgment enjoining and restraining it from the commission of such acts or such of them as the court may determine, and in case of failure to desist therefrom within the time to be specified in such judgment, that the corporation be dissolved. Pending the trial, if no bond has been given, as herein provided, the court may, upon motion of the attorney-general and upon notice to the corporation, association, or society, grant an injunction restraining it and its officers and directors from collecting any debt or demand and from paying out or in any way transferring or delivering to any person any money, property, or effects during the pendency of the proceedings, except by direction of the court, and may appoint one or more temporary receivers in such cases. From the action of said district court, an appeal may be taken, by either the commissioner of insurance or by the insurance company, to the supreme court of the state, as in other cases; and it shall be the duty of said district court and of said supreme court to advance the hearing of said matters so far as justice and the business of the court may permit.

1135. Fees. There shall be paid by every insurance company doing business in this state, to the commissioner of insurance, the following fees:

For filing statement preliminary to admission (foreign companies), $50;

For filing certified copy of acceptance by foreign companies of the provisions of the constitution of the state of Utah, $3;

For filing any power of attorney, $1;

For filing articles of incorporation and by-laws of foreign companies, and examination thereof, $25;

For filing amendments to articles of incorporation and by-laws of foreign companies, and examination of, $5;

For filing annual statement, $50;

For certificate of authority to transact business in this state, $5;

For each copy of certificate of authority for use of agents and solicitors, $2;

For preparing synopsis of annual statement for publication and certifying the same, $5;

For each copy of any paper filed in his office, per folio, 20 cents;

For affixing the seal of his office and certifying any paper, $1.

All insurance companies engaged in the transaction of business of insurance in this state shall annually, on or before the 1st day of March in each year, pay to the commissioner of insurance 1½ per cent of the gross amount of premiums received, less the amount of all premiums returned, within this state during the year ending the previous 31st day of December; *provided,* that if any insurance company shall have paid a property tax during said year, it shall be entitled to deduct from the tax therein provided the amount of such property tax paid for general state purposes.

1136. Taxes and fees provided herein shall be in lieu of all other taxes.

The taxes and fees, as provided herein, shall be in lieu of all other taxes, licenses, and fees of every kind and character by the state or any subdivision, or village, town, or municipality thereof.

1137. Disposition of moneys. Expenses. All moneys received by the commissioner of insurance shall be paid into the state treasury at the close of each month. The state treasurer shall give duplicate receipts for all moneys thus paid into the state treasury, one of which shall be delivered to the state auditor, and the other filed in the office of the commissioner of insurance. All expenses of the insurance department, including salaries, shall be paid upon approval by the state board of examiners on warrants drawn by the state auditor on the state treasurer. For all the payments made by him, the commissioner shall take proper vouchers. The accounts for all receipts and disbursements made by the insurance department shall be audited, adjusted, and a report made thereon to the governor at the close of each year by the commissioner of insurance.

1138. Duplication of corporate names prohibited. No domestic insurance company shall adopt the name of any existing company transacting a similar business, or any name so similar as to be calculated to mislead the public, but any domestic mutual or mutual assessment insurance company may, upon complying with the terms and conditions of this chapter, be reorganized and reincorporated as a joint stock company under the same name by which it was incorporated as a mutual or assessment company, with the omission of the word "mutual," and it shall be unlawful for any other company to be incorporated or transact business under or by the name under which any such mutual or mutual assessment company was operating at the time of reincorporation.

1139. Unlawful to solicit for company not authorized to do business. Penalty. Licenses. Bond. It shall be unlawful for any person, company, or corporation in this state either to procure, receive, or forward applications for insurance in, or to issue or to deliver or accept policies of or for, any company or companies not having been legally authorized to do business in this state, as provided in this chapter; and any such person, company, or corporation violating the provisions of this section shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall, for each and every offense, be punished by a fine of $100 or by imprisonment for two months in the county jail, or both, in the discretion of the court; *provided,* that insurance in companies not authorized to transact business in this state may be placed upon terms and conditions in this section hereinafter set forth. The insurance commissioner may issue a license to any regularly licensed fire insurance agent of this state, subject to revocation at any time, permitting the person named therein to procure policies of insurance on risks located in this stated for companies not authorized to transact business in this state, and for such license the commissioner of insurance shall collect a fee of $50 for each such license and renewal thereof, and each such license and renewal shall expire on the 1st day of March, unless revoked sooner. Before the person named in such license shall procure any insurance in such company, he shall, in every case, execute and file with the commissioner of insurance an affidavit that he is unable to procure, for a specified person, firm, or corporation, in a majority of the companies authorized to do business in this state, the amount of insurance necessary. Every person so licensed shall keep a separate account of the business done under said license, open at all times to inspection of the insurance commissioner, and shall file a certified copy thereof forthwith with the insurance commissioner, showing the exact amount and character of such insurance placed for any person, firm, or corporation, the gross premiums charged thereon, the companies in which the same is placed, the dates of the policies, and the terms thereof, the location of the insured property, and also a report in the same detail of all such policies canceled and the gross return thereon. Before receiving such license, the person licensed shall execute and deliver to the commissioner of insurance a bond to the people of the state of Utah in the penal

sum of $2,000, with such sureties as the commissioner shall approve, conditioned that the licensee will faithfully comply with the requirements of this section, and will file with the insurance commissioner on or before the last day of February of each year a sworn statement of the gross premiums charged for insurance procured or placed, and the gross return premiums on such insurance canceled under such license during the year ending on the 31st day of December last preceding, and will pay to the insurance commissioner of the state of Utah, for the use and benfit of said state, an amount equal to 4 per cent of such gross premiums, less such return premiums so reported, and in default of the payment of any sum imposed by this section, the said commissioner may sue for same in any court of record in this state. Any person, firm, company, or corporation for whom such insurance as herein specified shall have been effected, whenever required by the commissioner so to do, shall produce for examination by him the policy or policies issued for such insurance, and disclose to him the true amount of the gross premiums agreed to be paid therefor, and upon refusal so to do shall forfeit to the said state of Utah, for each such refusal, the sum of $200 to be recovered in a civil action. All policies and insurance contracts issued without full compliance, by all parties concerned, with the laws of this state, are null and void.

1140. Certificate of authority before doing business. Revocation. Penalty. 1. No foreign or domestic insurance company shall transact any insurance business in this state unless it shall first procure from the commissioner a certificate of authority stating that the requirements of the laws of this state have been complied with and authorizing it to do business. Said certificate of authority shall expire on the last day of February in each year, and shall be renewed annually if the company has continued to comply with the laws of the state.

2. Every such company shall, through its proper officer or agent, promptly notify the commissioner in writing of the name, title, and address of each person, firm, or corporation it shall appoint or employ to act as agent or solicitor in this state. Upon receipt of this notice, together with the fee required by this chapter, if such person is of good reputation and character and the facts warrant it, the commissioner shall issue to such person, firm, or corporation a certificate, which shall include the name of the company requesting it, a copy of the certificate of authority authorizing it to do business in this state, and the name and title of the person to whom the certificate is issued. Such certificate, unless revoked by the commissioner for cause, or canceled at the request of the company employing the holder thereof, shall continue in force until the 1st day of March next after its issue, and must be renewed annually; *provided,* in the event of change of agent or solicitor, said certificate may be transferred by endorsement thereon for the unexpired term.

3. Cause for the revocation of the certificate of an agent or solicitor may exist for violation of the insurance laws, or, if it shall appear to the commissioner, upon due proof, after notice, that such agent or solicitor has knowingly deceived or defrauded a policy-holder or person being solicited for insurance, or that such agent or solicitor has unreasonably failed and neglected to pay over to the company, or its agent entitled thereto, any premium or part thereof, collected by him on any policy of insurance. The commissioner shall publish such revocation in such manner as he deems proper for the protection of the public.

4. A person who is not provided with a certificate from the commissioner as an authorized agent or solicitor of an insurance company, and who, for compensation, transmits for a person other than himself an application for a policy of insurance to or from such company, shall be an insurance agent or solicitor within the intent and for the purposes of this chapter, and shall therefor become liable for all duties, requirements, liabilities, and penalties to which an agent of such company is subject, and such company, by compensating such person, through any of its officers, agents, or solicitors,

shall thereby accept and acknowledge such person as its agent or solicitor in such transactions.

5. When an application is received for a certificate of authority, for an agent or solicitor for a life insurance company for a person already authorized by the commissioner to act for another insurance company, it shall be the duty of the commissioner to notify the company for which such person is already authorized to act of such application, and to also notify the company by or for which the application is made, of the name of the company for which such person is already authorized to act as agent or solicitor.

6. It shall be the duty of every person soliciting insurance in this state to comply with the provisions of this chapter, relating to the procurement of certificates; and any person who solicits insurance without the certificate of authority of an agent or solicitor for the company receiving the business as required by this chapter, shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not less than $100, or by imprisonment in the county jail not exceeding two months, or by both such fine and imprisonment, in the discretion of the court.

7. Any person who shall solicit and procure an application for insurance, other than fire insurance, shall, in any controversy between parties to the contract, or between the parties to the contract and the beneficiary, if any, be held to be the company's agent, whatever conditions or stipulations may be contained in the policy or contract; but such policy may provide that no statement or declaration made to or by any agent, examiner, or other person, not contained in the application, shall be taken or considered as having been made to or brought to the notice or knowledge of the company, or as charging it with any liability by reason thereof. Such agent who knowingly procures by fraudulent representations payment of an obligation for payment of premium of insurance, shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than $100 or more than $1,000, or by imprisonment in the county jail for not more than one year.

8. An insurance agent who acts in negotiating a contract of insurance, or who collects premiums for an insurance company lawfully doing business in this state, and who embezzles or fraudulently converts to his own use or with the intent to use or embezzle, takes, secretes, or otherwise disposes of or fraudulently withholds, appropriates, lends, invests, or otherwise uses or applies any money or substitute for money received by him as such agent, contrary to the instructions or without the consent of the company for or on account of which the same was received by him, shall be guilty of larceny and be punished accordingly.

9. Any solicitor, agent, or examining physician who shall knowingly or wilfully make any false or fraudulent statement or representation in or with reference to any application for insurance or for the purpose of obtaining any money or benefit in any corporation transacting business under this chapter, shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than $100 nor more than $500, or by imprisonment in the county jail for not less than thirty days nor more than one year, or both in the discretion of the court.

1141. Foreign companies. Any insurance company, not incorporated or organized under the laws of this state desiring to transact business in this state, shall file with the insurance commissioner of this state a written instrument or power of attorney, duly signed and sealed, appointing and authorizing some person, who shall be a resident of this state, to acknowledge or receive service of process and upon whom process may be served for and in behalf of such company in all proceedings that may be instituted against such company in any court of this state, or any court of the United States in this state, and consenting that service of process upon any agent or attorney appointed to accept service under the provisiins of this section shall be taken and held as valid as if served upon the company, and such instrument shall further provide that the authority of such attorney shall continue until

revocation of his appointment is made by such company by filing a similar instrument with the said insurance commissioner, whereby another person shall be appointed as such attorney. Every such company shall thereafter, before the 1st day of March of each year, file a new power of attorney, signed as aforesaid and of similar tenor. Hereafter it shall be unnecessary to file such papers in the office of the secretary of state.

1142. Id. No foreign insurance company shall transact any business in this state unless it shall first file in the office of the commissioner a copy of its articles of incorporation and by-laws and all amendments thereof or alterations thereto, and also any such subsequent amendments or alterations, and also a copy of its acceptance of the provisions of the constitution of this state, and, in the case of companies which have already filed the same, a copy of the instrument designating its agent upon whom process may be served, all certified to by the secretary of state as being true copies of such papers on file in his office; together with a statement under oath of the president and the secretary or other chief officers of such company, showing the condition of affairs of such company on the 31st day of December next preceding the date of such oath. This statement shall be in the same form and shall set forth the same particulars as the annual statement required by this chapter. No charge for such certified copies, other than for the certificate attached thereto, shall be made when true copies are furnished by such company to the secretary of state for his certification.

1143. Annual statement. Forms. Every insurance company doing business in this state shall, on or before the 1st day of March in each year, render to the commissioner of insurance a report signed and sworn to by its chief officers of its condition on the preceding 31st day of December, which shall include a detailed statement of assets and liabilities, the amount and character of its business transacted and moneys received and expended during the year, and any further details of expenditures, and such other information to be included in the report or supplementary thereto which the commissioner may deem necessary. A synopsis of such statement, together with the commissioner's certificate of authority to transact business in this state, shall be published in some newspaper of general circulation published at the capital for at least four insertions. Such publication shall be made within thirty days after such certificate of authority is issued, and a copy of the paper containing such publications shall be filed in the office of the commissioner. The commissioner shall revoke and refuse to reissue the certificate of authority of any insurance company failing or refusing to furnish the reports or other information requested by the commissioner, as provided in this section. The commissioner of insurance must cause to be prepared and furnish on demand to each of the companies printed forms of the statements herein required; and he may make such changes from time to time in the form of such statements and reports as seem to him best adapted to elicit from the companies a true exhibit of their condition. The same forms must be so furnished on demand to all companies engaged in the same kind of business.

This section applicable to corporate surety companies, § 1211.

1144. Capital required. No joint stock fire insurance company shall be permitted to do any business in this state unless it is possessed of an actual paid up cash capital and surplus as follows: Companies with territory not limited to Utah, a capital of not less than $200,000, and a net surplus over all liabilities of not less than $100,000, or a capital and net surplus over all liabilities aggregating $300,000. Companies, the business of which is limited to Utah only, a capital of not less than $50,000 and a net surplus over all liabilities of not less than $50,000. No mutual or mutual assessment fire insurance company shall be permitted to do any business in this state unless it is possessed of cash assets as follows: Companies with territory not limited to Utah, cash assets of not less than $100,000. Companies whose business is limited to Utah only, cash assets of not less than $25,000, such assets to be net after deducting all liabilities other than reinsurance reserve.

Companies with a guaranty fund shall be required to have the same capital and surplus as that required of joint stock companies.

No mutual or mutual assessement fire insurance company shall receive a certificate of authority to do business in this state until it has filed with the insurance commissioner a satisfactory bond, to be approved of by the insurance commissioner, executed by at least two resident freeholders of this state or by a surety company authorized to do business in this state, in the penal sum of $10,000, for the use and benefit of the policy-holders of such company in this state, who, in any action against such company, may make such sureties or surety company defendants to the suit, and a judgment shall be rendered against them as shall be proper. If the total annual premiums of such company in this state should exceed $10,000, then the bond shall be increased to an amount equal to such premiums. If the insurance company so desires, it may, in lieu of such bond, deposit with the commisioner of insurance bonds or securities of the kind mentioned in paragraph 1 § 1145, equal in value to the amount of such bond, the value thereof to be determined by said commissioner. In the event a policy-holder of this state recovers judgment against such company, the court shall make such decree for the sale of such securities to satisfy the same as may be just and proper.

No joint stock insurance company, organized for any other purpose than fire insurance, shall be permitted to do business in this state unless it is possessed of a cash capital of not less than $100,000.

No mutual or mutual assessment insurance company organized for any other purpose than fire insurance shall be permitted to do business in this state unless it is possessed of a guaranty or surplus fund of not less than $100,000.

No insurance company not organized under the laws of a state, territory, or district of the United States shall be admitted or permitted to do any business in this state, until, besides complying with the insurance laws of this state, it has made a deposit with the commissioner of insurance of this state, or with the duly authorized officer of some other state of the United States, of a sum of not less than the capital, or capital and surplus, or guaranty, or surplus fund required of like companies under this chapter. Such deposit must be an exclusive trust for the benefit and security of all the company's policy-holders and creditors in the United States, and may be made in the securities, but subject to the limitations specified in § 1145; and such deposit shall be deemed, for all purposes of the insurance laws, the capital, or capital and surplus, or guaranty, or surplus fund of the company making it.

1145. Id. Investments. 1. No insurance company shall transact business in this state unless it is possessed of the actual amount of capital or guaranty or surplus funds as required in § 1144, in cash or invested in bonds or public stock issued or created by the United States, or by this state, or by any other state of the United States, or the district of Columbia, or any or either of them, or by any of the incorporated cities, counties, townships, or other municipal corporation thereof; or in bonds or notes secured by mortgages or trust deeds on unencumbered real estate located within said states, or the district of Columbia, or either of them, worth at least 50 per cent more than the sum invested or loaned thereon.

2. Domestic insurance companies hereafter organized may, after complying with the provisions of this chapter, invest their additional surplus, or other funds, in such securities as are named in paragraph 1 hereof; or may loan upon, or purchase real estate or mortgage bonds of railroad companies organized under the laws of said states or the district of Columbia, or either of them, or operated therein, or the capital stock, bonds, securities, or evidences of indebtedness created by any corporation or corporations created under the laws of the United States, or of this or any other state, except the stock of mining companies; *provided,* that no loan shall be made or retained on any of the above-mentioned securities, except the bonds or stocks issued or created by the United States or this state, exceeding 90 per cent of the market

value thereof; and *provided, further,* that no loan shall be made by any company on its own stock; and any life insurance company of this state may, in addition to the foregoing, purchase for its own benefit any policy of insurance or other obligation of the company, and any claims of policy-holders, and may lend to the holders of policies of the company a sum not exceeding the reserve value of the policies and surplus or dividend additions thereto, if any, at the time the loan is made, for the payment of which loan, the policies and all profits thereon shall be pledged. After January 1, 1915, domestic insurance companies now organized shall be subject to the provisions of this paragraph.

May invest in land mortgage bonds, § 1057.

1146. Dividends and profits. It shall be unlawful for the directors, trustees, managers, or officers of any insurance company organized under any of the laws of this state, directly or indirectly, to make or pay any dividend or pay any interest, bonus, or other allowance in lieu of dividends except from surplus profits arising from their business. Except as otherwise provided herein, in the case of life insurance companies, every insurance company, doing business in this state and issuing policies or certificates in which policy-holders or members are entitled to share in any part of the profits or surplus, shall on all policies hereafter issued, beginning at the end of the fifth policy year, make an annual apportionment and accounting of divisible surplus to each such policy-holder or member on all such participating policies, and shall carry the amount of such apportioned surplus as a distinct and separate liability, and no company or any of its officers shall be permitted to use any part of such apportioned surplus fund for any purpose whatsoever, other than for the express purpose for which the same was accumulated.

1147. Domestic companies doing business in other states. If, upon investigation, the commissioner of insurance finds that any insurance company incorporated under the laws of Utah is doing business in another state or territory without having first procured a license or authority from such state or territory, if any is required, authorizing it to do business therein, he may revoke the authority of such company to do business in this state.

1148. Maximum insurance on any one risk. No foreign or domestic insurance company doing business in this state shall expose itself to loss on any one risk or hazard to an amount exceeding 10 per cent of its paid up capital and surplus, unless the same shall be reinsured in some other good and responsible companies. A mutual fire insurance company may, however, insure a single risk in an amount not exceeding 5 per cent of its net annual premium income for the year last preceding.

1149. Organization of joint stock companies. Any number of persons, not less than five, at least one of whom shall be a resident of this state, may associate to establish a joint stock insurance company, under the provisions of chap. 1 of this title (§§ 860-899), respecting corporations for pecuniary profit, and all the rights, privileges, and all the duties and obligations of such corporations, and the officers and stockholders thereof, shall be as provided in chaps. 1 and 2 of this title (§§ 860-919). The secretary of state shall not issue a certificate of incorporation to any insurance company unless it shall appear by affidavit that the subscribed capital and net surplus or guaranty fund when required by this chapter shall have been paid as required by § 1144.

1150. Secretary of state to furnish commissioner copies of articles of domestic companies. A copy of the articles of incorporation and by-laws, and all amendments and alterations thereof, of all the domestic insurance companies now doing business within this state shall, without charge for so doing, be certified by the secretary of state to the commissioner, who, also without charge, shall file the same. Hereafter, and before the secretary of state shall issue a certificate of incorporation to domestic insurance companies, he shall, without charge for so doing, certify a copy of the articles of incorporation, together with a copy of its by-laws, to the commissioner for approval, and when so approved by the said commissioner, the secretary of state shall issue

the certificate of incorporation to such domestic insurance company. He shall also, without charge for so doing, certify to the commissioner any amendments made to such articles of incorporation or by-laws. On and after the passage of this chapter, no such domestic insurance company shall be permitted to do business in this state until it shall have complied with the provisions of this chapter and shall have received from the commissioner a certificate of authority to transact business in this state; *provided,* that any part of the paid up capital stock and surplus may be paid in real or personal property, in which insurance companies are permitted to invest their capital or funds, as herein provided, the value thereof to be determined by affidavit as provided in chap. 1 of this title (§§ 860-899).

1151. Policies. All policies or contracts made or entered into by any domestic company may be made with or without the seal thereof. They shall be subscribed by the president or such other officers as may be designated by their by-laws for that purpose, and shall be attested by the secretary, and being so subscribed shall be obligatory upon the company.

1152. Risks to be approved. No insurance company or association (other than life), not incorporated under the laws of this state, shall make, write, or place any policy or contract of insurance of any kind or character binding in law upon any person or property situated or located in this state, except after the said risk has been approved by an agent resident of this state, regularly commissioned and licensed to transact insurance business in Utah for said company, who shall countersign all policies so issued and receive his commission thereon, and also to the end that the state may receive the taxes required by law to be paid on the premiums collected for insurance written herein. This section shall not apply to reinsurance policies, nor insurance covering the rolling stock of railroad corporations where such railroad line lies partially within and partially without the state of Utah, nor to property in transit while in the possession and custody of common carriers.

1153. Valuation of life policies. For the purpose of making valuations of life insurance policies under the provisions of this chapter, the rate of interest assumed in valuing policies shall be 3½ per cent per annum, and the rate of mortality shall be established by the table known as the "American experience table of mortality," for policies issued after January 1, 1910; for policies issued prior to January 1, 1910, the rate of interest assumed shall be 4 per cent per annum, and the rate of mortality shall be established by the table known as the "actuaries' table of mortality," such values to be on the basis of net premiums. For the purpose of estimating the liabilities of insurance companies other than life, the amount required to safely reinsure all outstanding risks shall be estimated by taking 50 per cent of the gross premiums on all risks and policies in force issued for not more than one year and pro rata of all gross premiums on risks and policies written for a longer term than one year. The commissioner may accept the valuation of the department of insurance of any other state or country if made upon the basis and according to the standard herein required, if the insurance officer of such state or country accepts as sufficient and valid for all purposes the certificate of valuation of the commissioner of this state.

1154. Provisions in life policies. On and after January 1, 1910, it shall be unlawful for any foreign or domestic life insurance company to issue or deliver in this state any life insurance policy unless the same shall contain the following provisions:

1. A provision that all premiums shall be payable in advance either at the home office of the company or to an agent of the company upon delivery of a receipt signed by one or more of the duly authorized officers, unless the first payment is set forth in the policy, in which case the policy itself shall be a receipt.

2. A provision that the policy shall be incontestable after two years from its date, except for non-payment of premiums and except for violations of

the conditions of the policy relating to naval or military service in the time of war or other prohibited risks.

3. A provision that the policy shall constitute the entire contract between the parties, and that all statements made by the insured shall, in the absence of fraud, be deemed representations and not warranted, and that no such statement or statements shall be used in defense of a claim under the policy, unless contained in a written application, and a copy of such statement or statements shall be endorsed upon or attached to the policy when issued.

4. That, if the age of the insured has been misstated, the amount payable under the policy shall be such as the premium would have purchased at the correct age, or the premium may be adjusted and credit given to the insured or to the company, according to the company's published rate at date of issue.

5. A provision which shall fulfill the requirements of § 1160. This provision shall not be required in non-participating policies.

6. A provision which shall fulfill the requirements of § 1161. This provision shall not be required in term insurance twenty years or less.

7. A table showing in figures the loan values, if any, and options available under the policies each year upon default in premium payments during the first twenty years of an ordinary life policy, and during the term of premium payments required by the policy upon a limited payment life policy beginning with the year in which such values and options become available.

8. A table showing the amounts of instalments in which the policy may provide its proceeds may be payable.

Any of the foregoing provisions or portions thereof relating to premiums not applicable to single premium policies shall to that extent not be incorporated therein.

1155. Prohibited provisions. On and after January 1, 1910, it shall be unlawful for any foreign or domestic life insurance company to issue or deliver in this state any life insurance policy if it contains any of the following provisions:

1. A provision for forfeiture of the policy for failure to repay any loans on the policy or to pay interest on such loan while the total indebtedness on the policy is less than the loan value thereof. In ascertaining the indebtedness due upon the policy loans, the interest, if not paid when due, shall be added to the principal of such loans and shall bear interest at the rate specified in the note or loan agreement.

2. A provision limiting the time within which any action at law or in equity may be commenced to less than five years after the cause of action shall accrue.

3. A provision by which the policy shall purport to be issued or to take effect more than one year before the original application for the insurance is made, if thereby the assured would rate at an age more than one year younger, according to his age at nearest birthday, than his age at the date of his application, and unless the aggregate amount of the annual premiums for the whole term of such period shall be paid in cash.

1156. Id. Exceptions. The provisions of §§ 1154-1155 shall not apply to annuities, industrial policies, or to corporations or associations operating on the assessment or fraternal plan.

1157. Suspension of authority. The certificate of authority of any foreign or domestic life insurance company violating any of the provisions of §§ 1154-1155 shall be suspended by the commissioner of insurance and shall not be renewed until such company fully and completely conforms to the same. Such action by the commissioner shall be subject to review by any court of competent jurisdiction.

1158. Form of policy submitted to commissioner. On and after January 1, 1910, no policy of life insurance shall be issued or delivered in this state, or be issued by a life insurance company organized under the laws of this state, until the form of the same has been filed with the insurance commissioner;

and after the commissioner shall have notified any company of his disapproval of any form, it shall be unlawful for such company to issue any policy in the form disapproved. The commissioner's action shall be subject to review by any court of competent jurisdiction.

1159. Policies delivered in other states. The policies of a domestic life insurance company may, when issued or delivered in any other state, territory, district, or country, contain any provision required by the laws of the state, territory, district, or country in which the same are issued, anything in this chapter to the contrary notwithstanding, and the policies of a foreign life insurance company, when issued in this state, may include any provision which, by the law of its own state, it is required to incorporate in all policies issued by it.

1160. Holders of participating policies. Every policy-holder shall, on all participating policies hereafter issued, except as provided in § 1162, be permitted at the time the first dividend is declared, to select from among the options set forth in the policy the manner and method of the payment of the surplus to be annually apportioned to his policy.

1161. Default in payment of premiums. 1. In the event of default in payment of any premium due on any policy, provided that not less than three full years' premiums have been paid, there shall be secured to the insured without action on his part as specified in the policy, either paid-up insurance or extended insurance or the application of the net value of the policy as a loan in payment of future premiums, so long as such net value, less the deduction herein provided for, is sufficient to secure such loan with interest added at a rate not exceeding 6 per cent per annum, payable annually in advance; the net value applied to one of the options above provided for shall be at least equal to the entire net reserve held by the company on such policy, including dividend additions, if any, less 2½ per cent of the amount insured by the policy and dividend additions, if any, or one-fifth of such reserve, and less any outstanding indebtedness to the company on the policy at the time of default.

2. No agreement between company and policy-holder or applicant for insurance shall be held to waive any of the provisions of §§ 1160 and 1161, except as herein provided.

3. This section shall not apply to industrial policies.

1162. Mutual companies. Every life insurance company doing business in this state, conducted on the mutual plan, or in which policy-holders are entitled to share in the profits or surplus, shall, on all policies of life insurance hereafter issued under conditions of which the distribution of surplus is deferred to a fixed or specified time, and contingent upon the policy's being in force and insured's living at that time, annually ascertain, beginning at the end of the fifth policy year on all policies hereafter issued, the amount of surplus to which all such policies as a separate class are entitled, and shall annually apportion to such policies as a class the amount of surplus so ascertained, subject to the mortality experience of the company to the end of the dividend period. Every company having in force any such deferred dividend policies shall, upon application from a policy-holder, at the time of the mailing of annual premium notice, furnish to such a policy-holder an annual statement showing the contingent surplus accumulation to the credit of the policy at the beginning of the preceding year, the rate of interest earned on the accumulation, the amount of interest, and the amount of saving and profit contingently credited to said policy during the preceding year, with a showing of the total amount of surplus accumulation then contingently accredited to the policy, which statement shall be substantially in accordance with the following form:

STATEMENT OF ANNUAL APPORTIONMENT OF SURPLUS.

Policy No. ..... Distribution period .....
Years ..... Age at issue ..... Surplus accumulation
contingently credited to policy as per last annual statement .....

Interest credit: Net rate earned by company ..... per cent .....
Savings and profit additionals for year .....
Contingent Surplus Credit .....19..... $.....

.....
Secretary.

This section shall not apply to industrial policies.

1163. Disbursements by domestic companies. No domestic life insurance company shall make any disbursement of $100 or more unless the same is evidenced by a voucher signed by or on behalf of the person, firm, or corporation receiving the money and correctly describing the consideration for the payment. If the expenditure be for both services and disbursements, the voucher shall set forth the services rendered and an itemized statement of the disbursements made. If the expenditure be in connection with any matter pending before any legislature or public body, or before any department or officer of any state or government, the voucher shall correctly describe, in addition, the nature of the matter and of the interest of such company therein. When such voucher cannot be obtained, the expenditure shall be evidenced by an affidavit describing the character and object of the expenditure, and stating the reason for not obtaining such voucher.

1164. Salaries. No domestic life insurance company shall pay any salary, compensation, or emolument to any officer, trustee, or director thereof, nor any salary compensation or emolument amounting in any year to more than $5000 to any person, firm, or corporation, unless such payment first be authorized by a vote of the board of directors of such life insurance company. No such company shall grant any pension to any officer, director, or trustee thereof or to any member of his family after his death.

1165. Unlawful to use or offer money for political purposes. No insurance company or association, including fraternal beneficiary associations, doing business in this state, shall, directly or indirectly, pay or use or offer, consent or agree to pay or use any money or property for or in aid of any political party, committee, or organization, or for or in aid of any corporation, joint stock or other association organized or maintained for political purposes, or for or in aid of any candidate for political office, or for nomination for such office, or for any political purpose whatsoever, or for the reimbursement or indemnification of any person for money or property so used. Any officer, director, stockholder, attorney, or agent of any corporation or association which violates any of the provisions of this chapter, who participates in, aids, abets, advises, or consents to any such violation, and any person who solicits or knowingly receives any money or property in violation of this chapter, shall be guilty of a misdemeanor and be punished by imprisonment for not more than one year and a fine of not more than $1000, and any officer aiding or abetting in any contribution made in violation of this chapter, shall be liable to the company or association for the amount so contributed.

No person shall be excused from attending and testifying or producing any books, papers, or other documents before any court or magistrate upon any investigation, proceeding, or trial, for a violation of any of the provisions of this chapter, upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate or degrade him; but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may so testify or produce evidence, documentary or otherwise, and no testimony so given or produced shall be used against him upon any criminal investigation or proceeding.

Corporations prohibited from making campaign contributions, § 2379.

1166. Misrepresentations. Penalty. No insurance company doing business in this state, and no officer, director, or agent thereof, shall issue or circulate, or cause or permit to be issued or circulated, any estimate, illustration, circular, or statement of any sort, misrepresenting the terms of any policy

issued by it or the benefits or advantages promised thereby, or the dividends or shares of surplus to be received thereon, or shall use any name or title of any policy or class of policies, misrepresenting the true nature thereof, nor shall any such corporation or agent thereof make any misrepresentation to any person insured in another company for the purpose of inducing or tending to induce such person to lapse, forfeit, or surrender his said insurance. Violation of this section by an agent or officer of an insurance company shall be a misdemeanor and punished by a fine of $500 or by imprisonment in the county jail for sixty days, or by both such fine and imprisonment; and if the company violates or participates in the violation of this section, such company shall have its certificate of authority to do business in this state suspended for a period not exceeding six months for each offense.

1167. Discriminations and rebates prohibited. Penalty. No life insurance company doing business in this state shall make or permit any distinction or discrimination in favor of individuals between insurants of the same class and equal expectation of life in the amount of payment of premiums or rates charged for policies of life or endowment insurance, or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of the contracts it makes. Nor shall any such company or agent thereof make any contract of insurance or agreement as to such contract other than as plainly expressed in the policy issued thereon; nor shall any such company or any officer, agent, solicitor, or representative thereof pay, allow, or give or offer to pay, allow, or give, directly or indirectly, as an inducement to insurance, any rebate or premium payable on the policy, or any special favor or advantage in the dividends or other benefits to accrue thereon, or any paid employment or contract for services of any kind; nor any valuable consideration or inducement whatever, not specified in the policy contract of insurance, nor give, sell, or purchase or offer to give, sell, or purchase as inducement to insurance or in conjunction therewith, any stocks, bonds, or other securities of any insurance company or other corporation, association, or partnership, or any dividends or profits to accrue thereon; nor anything of value whatever not specified in the policy. Every officer or agent of an insurance company doing business in this state, who shall violate any of the provisions of this section, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined a sum not less than $100 nor exceeding $500, or imprisoned in the county jail not less than thirty days, nor more than ninety days, or both, in the discretion of the court, and shall pay the costs of the prosecution. It shall be the duty of the commissioner, upon being satisfied that any such insurance company, or any agent thereof, has violated any of the provisions of this section, to revoke the certificate of authority of the company or agent so offending.

1168. Stock schemes, advisory board contracts, etc., prohibited. Penalty. From and after the date this chapter takes effect, no life insurance company shall issue in this state, nor permit its agents, officers, or employes to issue in this state, agency company stock or other stock or securities or any special or advisory board or other contracts of any kind promising returns and profits as an inducement to insurance, and on and after the passage of this chapter, no life insurance company shall be authorized to do business in this state, which issues or permits its agents, officers, or employes to issue in the state of Utah or in any other state or territory, agency company stock or other stock or securities or any special advisory board or other contracts of any kind promising returns and profits as an inducement to insurance, and no corporation or stock company, acting as agent of a life insurance company, nor any of its agents, officers, or employes, shall be permitted to agree, sell or offer to sell, give or offer to give, directly or indirectly, in any manner whatsoever, any share of stock, securities, bonds, or agreement of any form or nature, promising returns and profits as an inducement to insurance, or in connection therewith; *provided,* that nothing herein contained shall impair or affect in any manner any such contracts issued or made as an inducement to

insurance, prior to the enactment hereof, or prevent the payment of the dividends or returns therein stipulated to be paid. It shall be the duty of the commissioner, upon being satisfied that any such insurance company or any agent thereof has violated any of the provisions of this section, to revoke the certificate of authority of the company or agent offending.

1169. Unlawful to accept rebates. Penalty. Any person knowingly receiving any rebate or allowance or reduction from any premium or any special contract of employment, or promising profits or dividends of any character, or any valuable thing, special favor, or advantage whatever, as an inducement to take any policy of life insurance, not specified in the policy contract, shall be guilty of a misdemeanor and shall upon conviction be punished by a fine of $100 or imprisoned in the county jail for a period of thirty days, or both, in the discretion of the court; *provided,* that this section shall not apply to the payment of dividends upon contracts made as inducements to insurance prior to the enactment hereof.

1170. Contracts, where made. Any insurance contract shall be deemed to be made in the state of Utah if made through an authorized agent of such insurance company within this state, irrespective of where the insurance contract may be written.

1171. Suicide no defense after first year. From and after the passage of this chapter, the suicide of a policy-holder after the first policy year of any life insurance company doing business in this state shall not be a defense against the payment of a life insurance policy, whether said suicide was voluntary or involuntary and whether said policy-holder was sane or insane.

1172. Assessment companies. No life insurance company, or association, other than fraternal beneficiary associations, which issue contracts, the performance of which is contingent upon the payment of assessments or calls made upon its members, shall do business within this state, except such companies which shall value their assessment policies or certificates of membership as yearly renewable term policies, according to the standard of valuation of life insurance policies prescribed by the laws of this state, and no such company shall provide in any contract of insurance for any cash or other benefit to accrue to any living member or policy-holder or to any beneficiary, except a death benefit, and the assessment policies or certificates of any assessment company or association reincorporated to transact business as a legal reserve or level premium company shall also be valued as yearly renewable term policies, according to the standard of valuation of life insurance policies prescribed by the laws of this state.

1173. Commissioner to examine contracts. The commissioner of insurance shall have power, and it shall be his duty, to examine the form of all policy contracts hereafter issued or proposed to be issued by any fire insurance company, association, or corporation now authorized by law, or that may hereafter apply to be authorized, to transact business of fire insurance in this state.

1174. Reinsurance. Every insurance company doing business in this state may reinsure the whole or any part of any policy obligation in any other insurance company. When the reinsurance is made by any other than a life insurance company, the company so reducing its direct amount at risk shall, for the purpose of computing its unearned premium fund, deduct from the original or policy premium on said direct amount at risk, the net sum actually paid for reinsuring such risk. The company taking over or acquiring the risk, through reinsurance, shall enter, in premium in force at any time the premiums actually received for risks thus acquired through reinsurance, the unearned premium to be computed by the company ceding the risk upon the balance of policy premium in force after deducting the sum actually paid as a premium consideration for the risk so ceded. The company taking over such reinsurance shall compute its unearned premium fund on account thereof upon the basis of the actual amount of net premium so received and in force at the

time of such computation. But this provision shall not apply to a company that reduces by reinsurance its direct liability to the holders of its policies as a step preliminary to its permanent or final retirement from business. Said retiring company shall then be credited in reduction of its outstanding policy liability with the original or policy premium reinsured, irrespective of the net sum actually paid for such reinsurance, and the company taking over such outstanding risks shall be charged with an unearned premium fund on the original or policy premium on said risks, as the same appear in the outstanding policies of the retiring company. No credit of any kind shall be allowed or given, either as a reduction of taxes or of liabilities, to any company transacting business in this state for reinsurance made in companies not authorized to issue policies in this state. The commissioner of insurance may, at any time, require schedules of reinsurance to be filed by each company, which schedules, however, shall not be open to the inspection of the public. Whenever the commissioner shall have or receive any information that any foreign insurance company, other than life, has violated any of the provisions of § 1152 he is authorized, at the expense of such company, to examine, by himself or his accredited representative, at the principal office or offices of such company, located in the United States of America, or in any foreign country, and also at such other offices or agencies of such company as he may deem proper, all books, records, and papers of such company and agents; examine, under oath, the officers, managers, and agents of such company as to such violation or violations. The refusal of any such company to submit to such examination, or to exhibit its books and records for inspection, shall be presumptive evidence that it has violated the provisions of § 1152, and it shall be subject to the penalties prescribed and imposed by this chapter.

1175. Penalty for violations by fire insurance companies. Any fire insurance company, wilfully violating or failing to observe and comply with any of the provisions of this chapter applicable thereto, shall have its authority to transact business in this state revoked by the commissioner of insurance, and such revocation shall continue for at least one year from the date thereof; nor shall any fire insurance company, whose authority to transact business in this state shall have been so revoked, be again authorized or permitted to transact business herein until it shall have filed in the office of the commissioner a certificate signed by its president or other chief officer to the effect that the terms and obligations of the provisions of this chapter are accepted by it as a part of the conditions of its right and authority to transact business in this state. Any fire insurance company, which shall hereafter apply to enter this state to transact business as a new company or to have its certificate of authority renewed, shall, before permission is given to transact business, or before the renewal of its certificate of authority be issued, file with the commissioner of insurance a certificate, signed by its president or other chief officer of such company, to the effect that the terms and obligations of the provisions of this chapter are accepted by it as a part of the conditions of its right and authority to transact business in this state.

1176. Guaranty fund certificates. Guaranty fund certificates may be used to provide a guaranty fund for domestic life and fire insurance companies incorporated upon the mutual plan; such fund to be held as security for the payment of all losses and other policy liabilities of such companies. Guaranty fund certificates may draw interest or dividends not exceeding in the aggregate 8 per cent per annum, which shall only be paid from the profits of the company. Said certificates can only be retired or redeemed by using the profits of the company for that purpose, but the full fund, as required of each kind of mutual and assessment company by this chapter must at all times be maintained. Such guaranty fund shall be a liability until redeemed and retired. It shall be only used to pay the policy claims or liabilities when the contingent mutual liability of the policy-holders has been drawn upon and found insufficient to meet the losses of policy claims, or when the directors from any cause fail to provide for the payment of policy claims. Upon satis-

fying himself of such failure, the commissioner of insurance shall suspend the certificate of authority of such company and apply to the district court for an order restraining said company from doing further business, and the court may appoint a receiver or issue such decrees and orders as may best serve the interests of the members or policy-holders and of the public; and the disbursement or distribution of the guaranty fund shall then be made under the court's direction; *provided, however,* that the fund shall first be used to pay policy claims or losses, and if any of the fund then remains it shall be used to pay creditors, if any, and then the remaining portion of the fund shall be used to redeem outstanding guaranty fund certificates, or, if none are outstanding, it shall be distributed among the members of the company, as the court may direct. The profits of a domestic mutual insurance company or association are that portion of its cash funds not required for the payment of losses and expenses, not set apart for the unearned premium reserve or any other purpose required by law.

1177. Reinsurance by domestic mutual or assessment companies. No domestic insurance company, organized upon the mutual or the assessment plan, shall transfer its risks to, or reinsure them in, any other corporation unless the said contract or transfer or reinsurance is first submitted to and approved by two-thirds vote of the membership, to be taken by person, mail, or proxy, at a meeting of the insured called to consider the same, of which meeting a written or printed notice clearly describing its purpose shall be mailed to each policy-holder or indemnity certificate holder, not less than twenty nor more than ninety days before the day fixed for said meeting, and, in case said transfer or reinsurance shall be approved, every policy-holder or indemnity certificate holder of the said corporation, who shall file, with the secretary thereof within ten days after said meeting, written notice of his preference to be transferred to some other corporation than that named in the contract, shall be accorded all the rights and privileges, if any, in aid of such transfer as would have been accorded under the terms of said contract had he been transferred to the corporation named therein. Before issuing the call aforesaid, a certified copy of such proposed contract of transfer or reinsurance shall be filed in the insurance department, and the call for such meeting shall be submitted to the commissioner of insurance for his approval. The meeting and the counting of votes shall be held and done under the supervision of the commissioner, for the purpose of seeing that the by-laws of the company and the laws of the state are faithfully observed, and the commissioner shall, before the transfer is finally made, report to the governor upon the nature of the contract of reinsurance or transfer, and also as to the methods employed to secure the consent of the members or policy-holders thereto, and as to the disposition of any funds belonging to the members or policy-holders of the company that is to be reinsured, and the said commissioner may, if in his judgment the law has been violated or the members are to be wrongfully deprived of any of their rights or of their joint assets, apply, with the consent of the governor, to the district court for an injunction restraining such transfer or reinsurance. In case such transfer or reinsurance of the corporation is to result in any increase in the premium rates of insurance of those already holding contracts, or in any reduction of the amount of insurance, in lieu of such advance in premium, the fact shall be set forth in the call for the meeting.

1178. Id. Fees and supervision. Mutual and assessment companies shall, unless otherwise specified in this chapter, be required to pay the same fees and be under the same supervision and authority of the commissioner as companies which are engaged in the same kind of insurance business and which are organized upon the joint stock plan; and shall comply with this chapter, unless otherwise specified, and be subject to the penalties provided therein.

1179. Accumulation of profits. Every domestic insurance company incorporated upon the mutual or assessment plan shall state clearly in its

policies or certificates that the accumulation of profits of such corporation, over and above all proper liabilities, shall be the sole property of the members or policy-holders in good standing, and that the same shall be distributed in a just and equitable manner, in case such company is reinsured or ceases to do business.

1180. Organization of mutual or assessment companies. Twenty-five or more persons, citizens of this state, may form a corporation to carry on the business of insurance on the mutual plan of fire insurance upon the assessment plan. The secretary of state shall not issue a certificate of incorporation to any such insurance company organized on the mutual or the assessment plan unless it shall appear by affidavit of at least three of the incorporators that a guaranty or equivalent fund shall have been provided, as required in § 1144, and until the commissioner shall have approved the same. Any company so incorporated shall thereupon have the power to elect directors by vote of incorporators, but the directors so selected shall serve but one year, when an election by the members shall be held. The number of such directors shall be not less than nine, nor more than twenty-five, and in all meetings of the members each shall have one vote, and shall vote in person, by mail, or by proxy; but no person shall vote more than five proxies. Every mutual fire insurance company must, in its by-laws and in its policies, fix an unlimited liability on the part of its members for the payment of losses and expenses; but such liabilities shall cease with the expiration of the time for which a premium has been paid in advance, except for liability incurred during such times. No mutual fire insurance company shall have the power to insure the property of others than members of the company. No note shall be accepted for a premium or a part of a premium or as a part of any fund of a mutual fire insurance company, nor valued as an asset, unless such note shall be and shall state upon its face that it is a lien upon the property insured, and said note shall thereupon be recorded in the office of the recorder of the county where the property is situated, and shall be and become a lien upon such property of like force and effect as a mortgage against same, and no such note shall be surrendered, nor any part of the cash paid upon the premium returned, while the policy for which it was given remains in force. The fee for the recording of such note shall be 25 cents in each case.

1181. Id. Liability of member. Every person who effects insurance in a mutual fire insurance company and continues to be insured, and his heirs, executors, and administrators and assigns, shall thereby become members of the company, during the period of insurance, and shall be bound to pay for losses and such necessary expenses as accrue in and to the company in proportion to the original amount of his deposit note or contingent liability; and the directors shall, as often as they deem necessary, settle and determine the sum to be paid by the several members thereof, and publish the same in such a manner as they may choose, or as the by-laws prescribe, and the sum to be paid by each member shall always be in proportion to the original amount of such liability and shall be paid to the officers of the company within thirty days next after the publication or mailing of such notice; *provided,* that whenever such company is not possessed of cash funds, above its reinsurance reserve, sufficient for the payment of incurred losses and expenses, it shall be deemed as having impaired its capital and shall make an assessment, for the amount needed to pay such losses and expenses, upon its members liable to assessment therefor, in proportion to the several liabilities, and no such company shall borrow money or create a debt, unless for necessary operating expenses, to continue beyond the period when such assessment may be collected and applied to the payment thereof, and no member shall be assessed for liabilities incurred prior to his membership.

1182. Id. In mutual companies, if a member neglect or refuse, for a space of thirty days after the publication or mailing of notice of an assessment, and after demand for payment, to pay the sum assessed upon him as his proportion of any loss or expense as aforesaid, the corporation may sue for

and recover the whole amount of contingent liability with the cost of suit; but execution shall only issue for assessments and costs as they accrue, and every execution shall be accompanied by a list of losses or expenses for which the assessment is made. If the whole amount of the contingent liability of members shall at any time be insufficient to pay expenses and losses occasioned by any fire or fires, the insured, who are entitled to receive payment for losses sustained, for which the company is liable upon its policies, shall receive from and out of such contingent liabilities of members, on account of their respective losses, a proportionate share of the whole amount of such liability, according to the amount of their respective losses; *provided, however,* that nothing herein contained shall be deemed nor construed to affect or take away the rights of such policy-holders in the guaranty fund of such company.

1183. Actions to recover assessments. In actions for the recovery of assessments duly levied by the directors of any mutual fire insurance company in this state, or for money due on the liability of the members of any such company, the official statement of the president or the secretary of such company, under seal and sworn to, shall be received in court as evidence of the facts essential for making the same, and that such assessment for the non-payment of which any such action is commenced has been duly levied and notice thereof given.

1184. Word "mutual" in corporate name. Every mutual fire insurance company shall embody the word "mutual" in its title, which shall appear upon the first page of every policy and renewal receipt in some suitable manner.

1185. Notes not transferable. Mutual fire insurance companies, which shall receive notes in consideration of premiums on their policies, shall be required to insert on the face of each note the following words, to wit: "It is hereby understood and agreed that this note is not transferable."

1186. Certificate by foreign mutual companies. Any foreign mutual fire insurance company organized under authority other than that of the state of Utah, before being authorized to do business in this state, shall be required to file a certificate from the insurance department of its home state, certifying to the fact that such company has assets to the amount required by the provisions of § 1144.

1187. County mutual companies exempt. The provisions of this chapter shall not apply to county mutual fire and lightning insurance companies doing business exclusively within this state. Am'd '15, p. 12.

County mutual insurance companies, §§ 3250-3265. Fraternal insurance companies, §§ 3271-3303. Family protection, §§ 3311-3313.

CHAPTER 12.

LOAN, TRUST, AND GUARANTY ASSOCIATIONS.

1200. (423.) Manner of organization. Loan, trust, and guaranty associations may be incorporated under the provisions of chap. 1 of this title (§§ 860-899), respecting corporations for pecuniary profit; *provided, however,* that the secretary of state shall not issue a certificate of incorporation to any such association, authorizing it to do business in this state, until its articles of association or agreement shall have been approved by the bank commissioner; and all the rights, privileges, and powers, and all the duties and obligations of such corporations, and the officers and stockholders thereof, shall be as provided in said chapter and in chap. 2 of this title (§§ 900-919), respecting assessments; except as in this chapter otherwise provided. Am'd '15, p. 172.

Bank commissioner to examine, § 974. Fees for examinations, § 977.

1201. (424.) Duties and powers. Such corporations shall have power:

1. To make insurance of every kind pertaining to or connected with titles to real estate;

2. To act as assignees, agents, receivers, guardians of the estates of minors and incompetent persons, excutors and administrators, and to execute trusts of every description not inconsistent with law;

3. To become sole security in any case where by law one or more sureties may be required for the faithful performance of any trust, office, duty, action, or engagement;

4. To buy, sell, or mortgage real estate or personal property, to loan money on real estate security or otherwise, to sell and assign mortgages and endorse negotiable instruments, and to make, execute, and deliver bonds, promissory notes, and bills of exchange;

5. To receive deposits of money and to pay an agreed rate of interest on the same; *provided,* that if any loan, trust, and guaranty association organized or existing under the laws of the state shall receive commercial or savings deposits, the liability of the stockholders of such corporation, and the restrictions concerning the lending of its funds, shall be as expressed and limited in the chapter of this title concerning commercial or savings banking corporations respectively;

6. To act as security for the faithful performance of any contract;

7. To become sole security for the faithful performance of the duties of any public officer, or of any officer or employe of any corporation, firm, or individual;

8. To become security upon any writ of error or appeal, or in any proceeding instituted in any court of this state.

Corporate suretyship in general, §§ 1208-1216.

1202. (425.) May act as sole surety. Approval. Certificate of authority. Nothing in this chapter shall be so construed as to dispense with the approval of such loan, trust, and guaranty associations as sole security by such court, officer, corporation, or individual, as is or may be by law required to approve such security; *provided, however,* that upon production of proof to the bank commissioner by such company, organized under the provisions of this chapter, that it possesses the qualifications by this chapter required, and that it has complied therewith, he shall issue to such company his certificate that it is authorized for the ensuing year to become and be accepted as sole surety on all bonds, undertakings, and obligations provided for in this chapter; and that such certificate during the period for which it is issued, unless the same shall be canceled as hereinafter provided, shall be accepted, by all the courts or officers authorized to take, or before whom sureties are required to justify upon exception to said company's sufficiency, as a complete justification; *provided, further,* that the bank commissioner at any time after the issuance of such certificate and during the period for which such certificate is issued, when it shall appear to him that any such company has become insolvent and is not entitled to do business as such, shall cancel such certificate and refuse further to allow such company to transact such business.

Am'd '05, p. 84; '15, p. 112.

1203. (426.) Capital held as security. Whenever any such corporation shall accept an appointment as assignee, receiver, guardian, executor, or administrator, or be directed to execute any trust, the capital of the said corporation shall be held as security for the faithful performance of such duties and be held liable for any default whatever, and no bond shall be required of it for the faithful performance of such trust.

1204. (427.) Oath of corporation. The oath or affidavit of any officer of such corporation for and in its behalf shall be deemed to be the oath or affidavit of such corporation.

1205. (428.) Paid-up capital. The secretary of state shall not issue a certificate of incorporation to any loan, trust, and guaranty association until it shall appear by affidavit of at least three of the incorporators that such corporation has a paid-up cash capital of not less than $25,000, and, in cities of the first class, of not less than $100,000.

1206. (429.) Investment of capital. Any corporation organized or ex-

isting under this chapter shall keep its capital stock in money on hand, or on deposit in solvent banks, or invested in the bonds of the United States or of this state, or of any county, municipality, or school district thereof, or in first mortgages on real estate situated in Utah, the amount invested in any mortgage not to exceed 50 per cent of the value of the land so mortgaged.

1207. (430.) Reports. Loan, trust, and guaranty associations shall be bound by the provisions of law governing banks as to the times and manner of making reports to the secretary of state, as to the penalty for failure to make any such report, and as to the winding up of their affairs in certain cases.

Examination by bank commissioner, § 974. Report, §§ 1002, 1003, 1004, 1007.

CHAPTER 13.

CORPORATE SURETYSHIP.

1208. (430x.) Corporate suretyship to be accepted on certain bonds and undertakings. Whenever any bond, undertaking, recognizance, or other obligation is by any law of the state of Utah, or of the charter, ordinances, rules, or regulations of any municipality, city government, common council, board of county commissioners, any savings bank, state bank, or private bank, or any corporation, board, body, organization, or public officer, required or permitted to be made, given, tendered, or filed with surety or sureties, and whenever the performance of any act, duty, or obligation, or the refraining from any act, is required or permitted to be guaranteed, such bond, undertaking, obligation, recognizance, or guarantee may be executed by a company qualified to act as such surety or guarantor, as hereinafter provided; and such execution by such company of such bond, undertaking, obligation, recognizance, or guarantee shall be in all respects a full and complete compliance with every requirement of law, charter, ordinance, rule, or regulation now in force, or which may hereafter be enacted, that such bond, undertaking, obligation, recognizance, or guarantee shall be executed by one surety, or by one or more sureties, or that such sureties shall be residents or householders, or freeholders, or either or both, or possess any other qualifications. '99, p. 95.

Loan and trust companies as sureties, § 1201.

1209. (430x1.) Authority to act. Such company, to be qualified to so act as surety or guarantor under this chapter, must be authorized, under the laws of the state where incorporated and its charter, to guarantee the fidelity of persons holding places of public or private trust, and to guarantee the performance of contracts other than insurance policies, and to execute bonds and undertakings required or permitted in actions or proceedings, or by law allowed; must comply with the requirements of law of this state applicable to such company, in doing business herein; must have an unimpaired and safely invested capital of at least $200,000, fully paid in, in cash; must have at least $100,000 invested in good dividend-paying or interest-bearing stocks or securities created under or by virtue of the laws of the United States, or the laws of the state where it is incorporated, or of good, solvent, dividend-paying corporations, which said stocks or securities shall be at or above par in value, and be deposited with or held by the insurance commissioner, or superintendent, or other corresponding officers of the state where such company is incorporated, or such officer in some other state, in trust for the benefit of the holders of the obligations of such company; must have good available assets in excess of its liabilities, which said liabilities, however, shall, for the purpose of this chapter, be taken to be its capital stock, its outstanding debts, and a premium reserve at the rate of 50 per cent of the current premium of all outstanding risks in force; must also file with the secretary of state a certified copy of its charter or act of incorporation, a written application to be authorized to do business under this chapter, and a statement, signed and sworn to

by two of its officers, stating the amount of its paid-up cash capital, particularizing each item of the investment, the amount of premium on existing bonds upon which it is surety, the amount of liability for unearned portion thereof, estimated at the rate of 50 per cent of the annual premium on all outstanding obligations for one year or less, and pro rata for terms of more than one year; stating also the amount of its outstanding debts of all kinds, and such further statement, similarly verified as may be by the laws of this state required of such company in transacting business herein; and if such company be incorporated under the laws of any other state than this state, it must appoint an attorney in this state, on whom process of law can be served, and, in addition thereto, file with the commissioner of insurance a written instrument, duly signed and sealed, certifying such appointment, which shall continue until another attorney be substituted. Any such company which shall at any time have made a deposit in the office of the secretary of state of this state of the amount of deposit required by this section, may require the return of such deposit to be made upon written application to the office of the secretary of state, and upon the filing by such company with the secretary of state of a certificate from the commissioner of insurance that such company has complied with the provisions of this chapter, and that it is qualified and authorized to do business in this state, the secretary of state shall deliver to such company all securities belonging to such company and on deposit in his office. '99, p. 95; Am'd '11, p. 116.

1210. (430x2.) Commissioner of insurance to issue certificate. Upon production of proof to the commissioner of insurance by such company that it possesses the qualifications by this chapter required, and that it has complied therewith, he shall issue to such company, and to each of its agents in this state, his certificate that it is authorized for the ensuing year to become and be accepted as sole surety on all bonds, undertakings, and obligations provided for in this chapter, and said certificate of the commissioner of insurance shall be accepted, by all courts or officers authorized to take, or before whom sureties are required to justify, upon exception to the sufficiency of said company, as a complete justification, and shall be equivalent to the justification required of individual sureties by law; all bonds, undertakings, and obligations shall be accompanied by an affidavit of qualification, made by some officer or agent duly authorized by the company, in substantially the following form:

....., being first duly sworn, on oath deposes and says that he is the (officer or agent) of said company, and that he is duly authorized to execute and deliver the foregoing obligation; that said company is authorized to execute the same and has complied in all respects with the laws of Utah, in reference to becoming sole surety upon bonds, undertakings and obligations.

(Signed).....

Provided, that the commissioner of insurance, at any time after the issuance of such certificate and during the period for which such certificate is issued, when it shall appear to him that any such company has become insolvent, and is not entitled to do business as such, shall cancel such certificate and refuse further to allow such company to transact business in this state; and *further provided,* that he shall have the powers to examine the affairs of such corporation as he has in other cases. '99, p. 96; '05, p. 232; Am'd '11, p. 116.

1211. (430x3.) Annual statement. Such company shall also annually, before the 1st day of March, file with the commissioner of insurance, in addition to, but in connection with, the statement required by § 1143, its statement and proofs similar to that hereinbefore, in §§ 1209, 1210, provided for, made to the 31st day of December next preceding, and shall also furnish him with a certificate from the offices with whom the deposits, in § 1209 specified or required to be made, are placed, describing such securities so deposited and the manner in which they are held, and stating that such securities are fully worth $100,000; and upon the filing of such statement and proofs, said commissioner of insurance shall issue to such company, and each of its agents in

this state, his certificate that such company is qualified and authorized for the ensuing year, as in § 1210 provided. '99, p. 97; Am'd '11, p. 116.

1212. (430x4.) Money deposited in fiduciary capacity may be drawn only by consent of surety or order of court. It shall be lawful for any receiver, assignee, guardian, trustee, committee, executor, administrator, curator, or other fiduciary or party of whom a bond, undertaking, or other obligation is required, to agree and arrange with his surety or sureties for the deposit for safe keeping, of any and all moneys, assets, and other property for which he is or may be responsible, with a bank, savings bank, safe deposit, or trust company authorized by law to do business as such, and in such manner as to prevent the withdrawal or alienation of such money, assets, or other property, or any part thereof, without the written consent of such surety or sureties, or an order of the court, or a judge thereof, made on such notice to such surety or sureties, as the court or judge may direct. '99, p. 97.

1213. (430x5.) Surety may apply to court to be relieved. Such surety, or the representative of any surety, upon the bond of any trustee, committee, guardian, assignee, receiver, executor, or administrator, or other fiduciary, may apply by petition to the court wherein said bond is filed, or which may have jurisdiction of such trustee, committee, guardian, assignee, receiver, executor, or administrator, or other fiduciary, or to a judge of said court, praying to be relieved from further liability as such surety for the acts or omissions of the trustee, committee, guardian, assignee, receiver, executor, or administrator, or other fiduciary, which may occur after the date of the order relieving such surety, to be granted as herein provided for, and to require such trustee, committee, guardian, assignee, receiver, executor, or administrator, or other fiduciary, to show cause why he should not account and such surety be relieved from such further liability as aforesaid, and such principal be required to give a new bond; and thereupon, upon the filing of such petition, the court in term time, or judge thereof in vacation, shall issue such order, returnable at such time and place, and be served in such manner as such court or judge may direct, or may restrain such trustee, committee, guardian, assignee, receiver, executor, or administrator, or other fiduciary from acting, except in such manner as it may direct, to preserve the trust estate; and upon the return of such order to show cause, if the principal in the bond shall account in due form of law and file a new bond duly approved, then such court or judge must make an order releasing such surety filing the petition, as aforesaid, from liabilty upon the bond for any subsequent act or default of the principal; and in default of such principal then accounting and filing such new bond, such court or judge must make an order directing such trusteee, committee, guardian, assignee, receiver, executor, or administrator, or other fiduciary to account in due form of law within ten days, and that if the trust fund or estate shall be satisfactorily accounted for and delivered or properly secured, such surety shall be discharged from any and all further liability, as such, and the subsequent acts or omissions of the trustee, committee, guardian, assignee, receiver, executor, or administrator, and discharging and revoking the appointment of or removing such trustee, committee, guardian, assignee, receiver, executor, or administrator, or other fiduciary; *provided,* that upon the discharge of any such surety from liability upon such bond, such surety shall refund or repay the pro rata unearned part of the premium paid for the execution of the bond. '99, p. 97.

1214. (430x6.) Expense of obtaining surety to be included as costs. Any receiver, assignee, guardian, committee, trustee, executor, administrator, or other fiduciary, required by law, or the order of any court or judge, to give a bond or obligation as such, may include, as a part of the lawful expense of executing his trust, such reasonable sum paid a company authorized under this chapter so to do, for becoming his surety on such bond or obligation, as may be allowed by the court in which he is required to account, or a judge thereof, not exceeding, however, 1 per cent per annum on the amount of such bond or obligation. '99, p. 98.

1215. (430x7.) Id. In all actions at law or in equity, a party entitled to recover costs may include and tax, as a part of his proper costs, such reasonable sum as may have been expended by him as a premium to any surety company for executing or guaranteeing any bond, undertaking, or obligation therein, not exceeding 1 per cent per annum on the amount of any such bond, undertaking, or obligation. '99, p. 98.

1216. (430x8.) Surety cannot deny its power to execute liability. No company, having signed any such bond, undertaking, or obligation, shall be permitted to deny its corporate power to execute such instrument, or incur such liability, in any proceeding to enforce liability against it thereunder. '99, p. 98.

CHAPTER 14.

RAILROAD CORPORATIONS.

1225. (431.) Formation. Duration. Any number of persons, not less than five, may associate, under the provisions of law respecting corporations for pecuniary profit, for the purpose of forming a railroad corporation to exist for a term of years, not less than five nor more than one hundred years. Am'd '01, p. 20; '07, p. 104.

See public utilities act, §§ 4775-4853.

1226. (432.) Contents of articles. The articles of incorporation shall include, in addition to the matters required to be stated in the articles of incorporation of corporations organized for pecuniary profit, the names of the places between which and of the counties through or into which it is proposed to construct such railroad, and, as near as may be, its length; nor shall the certificate of incorporation issue until it shall appear to the secretary of state by affidavit of at least three of the incorporators that $1000 for each mile in length of the proposed railroad shall have been subscribed, and that 10 per cent of the stock suscribed by each stockholder has been paid in. Am'd '01, p. 20; '07, p. 104.

Rolapp v. Ogden & N. W. R. Co., 37 U. 540; 110 P. 364.

1227. (433.) May be formed to buy other railroads. Railroad corporations may be formed, pursuant to the laws of this state, for the purpose of buying, owning, maintaining, operating, and further extending the railroad, rights, property, and franchises of any corporation or corporations whose lines of railroad are situated within or without this state, or partly within and partly without this state, which shall have been or may be sold under judicial proceedings, or in the enforcement of mortgage liens, or at private sale; and the purchaser or purchasers at such sale or sales of such railroad, rights, property, and franchises, or any part thereof, together with his or their associates, or any number of persons, not less than five, may become a railroad corporation for the purpose aforesaid, by filing articles of association in the office of the secretary of state, which articles shall contain the name of the proposed corporation, the number of years it is to continue, not exceeding 100, the amount of capital stock, the termini of the road so purchased or to be purchased, and its length, and the states, territories, and counties through which it passes, the number of directors, not less than five nor more than fifteen, and the names of those who shall serve as directors of the corporation for the first year and until their successors are chosen and qualified; and, upon such filing of such articles of association, said corporation shall, without further act, be deemed and held to have been fully formed and created with the powers specified in such articles of association; *provided,* they are not inconsistent with the laws and constitution of this state. Such purchasing corporation shall, in addition to the foregoing powers, be vested with and be entitled to exercise and enjoy all the powers, rights, privileges, and franchises which at the time of sale

belonged to, or were vested in, the corporation or corporations last owning the properties sold, not inconsistent with the laws and constitution of this state, as well as all the rights, privileges, and franchises of railroad corporations organized under the laws of this state, and, except as herein otherwise provided, shall be subject to all the duties and liabilities imposed by the laws of this state upon railroad corporations, and shall have the power to purchase, hold, enjoy, maintain, and operate the railroads, property, rights, and franchises, or any part thereof, which shall have been, or may be, sold as aforesaid, upon such terms as the directors may deem expedient, and to extend the said railroads, within and without this state, and shall have power to construct or acquire by lease, purchase, consolidation, ownership of capital stock, or otherwise, branches, extensions, cut-offs, and connecting lines, within or without this state, and may make such contracts and do such acts as the directors shall deem necessary or expedient; *provided,* such acts and contracts are not in violation of the laws and constitution of this state; and may from time to time create and issue capital stock to an amount not exceeding the amount authorized by and stated in the articles of association, or any amendment or amendments thereof made by authority of its directors or stockholders as provided by law, and from time to time to issue bonds for such sum or sums, and payable at such times and places, and drawing interest at such rate as the directors may deem proper, and to execute trust deeds or mortgages, or both, upon the whole or any part of the railroad lines, branches, branch lines, extensions, cut-offs, and connecting lines, property, franchises, income, and profits then owned or thereafter acquired by such corporation, and situated within or without, or partly within and partly without this state, to secure the payment of such bonds and interest, and may use such bonds or stocks or any part thereof, in payment for the property purchased, constructed, acquired, or taken by or for such corporation or for any improvement or extension thereof, or any part of it, upon such terms as the directors may deem expedient. Am'd '99, p. 17; '01, pp. 2, 21; '07, p. 109.

1228. (434.) Rights, privileges, and powers. Any railroad corporation organized under the laws of this state shall, except as otherwise provided in this chapter, and subject to the limitations and requirements hereof, have all the rights, privileges, and powers, and be subject to all the duties and obligations of corporations organized for pecuniary profit, and in addition thereto such railroad corporations shall have the following powers:

1. To lay out, locate, relocate, construct, reconstruct, purchase, lease, or otherwise acquire, and to own, maintain, operate, and enjoy single track or double track railroads situated within this state, or wholly without this state, or partly within and partly without this state, and any branch or branches of such railroads; together with all property appurtenant to, or necessary, or useful in connection with the construction, maintenance, or operation of such railroads; and may change or relocate and reconstruct any portion of any existing railroad with either single or double tracks, and all such turnouts, yards, and other facilities as shall be deemed necessary or convenient for use in connection therewith. '01, p. 24; '03, p. 119; '07, p. 105.

Injuring, obstructing, etc., penalty, § 8383.

Public utility commission may order physical connection with other lines, when, § 4806.

2. To construct, purchase, or lease spurs or branch lines of railroad, connecting with the main line or any branch thereof, and to relocate any section or sections of its line with the same power as in the case of original or first location, though such spurs or branch lines or relocated sections be not named or described in the articles of incorporation.

R. S. '98, § 436; '03, p. 119; '07, p. 105.

3. To enter, by its servants, upon the real property of any person, for the purpose of selecting an advantageous route for its main line or any extension or branch thereof, or for the purpose of relocating its line, subject to responsibility for all damages resulting therefrom; to acquire by purchase, donation, or otherwise, all such real and personal property as shall be neces-

sary for, or shall be given to aid or encourage the construction and maintenance of its railway, and for the buildings or yards; to condemn in the manner provided by law, a right of way, not to exceed nine rods in width, with such additional lands as shall be necessary for depot grounds, roundhouses, shops, and other necessary uses, or for the purpose of constructing necessary embankments, excavations, ditches, drains, culverts, or for the procuring of timber, stone, gravel, or other essential materials, including water and water rights for its locomotives, cars, shops, depots, yards, together with all lands and rights of way necessary for the construction and maintenance of reservoirs, pipe or conduit lines, for the storage and conveyance of such waters to the places where the same are required for such use; to cross natural or artificial streams or bodies of water, streets or highways, or railroads, which its road shall intersect, in such manner as to afford security for life and property and subject to the duty of immediately restoring such course or body of water, street, highway, or railroad to its former condition, as nearly as may be; to cross, intersect, join, or unite its railroad with any other railroad, either before or after construction, at any points upon its route, and upon the grounds of such other railroad corporation, with the necessary turnouts, sidings, and switches, and other conveniences, in furtherance of the objects of its connections; and every corporation whose railroad is or shall be hereafter intersected by any new railroad, shall unite with the owners of such new railroad in forming such intersections and connections, and grant facilities therefor.

R. S. '98, § 436; '03, p. 119; '07, p. 105.

Eminent domain generally, §§ 7330-7350. Cook v. Salt Lake City, 48 U. 58; 157 P. 643.

4. To take and transport persons and property by steam, electrical, animal, or other power, or by any combination thereof; and to receive such compensation therefor as shall be reasonable and conformable to law, and make such regulations regarding the movement of its trains or cars, and the manner of transporting passengers and freight, and for the management of its property and conduct of its business as shall be reasonable and conformable to law. '07, p. 106.

A carrier cannot, by contract, exempt itself from, nor limit its liability for, the loss of or damage to property caused by its negligence or misconduct, or that of its servants; and a provision in a contract with a carrier that a shipper of sheep assumed all risk of damage from delay in transportation, or loss or damage from any other cause than wilful or gross negligence, and other provisions exempting the carrier from or limiting its liability for loss or damage for failure to exercise a proper degree of care, contravene public policy, and are void. Houtz v. Union Pac. R. R. Co., 33 U. 175; 93 P. 439.

5. To lease and operate any part or all of a railroad situated wholly or partly within or without this state; and any railroad company organized under the laws of the United States, or of this or any other state or territory, may lease and operate any part or all of the railroad owned by a company of this state; *provided,* that this section shall not be construed to permit any railroad company to lease or operate, in whole or in part, any competing line situated within this state. '03, p. 23; '07, p. 106.

6. To merge or to consolidate with any other railroad company or companies organized or existing under the laws of this or any other state or territory, or of the United States; *provided,* that the lines of such companies shall not be competing, but shall be substantially continuous or connective, either by means of actual union of track or through the medium of any bridge, ferry, or line of railroad leased, operated, or otherwise controlled by any or either of said corporations, or which any such corporation shall have the right, by contract or otherwise, to use or operate. The agreement of merger or consolidation, as the case may be, shall specify whether there shall be a merger of one or more such companies into another without the creation of a new corporation, or a consolidation forming a new consolidated corporation. The agreement shall be ratified by the stockholders of any such corporation of this state at any annual or general meeting or at any special meeting called for that purpose. It shall also be ratified by the stockholders of any such foreign corporation in the manner prescribed by the laws, if any there be, of the jurisdiction where such corporation is organized. The affidavit of the president

and the secretary of any such domestic or foreign corporation showing that such agreement has been ratified by stockholders, or that such foreign laws have been fully complied with, shall be filed with the secretary of state. In case of consolidation, such filing must be made with the secretary of state before his certificate of incorporation shall issue to the new consolidated corporation. R. S. '98, § 435; '01, pp. 3, 23; '07, p. 106.

Limitation on right to consolidate, Con. art. 12, sec. 13.

Consolidation of corporations generally, § 888.

The articles consolidating several railroad companies into the C. P. Railroad Co. contained a grant by which the original C. P. Railroad Co. "hereby sells, assigns, transfers, grants, bargains, releases, and conveys," to the consolidated company, "all its property, real, personal, and mixed"; held, that the lands granted the C. P. Railroad Co. were thereby conveyed.

Tarpey v. Deseret Salt Co., 5 U. 494; 17 P. 631.

7. To sell, convey, and transfer its property and franchises, or any part thereof, to any railroad corporation (not owning any competitive line in this state), whether organized under the laws of this state or of any other state or territory, or of the United States, and any railroad corporation receiving such conveyances may hold and operate such railroad, franchises, and property within this state, and build and operate extensions or branches thereof, and for that purpose may exercise the power of eminent domain, and do any other business in connection therewith as fully and effectually to all intents and purposes as if such corporation were organized under the laws of this state: *provided,* that such purchasing corporation shall comply with all the laws of the state of Utah relative to railroad corporations, not in conflict herewith. '03, p. 21; '07, p. 106.

May sell foreign railroad, § 1263.

8. To acquire, own, maintain, operate, and navigate steamships, sailing vessels, and boats of every description, and generally to carry on the business of a common carrier by water, and to purchase, own, hold, pledge, or otherwise dispose of the capital stock, bonds, or other obligations of any corporation owning or operating any such ships, vessels, or boats; *provided,* that this section shall not be construed to permit any railroad company to purchase, own, hold, pledge, or otherwise dispose of the capital stock, bonds, or other obligations of any corporation owning or operating such ships, vessels, or boats, where such corporation may be a competing line with such railroad company, or with any other corporation in which said railroad company may own any of the capital stock, bonds, or other obligations thereof. '07, p. 107.

9. To issue bonds for such sums, and payable at such times and places, and drawing interest at such rates as the board of directors shall deem expedient; and for the purpose of securing the payment of such bonds and interest, to execute trust deeds or mortgages, or both, upon the whole or any part of their lines, real property, rolling stock, machinery, and other personal property, franchises, income and profits acquired, or that thereafter shall be acquired. Such bonds and trust deeds or mortgages shall be valid according to their terms, notwithstanding the fact that the bonds may be sold below par value. A trust deed or mortgage made as aforesaid, to operate as notice to third persons, shall be recorded in the office of the recorder of each county in which any of the property affected by such trust deed or mortgage shall be situated, and need not be left or filed in said office. Any such mortgage or trust deed, when made, shall be a valid lien upon the real and personal property and chattels included therein, notwithstanding the fact that the possession of such personal property may remain with the mortgagor; and when recorded as aforesaid, such record shall be notice to all persons of the existence of such mortgage or deed of trust according to its terms; *provided,* that corporations organized under the laws of this state, owning and operating street, suburban, or interurban railroads, including those that own and operate, with such railroads, power and lighting plants, shall be deemed railroad companies, and their properties, railroad properties, within the meaning of this subdivision. R. S. '98, § 444; '05, p. 250; '07, p. 107.

Must not create excessive debt, §§ 8373, 8374.

10. To create, issue, and dispose of preferred stock, special stock, and income certificates, to such amounts and in such form, and for such purposes, and as between the stockholders themselves to make the same payable in respect of principal and dividends out of such class or character of assets and income as shall be determined upon by the board of directors of such corporation with the assent thereto of the holders of at least a majority in amount of the common capital stock; *provided,* that no increase of any preferred or special stock, or of any income certificates issued pursuant to this chapter, shall at any time be made without the assent thereto of the holders of at least a majority in amount of the preferred stock, special stock, or of the income certificates to be affected by such issue, as the case may be. The holders of such preferred or special stock shall have the same right to vote at stockholders' meetings as the holders of the common stock of said company, and shall be equally qualified to be officers thereof.

R. S. '98, § 443; '05, p. 29; '07, p. 108.

11. To purchase or otherwise lawfully acquire, and to own, hold, pledge, or otherwise dispose of the capital stock or any part of the capital stock, bonds, or other obligations of any corporation organized under the laws of this state, or of the United States, or of any other state or territory of the United States, which may own or operate, by lease or otherwise, any line or lines of steam, electric, street, or interurban railroad, any union depot or station, any railroad terminals, wharves, docks, or other shipping facilities, any steamships, steamboats, or other water craft, or which may carry on refrigerator business, or furnish cars or other facilities for refrigeration or storage of freight, or which may carry on an express or other transportation business, or which may manufacture, sell, lease, or otherwise provide railroad equipment; and upon the pledge or sale of such bonds or other obligations aforesaid, said railroad company shall have power, in the discretion of its board of directors, to guarantee the same; *provided, however,* that nothing in this section contained shall be construed to authorize the purchase, or acquisition otherwise, or any stock, bond, or other obligation of any corporation owning or operating a competing line of railroad within this state.

'07, p. 108.

Corporations not to exchange or purchase stock, § 8368.

Irrigation companies may take stock in other irrigation companies, § 3473.

12. Upon an increase of the amount of capital stock specified in its original or amended articles of association, to receive subscriptions for such increase of stock on such terms as the board of directors or a majority of the stockholders shall authorize, payable in shares of the capital stock or in bonds or other obligations of any other corporation organized under the laws of this state, or of the United States, or of any other state or territory of the United States, whose capital stock, bonds, or other obligations are authorized to be purchased or acquired by railroad corporations of this state; *provided,* that the stocks, bonds, or obligations of such other corporations to be received in payment and exchange for the stock so subscribed for shall be of a par value at least equal to the par amount of the stock subscribed for, or of an actual or market value equal, in the opinion of the board of directors, to that of the stock so subscribed for and issued, and such stock so issued shall for all purposes be deemed fully paid and non-assessable; and, *provided further,* that these privileges shall not be construed to permit any railroad corporation of this state to consolidate its stock, property, or franchises with any other railroad corporation owning a competing line in this state.

'07, p. 108.

Sec. 434, R. S. '98, transferred to § 1230.

1229. (434x.) Id. Railroad corporations heretofore organized and now existing, or hereafter organized and existing, under the laws of this state shall be subject to all the duties imposed, and shall have and possess all the powers and privileges conferred by this chapter, as well as the powers and privileges conferred by the laws under which said corporations were organized, or

which are contained in their articles of incorporation, and are not inconsistent with the laws and constitution of this state. '07, p. 109.

1230. (435.) Amendments adding new lines, etc., lawful. Any amendment of the articles of incorporation adding new lines of route, altering the original route, or changing the termini, shall not be deemed unlawful as an alteration of the original purpose of the corporation. R. S. '98, § 434.

1231. (437.) Street and highway crossings. No railroad shall use any road, street, alley, or highway within any county, city, or town, except with the consent of the authorities of such county, city, or town, as provided by law; *provided,* that this section shall not be construed to prevent railroads from crossing at right angles, or as nearly as may be, any street, alley, or highway across which its located line may pass.

Street railroads must have consent of municipal authorities, Con. art. 12, sec. 8.
To maintain good crossings, § 1237.
Powers of city council over streets, etc., §§ 570x32-570x35, 573, 574.
Crossings regulated and granted by public utility commission, § 4811.
D. & R. G. v. Pub. Ut. Com., 51 U. —; 172 P. 479.

1232. (438.) Franchise forfeited by inaction. If such railroad company shall not, within three years after the filing of its articles of association, begin the construction of its railroad and expend thereon an amount equal to at least 3 per cent of its incorporated capital, or if it shall fail to finish the road and put the same into full operation within ten years after the filing of its articles, its corporate franchise, as to all parts of its line not then constructed, shall be deemed forfeited.

A railway company in this state, consolidating with a company of another state, creates a new corporation, and the time prescribed for doing of certain acts under § 1232 begins to run when the articles of incorporation of the new company are filed.
R. G. W. Ry. Co. v. Telluride P. & T. Co., 16 U. 125; 51 P. 146; dismissed 175 U. S. 639.
Same case, 23 U. 22; 63 P. 995.
The franchise granted to defendant imposed no restriction, except as to time for which the franchise should be granted; no rights can be forfeited, except for the causes and in the mode prescribed in the franchise, and the provisions of this section are not applicable.
Dern v. S. L. C. R. R. Co., 19 U. 46; 56 P. 556.

1233. (439.) Right of way through state lands granted. The right of way through the state lands not appropriated to some public use is hereby granted to any railroad company duly organized under the laws of any state or territory or by the congress of the United States, which shall have filed with the secretary of state a copy of its articles of incorporation and due proofs of its organization under the same, to the extent of seventy-five feet on each side of the central line of said road; also the right to take, from the state lands adjacent to the line of said road, material, earth, stone, and timber, necessary for the construction of said railroad; also ground adjacent to such right of way for station buildings, depots, machine shops, sidetracks, turnouts, and water stations, not to exceed in amount ten acres for each station, to the extent of one station for each ten miles of its road. Any railroad company desiring to secure the benefits of this section shall, immediately after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, immediately after the official survey thereof, file with the state board of land commissioners a map of its road; and upon approval thereof by the secretary of state the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way; *provided,* that if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road.

Sup. R. S. of U. S., vol. I, chap. 152*.
Limitation on sale of land not to apply to common carrier, § 5616.
Keep right of way clear of weeds, § 6267.
Drainage bridge or culvert over, § 2069.
Drainage assessment, § 2068.
Grant of right of way over public lands to railroad held to include public lands within the city limits.
Moon v. S. L. County, 27 U. 435; 76 P. 222.

1234. (440.) Railways and highways through canyons. Any railroad company whose right of way, or whose track or roadbed upon such right of way, passes through any canyon, pass, or defile, shall not prevent any other railroad company from the use and occupancy of the said canyon, pass, or

defile, for the purposes of its road, in common with the road first located, or the crossing of other railroads at grade; and the location of such right of way through any canyon, pass, or defile shall not cause the disuse of any wagon or other public highway now located therein, nor prevent the location through the same of any such wagon road or highway where such road or highway may be necessary for the public accommodation; and where any change in the location of such wagon road is necessary to permit the passage of such railroad through any canyon, pass, or defile, said railroad company shall, before entering upon the ground occupied by such wagon road, cause the same to be reconstructed at its own expense in the most favorable location, and in as perfect a manner as the original road; *provided,* that such expenses shall be equitably divided between any number of railroad companies occupying and using the same canyon, pass, or defile.

Sup. R. S. of U. S., vol. I, chap 152*.

1235. (441.) Maps showing location to be filed. Every company constructing or operating a railroad in this state shall, within a reasonable time after the final location of the road, file a map thereof showing the route decided upon and the land obtained for the use thereof, in the office of the secretary of state; and like maps of the several parts thereof located in the several counties through or into which the road may be extended shall be filed in the offices of the recorders of such counties respectively. Map and profiles, certified by the chief engineer, the president, and the secretary of the company, shall be filed in the office of the secretary of the company, subject to examination by any person interested.

1236. (444x.) Amendments validated. Amendments made by corporations to their original articles of incorporation, in accordance with the laws of this state, or the provisions of chap. 131, laws of 1905, are hereby approved and validated; and all corporations organized by consolidating their properties, rights, and franchises, whether by strict consolidation or by the sale of the property and franchises of two or more corporations to one corporation, in accordance with the provisions of the laws of this state, or the provisions of chap. 131, laws of 1905, are hereby approved and validated, and said corporations are hereby declared to be bodies corporate under the name and style in such consolidating articles set forth, with the rights and powers therein enumerated, and such corporate existence shall date from the time when such consolidating companies filed their articles of association, or copies thereof, with the secretary of state, and received a certificate of incorporation, and all acts done by such corporations within the powers specified in their articles of association are hereby validated. '05, p. 251.

Corporations existing prior to 1898 continued, § 899.

Defective incorporations validated, § 863.

OPERATION.

1237. (445.) Must maintain good crossings. Every railroad company shall be liable for damages caused by its neglect to make and maintain good and sufficient crossings at points where any line of travel crosses its road.

City may require railroad to keep flagmen at crossings, § 570x35; and to put in gates, § 574.

Gates provided by railroad to be kept closed by owner of land, § 1254.

Decisions on ringing bell, etc., at crossings, note to § 1239.

Public utility commission regulates crossings, § 4811.

What is a good and sufficient crossing is ordinarily a question for the jury, but the evidence may be so clear on it that it becomes a question of law.

Denkers v. S. P. Ry. Co., 57 U. —; 171 P. 999.

1238. (446.) Liable for stock killed or injured. Every railroad company shall be liable for all damages sustained by the owner of any live stock killed or injured by the engineer or cars of said company.

Notice of stock killed to be posted, §§ 110, 111.

Failure to fence; liability for stock killed, § 1253.

Sec. 2349, C. L. 1888, which provided that every railroad company should be liable for all live stock killed by it, regardless of any fault on the part of the railroad company, is void as taking property without due process of law, under the fifth amendment to the constitution of the U. S.

Jensen v. U. P. Ry. Co., 6 U. 253; 21 P. 994.

1239. (447.) Ringing bells and blowing whistles at crossings. Every locomotive shall be provided with a bell weighing not less than twenty pounds, which shall be rung continuously from a point not less than eighty roads from any street, road, or highway crossing, until such street, road, or highway shall be crossed, but the sounding of the locomotive whistle at least one-fourth of a mile before reaching any such crossing shall be deemed equivalent to ringing the bell as aforesaid, except in towns and at terminal points; during the prevalence of fogs, snow, and dust storms, the locomotive whistle shall be sounded before each street crossing while passing through cities and towns. All locomotives, with or without trains, before crossing the main track at grade of any other railroad, must come to a full stop at a distance not exceeding 400 feet from the crossing, and must not proceed until the way is known to be clear; two blasts of the whistle shall be sounded at the moment of starting; *provided,* that whenever interlocking signal apparatus and derailing switches are adopted such stop shall not be required. Every person in charge of a locomotive, for any neglect to observe the provisions of this section shall be deemed guilty of a misdemeanor, and the corporation shall be liable for all damages which any person may sustain by reason of such neglect.

Penalty for failure to ring bell, etc., § 8201.

City may require gates, § 574; or flagmen, § 570x35.

A failure to ring the bell or sound the whistle at crossing of highways is such negligence as in the absence of contributory negligence will render the company liable for injuries resulting from a collision with a person in a wagon.

Bitner v. U. Cen. Ry. Co., 4 U. 502; 11 P. 620.

It is negligence for a railroad company not to provide its engines with a bell of at least twenty pounds weight, and not to ring the same at least eighty rods from a crossing, or, in lieu thereof, not to sound the whistle at least a quarter of a mile from the crossing.

Olsen v. O. S. L. Ry Co., 9 U. 129; 33 P. 623.

The statutory requirement that the locomotive bell should be rung and whistle sounded at street crossings does not relieve the company from its failure to adopt other reasonable measures for the public safety; in cities, should provide gates or flagmen.

English v. Sou. Pac. Co., 13 U. 407; 45 P. 47.

Under this section, in a proper case, it is competent for plaintiff to show by his witnesses that, if the whistle had been sounded or the bell rung, they would have heard it.

Haun v. R. G. W. Ry. Co., 22 U. 346; 62 P. 908.

A prima facie case of negligence in an action against a railway company for injuries to a traveler at a railway crossing is not established by proof of failure to give the statutory signals, but the evidence must show that such failure was the proximate cause of the injury.

Roger v. R. G. W. Ry. Co., 32 U. 367; 90 P. 1075.

It will not be presumed, in the absence of proof, that a crossing at which plaintiff was injured by defendant's alleged failure to give signal was a crossing where signals were required.

Wilkinson v. O. S. L. R. Co., 35 U. 110; 99 P. 466.

In view of § 1229 this section is applicable to motor cars.

Shortino v. S. L. & U. R. Co., 51 U. —; 173 P. —.

1240. (448.) Trains to be run on schedule. Bulletins. Every railroad company shall start and run its trains for the transportation of persons and property at such regular times as it shall fix by public notice; and the station agents thereof shall announce on a bulletin board placed in a conspicuous and public place at each station, not less than fifteen minutes before the regular time of departure of each passenger train, the time of such departure, or, if the train is delayed, the probable duration of such delay, and on failure thereof shall be deemed guilty of a misdemeanor. The corporation shall be liable for all damages that may be sustained by any person by reason of the failure of any of its station agents to observe the requirements of this section.

Train service regulated, § 4805.

1241. (449.) To transport all freight and passengers offered. Every railroad company shall furnish sufficient accommodations for the transportation of all passengers and property as shall, within a reasonable time previous to the departure of any train, offer or be offered for transportation at any station, siding, or stopping place established for receiving and discharging passengers and freight, and at any railroad junction; and shall take, transport, and discharge such passengers and property at, from, and to such places, on the due payment of tolls, freight, or fare therefor; and if the company or its agents shall refuse to take and transport any passenger or property, or to deliver the same at the regularly appointed places, it shall be liable to the party aggrieved for all accruing damages, including costs of suit.

Not to receive live stock from quarantined district, § 219.

Live stock to be inspected, §§ 183, 196.

Cars disinfected, § 202.

Stockyards in infected district, § 204.

Not charge freight on excess coal weight, §§ 1250-1252.

Consignee right to examine, §§ 5155, 5156.

Passes and free transportation prohibited except, §§ 4779, c, d, f, 4787.

Long and short haul, (a), § 4793.
Rate schedule must be filed, § 4784.
A railway, as a common carrier of passengers, owes a duty to its passenger to carry him safely and properly and to use due care to see that the car in which he is being carried is kept in a decent and habitable condition.
Mathias v. S. P. Co., 31 U. 507; 88 P. 668.
McCollum v. S. P. Co., 31 U. 494; 88 P. 663.
Fitzgerald v. S. P. Co., 31 U. 510; 88 P. 669.

The duties imposed by this section must be discharged by a carrier at depots or stopping places duly established, and a carrier is not required to stop its cars at any particular place, to discharge or receive passengers.
Skeen v. Ogden Rapid Trans. Co., 38 U. 242; 112 P. 120.
Houtz v. Union Pac. R. Co., 33 U. 175; 93 P. 439.

1242. (450.) When not liable for injuries to passengers on platforms. In case any passenger shall be injured on the platform of any car or on any baggage, wood, gravel, or freight car, in violation of the printed regulations of the company, posted up at the time in a conspicuous place inside of its passenger cars then in the train or in violation of verbal instruction given by any officer of the train or company, such company shall not be liable for the said injury; *provided,* said company at the time furnished room inside its passenger cars sufficient for the accommodation of the passengers.

1243. (451.) Ejection of passengers for refusal to pay, or disorderly conduct. If any passenger refuses to pay his fare or exhibit or surrender his ticket when requested so to do, or if he behaves in a disorderly manner, the conductor and employes of the corporation may put him and his baggage out of the cars, using no unnecessary force, at any usual stopping place, or in sight of a dwelling, on stopping the train.

A contract ticket providing that if it is presented by any other person than the original holder it shall be void and the conductor shall take it up and collect full fare, is valid.
Drummond v. So. Pac. Co., 7 U. 118; 25 P. 733.
The conductor had a right to take up the ticket presented by a person other than the original purchaser; and plaintiff could not have been damaged if the ticket was afterward returned to him.
Id.
Passenger without ticket must be put off at regular stopping place. Under § 2354, C. L. 1888, which provides that any passenger who refuses to prepay his fare or toll on demand may be put off the cars at any stopping place the conductor or employes of the company may elect, the conductor must select a regular stopping place of the train.
Nichols v. U. P. Ry. Co., 7 U. 510; 27 P. 693.
Id. A passenger who has purchased no ticket, and who refuses the extra fare required by the rules of the company, can be put off only at a passenger station (affirming Nichols v. U. P. Ry. Co., 7 U. 510; 27 P. 693).
Durfee v. U. P. Ry. Co., 9 U. 213; 33 P. 944.

Where there is no statute requiring the ejection of a passenger refusing to pay his fare, to be made at a regular station, he may be ejected at any place, provided he be not thereby unreasonably exposed to danger; and the carrier is not obliged to put him off at a station, dwelling house or stopping place.
Rudy v. R. G. W. Ry. Co., 8 U. 165; 30 P. 366.
The good faith of a person in believing that he had a right to ride upon a railroad ticket that had expired, cannot affect the right of the company to eject him from the train.
Id.
In the absence of evidence to the contrary, railroad tickets are not deemed to be contracts in writing, and no presumption arises, from the purchase of a ticket, that the ordinary duties of a carrier imposed by law are modified in the ticket. Where through tickets are in the form of coupons, each coupon is to be regarded as a distinct ticket for each road, sold by the first company as agents for the other companies.
McCollum v. S. P. Co., 31 U. 494; 88 P. 663.
Mathias v. S. P. Co., 31 U. 507; 88 P. 668.
Fitzgerald v. S. P. Co., 31 U. 510; 88 P. 669.

1244. (452.) Employes to wear official badges. Every conductor, baggage master, engineer, brakeman, or other employe of said railroad company employed in a passenger train, or at stations for passengers, shall wear upon his hat or cap, or in some conspicuous place on the breast of his coat, a badge indicating his office or station, and the initial letters of the name of the company by which he is employed; and no collector or conductor, without such badge, shall demand or be entitled to receive from any passenger, any fare, or ticket, or exercise any of the powers of his office or station, or interfere with any passenger or property.

1245. (453.) Baggage to be checked. A check shall be fixed to every package or parcel of baggage when taken for transportation, by the agent or an employe of such company, and a duplicate thereof given to the passenger or person delivering the same.

('13, p. 187.)

1250. Unlawful to collect freight charges on excess weight. How determined. It shall be unlawful for any railroad company, its servants, or employes, to collect freight charges from any consignee of lump coal in carload lots delivered at any point within the state of Utah, where railroad track scales are maintained by the railroad company transporting such coal, for any weight in excess of the actual weight of coal delivered to said consignee; and in determining the actual weight of such coal, the said railroad company shall

be entitled to take the weight of the empty car as determined by weighing such car at the point where the coal is loaded for shipment and by deducting said weight from the gross weight of the car and contents as weighed at the point of delivery of said coal to the consignee; *provided, however,* that when such carload shipments have been weighed both light and loaded at the point of origin of the shipment and such weight at point of origin is determinable by gross, tare, and net weight, as shown by the bill of lading, and the destination weight varies less than 1 per cent from the weight at origin of shipment, then and in that event the weight at point of origin shall govern.

1251. Certificate of weight. Upon the payment by a consignee of the freight upon any carload of lump coal delivered by any railroad company within the state of Utah, such railroad company shall deliver to said consignee a certificate by the party legally authorized to weigh such coal, stating the gross weight of the car and the coal contained therein, as weighed at the point of delivery thereof to the consginee.

1252. Excess charges recoverable. Any corporation, association, party, or parties who are required to pay any railroad company delivering lump coal in carload lots at points within the state of Utah freight charges based upon a weight of the contents in excess of the weight thereof determined in the manner provided for in § 1250, shall be entitled to recover from such railroad company the excess freight so paid.

1253. (456x.) Railroads to fence tracks. Every railroad company operating a railroad by steam, electric, gasoline, or any other mechanical motive power within this state, or which hereafter constructs or operates any such road, is hereby required to erect, within one year, and thereafter maintain, a fence on each side of its railroad where the same passes through lands owned and improved by private owners, and connect the same, at all public road crossings, with cattle guards. Such fence shall not be less than four and a half feet in height and may be constructed of barbed or other fencing wire and shall consist of not less than five wires, with good, substantial posts not more than one rod apart, with a stay midway between said posts attached to the wires of said fence to keep said wires in place; and whenever such railroad company shall provide gates for private crossings, for the convenience of the owners of the land through which such railroad passes, such gates shall be so constructed that they may be easily operated; and any such corporation shall be liable for all damages sustained by the owner of any domestic animal killed or injured by such railroad, in consequence of the failure to build or maintain such fence. '01, p. 92; '03, p. 69; Am'd '13, p. 117.

Railroad liable for stock killed, § 1238.

Laws of 1890, p. 78, which render railroad companies liable for injuries to stock unless they fence their roads and construct sufficient cattle guards where such roads pass through lands "owned and settled or occupied by private owners," require such fencing and construction of guards where the land forms a portion of tracts which are under cultivation, though not itself cultivated.

Stimpson v. U. P. Ry. Co., 9 U. 123; 33 P. 369.

Where complaint before a justice of the peace against a railroad for killing plaintiff's horse at a point where the road was not fenced alleged that the railroad "passed through lands owned and improved by private owners," the denial of such allegation did not raise a material issue of freehold, ousting the justice of jurisdiction, as provided by § 7433.

O. S. L. R. R. Co. v. Dist. Court, 30 U. 371; 85 P. 360.

An action, for negligence in operating a train, as well as defective cattle guards and wing fences, is not barred under the provision barring after one year "an action for liability approved by statute."

Preese v. O. S. L. R. R. Co., 48 U. 551; 161 P. 40.

A railroad company is not liable for injuries to stock caused by its failure to construct a fence between its depot ground and adjoining private land, where the fence necessarily would have interfered with free access to buildings and tracks and with the loading and unloading of freight.

Reid v. San Pedro etc. R. R. Co., 42 U. 431; 132 P. 253.

This section imposes no duty upon a railroad company, either to put in cattle guards, or to construct wing fences at private farm crossings, and in the absence of a statute providing therefor, such duty does not exist.

Knight v. S. Pacific Co., 51 U.—; 172 P. 688.

Where a railroad company voluntarily accommodates a farmer by putting in wing fences at a private farm crossing, it does not thereby become obligated to maintain and keep it in repair for all time.

Id.

1254. (456x1.) Owner of land to keep gates closed. Whenever such railroad company shall provide gates for private crossings for the convenience of the owner of the lands through which such railroad passes, such owner shall keep such gates closed at all times when not in actual use, and if such

owner fail to keep such gates closed, and in consequence thereof his animal strays upon said railroad, and is killed or injured, such owner shall not be entitled to recover damages therefor. '01, p. 92; '03, p. 69.

City council may require gates, § 574; or flagmen, § 570x35.
Shall maintain good crossings, § 1237.

Applied, in Reid v. San Pedro, 35 U. 618; 118 P. 1009.

CHAPTER 15.

CONDITIONAL SALE OF RAILROAD EQUIPMENT.

1260. (456x2.) Conditional sale railroad equipment. Recording contract. In any contract for the sale of railroad or street railway equipment or rolling stock it shall be lawful to agree that title to the property sold or contracted to be sold, although possession thereof may be delivered immediately or at any time or times subsequently, shall not vest in the purchaser until the purchase price shall be fully paid, or that the seller shall have and retain a lien thereon for the unpaid purchase money. And in any contract for the leasing or hiring of such property, it shall be lawful to stipulate for a conditional sale thereof at the termination of such contract, and that the rentals or amounts to be received under such contract may, as paid, be applied and treated as purchase money, and that the title to the property shall not vest in the lessee or bailee until the purchase price shall have been paid in full, and until the terms of the contract shall have been fully performed, notwithstanding delivery to and possession by such lessee or bailee; *provided*, that no such contract shall be valid as against any subsequent judgment creditor or any subsequent bona fide purchaser for value and without notice, unless (1) the same shall be evidenced by an instrument executed by the parties and duly acknowledged by the vendee, lessee, or bailee, as the case may be, or duly proved before some person authorized by law to take acknowledgments of deeds, and in the same manner as deeds are acknowledged or proved; (2) such instrument shall be filed for record in the office of the secretary of state of this state; (3) each locomotive engine or car so sold, leased, or hired, or contracted to be sold, leased, or hired as aforesaid, shall have the name of the vendor, lessor, or bailor plainly marked in letters not less than one inch in size on each side thereof, followed by the word "owner," or "lessor," or "bailor," as the case may be. '05, p. 3.

Conditional sales of railroad equipment, § 487.

Decisions on conditional sales, note to § 487.

1261. (456x3.) Recorded by secretary of state. Release. Fee. The contracts herein authorized shall be recorded by the secretary of state in a book of records to be kept for that purpose. And on payment in full of the purchase money and the performance of the terms and conditions stipulated in any such contract, a declaration in writing to that effect shall be made by the vendor, lessor, or bailor, or his or its assignee, which declaration may be made on the margin of the record of the contract, duly attested, or it may be made by a separate instrument, to be acknowledged by the vendor, lessor, or bailor, or his or its assignee, and recorded as aforesaid. And for such services the secretary of state shall be entitled to a fee such as is allowed by law for recording like instruments. '05, p. 4.

1262. (456x4.) Not retroactive. This chapter shall not be held to invalidate or affect in any way any contract heretofore made of the kind referred to in § 1260, and any such contract heretofore made may, upon compliance with the provisions of this chapter, be recorded as herein provided. '05, p. 4.

1263. (456x5.) May sell lines of railroad, etc. Any railroad corporation formed pursuant to the laws of this state, owning lines of railroad situated wholly in a foreign country, may sell, convey, and transfer such lines of rail-

road, property, and franchises, or any part thereof, to a corporation organized under the laws of the country in which any of such lines may be situated.
'07, p. 34.

May sell railroad property and franchises, § 1228.

CHAPTER 16.

ANNUAL LICENSE TAXES.

('09, p. 226.)

1270. Domestic and foreign corporations defined. The term domestic corporations, within the meaning of this chapter, shall include all corporations heretofore organized under the laws of the territory or state of Utah, or which shall hereafter be organized under the laws of said state; and the term foreign corporations shall include all corporations organized under the laws of any state or territory of the United States, other than this state, or under the laws of any foreign country.

1271. (456x6.) Annual license tax. Schedule. All domestic corporations (except corporations not organized for pecuniary profit, and all religious, charitable, benevolent, and all corporations organized for educational purposes, and all private water corporations organized to furnish water for culinary purposes, and furnishing water exclusively to members of such corporations, and all canal and irrigation corporations engaged exclusively in furnishing water to or for lands owned by the members thereof, all water users' associations organized to comply with the rules of the United States reclamation service, and all insurance corporations), and all foreign corporations (except insurance companies) hereafter engaging in any business in this state, before engaging in, or continuing to transact business after the 15th day of November, 1915, shall procure a certificate from the secretary of state of this state, authorizing such corporation to engage in, or to continue to transact its corporate business within this state, and each of the corporations aforesaid, not coming within the exceptions hereinbefore stated, shall pay to the secretary of state a corporation license tax as follows: All corporations with an authorized capital stock of $10,000 or less, $5; with an authorized capital stock of more than $10,000, and not to exceed $25,000, $10; with an authorized capital stock of more than $25,000, and not to exceed $50,000, $15; with an authorized capital stock of more than $50,000, and not to exceed $75,000, $20; with an authorized capital stock of more than $75,000, and not to exceed $100,000, $25; with an authorized capital stock of more than $100,000, and not to exceed $150,000, $35; with an authorized capital stock of more than $150,000, and no to exceed $200,000, $40; with an authorized capital stock of more than $200,000, and not to exceed $250,000, $50; with an authorized capital stock of more than $250,000, and not to exceed $300,000, $60; with an authorized capital stock of more than $300,000, and not to exceed $400,000, $70; with an authorized capital stock of more than $400,000, and not to exceed $500,000, $80; with an authorized capital stock of more than $500,000, and not to exceed $600,000, $90; with an authorized capital stock of more than $600,000, and not to exceed $700,000, $100; with an authorized capital stock of more than $700,000, and not to exceed $800,000, $110; with an authorized capital stock of more than $800,000, and not to exceed $900,000, $120; with an authorized capital stock of more than $900,000, and not to exceed $1,000,000, $125; with an authorized capital stock of more than $1,000,000, and not to exceed $1,500,000, $150; with an authorized capital stock of more than $1,500,000, and not to exceed $2,000,000, $175; with an authorized capital stock of more than $2,000,000, and not to exceed $3,000,000, $200; with an authorized capital stock of more than $3,000,000, and not to exceed $4,000,000, $225; and an authorized capital stock of more than $4,000,000, $250.
Am'd '09, p. 226; '15, p. 48.

This chapter is constitutional, and the rule, that a statute must be held constitutional unless it clearly violates a provision of the constitution, applies with special force to revenue measures.
Blackrock Copper M. & M. Co. v. Tingey, 34 U. 369; 98 P. 180.

1272. Id. When due. Certificate. The corporation license tax herein provided for shall be due and payable to the secretary of state at his office on the 15th day of November in each year; and when paid, the secretary of state shall issue to each corporation paying such tax a certificate authorizing it to transact and conduct its business within this state for the period of one year. Such certificate shall contain the name of the corporation paying such tax, the amount of the authorized capital stock of the corporation, the amount of tax paid, and the time from which and to which the license tax paid authorizes the corporation paying the same to transact business within this state.

1273. Penalty for neglect or refusal. Any corporation required to pay the license tax herein provided, which shall refuse or neglect to pay the same on or before noon of the 15th day of December following the 15th day of November when such tax is payable, shall be deemed to be in default, and for such default there shall be added to the amount of tax a penalty of $10, and unless such tax and penalty shall be paid on or before the first Monday of April following, the defaulting corporation shall by reason of such default forfeit to the state of Utah the amount of the tax and penalty aforesaid, and shall likewise forfeit its right to transact any business within this state, and the tax and penalty may be collected as hereinafter provided.

1274. List of defaulting companies filed with governor. Proceedings thereon. The secretary of state, on or before the 15th day of March of each year, shall file with the governor of this state a complete list of the names of all defaulting corporations, together with the amount of license tax, penalties, and costs remaining unpaid. The governor, for at least ten days prior to the first Monday in April following, shall publish such list in at least two daily papers of general circulation within this state, and shall append to such lists and publish therewith his proclamation to the effect that unless the license tax owing by such corporation, together with the penalty and all the costs, shall be paid to the secretary of state on or before noon on the first Monday in April following, such defaulting corporation shall forfeit the amount of the tax and the penalty and costs to the state of Utah, and shall also forfeit its right to carry on business within said state; and, further, that the charters of all defaulting domestic corporations will be revoked unless payment is made as aforesaid. Immediately after the first Monday in April the governor shall file with the secretary of state a full and complete list containing the names of all corporations whose right to do business has been annulled and whose charters have been revoked. The secretary of state shall forthwith notify the several county clerks in whose office the articles of incorporation which have been forfeited are on file and shall also by letter addressed to its president or secretary notify each corporation of the forfeiture of its charter. In case of a reinstatement as provided in the next section, the secretary shall also immediately notify such county clerks of such fact. In case of forfeiture of the charter and of the right to transact business thereunder, all the property and assets of the defaulting domestic corporations shall be held in trust by the directors of such corporation as in case of insolvent corporations, and the same proceeding may be had with respect thereto as is applicable to insolvent corporations. Any person interested may institute such proceedings at any time after a forfeiture has been declared as herein provided, but in case the governor shall reinstate the charter the proceedings shall at once be dismissed and all property restored to the officers of the corporation. In case the assets are distributed they shall be applied as follows:

1. To the payment of the license tax, penalties, and costs due to the state;
2. To the creditors of the corporation; and,
3. Any balance remaining shall be distributed among the stockholders in accordance with the amount of stock held by each.

In case a foreign corporation shall make default as herein provided, the secretary of state shall issue his warrant stating the amount of the tax, penalty, and costs due to the state, and shall deliver such warrant to any sheriff of any county of this state, who may seize and sell any property of a foreign corporation as upon execution and apply the proceeds to the payment of the tax, penalty, and costs and accruing costs, and any balance remaining after such sale shall by the sheriff be paid to the secretary of state, who shall return the same to the corporation whose property was sold; *provided,* that no more than sufficient property to pay the tax, penalty, and costs shall be seized and sold.

Where the charter has been revoked for failure to pay license tax, the directors are the trustees for the corporation and may dispose of the property and wind up the business of the company, no receiver is necessary. Henriod v. East Tintic Development Co., 51 U. —; 172 P. —.

1275. Reinstatement. The governor is hereby authorized to reinstate any corporation in its right to carry on business in this state, and in the exercise of its corporate privileges and immunities in case such corporation, on or before the 1st day of July following the first Monday in April, shall pay to the secretary of state all taxes due, together with the penalty, costs, and expenses incurred by the state. In case such payment is made and the governor reinstates the corporation in its former rights, he shall at once notify the secretary of state of his action, and the secretary shall, upon receiving such notice, issue and deliver to the corporation so reinstated a certificate authorizing it to transact business the same as if the tax had been paid when due as herein provided.

1276. Moneys deposited quarterly. The secretary of state, at the close of each quarter, shall pay to the state treasurer all moneys received by the secretary under this chapter, and the state treasurer shall credit the same to the general fund of this state.

1277. Effective, when. Notice. This chapter shall go into effect on the first day of October, 1909, and all corporations which shall desire to exist and carry on or continue in business, or may desire to continue in existence within this state after the 15th day of November, 1909, shall apply for and obtain authority to do so at the time and in the manner as herein provided, and in case of failure to do so the penalties and forfeitures shall become effective and shall be enforced against all defaulting corporations. It is hereby made the duty of the secretary of state, between the 1st and 15th days of October in each year, including the year 1909, to mail a written or printed notice properly directed to each corporation, which notice shall state the amount of the tax due from such corporation, the time when payable, and in case of default that the right to transact business and the charter will be revoked. The failure, however, to mail any notice required by this chapter, or the failure of any corporation to receive the same, shall in no way affect the right of the state to proceed under this chapter. The notice referred to shall be deemed as a matter of information merely and not as an essential requirement to be complied with by the state for the purpose of enforcing the provisions of this chapter or any of them.

TITLE 20.

COUNTIES.

CHAPTER 1.

BOUNDARIES.

1290. (457.) Definitions. The words "range," "township," and "section," as employed in this chapter, refer to the Salt Lake meridian and base line of the United States survey, except in such cases as the word "range" obviously refers to a range of mountains.

1291. (458.) Id. In the description of courses the words "north," "south," "east," and "west," shall be construed to mean true courses.

1292. (459.) Existing counties. The several counties as they are in this chapter named and described are the counties of the state until otherwise changed by law.

Existing counties recognized, Con. art. 11, sec. 1.

1293. (460.) Beaver county: Beginning at a point on the summit of the range separating Beaver and Pauvan valleys from Sevier valley east of a point two miles south of the south side of Fort Wilden on Cove creek, thence west to the state boundary; thence south to the line separating townships 30 and 31 south; thence east to the summit of said range; thence northerly along said summit to the point of beginning.

1294. (461.) Box Elder county: Beginning at the intersection of the northern boundary of the state and the summit of the range next east of Malad valley, thence west to the northwest corner of the state; thence south to the forty-first parallel of north latitude; thence east to the western shore of Great Salt lake; thence northeasterly along, and to the middle point of, a straight line drawn between said point on the lake and a point on the east shore of said lake due west of the middle of the channel of Weber river at a point north of the northwest corner of Kingston's fort; thence northeasterly along a straight line drawn from said middle point of said line to a point on the west line of range 3 west, due west from the Hot Springs situated at the point of the mountain north of Ogden; thence east to said springs; thence northeasterly along the summit of the spur range terminating at said springs to, and thence along, the summit of the Wasatch mountains, passing around the headwaters of Box Elder and Willow creeks, and crossing Bear river at the middle point of its lower canyon, to, and thence northerly along, the summit of the range of mountains next east of Malad valley, to the point of beginning.

1295. (462.) Cache county: Beginning at the intersection of the northern boundary of the state and the summit of the watershed separating Cache and Bear Lake valleys, thence west along the said boundary to the summit of the range next east of Malad valley; thence southerly along the summit of the last mentioned range, crossing Bear river at the middle point of its lower canyon to, and thence along, the summit of the Wasatch range, passing round the headwaters of Box Elder and Willow creeks; and thence easterly along the summit of said range to its intersection with, and thence northerly along, the summit of the watershed between Cache and Bear Lake valleys to the point of beginning.

1296. (463.) Carbon county: Beginning at the middle of the channel of Green river where intersected by the line dividing townships 11 and 12 south, thence west along said line to the section line running north and south through the middle of range 6 east; thence south to the summit of the watershed next east of Huntington creek; thence southeasterly along said summit to the third standard parallel south; thence east to the middle of the main

channel of Green river; thence northerly up said channel to the point of beginning.

1297. Daggett county: Beginning at the point of intersection of the boundaries of Utah, Wyoming, and Colorado, thence west to the one hundred and tenth meridian of west longitude, thence south to the watershed of the Uintah mountains, thence east along said watershed to the Colorado state line, thence north to the point of beginning. (Governor's proclamation, November 16, 1917.)

1298. (464.) Davis county: Beginning at a point in the middle of the channel of Weber river where crossed by the summit line of the Wasatch range, thence westerly down the middle of said channel to a point north of the northwest corner of Kingston's fort; thence west to the east shore of Great Salt lake; thence southwesterly along and to the middle point of a straight line running between said point on the east shore and a point on the west shore of said lake at latitude 41 degrees north; thence southeasterly along a straight line running between Black Rock on the southern shore of said lake and said middle point of said line, to the base line of the United States survey; thence northeasterly and equidistant between Antelope island and the south shore of said lake to a point west of the mouth of Jordan river on the west line of range 1 west; thence east to the mouth of Jordan river; thence southeasterly up the middle of the channel of Jordan river to a point west of a point 136 rods north of the Hot Spring in the northern part of Salt Lake City; thence east to the summit of the spur range terminating at said Hot Spring; thence northeasterly along said last mentioned summit to its intersection with, and thence northerly along, the summit of the Wasatch range to the point of beginning.

1299. (464x.) Duchesne county: Beginning at a point on the summit of the Uintah mountains two and one-fifth miles west of the point where the Uintah special meridian intersects the summit of said Uintah mountains, thence southwesterly along the summit of said mountains to a point due north of the center line between the east and west range lines of range 9 west of the Uintah special meridian; thence south intersecting and thence following the said center line of said range 9 west of the Uintah special meridian to a point where it intersects with the second standard parallel south, Salt Lake base and meridian (which point is also an extension east from the Salt Lake meridian); thence east to the line between ranges 9 and 10 east of Salt Lake meridian; thence south to the township line between townships 11 and 12 south of the Salt Lake meridian; thence east along said township line to a point due south of the point of beginning; thence due north to point of beginning. '17, p. 103.

1300. (465.) Emery county: Beginning at the intersection of the third standard parallel south with the middle of the main channel of Green river, thence west to the summit of the watershed next east of Huntington creek; thence northwesterly along said summit to the section line running north and south through the middle of range 6 east; thence south to the third standard parallel south; thence west to the line between ranges 5 and 6 east; thence south to parallel 38 degrees 30 minutes north latitude; thence east to the middle of the main channel of Green river; thence northerly up the middle of said channel to the place of beginning. Am'd '11, p. 115.

1301. (466.) Garfield county: Beginning at the intersection of the main channel of the Colorado river with the line between townships 30 and 31 south; thence west along said township line to the line between ranges 5 and 6 west; thence south to the line between townships 33 and 34 south; thence west to the line between ranges 6 and 7 west; thence south to the line between townships 34 and 35 south; thence west to the line between ranges 7 and 8 west; thence south to the line between townships 37 and 38 south; thence east along said line to the main channel of the Colorado river; thence northeasterly up said channel to the place of beginning.

1302. (467.) Grand county: Beginning at the intersection of the summit of Brown cliffs with the eastern boundary of the state, thence westerly along the summit of said cliffs to the third standard parallel south; thence west to the middle of the main channel of Green river; thence southerly down the middle of said channel to parallel 38 degrees 30 minutes north latitude; thence east to the state boundary; thence north to the point of beginning.

1303. (468.) Iron County: Beginning at the northwest corner of township 31 south, range 5 west, thence west to the boundary of the state; thence south to the line between townships 36 and 37 south; thence east to the line between ranges 16 and 15 west; thence north to the northwest corner of township 37 south, range 15 West; thence east to the northeast corner of township 37 south, range 15 west; thence south to the southeast corner of township 37 south, range 15 west; thence east to the southeast corner of township 37 south, range 13 west; thence south to the northeast corner of section 24, township 38 south, range 13 west; thence east on the section lines to the intersection of the range lines between ranges 12 and 11 west; thence south on that range line to the southwest corner of section 18, township 38 south, range 11 west; thence east on the section lines to the intersection of the range line between ranges 11 and 10 west; thence north along the range line to the southwest corner of section 18, township 38 south, range 10 west; thence east on the section lines to the intersection of the range line between ranges 11 and 10 west, at the northeast corner of section 24, township 38 south, range 10 west; thence north to the line separating townships 37 and 38 south; thence east to the line between ranges 8 and 7 west; thence north to the northwest corner of township 35 south, range 7 west; thence east to the northeast corner of said township 35 south, range 7 west; thence north to the northwest corner of township 34 south, range 6 west; thence east to the northeast corner of township 34 south, range 6 west; thence north to the place of beginning.

Am'd '17, p. 226.

1304. (469.) Juab county: Beginning at the intersection of the second standard parallel south with the divide between Cherry and Faust creeks, thence west to the boundary of the state; thence south to a point due west of the mouth of the lower canyon of the Sevier river; thence east to the middle of the channel of said river; thence northeasterly up the channel of said river to its point of intersection with the summit, if prolonged, of the range separating Oak creek district from Little valley; thence southerly along the summit of said last mentioned range to the summit of the high ground and mountains between Round and Little valleys; thence easterly along the last mentioned summit to the highest point of the dugway over the Sevier hill; thence east to a point south of, and about four miles distant from the Sevier bridge, thence northerly crossing the Sevier river at the upper bluff or painted rocks to the top of said upper bluff or painted rocks; thence northeasterly on a straight line to the northwest corner of section 36, township 16 south, range 1 west, of the Salt Lake base and meridian; thence east along the north section of said section 36, said township and range, to its intersection with the summit of the range of mountains dividing Sanpete valley from Chicken creek and Juab valleys; thence northerly along the summit of said range to Bradley canyon and the ridge between Bradley and Meeting House canyons to a point west of the southwest corner of section 10, township 13 south, range 2 east, Salt Lake meridian; thence east on section line crossing the Sanpete road where it first rises out of Salt Lake canyon upon the divide to a point on said section line 1724 feet east from the southwest corner of said section 10; thence north 19 degrees east 727 feet; thence up the ridge along the summit between Hop creek and Water hollow to Bald mountain in section 22, township 12 south, range 3 east, Salt Lake meridian; thence northerly along the summit of the Nebo range to the summit of the high ground and range between Utah and Juab valleys; thence along the last mentioned summit, and the summit between Goshen and Juab valleys, and the summit between Tintic

valley and Cedar and Goshen valleys and the summit between Tintic and Rush valleys, to the point of beginning. Am'd '13, p. 113.

The legislature had power to define and establish the boundary line between Juab county and Sanpete county, by chap. 71 of the laws of 1913, and the line so established thereunder should prevail. Barton v. Sanpete County, 49 U. 188; 162 P. 611.

1305. (470.) Kane county: Beginning at the middle of the main channel of the Colorado river where intersected by the line separating townships 37 and 38 south; thence west to the line separating ranges 9 and 10 west; thence south to the boundary of the state; thence east to the middle of the main channel of the Colorado river; thence northeasterly up the middle of said channel to the point of beginning.

1306. (471.) Millard county: Beginning at a point due east of the highest point of the dugway over the Sevier hill, and south of, and about four miles distant from the Sevier bridge, thence west to the highest point of said dugway; thence westerly following the summit of the mountains and high ground between Round and Little valleys to the summit of the mountains separating Oak Creek district from Little valley; thence northerly following the last mentioned summit to its point of intersection, if prolonged, with the middle of the channel of Sevier river; thence southwesterly down the middle of said channel to the mouth of the lower Sevier canyon; thence due west to the boundary of the state; thence south to a point west of a point two miles south of the south side of Fort Wilden on Cove creek; thence east to the summit of the range separating Sevier valley from Pauvan and Round valleys; thence northerly along said last mentioned summit, keeping east of the lake in Round valley, to the point of beginning.

1307. (472.) Morgan county: Beginning at the point on the summit of the Wasatch range of mountains nearest to the eastern headwaters of Ogden river, thence southwesterly along the summit of said range, passing south around the headwaters of Ogden river to the summit of the main Wasatch range southeast of Ogden City; thence southerly along the summit of said range, crossing Weber canyon and river, to the summit of the cross range through which the upper canyon of East Canyon creek runs; thence easterly along the summit of said last mentioned range to, and thence northerly along, the summit of the range between East Canyon creek and Weber river to Weber river; thence northeasterly across said river and along the summit of the high land between Lost and Echo Canyon creeks to the summit of the Wasatch range separating the valley of Bear river from the valley of Weber river; thence northwesterly along the last mentioned summit to the point of beginning.

1308. (473.) Piute county: Beginning at a point on the summit of the range between Grass and Rabbit valleys, east of the point at which the wagon road crosses the summit between Marysvale and Monroe, thence west to the summit of the range separating Beaver and Pauvan valleys from Sevier valley; thence southerly following said last mentioned summit to the line between townships 30 and 31 south; thence east to the Salt Lake meridian; thence north to the intersection of said meridian with the summit of the range separating Grass and Rabbit valleys; thence northeasterly to the point of beginning.

1309. (474.) Rich county: Beginning at the point of intersection of the boundaries of Utah, Idaho, and Wyoming, thence west to the summit of the watershed separating Cache and Bear Lake valleys; thence southerly along the summit of said watershed to the summit of the Wasatch range lying north and east of the headwaters of Ogden river; thence southeasterly along the summit of the last mentioned range to its intersection with the summit of the high land between Echo and Lost creeks; thence along the summit of the mountains separating the valley of Bear river from the valley of the Weber river to the point where the Union Pacific railroad crosses said summit; thence easterly to the west quarter corner of section 1, township 5

north, range 7 east, Salt Lake meridian, thence east to the northeast corner of lot No. 6, section 4, township 5 north, range 8 east, Salt Lake meridian, thence north to the point of beginning. Am'd '17, p. 386.

1310. (475.) Salt Lake county: Beginning at the intersection of the summit of the Wasatch range with the summit of the spur range terminating at the Hot Spring in the northern part of Salt Lake City, thence southwesterly along said last mentioned summit to a point east of a point 136 rods north of said Hot Spring; thence west to the middle of the channel of Jordan river; thence down the middle of said channel to the mouth of said river; thence west to the west line of range 1 west; thence southwesterly, and equidistant between Antelope island and the south shore of Great Salt lake to the base line of the United States survey where intersected by a straight line drawn between Black Rock, on the south shore of said lake, and the middle point of the line running from the west shore of the said lake at latitude 41 degrees north, to a point on the east shore of said lake west of the middle channel of the Weber river where said channel lies north of the northwest corner of Kingston's fort; thence southeasterly through Black Rock to the northern end of, and thence along the summit of the Oquirrh range to the summit of the cross range between the Oquirrh and Wasatch ranges; thence easterly along said last mentioned summit to the summit of the Wasatch range; thence northwesterly along said last mentioned summit to the point of beginning.

1311. (476.) San Juan county: Beginning on the eastern boundary of the state at latitude 38 degrees and 30 minutes north, thence west to the middle of the main channel of Green river; thence southwesterly down the middle of the channel of Green and Colorado rivers to the southern boundary of the state; thence east to the eastern boundary of the state; thence north to the place of beginning.

1312. (477.) Sanpete county: Beginning at the intersection of the line between townships 11 and 12 south, and the section line running north and south through the middle of range 6 east, thence west to the summit of the Nebo range; thence southerly along the summit of said range to Bald mountain in section 22 in township 12 south, range 3 east, Salt Lake meridian; thence down the ridge on the summit between Hop creek and Water hollow to a point 1724 feet east and north 19 degrees east, 727 feet from the southwest corner of section 10 in township 13 south, range 2 east, Salt Lake meridian; thence south 19 degrees west 727 feet to the south line of said section 10; thence west on section line to southwest corner of said section 1724 feet; thence west to the ridge between Bradley and Meeting House canyons; thence southerly along the summit of said ridge and the summit of the range between Sanpete and Juab and Chicken Creek valleys to the section line between sections 25 and 36 in township 16 south, range 1 east of the Salt Lake base and meridian; thence west along said section line to the northwest corner of section 36 in township 16 south, range 1 west of the Salt Lake base and meridian; thence southwesterly on a straight line to the top of the upper bluff or painted rocks on the north bank of the Sevier river; thence southerly to a point south of, and about four miles distant from, the Sevier bridge, and east of the highest point of the Dugway over the Sevier hill; thence southeasterly along the summit of the range lying next east of Round valley to a point west of the point where the road between Gunnison and Salina crosses Willow creek at the forks of said creek; thence east to the east bank of the Sevier river; thence southerly along the east bank of said river to a point one mile north of the fourth standard parallel south; thence east to the line between ranges 5 and 6 east; thence north to the third standard parallel south; thence east to the line running north and south through the middle of range 6 east; thence north to the place of beginning. Am'd 13, p. 115.

Barton v. Sanpete County, 49 U. —; 162 P. 611.

1313. (478.) Sevier County: Beginning at a point on the line between ranges 5 and 6 east one mile north of the fourth standard parallel south, thence west to the east bank of Sevier river; thence northerly along the east bank of

said river to a point west of the point where the road between Gunnison and Salina crosses Willow creek at the forks of said creek; thence west to the summit of the range separating Sevier valley from Round and Pauvan valleys; thence southwesterly along the summit of said range to a point thereon due west of the point at which the wagon road crosses the summit between Marysvale and Monroe; thence east to the line between ranges 5 and 6 east; thence north to the point of beginning.

1314. (479.) Summit County: Beginning on the northern boundary of state at a point two and one-fifth miles west of the Uintah special meridian if prolonged, thence west to the southwest corner of Wyoming; thence north to the northeast corner of lot No. 6, section 4, township 5 north, range 8 east, Salt Lake meridian; thence west to the west quarter corner of section 1, township 5 north, range 7 east, Salt Lake meridian; thence westerly to the point where the Union Pacific railroad crosses the summit dividing the valley of the Bear river from the valley of Weber river; thence southwesterly along said last mentioned summit to its intersection with the high land between Echo and Lost creeks; thence southwesterly down said last mentioned summit to and directly across the Weber river; thence southerly along the summit of the range separating East canyon from Weber valley to the summit of the cross range through which the upper canyon of East Canyon creek runs; thence southeasterly along said summit to the summit of the range next south of the headwaters of Silver and East Canyon creeks; thence easterly along said last mentioned summit to the point where it is crossed by the road between Rhodes valley and Salt Lake City; thence southerly to the middle of the channel of the Provo river at the high bluff below Goddard's ranch; thence easterly along the middle of said channel to the headwaters of said river farthest east; thence east to the summit of the Uintah range; thence northeasterly to a point two and one-fifth miles west of the Uintah special meridian if prolonged. Am'd '17, p. 386.

1315. (480.) Tooele county: Beginning at the middle point of a straight line drawn between a point on the west shore of Great Salt Lake at latitude 41 degrees north and a point on the east shore of said lake due west of the middle of the channel of Weber river and north of the northwest corner of Kingston's fort; thence southwesterly along said line to the west shore of said lake; thence west to the western boundary of the state; thence south to the second standard parallel south; thence east to the summit of the divide between Cherry and Faust creeks; thence along the summit of the range next east of Rush and Tooele valleys to the northern end of said summit; thence northeasterly on a straight line through Black Rock on the shore of Great Salt Lake to the point of beginning.

1316. (481.) Uintah county: Beginning at a point on the summit of the Uintah range two and one-fifth miles west of the point where the Uintah special meridian intersects the summit of said Uintah mountains, thence due south parallel with said meridian to the south boundary of the former Uintah Indian reservation; thence due south to the line between townships 11 and 12 south, Salt Lake meridian; thence east to the middle of the main channel of Green river; thence down said channel to the third standard parallel south; thence east to the summit of Brown cliffs; thence easterly to the state boundary; thence north to the summit of the Uintah mountains; thence west along the watershed of said mountains to the place of beginning. (Boundaries changed by the Governor's proclamation November 16, 1917.)

1317. (482.) Utah county: Beginning at the point of intersection of the Wasatch range with the summit of the range crossing from the Wasatch to the Oquirrh mountains, thence westerly along said last mentioned summit to the summit of the range between Cedar and Rush valleys; thence southerly along said summit to the summit of the range between Tintic valley and Goshen and Cedar valleys; thence southerly along said last mentioned summit to, and thence easterly along, the summit between Goshen and Juab valleys to,

and thence northeasterly along, the summit of the high ground and range of mountains between Utah and Juab valleys to the summit of the Nebo range; thence southeasterly along said summit to the line between townships 11 and 12 south; thence east to the line between ranges 9 and 10 east; thence north to the township line between townships 10 and 11 south; thence west to a point due south of the point where the wagon road from Spanish Fork to White river as it existed in February, 1880, crossed the summit of the divide south of Strawberry valley; thence north of said last mentioned point of crossing; thence northwesterly along the summit of the range, passing around the headwaters of Spanish Fork and Hobble creeks to a point south of the point on the Provo river one-fourth of a mile up stream from the middle of the mouth of the north fork of said river; thence north to the summit of the range passing around the headwaters of Battle and American Fork creeks; thence following said summit to the point of beginning.

1318. (483.) Wasatch county: Beginning at a point on the summit of the Uintah range due north of the center line between the east and west range line of range 9 west of the Uintah special meridian, thence southwesterly along the summit of said range to a point east of the headwaters of the Provo river farthest east; thence west to the said headwaters; thence down the middle of the channel of said river to the high bluff below Goddard's ranch; thence northerly to the point where the road between Rhodes valley and Salt Lake City crosses the summit of the range south and east of the headwaters of East Canyon and Silver creeks; thence north to said point of crossing; thence southwesterly along said last mentioned summit to the summit of the Wasatch range at a point north of a point on the Provo river one-fourth of a mile upstream from the middle of the mouth of the north fork of said river; thence south to the summit of the range east of the headwaters of Hobble and Spanish Fork creeks; thence southeasterly along said last mentioned summit to the point where the White river and Spanish Fork road crossed said summit in February, 1880; thence south to the second standard parallel south, Salt Lake base and meridian (which point is also an extension east from the Salt Lake base line of the line between townships 10 and 11 south of Salt Lake meridian); thence east along this line to its intersection with the center line between the east and west range lines of range 9 west of the Uintah special meridian; thence following the center line of the said range 9 west of the Uintah special meridian, to its northern extremity; thence due north to the place of beginning. Am'd '17, p. 102.

1319. (484.) Washington county: Beginning at the intersection of the line between townships 36 and 37 south and the western boundary of the state of Utah, thence east to the line between ranges 16 and 15 west; thence north to the northwest corner of township 37 south, range 15 west; thence east to the northeast corner of township 37 south, range 15 west; thence south to the southeast corner of township 37 south, range 15 west; thence east to the southeast corner of township 37 south, range 13 west; thence south to the northeast corner of section 24, township 38 south, range 13 west; thence east on the section lines to the intersection of the range line between ranges 12 and 11 west; thence south on that range line to the southwest corner of section 18, township 38 south, range 11 west; thence east on the section line to the intersection of the range line between ranges 11 and 10 west; thence north along the range line to the southwest corner of section 18, township 38 south, range 10 west; thence east on the section line to the intersection of the range line between ranges 10 and 9 west; at the northeast corner of section 24, township 38 south, range 10 west; thence south on that range line to the south boundary line of the state of Utah; thence west along the Utah-Arizona boundary line to the west boundary line of the state of Utah; thence north along said west boundary line to the place of beginning. Am'd, '17, p. 226.

1320. (485.) Wayne county: Beginning at the middle of the channel of Green river at latitude 38 degrees and 30 minutes north, thence west to the line between ranges 5 and 6 east; thence north to a point east of the point where

the wagon road crosses the summit between Marysvale and Monroe; thence west to the summit of the range between Rabbit and Grass valleys; thence southwesterly along said summit to the Salt Lake meridian; thence south to the line between townships 30 and 31 south; thence east to the middle of the channel of Colorado river; thence northerly up the channel of Colorado and Green rivers to the point of beginning.

1321. (486.) Weber county: Beginning at the intersection of the summit of the Wasatch range north and east of Ogden valley and the summit of the range separating Bear Lake valley from Cache valley, thence westerly to the Hot Springs near the county road north of Ogden, along the summits of the Wasatch range and the spur range terminating at said Hot Springs; thence west to the line between ranges 3 and 4 west; thence southwesterly in a straight line to the middle point of a line drawn from a point on the east shore of Great Salt lake west of the middle of the channel of the Weber river north of the northwest corner of Kingston's fort to a point on the west shore of said lake at latitude 41 degrees north; thence northeasterly along said last described line to the east shore of Great Salt lake; thence east to the middle of the channel of Weber river; thence up the middle of said channel to a point where crossed by the summit line of the Wasatch range; thence northeasterly along the summit of said range, around the headwaters of Ogden river, to the point of beginning.

1322. (487.) Procedure in case of dispute. Whenever any dispute or uncertainty shall arise as to any county boundary, the same may be determined by the county surveyors of the counties interested, and in case they fail to agree, or otherwise fail to establish the boundary, the board of county commissioners of either or both counties interested shall engage the services of the state engineer, who, with the aforesaid county surveyors, or either of them if but one appears for that purpose, all having received due and proper notice, shall proceed forthwith to permanently determine such boundary line, by making the necessary surveys and erecting suitable monuments to designate said boundaries, which shall be deemed permanent until superseded by legislative enactment. Nothing in this section shall be construed to give the surveyors or state engineer mentioned herein, any further authority than to erect suitable monuments to designate said boundaries as they are now established by law. Am'd '07, p. 85.

Barton v. Sanpete County, 49 U. 188; 162 P. 611.

CHAPTER 2.

MANNER OF ANNEXING COUNTY TO ADJOINING COUNTY.

1335. (487x.) Petition for annexation. Submission to electors. Whenever a majority of the legal voters of any county of this state desire to have the territory included within the boundaries of such county annexed to an adjoining county, they may petition therefore to the board of county commissioners of the county in which they reside, which shall be hereafter referred to as the county to be annexed, as well as to the board of county commissioners of the county to which they desire to be annexed, which shall hereafter be referred to as the annexing county. Such petition must be presented before the first Monday in June of any year, and, if presented in a year during which the general election is held, the county commissioners must cause the said proposition to be submitted to the legal voters of each of said counties at a general election. If the petition be presented during the year in which there is no general election, then the boards of county commissioners must call a special election to be held on the first Tuesday after the first Monday in November following the presentation of such petition, and must cause the proposition to be submitted to the legal voters of the respective counties on that day. Ex-

cept as herein otherwise provided, such election shall be held, the result thereof canvassed, and returns made under the provisions of the general election laws of the state. The ballot to be used shall be:

For annexing ..... county to ..... county.

Against annexing ..... county to ..... county. '01, p. 129.

Consent of voters necessary, Con. art. 11, sec. 3.
Annexing territory to county, §§ 1340-1346.
Creating new county out of existing county, §§ 1350-1358.

1336. (487x1.) Returns transmitted to secretary of state. As soon as the returns of the vote upon such proposition have been canvassed by the county boards of canvassers, each county clerk must make a certified abstract thereof, seal up such abstract, indorse it "election returns," and, without delay, transmit it by registered mail to the secretary of state. '01, p. 130.

1337. (487x2.) If vote in favor of annexation secretary of state must certify result to governor. The certified abstract of such returns must be filed in the office of the secretary of state, and, if it appear therefrom that a majority of the voters in each of the counties have voted in favor of such annexation, the secretary of state must certify the result of such vote to the governor. '01, p. 130.

1338. (487x3.) Governor must issue proclamation. Publication. The governor must thereupon issue his proclamation, stating therein the result of the vote in each of said counties, and that the annexation of the one county to the other will take effect on the first Monday in January following. Such proclamation must immediately be published in a newspaper having general circulation in the state, as well as in a newspaper published in each county voting on the proposition, if a newspaper be published in each of said counties. '01, p. 130.

1339. (487x4.) Conditions of annexation. Whenever a majority of the legal voters of each of the counties to which the proposition is submitted vote in favor of annexing one county to another, in the manner hereinbefore provided, such annexation shall be made under the following conditions:

1. Such annexation shall be complete and take effect on the first Monday of January following the day of the election at which such proposition was submitted;

2. All territory theretofore included within the boundaries of the county to be annexed shall become the territory of the annexing county;

3. The precincts and school districts existing in the county to be annexed shall continue and become precincts and school districts for the annexing county, and remain as then organized until changed in the manner provided by law, and the officers of such precincts and school districts shall hold their respective offices until the expiration of the terms thereof;

4. That all property, both real and personal, held and owned by the county to be annexed shall be vested in the annexing county;

5. The terms of all county officers in the county to be annexed shall terminate and cease on the day the annexation takes effect, and it is made the duty of such officers to immediately deliver to the corresponding officers of the annexing county all books, records, and papers of the annexed county;

6. Any person who is confined under lawful commitment in the county jail of the county to be annexed, or otherwise lawfully held to answer for alleged violation of any of the criminal laws of this state within said county, shall be immediately delivered to the sheriff of the annexing county, and such person shall be confined in the county jail of said county for the unexpired term of the sentence, or held to answer as specified in the commitment;

7. All criminal proceedings and penal actions which shall be pending in the county to be annexed shall be prosecuted to judgment and execution in the annexing county; all offenses theretofore committed in the county to be annexed, which shall not have been prosecuted, may be prosecuted in the annexing county;

8. All actions, cases, proceedings, and matters pending in the district

court in the county to be annexed, may be proceeded with in the district court of the annexing county;

9. All bonded indebtedness of the county to be annexed shall be transferred to and become the indebtedness of the annexing county, with like effect as if the same had been issued by such county. '01, p. 130.

MANNER OF ANNEXING TERRITORY TO ADJOINING COUNTY.

1340. (487x5.) Procedure for annexation. Whenever a majority of the legal voters of any portion of any county of this state, in number equal to a majority of the votes cast at the preceding general election within said portion of said county, desire to have the territory within which they reside included within the boundaries of an adjoining county, they may petition therefor, to the board of county commissioners of the county in which they reside, which shall be hereafter referred to as the county from which territory is to be taken, as well as to the board of county commissioners of the county to which they desire to be annexed, which shall hereafter be referred to as the annexing county. Such petition must be presented before the first Monday in June of a year during which the general election is held, and the county commissioners must cause the said proposition to be submitted to the legal voters residing in the county from which territory is to be taken, as well as to the legal voters of the annexing county at the ensuing general election. Except as herein otherwise provided, such election shall be held, the result thereof canvassed, and returns made under provisions of the general election laws of the state. The ballot to be used shall be:

For annexing a portion of ..... county to ..... county.
Against annexing a portion of ..... county to ..... county.
'03, p. 117.

1341. (487x6.) Returns transmitted. As soon as the returns of the vote upon such proposition have been canvassed by the county board of canvassers, each county clerk must make a certified abstract thereof, seal up such abstract, indorse it "election returns," and, without delay, transmit it by registered mail to the secretary of state. '03, p. 118.

1342. (487x7.) Returns filed. The certified abstract of such returns must be filed in the office of the secretary of state, and, if it appear therefrom that a majority of those voting in each county have voted in favor of such annexation, the secretary of state must certify the result of such vote to the governor. '03, p. 118.

1343. (487x8.) Governor to issue proclamation. The governor must thereupon issue his proclamation, stating therein the result of the vote in each county, and that the annexation of such territory to the annexing county will take effect on the first Monday in the January following, and thereupon such annexation shall be complete, and take effect on the first Monday in January following the day of election at which such proposition was submitted.
'03, p. 118.

1344. (487x9.) Annexed territory. All the territory sought to be annexed shall become the territory of the annexing county. '03, p. 118.

1345. (487x10.) Effect on school districts. The precincts and school districts in the annexed territory shall continue, and shall become precincts and school districts in the annexing county, and remain as then organized until changed in the manner provided by law, and the officers of such precincts and school districts shall hold their respective offices until the expiration of the terms thereof; *provided,* that whenever, pursuant to the provisions of this chapter, any precinct or school district shall be divided, the same shall become disorganized, and the property and territory embraced therein shall be subject to the action of the county commissioners of the respective counties; *provided, further,* that any bonded or other indebtedness of any such school district shall attach to, and become the obligation of, the district that shall be created

out of the territory that shall retain the buildings and other property of the original district. '03, p. 118.

1346. (487x11.) Criminal actions. All criminal proceedings and penal actions which shall be pending in the annexed territory shall be prosecuted to judgment and execution in such annexed territory as part of the annexing county. All offenses theretofore committed in the annexed territory, which shall not have been prosecuted, may be prosecuted to judgment and execution in such annexed territory or any part of the annexing county. '03, p. 118.

MANNER OF CREATING A NEW COUNTY OUT OF AN EXISTING COUNTY.

('13, p. 35.)

1350. Citizens may petition for division. Special election. Whenever any number of the qualified electors of any portion of any county of this state desire to have the territory within which they reside created into a new county, they may petition therefor to the board of county commissioners of the county in which they reside. Said petition must be signed by at least one-fourth of the qualified electors, as shown by the registration list of the last preceding general election, residing in that portion of the county to be created into a new county, and by not less than one-fourth of the qualified electors residing in the remaining portion of said county. Such petition must be presented on or before the first Monday in May of any year, and shall propose the name and define the boundaries of such new county; and the county commissioners must cause the said proposition or propositions to be submitted to the legal voters residing in the county at a special election to be held in the month of July next following, first causing thirty days notice of such election to be given in the manner provided by law for giving notice of general elections. Such election shall be held, the result thereof canvassed, and returns made under the provisions of the general election laws of the State. The form of ballot to be used at such election shall be:

For the creation of (supplying the name proposed) county.

Against the creation of (supplying the name proposed) county.

1351. Canvass of returns. As soon as the returns of the vote upon such proposition have been canvassed by the county board of canvassers, the county clerk must make a certified abstract thereof, seal up such abstract, indorse it "election returns," and without delay transmit it, together with a certified copy of the petition provided for in § 1350 by registered mail to the secretary of state.

1352. Secretary of state to certify. Governor to issue proclamation. The certified abstract of such returns must be filed in the office of the secretary of state, who shall certify the result to the governor; and if it appear that any proposition submitted to the electors as provided in this chapter has been carried in the affirmative by a majority vote of the qualified electors residing in that portion of the county proposed as a new county, and also by a majority vote of the qualified electors residing in the remaining portion of such county, the governor must issue his proclamation, stating therein the result of the vote in each division of said county, as above specified, and the name and boundaries of such new county, and the boundaries of the original county as changed by the creation of such new county; and that the creation of such new county will take effect on the first Monday in January following; and the same shall be a county of this state from and after twelve o'clock noon of the first Monday in the following January, in accordance with such proclamation. The governor shall designate in the said proclamation the name proposed in said petition as the name of such new county; the governor shall also state in said proclamation the judicial district to which such new county shall belong.

1353. Selection of county seat. Whenever a new county shall have been created under the provisions of this chapter, the board of county commissioners of the county from which territory has been taken to create such new

county shall provide for an election to select a county seat therefor and to elect officers for the new county; *provided,* that whenever the petitions provided for in this chapter shall be presented to any board of county commissioners during a year when no general election is held, they shall call a special election to select a county seat and county officers for such new county, said election to be held on the first Tuesday after the first Monday of the November following, and to be conducted under the laws providing for general elections; *provided,* that the city or town receiving the largest number of votes therefor shall be declared to be the county seat of said new county.

1354. Records to be copied and certified. Expenses, how paid. Whenever a new county shall have been created under the provisions of this chapter, the board of county commissioners of the county from which the new county has been taken shall furnish to the respective officers of the new county, in form and on suitable paper for binding into permanent records, certified copies of all such records, or parts of such records and books as pertain to or affect the title of real or personal property in such new county; such copies of said books and records to be continued to twelve o'clock noon and completed on the first Monday in January following the election for the creation of such new county; *provided,* that original records, books, maps, or plats, whether filed or recorded, or filed papers which exclusively relate to or affect the title to land in such new county, or which affect personal property owned by residents of such new county, as shown by the records pertaining thereto, shall be transferred to the custody of the proper officer of the new county, who shall give his receipt therefor; and where any record of any county from which such new county is taken has been compiled or arranged in such manner that it may be divided by segregating such instruments therein or pages thereof as to relate to or affect exclusively the title to lands in such new county or personal property owned by residents of said new county, such records shall be so divided, and the separate parts of such divided or segregated record shall be the property of the counties to which said records relate.

The records of all incorporations whose principal place of business is situate in the new county, unless recorded in such a manner that the original record pertaining to any such corporation may, as herein provided, be delivered over to said new county, shall be copied and certified, and such certified copy or copies, together with all original documents, files, and papers relating to such corporation, shall be transmitted to the new county.

All recorded official bonds of officers within the new county in force at the time such new county is created, unless recorded in such manner that the original record thereof may be transferred, shall be copied, certified, and transmitted to the new county; and all bonds of local officers within the new county which are required by law to be filed only, shall be transferred to the new county.

All official registers, books, papers, and files of every description relating to or affecting elections, both general and local, which shall have been held in any district, precinct, or other subdivision wholly within such new county, and certified copies of the last election proceedings had in any districts which are partly in the new and partly in the old county, shall be transmitted to the new county.

All records, maps, plats, files, and papers relating to or affecting the creation, regulation, and operation of irrigation districts which are wholly within the new county, and certified copies of such records, maps, plats, files, and papers relating to and affecting the creation, regulation, and operation of irrigation districts which are partly in the new and partly in the old county shall be transmitted to the new county.

All expenses lawfully incurred under the provisions of this chapter for transcribing and for the transfer of records, provided for in this section, shall be paid out of the general funds of the new county, and the expenses of any special election provided for in this chapter shall be paid one-half out of the

general funds of the county from which territory is taken and one-half out of the general funds of the new county. Am'd '15, p. 9.

1355. Organization of subdivisions. Distribution of indebtedness. All precincts, school districts, high school districts, road districts, and election districts, as they existed prior to the creation of such new county, shall continue, and shall become precincts, school districts, high school districts, road districts, and election districts of such new county, and the respective officers thereof shall hold office until the expiration of the several terms for which they were elected or appointed; *provided,* that wherever, pursuant to the provisions of this chapter, any precinct, school district, high school district, or road district shall be divided, the same shall be by reason thereof disorganized, and the property and territory embraced therein shall be subject to the action of the board of county commissioners of the respective counties as to reorganization thereof or adding the same to other like subdivisions already organized; *provided, further,* that any bonded or other indebtedness of any such school district or high school district so divided shall attach to and become the obligation of the district that shall be created out of the territory that shall retain the buildings and other property of the original district or to the district to which the same may be added; and all bonded or other indebtedness of the county from which territory is taken shall attach to and become the obligation of such county.

1356. Actions pending in territory embraced in new county. All civil and criminal actions which shall be pending in the territory embraced in such new county shall be prosecuted to judgment and execution therein, and all actions pending in the district court in any county shall be prosecuted to judgment and execution in the county in which the same are pending, subject to change of venue as provided by law.

1357. Id. Prosecutions. All offenses, theretofore committed in such new county in which prosecution shall not have been commenced, may be prosecuted to judgment and execution in such new county.

1358. Division of tax moneys. Whenever a new county shall be created under the provisions of this chapter and the officers thereof shall have duly qualified in the manner provided by law, the county treasurer of the county from which territory has been taken to create such new county shall furnish to the county treasurer of such new county a certified list of all taxes collected by him for the preceding year upon the property located within such portion of his county as has become a part of such new county, together with his warrant for the entire amount of such county, county school, district school, or other special taxes by him collected for such preceding year, less the pro rata cost of assessing and collecting the same and the entire cost of making said certified lists.

CHAPTER 3.

CORPORATE POWERS.

1360. (488.) Are bodies corporate. Powers. The several counties of the state as they now exist, and such other counties as may be hereafter organized according to law, are bodies corporate and politic, and as such have the powers specified in this title, and such other powers as are necessarily implied.

Existing counties recognized, Con. art. 11, sec. 1.

1361. (489.) Who exercises powers. The powers of a county can be exercised only by the board of county commissioners, or by agents and officers acting under authority of the board or authority of law.

General powers of county commissioners, §§ 1400x1-1400x52.

County is not liable for services of an attorney appointed by court to defend an indigent accused.

Pardee v. Salt Lake County, 39 U. 482; 118 P. 122.

1362. (490.) Corporate name. The name of a county designated in the law creating it is its corporate name, and it must be designated thereby in all actions and proceedings touching its corporate rights, property, and duties.

1363. (491.) Powers enumerated. It has power:

1. To sue and be sued;
2. To purchase and hold land within its limits necessary and proper for county purposes and tax sales;
3. To make such contracts and to purchase and hold such personal property as may be necessary to the exercise of its powers;
4. To manage and dispose of its property as the interests of its inhabitants may require;
5. To levy and collect such taxes, for purposes under its exclusive jurisdiction, as are authorized by law.

General powers of board of county commissioners, §§ 1400x1-1400x52.
To purchase property and water rights, § 1400x30.
Levy of taxes, § 570x37.
To sell unnecessary property, § 1400x35.
No suit can be maintained against a county as such in the absence of a statute authorizing counties to be sued.
Taylor v. County Court, 2 U. 405.
The right to sue is a power incident to the creation of a county by the legislature.
Salt Lake Co. v. Golding, 2 U. 319.

1364. (492.) County indebtedness. Authority to borrow. Limitations. Payment. No county shall, in any manner, give or lend its credit to or in aid of any person or corporation, or appropriate money in aid of any private enterprise. No county shall incur any indebtedness or liability, in any manner or for any purpose, exceeding in any one year the taxes for the current year, without the consent of a majority of such qualified electors thereof as shall have paid a property tax therein in the year preceding such election, voting at an election to be held for that purpose, nor unless, before or at the time of incurring such indebtedness, provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due and also to constitute a sinking fund for the payment of the principal thereof within twenty years of the time of contracting the same. For the purpose of meeting the ordinary current expenses of the county and for the purpose of meeting the expenses incurred in the building and maintaining in said county of state roads built under and by authority of the provisions of §§ 2852, 2853, 2856, 2857, until the payment of taxes for the current year, including the special road tax, the board of county commissioners are authorized to borrow money upon the promissory note or notes of the county at such rate of interest as they may agree upon, not exceeding seven per cent per annum; and the board of county commissioners are authorized to execute the promissory note or notes of the county for any such loan or loans; *provided,* that no such loan or loans shall be for a longer period than until the 31st day of December next following the date of said loan or loans, and all such loans must be paid from the taxes for the year in which such loan or loans were made; and *provided, further,* that the promissory note or notes executed to raise funds for current expenses shall be paid out of the taxes levied for such current expenses and promissory notes executed for the purpose of raising funds to pay for the building and maintenance of roads, as herein provided, shall be paid only from the moneys derived for the purposes of said road building, whether said moneys be from state road fund for use in said county provided for by sub-section A, sec. 6, chap. 81, Laws of Utah, 1915, [§ 2856], from the special road tax, or from the appropriation by the county from the general county fund for state roads in the said county.

Am'd '11, p. 61; '17, p. 378.

County shall not lend its credit, Con. art. 6, sec. 31, and note.
Limitation on creating indebtedness, Con. art. 14, secs. 3, 4, and note.
Election to vote on creating bonded indebtedness, § 1414.
Funding debt, §§ 1410, 2665.
Liable with principal contractor on public works, § 3753.
Distribution on creation of new county, § 1356.

Since the taxes for the current year are, in contemplation of law, collected as soon as the levy is made, the allowance of claims against the county equal to the tax revenue for the current year is not a creation of indebtedness against the county.
Fenton v. Blair, 11 U. 78; 39 P. 485.
Where the limit of indebtedness allowed by law has been reached, such county may issue warrants for future claims as they arise, as

soon as an equal amount of legally issued outstanding warrants have been redeemed.

Id.

The indebtedness of Salt Lake county for the year 1895 exceeded its debt limit, but was validated by the act of 1896 (p. 179, 524); held, that the indebtedness, though illegal at the time it was incurred, became by such authority of the legislature an indebtedness of the year 1895, and that the county board was therefore authorized by § 14, p. 524, of the laws of 1896, and by the laws of 1897, to issue bonds for its payment; held, also, that bonds may be issued to cover an indebtedness of the year 1895, paid out of the revenue of 1896.

Darke v. County Commissioners, 15 U. 467; 49 P. 257.

This section was not annulled by Con. art. 14, sec. 3, and power of county commissioners thereunder to incur indebtedness continued till June 5, 1896, when § 5 (p. 517), laws of 1896, made operative provisions of Con. art. 14, sec. 3, so far as it affected the authority of commissioners to incur indebtedness.

P. V. Coal Co. v. Co. Commissioners, 15 U. 97; 48 P. 1032.

The legislature, possessing the power to raise the debt limit of a county, may afterwards validate a warrant issued in excess of debt limit.

Daggett v. Lynch, 18 U. 49; 54 P. 1095.

Counties have no authority to incur indebtedness bearing interest, or to issue interest-bearing warrants, without express legislative authority.

Id.

In absence of a showing that county taxes for a year were sufficient to pay a claim against county for services rendered in that year, no recovery could be had.

Pardee v. Salt Lake County, 39 U. 482; 118 P. 122.

1365. (493.) Unlawful contracts void. All contracts, authorizations, allowances, payments, and liabilities to pay, made or attempted to be made in violation of this title shall be absolutely void and shall never be the foundation or basis of a claim against the treasury of such county. And all officers of said county are charged with notice of the condition of the treasury of said county and the extent of the claims against the same.

Allowance or rejection of claims, §§ 1427-1436.

Penalty for violation of law or neglect of duty, § 1383.

See: Pardee v. S. L. County, 39 U. 482; 118 P. 122.

CHAPTER 4.

COUNTY COMMISSIONERS.

1370. (494.) Number. Each county must have a board of county commissioners consisting of three members.

General powers of county commissioners, § 1400.

1371. (495.) Qualifications. Each member of the board of county commissioners shall be an elector of the county which he represents and must have been such for at least one year immediately preceding his election, and he shall be elected by the qualified electors of the county at large.

Election, tie vote, etc., §§ 2101-2108.

1372. (496.) When elected. County commissioners shall be elected in each county at the general election held in the year 1902, as follows: One for a term of four years and two for a term of two years, and every two years thereafter there shall be elected in each county two commissioners, one for a term of four years and one for a term of two years, and shall hold office for the term for which each has been elected and until their successsors are elected and have qualified. They shall take office on the first Monday in January next following their election. Am'd '01, p. 28.

1373. (497.) Vacancies. Whenever a vacancy occurs in the board of county commissioners, the board must fill the vacancy by appointment. Should the board fail to make the appointment within thirty days after the vacancy occurs, the clerk shall notify the governor of the fact, and the governor shall, within thirty days after the receipt of notice, fill the vacancy by appointment. If at any time there shall not be a majority of the board remaining in office, the governor shall appoint one or two commissioners, as the case may be, until there shall be a majority, and the majority shall select the third as hereinbefore provided. The appointee or appointees shall hold office for the unexpired term. Vacancies shall in all cases be filled from the same political party or parties to which the person or persons belonged whose ineligibility, death, refusal to act, or other disability, has occasioned the vacancy.

1374. (498.) Chairman. Quorum. The county commissioners shall elect one of their number chairman. The chairman shall preside at all meetings of the board, and in case of his absence or inability to act, the members

present must, by an order entered on the records, select one of their number to act as chairman temporarily. Any member of the board may administer oaths to any person when necessary in the performance of his official duties. Not less than two members shall constitute a quorum for the transaction of business, and no act of the board shall be valid or binding unless two members concur therein.

1375. (499.) Regular meetings. The board of county commissioners must provide by ordinance for the holding of regular meetings of the board at the county seat.

1376. (500.) Special meetings. If at any time the business of the county requires a special meeting of the board, such meeting may be ordered by a majority of the board or by the chairman thereof. The order must be signed by the members or chairman calling such meeting, and must be entered in the minutes of the board. Five days' notice of such meeting must be given by the clerk to the members not joining in the order. The order must specify the business to be transacted at such meeting, and none other than that specified shall be transacted at such special meeting unless all the members be present and consent thereto.

1377. (501.) Id. Must be public. Records. All meetings of the board must be public, and the books, records, and accounts, except such as are kept by the county auditor when he is not also clerk, must be kept at the office of the clerk, open at all times during usual business hours for public inspection.

1378. (502.) Rules for government of board. The board of county commissioners shall have power to make and enforce such rules and regulations for the government of the board, the preservation of order, and the transaction of business, as may be necessary.

1379. (503.) Members not to be interested in contracts, etc. No member of the board must be interested, directly or indirectly, in any property purchased for the use of the county, nor in any purchase or sale of the property belonging to the county, nor in any contract made by the board or other person on behalf of the county, for the erection of public buildings, the opening or the improvement of roads, or the building of bridges, or for any other purpose.

Contracts to lowest bidder, etc., §§ 1420-1425. Allowance of claims, etc., § 1427.

1380. (504.) Id. In licenses and franchises. Procedure. Whenever an application is made to the board for an order, franchise, or license relating to any subject over which the board has jurisdiction, in which a majority of the board are interested, the clerk of the board must thereupon certify the application and all orders and papers relating thereto, to the district court of the county, and the judge, or any judge thereof, shall have full jurisdiction to hear and determine the application.

Supplement to Deering's An. Cal. Codes (1893), p. 602.

1381. (505.) Liability for claims illegally allowed. Any county commissioner or other officer authorizing, or aiding to authorize, or auditing, or allowing any claim or demand upon or against said treasury or any fund thereof, in violation of any of the provisions of this title, shall be liable in person and upon his official bond to the person or persons damaged by such illegal authorization, to the extent of the loss by reason of the non-payment of his or their claims.

Unlawful contracts void, § 1365. Allowance of claims, §§ 1427-1432.

1382. (506.) Recovery of illegal payments. Whenever any board of county commissioners shall, without authority of law, order any money paid as a salary, fee, or for any other purpose, and such money shall have been actually paid, or whenever any other county officer has drawn any warrant or warrants in his own favor or in favor of any other person, without being authorized thereto by the board of county commissioners, or by law, and the same shall have been paid, the county attorney of such county is hereby empowered, and it is hereby made his duty, to institute suit in the name of the

county against such person or persons and their official bondsmen to recover the money so paid, and no order of the board of county commissioners shall be necessary to maintain such action; and when the money has not been paid on such order or warrants, it is hereby made the duty of the county attorney of such county, upon receiving notice thereof, to commence suit in the name of the county to restrain the payment of the same, and no order of the board of county commissioners shall be necessary in order to maintain such action.

Where a board, without authority of law, allowed and ordered payment of a claim for the publication of a list of delinquent taxes without having first invited bids for such publication or awarded a contract therefor, but there was no charge of corruption, fraud, or bad faith, in allowing the claim; held, that the hearing and determination by the board of the validity of the claim required the exercise of judicial or quasi-judicial functions and, as the claim was allowed for a purpose authorized by law, though erroneous and irregular, the members of the board were not personally liable for the amount of the claim.

Salt Lake County v. Clinton et al., 39 U. 462; 117 P. 1075.

1383. (507.) Violations of law or neglect of duty. Any county commissioner who refuses or neglects to perform any duty imposed upon him, without just cause therefor, or wilfully violates any law provided for his government as such officer, or who, as commissioner, wilfully, fraudulently, or corruptly attempts to perform an act unauthorized by law shall, in addition to the penalty provided in the penal code, forfeit to the county $500 for every such act, to be recovered on his official bond, and shall be further liable on his official bond to any person injured thereby for all damages sustained.

1384. (508.) Clerk of board. The county clerk is the clerk of the board of county commissioners. The records and minutes of the board must be signed by the chairman and the clerk.

1385. (509.) Duties of clerk. The clerk of the board must:

1. Record all its proceedings;
2. Make full entries of all its resolutions and decisions on all questions concerning the raising of money for, and the allowance of accounts against, the county;
3. Record the vote of each member on any question upon which there is a division;
4. Immediately after the adjournment of each meeting of the board, prepare and certify duplicate lists of all claims passed upon by the board, amount and date of each claim or order, and the date of the allowance or rejection thereof, which said list shall be countersigned by the chairman of the board; and thereafter said clerk shall deliver to and leave with the auditor one of said lists, and shall deliver to and leave with the county treasurer the other list;
5. File and preserve the reports of the county officers to the board;
6. Preserve and file all accounts acted upon by the board, except such as are necessarily kept by the auditor;
7. Preserve and file all petitions and applications for franchises, and record the action of the board thereon;
8. Authenticate with his signature and the seal of the county clerk the proceedings of the board whenever the same shall be ordered published;
9. Authenticate with his signature and the seal of the county clerk all the ordinances or laws passed by the board, and record the same at length in the "ordinance book";
10. Record all orders levying taxes;
11. Perform all other duties required by law or by any rule or order of the board.

1386. (510.) Books to be kept. The board must cause to be kept:

1. A "minute book," in which must be recorded all orders and decisions made by the board, and the daily proceedings had at all regular and special meetings;
2. An "allowance book," in which must be recorded all orders for the allowance of money from the county treasury, to whom made, and on what account, dating, numbering, and indexing the same through each year;
3. A "road book," containing all proceedings and adjudications relat-

ing to the establishment, maintenance, change, and discontinuance of roads and road districts;

4 A "franchise book," containing all franchises granted by the board, for what purpose, the length of time, and to whom granted, the amount of bond and license tax required or other consideration to be paid;

5. A "warrant book," to be kept by the county auditor, in which must be entered, in the order of drawing, all warrants drawn on the treasurer, with their number and reference to the order on the minute book, with date, amount, on what account, and the name of the payee;

6. An "ordinance book," in which must be entered all ordinances or laws duly passed by the board.

GENERAL POWERS OF BOARD.

('09, p. 187; '11, p. 195.)

1400. (511.) Powers. The board of county commissioners in each county has jurisdiction and power, as in the following sections enumerated, under such limitations and restrictions as are prescribed by law:

Certain acts validated, § 1402.
Sec. 1400-1400x52 were amended and re-enacted, '03, pp. 160-169; also '09, pp. 187-199; Am'd '11, p. 195.

1400x1. (511x1.) Divide county: To divide the county into precincts and into road, sanitary, and other districts required by law; to change the same and create others, as convenience requires.

General powers of county, § 1363.
To establish precincts for school purposes, § 4599.
Road districts and supervisors, §§ 2820-2824.
Powers of county, § 1363.

1400x2. (511x2.) Elections and election districts. To establish, abolish, and change election districts, appoint inspectors and judges of election, canvass all election returns, except as otherwise provided by law; declare the result, order the county clerk to issue certificates of election, and perform such other duties in relation to elections as are or may be prescribed by law; *provided,* that no precinct or election district shall be established or abolished or the boundaries of any precinct or district changed within ninety days prior to any election; *provided, further,* that no election district shall be divided between two or more precincts or municipal wards.

Divide county into justices' precincts, § 1460.
Appoint registry agents, §§ 2115, 2116, 2139.
Duties as canvassing board, §§ 2238-2246.
Election district not to contain more than three hundred voters, § 2214.
Call elections for creating new county, § 1350.

1400x3. (511x3.) Supervise county officers. To supervise the official conduct of all county officers and officers of all precincts, districts, and other subdivisions of the county (except municipal corporations); see that they faithfully perform their duties; direct prosecutions for delinquencies; and, when necessary, require them to renew their official bonds, make reports, and present their books and accounts for inspection.

Bonds of county officers, § 1466.
When treasurer may be suspended, § 1493.
Appoint inspector of bees, § 415.
Appoint crop inspector, § 1898.
Appoint justice court clerk, § 1459.
Auditor to examine books monthly, § 1554.
Concur with county recorder in using printed forms, § 1598.
The county commissioners are not authorized to compel the officers of a high school district within the county to submit their books of account for audit and examination at the instance of the commissioners.
Carbon County v. Carbon County High School District, 45 U. 147; 143 P. 220.
The county commissioners may direct the prosecution by a taxpayer of delinquent officers, and the county is liable for the expense so incurred.
Carbon County v. Hamilton, 48 U. 503; 160 P. 765.

1400x4. (511x4.) Audit accounts. To examine and audit, at least every six months, the accounts of all officers having the care, management, collection, or disbursement of moneys belonging to the county, or appropriated by law or otherwise for its use and benefit.

1400x5. (511x5.) Fill vacancies. To fill, by appointment, all vacancies that may occur in offices filled by the appointment of the board of county commissioners; and vacancies in all elective county, district, or precinct offices, except as otherwise provided by law, the appointee to hold office for the unexpired term.

Suspension of treasurer, filling of vacancy, § 1493.

1400x6. (511x6.) Establish funds. To establish a salary fund and such other county funds as the board may deem necessary for the proper transaction of the business of the county, and to transfer money from one fund to another, as the public interest may require.

1400x7. (511x7.) Settle accounts. To settle and allow all accounts legally chargeable against the county, after the examination of the same by the county auditor, and order warrants to be drawn on the county treasurer therefor.

Examination by auditor, §§ 1427, 1545.
Enumeration of county charges, § 1434.
Allowance or rejection of claims, §§ 1427-1432.
Claim for a refund of taxes collected on property not subject to taxation not to be made under this subdivision.
Nielsen v. Sanpete County, 40 U. 560; 123 P. 334.
Cited in: Salt Lake County v. Clinton et al., 39 U. 462; 117 P. 1075.

1400x8. (511x8.) Control suits. To control and direct the prosecution and defense of all suits to which the county is a party, and when necessary to employ counsel to assist the county attorney in conducting the same.

1400x9. (511x9.) Seal for county clerk. To adopt a seal for the county clerk, the impression of which shall contain the words, "state of Utah, county clerk," together with the name of the county in which the same is to be used, an impression whereof must be filed in the office of the county clerk and of the secretary of state.

1400x10. (511x10.) Seal for district court clerk. To provide a seal for the clerk of the district court of the county, the impression of which shall contain the words, "district court, state of Utah," together with the name of the county, an impression whereof must be filed in the office of the county clerk and of the secretary of state.

1400x11. (511x11.) Licenses. To license for purposes of regulation and revenue, all and every kind of business not prohibited by law, transacted and carried on in such county, and all shows, exhibitions, and lawful games carried on therein, outside the limits of incorporated cities; to fix the rates of license tax upon the same, and to provide for the collection thereof, by suit or otherwise; *provided,* that the board of county commissioners shall have the power to license, tax, regulate, suppress, and prohibit billiard, bagatelle, pigeon hole, or any other tables or implements kept or used for similar purposes, also pin alleys or tables, or ball alleys, dancing halls, dancing resorts, dancing pavilions and all places or resorts to which persons of opposite sexes may resort for the purpose of dancing or indulging in other social amusements; *provided, further,* that any person who is unable to obtain a livelihood by manual labor and who is deemed worthy may be given a privilege to hawk, peddle, and vend any goods, wares, and merchandise, not prohibited by law, without payment of a license tax or fee therefor; and in order to carry the provisions of this section into operation the board of county commissioners shall have the power to pass all ordinances and rules and make all regulations, not repugnant to law, necessary for carrying into effect, or for discharging all powers and duties conferred by this section, and to enforce obedience to such ordinances with such fines and imprisonment as the board of county commissioners may deem proper; *provided,* that the punishment of any offense shall not exceed a fine in the sum of $300, or by imprisonment not to exceed six months, or by both such fine and imprisonment.

Procedure when board interested in license, etc., § 1380.
Grant employment offices license, §§ 2440-2458.
County commissioners have no authority to impose a license for revenue only, without regard to regulation. The power to license conferred by this section, "for purposes of regulation and revenue," does not mean for "revenue" alone. County sheep license invalid.
Matthews v. Jensen, 21 U. 207; 61 P. 303.
The power to license must be the subject of a direct grant, it cannot be implied; a statute giving such power must be construed with great strictness, and any doubt or ambiguity arising out of the language employed must be resolved in favor of the public. A tax not a license.
Id.
Cited in: Williams v. Summit County, 41 U. 72; 123 P. 938.

1400x12. (511x12.) Destruction of pests. To provide for the destruc-

tion of gophers, or squirrels, or other wild animals, birds, noxious weeds, and insects, injurious to fruit, fruit trees, vines, vegetables, or plant life.

Bounties for destruction of animals, etc., § 463.
Bounties for crickets, etc., §§ 450-458.
Appoint crop pest inspector, § 1898.

1400x13. (511x13.) Prevention of injuries by dogs, and to tax dogs. To provide for the prevention of injuries to cattle or sheep by dogs, and to tax dogs, and direct the application of the tax.

Damages for injuries by dogs, §§ 112, 113.

1400x14. (511x14.) Fish and game. To make regulations for the protection of fish and game; *provided,* that such regulations shall not be in conflict with the laws of the state for the protection thereof.

1400x15. (511x15.) Provide work for prisoners. To provide for the working of prisoners confined in the county jail under judgment of conviction of misdemeanor, under the direction of some responsible person, upon public grounds, roads, streets, alleys, highways, or public buildings, for the benefit of the county, when, under such judgment of conviction, or existing laws, said prisoners are liable to labor.

1400x16. (511x16.) Inspection of merchandise. To provide for the inspection, measurement, or graduation of any merchandise, manufacture, or commodity and to appoint the necessary officers therefor.

Pure food law, §§ 1920-1995.

1400x17. (511x17.) Encourage tree planting. To encourage, under such regulations as it may adopt, the planting and preservation of shade and ornamental trees on the public roads and highways, and on and about the public grounds and buildings of the county and pay to persons planting and cultivating the same, for every living tree thus planted, at the age of four years, a sum not exceeding twenty-five cents.

Trees on highways, § 2812.

1400x18. (511x18.) Attendance of sheriff. To direct the sheriff to attend in person or by deputy, all the meetings of the board to preserve order, serve notices, subpœnas, citations, or other process.

1400x19. (511x19.) Police regulations. To make and enforec within the limits of the county, outside the limits of incorporated cities and towns, all such local, police, sanitary, and other regulations as are not in conflict with general laws.

1400x20. (511x20.) Storage of explosives. To adopt such rules and regulations within the county, outside the limits of incorporated cities and towns, with regard to the keeping and storing of every description of gunpowder, or other combustible or explosive material, as the safety and protection of the lives and property of individuals may require.

1400x21. (511x21.) Examination of engineers. To provide for the examination, regulation, and licensing of stationary engineers, and of others having charge or control of stationary engines, boilers, or steam generating apparatus within the county.

1400x22. (511x22.) Perform other acts. To do and perform all other acts and things required by law not in this title enumerated which may be necessary to the full discharge of the duties of the board.

Duties respecting drainage districts, §§ 2040-2073; artesian wells, §§ 3561-3567; irrigation districts, §§ 3501-3555; county hospital, §§ 2775, 2777; county school districts first class, §§ 4597-4599; certain school expense, § 4565; levy school taxes, §§ 4704, 4885.

County commissioners can exercise only such powers as are conferred upon them expressly or by necessary implication of statute. Carbon County v. Hamilton, 48 U. 503; 160 P. 765.

1400x23. (511x23.) Cities and towns not affected. Nothing contained in this chapter is intended to diminish, impair, or in any wise affect the power conferred upon incorporated cities and towns.

1400x24. (511x24.) Maintain roads and bridges. To lay out, maintain, control, erect, and manage public roads, turnpikes, ferries, and bridges within the county outside of incorporated cities; *provided,* that the board shall not change or alter the location of any public highway that has had public money

or poll tax expended upon it, unless a petition signed by a majority of the freeholders of the precinct wherein such change is proposed ask for such change; nor shall the board declare any road not a public highway that has had money appropriated and expended upon it by act of the legislature of the territory or of the state of Utah, without the consent of the legislature. Am'd '03, p. 162.

Letting of contracts to build bridges, §§ 1420-1423.
Permission for watermains in § 2879; hitching and sign posts, § 2880; telephone, trolleys, etc., § 2880.
Special tax for state roads, § 2857.
Keep roads clear of weeds, §§ 6269, 6270.

1400x25. (511x25.) Grant franchises. To grant franchises along and over the public roads and highways for all lawful purposes, upon such terms, conditions, and restrictions as in the judgment of the board may be necessary and proper, and in such manner as to present the least possible obstruction and inconvenience to the traveling public, but such permission shall not be for a longer period than fifty years.

Procedure when board interested in franchises, § 1380.

1400x26. (511x26.) License toll roads. To grant, on such terms, conditions, and restrictions as in the judgment of the board may be necessary and proper, licenses and franchises for taking tolls on public roads or highways, whenever in its judgment the expense of operating or maintaining such roads or highways as free public highways is too great to justify the county in operating or maintaining them; *provided,* that it shall always be a condition attached to the granting of such licenses and franchises that such roads and highways shall be kept in reasonable repair by the person or persons to whom such licenses or franchises may be granted.

1400x27. (511x27.) Highways and artesian wells. To enact all laws, ordinances, and regulations not in conflict with the laws of the state for the control, construction, alteration, repair, and use of all public roads and highways in the county outside of incorporated cities, and for the prevention of the waste of water flowing from artesian wells in the county.

Enaction of ordinances, § 1415.
Highways generally, § 2800.
May cap artesian wells, §§ 3561-3567.
Keep roads clear of weeds, §§ 6269, 6270.

1400x28. (511x28.) Construction of roads, bridges, and ferries. To grant licenses and franchises for constructing and keeping in repair roads, bridges, and ferries, and for the taking of tolls thereon.

1400x29. (511x29.) Franchises for ferries. All persons, companies, or corporations who own any toll boat or ferry, for the transportation of persons, wagons, or livestock across any stream, river, or body of water in this state, shall obtain a franchise for the operation of the same from the county commissioners of the county or counties in which such boat or ferry is operated. Whenever such boat or ferry is operated on a stream or body of water forming the boundary line between two adjoining counties, a joint franchise shall be obtained from the county commissioners of such adjoining counties.

1400x30. (511x30.) Purchase property and water rights. To purchase, receive by donation, or lease any real or personal property or water rights necessary for the use of the county; to purchase or otherwise acquire the necessary real estate upon which to sink wells to obtain water for sprinkling roads and for other county purposes, and to erect thereon pumping apparatus, tanks, and reservoirs for the obtaining and storage of water for such purposes; and to preserve, take care of, manage, and control the same; *provided,* that no purchase of real property may be made unless a notice of the intention of the board to make such purchase, describing the property to be purchased, the price to be paid therefor, from whom it is proposed to be purchased, and fixing the time when the board will meet to consummate such purchase, shall be published for at least three weeks in some newspaper of general circulation published in the county, or, if no newspaper be published in the county, then by posting such notices, in at least five public places in the county, for at least three weeks prior to the time when the board will meet to consummate such purchase.

Power to purchase land, § 1363.
To sell unnecessary property, § 1400x35.

1400x31. (511x31.) Receive donations. To receive, from the United States or other sources, lands and other property granted or donated to the county for the purpose of aiding in the erection of county buildings, roads, bridges, or for other specific purposes, to use the same therefor, and to provide for sale of the same and the application of the proceeds thereof.

1400x32. (511x32.) Erect public buildings. To cause to be erected, repaired, or rebuilt, and furnished, a courthouse, jail, hospital, and such other public buildings as may be necessary.

Letting of contracts, §§ 1420-1423. Require bond from contractors, §§ 3753, 3754.

1400x33. (511x33.) Provide rooms. To provide suitable rooms for county purposes when there are no suitable county buildings.

1400x34. (511x34.) Insure property. To insure the county buildings and furniture in the name of and for the benefit of the county.

Industrial insurance with industrial commission, §§ 3110, 3111, 3119.

1400x35. (511x35.) Sell unnecessary property. To sell at public auction at the courthouse door, after thirty days' previous notice given by publication in a newspaper published in the county, or, if no paper is published in the county, by posting in five public places in the county, and convey to the highest bidder for cash, any property belonging to the county no longer required for public use, paying the proceeds into the county treasury for the use of the county.

Clerk to execute deeds, § 1538. Right to buy and sell land, § 1363.

1400x36. (511x36.) Auditor's statement prior to tax levy. To have prepared by the auditor, under the direction of the board and prior to its annual meeting for levying taxes, a statement showing:

1. The indebtedness of the county, funded and floating, stating the amount of each class and the rate of interest borne by such indebtedness or any part thereof;

2. A concise statement of all property owned by the county, with an approximate estimate of the value thereof; and the amount of cash in the treasury and in its several funds.

1400x37. (511x37.) Levying general taxes. District taxes. To levy taxes upon the taxable property within the county for all county purposes, including the care, maintenance, and relief of the indigent sick and otherwise dependent poor. To levy taxes upon the taxable property within any district for the construction and repair of roads and highways, and for other district purposes; *provided,* that no district tax shall be levied until the proposition to levy the same has been submitted to a vote of such qualified electors of such districts as shall have paid a property tax therein in the year preceding such election, and a majority of those voting thereon shall have voted in favor of such tax. Am'd '03, p. 164.

Legislature shall not levy taxes for county purposes, Con. art. 13, sec. 5.
Levy of county and county school taxes, § 5993.
To apportion railroad and other taxes, § 5925.
General power of county to tax, § 1363.
To levy indigent tax, § 1400x46.
To levy tax; for advertising, § 1401; school tax, §§ 4584, 4624, 4704; county hospitals, § 2776; for state roads, § 2857.

1400x38. (511x38.) Board of equalization. To perform such duties as a county board of equalization as are or shall be provided by law.

Duties of county board of equalization, §§ 5974-5982. State geologist attend meeting, § 5782.

1400x39. (511x39.) Health regulations. Board of health. To adopt such provisions for the preservation of health in the county, or in any precinct or district therein, or any portion thereof (except municipal corporations), as the board may deem necessary, and to provide for paying the expenses thereof.

It shall be the duty of the board of county commissioners to appoint district health officers, who shall hold office for the term of two years. They may be allowed such reasonable compensation not to exceed $3 per day as the board may fix and determine; in addition thereto they may be allowed their actual and necessary expenses incurred in the discharge of their duties;

provided, that no member of the board of county commissioners shall be eligible to appointment as a health officer.

The board of health shall have general supervision of all the matters pertaining to the sanitary conditions of the county. It shall have power, in time of epidemic, to locate and establish pesthouses, and to do and perform such other acts as the health of the people of the district may require. All expenses necessarily incurred in the carrying out of the provisions of this section must be provided for by the board of county commissioners. Am'd '03, p. 165.

To create sanitary districts and appoint health officers, § 2721.

1400x40. (511x40.) Provide for indigents. Contracts. To provide for the care, maintenance, and relief of all indigent sick or otherwise dependent poor persons who have lawfully settled in any part of the county, including that territory or portion thereof lying within the limits of any incorporated city or town situated in said county; and it is hereby made the duty of the board to provide such care, maintenance, and relief for the indigent sick and dependent poor, whether found within or without the corporate limits of such incorporated cities or towns, and if found within corporate limits of such incorporated cities or towns, to observe, in caring for them, all such quarantine rules and regulations as may be therein prescribed; and in its discretion to erect, officer, and maintain such hospitals, poorhouses, or other institutions as may be necessary to provide for the same; and for such purposes to levy the necessary property tax, or poll, or both; *provided,* that the board shall appoint (not let to the lowest bidder) some suitable person or persons to take care of and maintain such hospitals, poorhouses, or other institutions; and, *provided, further,* that the board shall also appoint (not let to the lowest bidder) some suitable graduate in medicine to be known as the county physician, and in counties of the first class said board may also appoint another suitable graduate in medicine to be known as the assistant county physician, whose duty it shall be to attend and prescribe for all such indigent sick and dependent poor; and in cases where indigents are sick with a contagious disease and are found within incorporated cities or towns, to observe, in caring for them, such quarantine rules and regulations as may be therein prescribed; (and said board may also appoint one female office assistant to said county physician); *provided, further,* that in all cases where an indigent person sick with a contagious disease is quarantined by any health officer of any city or town, and in all cases where a person sick with a contagious disease, within the limits of an incorporated city or town, is quarantined by any city or town health officer and rendered dependent by reason of such quarantine, then in that case, the board of county commissioners shall only be responsible for the care and maintenance of such person or persons, from and after the date when they shall be notified of the establishment of such quarantine by such city or town health officers; and, *provided, further,* that from the time of the receipt of such notice of the quarantine of any such indigent sick or dependent person, the board of county commissioners shall have the exclusive care and control of the maintenance and support of such person and the expenditure of money therefor. Am'd '03, p. 165; '09, p. 194; '11, p. 201.

Board to compel support of poor by relatives, § 5853.

A $2.00 poll tax is levied by, § 4465.

Duty respecting delinquent husband or father, §§ 8112-8115.

Under the provisions of this section non-resident paupers, whether living in a different county or without the state, who happen to come within the county, are not excluded from the benefits of this section. Where the county refuses to provide necessary relief for indigent sick, etc., and such relief is furnished by a city, the city may recover from the county. Ogden City v. Weber County, 26 U. 129; 72 P. 433.

1400x41. (511x41.) Commissioners to provide cemeteries and care for indigent dead. To purchase, hold, own, lay out, and control graveyards or cemeteries, and regulate the burial of the dead, and to have police jurisdiction over such graveyards or cemeteries, and to survey, map, plat, fence, ornament, and otherwise improve the same, and to convey cemetery lots therein, and pass rules and ordinances for the protection and governing of such graveyards and cemeteries.

They shall also have, and also are given power to provide for the burial of the indigent dead, and it shall be the duty of the board to so provide, or to provide for other disposition of the bodies of such indigent dead, under such restrictions as they may deem advisable. Am'd '15, p. 122.

1400x42. (511x42.) Poor farm. To provide a farm in connection with the county hospital, infirmary, or poorhouse and to make the necessary rules and regulations for governing the same. Am'd '03, p. 166.

1400x43. (511x43.) Prohibit leaving of non-resident indigents, etc. To adopt such rules and regulations, by resolution of such board of county commissioners, as may be necessary to regulate or to prohibit the leaving by any person or common carrier within the limits of the county, of any indigent, idiotic, or insane persons not having a lawful settlement in such county, or the leaving of the bodies of any such persons who may have died while traveling, unless such person or common carrier shall undertake to be responsible for the proper burial of such bodies, or unless such deceased person, at the time of his death, had a lawful settlement in the county within which it is proposed to deliver his body, also to regulate or prohibit the bringing into or leaving within the county persons affected with or who have recently been exposed to any contagious disease. Am'd '03, p. 166.

Power of county commissioners over insane persons, etc., §§ 5401, 5417.

1400x44. (511x44.) Lawful settlement. Definitions. A lawful settlement, such as referred to in this section, may be acquired in any county, so as to oblige such county to relieve and support any indigent sick or otherwise dependent poor person acquiring such settlement, in case they are in need of care, maintenance, and relief, or the attention of the county physician, as follows:

1. A married woman shall always have the settlment of her husband, if he has any such settlement within the state, otherwise her own at the time of her marriage, and in case the wife shall be removed from the place of her settlement and her husband shall need relief, he shall receive it in the place where his wife shall have the settlement; legitimate children shall follow and have the settlement of their father, if he have one within the state; illegitimate children shall follow and have the settlement of their mother, at the time of their birth, if she have any within the state, but neither legitimate nor illegitimate children shall gain a lawful settlement by birth in the place where they were born, unless their parent or parents had the settlement therein at the time;

2. Every male person and every unmarried female person over the age of twenty-one years, who shall have continuously resided in any county in this state for the period of four months, shall thereby gain a lawful settlement in such county;

3. Every minor whose parents and every married woman whose husband has no settlement in this state, and who has resided four months in any county of the state, shall thereby gain a lawful settlement in such county;

4. Every lawful settlement once legally acquired shall continue until it shall be lost or defeated by acquiring a new one in this state, or by absence from the county in which such legal settlement has been made for four months or more, and upon acquiring a new settlement, all former acquired settlements shall be defeated and lost. The provisions of this subdivision shall apply to cases of settlement begun to be acquired, or lost, or defeated, as well as before the provisions of this section shall go into effect. Am'd '03, p. 166.

1400x45. (511x45.) Temporary relief to non-resident indigent. It shall be the duty of the board of county commissioners in each county in the state, upon any complaint made to them that any person, not an inhabitant of that county, and not having a lawful settlement therein, is lying sick or disabled therein, or is in distress, without friends or money, so that he or she is likely to suffer, to examine into the case of such person and grant such temporary relief as the nature of the examination shall require. If any person not having a legal settlement in such county shall die within the county, and who shall

not leave money or other means to defray his or her funeral expenses, it shall be the duty of the county commissioners of such county to employ some person to provide for and superintend the burial of such deceased person, and the necessary and reasonable expenses thereof shall be paid upon the order of the board of county commissioners of such county, in the same way that other claims against said county for the care, maintenance, and relief of the indigent sick or otherwise dependent poor persons are allowed and paid. '03; p. 167.

1400x46. (511x46.) Taxes. The board of county commissioners in each county in the state may, if they deem it necessary and expedient so to do, annually at their session at which the annual tax levy for county purposes is fixed and levied, assess and levy a tax not exceeding 1 mill on the dollar, for the following purposes, to wit:

1. The care, maintenance, and relief of the indigent sick or otherwise dependent poor persons having a lawful settlement in the county;
2. For temporary relief of indigent persons not having a lawful settlement in the county temporarily residing therein, and for the burial of such indigent persons who shall die within the county;
3. The erection and maintenance of hospitals, infirmaries, or poorhouses, and any and all farms in connection therewith;
4. The employment of a superintendent for such county hospitals, poorhouses, and infirmaries, and any other necessary help therein;
5. The salary of the county physician attending the indigent sick or otherwise dependent poor.

The said taxes herein authorized shall be collected on each dollar of valuation of property within the county, in the same manner that other county taxes are assessed, levied, and collected, and by the same officers whose duties require them to assess, levy, and collect the other county taxes. '03, p. 167.

1400x47. (511x47.) Taxes. How Disposed of. All taxes collected through the levying of the tax referred to in § 1400x46 shall, as rapidly as they are collected, be covered into the county treasury, and shall be placed in a separate fund in the custody of the county treasurer, to be called the poor fund, and the money therein shall at all times be used exclusively for the purposes mentioned and authorized in § 1400x49. All claims against any county in payment of expenses incurred under the provisions of this section shall be audited, approved, and allowed by the county commissioners of such county, in the same manner that other claims against said county are allowed and paid. '03, p. 168.

1400x48. (511x48.) Commissioner of poor. The board of county commissioners of any county in this state may appoint, if they deem it necessary and expedient so to do, one of their own number as commissioner of poor for said county. Such commissioner of poor shall have, under control of the board of county commissioners, general care and supervision of the indigent sick or otherwise dependent poor persons of such county. It shall be the duty of such commissioner of poor to keep his office at the county seat, and to personally inform himself of the necessity of all expenditures of public money for the relief of the indigent sick or otherwise dependent poor persons; to make all arrangements that may be required for the assistance of those indigent sick or other dependent poor persons not in the county hospital, infirmary, or poorhouse, and to certify all accounts of such expenditures. It shall be the duty of such commissioner of poor to visit regularly the county hospital, infirmary, or poorhouse, and keep himself informed of the condition thereof and of the inmates therein. Said board of county commissioners may also appoint a pauper clerk and one assistant to the pauper clerk at such compensation as may be fixed by said board. '03, p. 168.

1400x49. (511x49.) Duties of commissioner of poor. The board of county commissioners of each county shall have the power to make such orders regarding the indigent sick or otherwise dependent poor persons of the county as they may deem proper, and it shall be the duty of the commissioner

of poor, on the first Monday in January, April, July, and October in each year, to make a detailed written report to the board of county commissioners stating the number of poor persons in the hospital, infirmary, or poorhouse of such county during the preceding quarter, the names of such persons and the number of days each of such persons during last quarter has been in such hospital, infirmary, or poorhouse, with the statement of the condition of the health therein and the total expense incurred. '03, p. 168.

1400x50. (511x50.) No indigent received without order. No person shall be received in any hospital, infirmary, or poorhouse maintained by the county, without an order of the county commissioners or of the commissioner of poor of said county. '03, p. 168.

1400x51. (511x51.) Commissioner of poor to report. The commissioner of poor shall annually make a report to the board of county commissioners, stating in detail the number of poor persons in the county hospital, infirmary, or poorhouse during the preceding year, with the names thereof, and the number of days each has been in said hospital, infirmary, or poorhouse, the number and names of the indigent sick and otherwise dependent poor persons cared for, maintained, and relieved, or otherwise aided during the preceding year, who are not in such hospital, infirmary, or poorhouse, and the amount expended for each of such persons; at the same time the commissioner of poor shall make and render to the board of county commissioners an estimate of the amount which in his judgment, will be required for the support and maintenance of the indigent sick or otherwise dependent poor of such county for the succeeding year, both for those provided for in the county hospital, infirmary, or poorhouse, and those otherwise cared for, maintained and relieved. '03, p. 168.

1400x52. (511x52.) Compensation of commissioner of poor. Any county commissioner who may have been appointed a commissioner of the poor by a board of county commissioners in any county belonging to the second or the third class, as in this chapter provided, shall receive, in addition to the salary now provided by law, and in addition to his actual traveling expenses as provided by law, a sum to be fixed by the board of county commissioners of the county making such appointment; *provided,* said sum shall not exceed annually $500. Any county commissioner who may have been appointed a commissioner of poor by a board of county commissioners in any county in this state, other than in the first, second, or third class, shall receive in addition to the salary now provided by law and in addition to his actual traveling expenses, as provided by law, the sum to be fixed by the board of county commissioners of the county making such appointment; *provided,* said sum shall not exceed annually $200.

Sec. 1400-1400x52 was amended and the whole section re-enacted in '03, pp. 160-169; also in 1909, pp. 187 to 199; Am'd. '11, p. 195.

1401. Special county tax for exhibition and advertising purposes. Limit. The board of county commissioners of the several counties within the state of Utah, or any of them, may and are hereby authorized and empowered to levy a special tax on the taxable property within their respective counties, for the purpose of creating a fund, not exceeding $5000 in any one year in any one county, to be used for collecting, preparing, and maintaining an exhibition of the products and industries of the county at any domestic or foreign exposition or fair, for the purpose of encouraging immigration and increasing trade in the products of the state of Utah; *provided,* the total tax levied for such purpose in any one year shall not exceed two-thirds of 1 cent on each $100 of taxable property in the county, according to the assessment roll. '11, p. 57; Am'd '15, p. 198.

1402. Validating certain acts of county commissioners. All acts of any and all county commissioners of counties of the first class in appointing or ordering any money paid as salary to commissioners' clerks, pauper clerks, assistant pauper clerks, assistant county physicians, county physician's office girl, county physician's clerk, and as rental for two horses and buggies, one

for the use of assistant county physicians, and one for the use of pauper clerks, from the month of June, 1896, to the month of February, 1909, both inclusive, are hereby validated. '09, p. 226.

REMOVAL OF COUNTY SEATS.

1403. (512.) County seats. Removal. The county seats of the respective counties of this state, as now fixed by law, are hereby recognized as and declared to be the county seats of the respective counties. No county seat shall be removed unless two-thirds of the qualified electors of the county, voting on the proposition at a general election, shall vote in favor of such removal, and two-thirds of the votes cast on the proposition shall be required to relocate a county seat.

Grounds for contest of location or relocation of county seat, § 2410.
Removal of county seat, Con. art. 11, sec. 2.
Special law for removal of county seat forbidden, Con. art. 6, sec. 26.

1404. (513.) Id. Petition. Election. Whenever there shall be presented to the board of county commissioners of any county, a petition signed by the qualified electors of such county, in number equal to a majority of the votes cast at the preceding general election, praying for the submission of the question of the removal of the county seat of said county, it shall be the duty of the board of county commissioners, by due proclamation, to submit the question of such removal, at the next general election, to the qualified electors of such county; and such election shall be conducted and the returns canvassed in all respects as provided by law for the conducting of general elections and canvassing the returns thereof. A proposition of removal of the county seat shall not be submitted in the same county more than once in four years, nor within four years from the time when any such proposition has been heretofore submitted.

FUNDING COUNTY INDEBTEDNESS.

1410. (514.) County debts existing June 4, 1896. The board of county commissioners of any county having an outstanding indebtedness on the 4th day of June, 1896, evidenced by bonds, warrants, promissory notes, or other evidences thereof, provided that such indebtedness is not in excess of that authorized by law, by an affirmative vote of all the members thereof, is empowered to fund and refund the same, and to issue bonds of the county therefor, in sums not less than $100 nor more than $1000 each, having not more than twenty years to run, and bearing interest at a rate not to exceed 5 per cent per annum, payable semi-annually, which bonds shall be substantially in the following form:

No. ..... The county of ....., in the state of Utah, for value received, promises to pay ..... or order, at the office of the treasurer of said county, in ....., on the first day of ....., 19....., (twenty years after date), or at any time before that date and after ..... (ten years after date), at the pleasure of the county, the sum of ..... dollars, lawful money of the United States, with interest at the rate of ..... per cent per annum, payable at the office of said treasurer semi-annually, on the first day of ..... and ..... in each year, on presentation and surrender of the interest coupons hereto attached. This bond is issued by the board of county commissioners, in conformity to a resolution of said board, dated the ..... day of ....., 19....., and under authority, conferred upon said board by the provosions of an act of the legislature of Utah, entitled (insert title of act and date of approval).

In testimony whereof, the said county, by its board of county commissioners, has caused this bond to be signed by the chairman of the board, and attested by the county clerk, with his seal attached, this ..... day of ....., 19.....

.....
Attest: Chairman of board of county commissioners.

.....
County clerk.

And the interest coupons shall be substantially in the following form:

The treasurer of ..... county, Utah, will pay to the holder hereof, on the ..... day of ....., 19....., at his office in ....., ...dollars, lawful money, for interest on county bond No. .....

.....

Attest: Chairman of board of county commissioners.

.....

County Clerk. Am'd '01, p. 30.

Sinking fund to be invested, § 5200. Refunding floating indebtedness, § 2665.
Decisions on county indebtedness, note to § 1364. Distribution on creation of new county, § 1356.

1411. (515.) Id. Duties of county treasurer. Sale of bonds. Whenever bonds so issued shall be duly executed, numbered consecutively, and sealed, they shall be delivered to the county treasurer and his receipt taken therefor, and he shall stand charged on his official bond with all bonds delivered to him and the proceeds thereof, and he shall sell or exchange the same under the direction of the board of county commissioners, on the best available terms, for any legal indebtedness of the county outstanding on the 4th day of January, 1896, but such bonds shall not be sold or exchanged for a less sum than their face value, together with accrued interest at the date of such sale or exchange; and if any portion of such bonds are sold for money, the proceeds thereof shall be applied exclusively to the payment of liabilities existing against the county at and before the date above named. When they are exchanged for bonds or warrants or other legal evidences of county indebtedness, the treasurer shall at once proceed to cancel the old bond and such other evidences of indebtedness, by stamping on the face thereof the amount for which they were received, the word "canceled," and the date of cancellation. He shall also keep a record of bonds sold or exchanged by him, by number, date of sale, amount, date of maturity, the name and postoffice address of purchasers, and, if exchanged, what evidence of indebtedness was received therefor; which record shall be open at all times for inspection by the public. Whenever the holder of any bond shall sell or transfer it, the purchaser shall notify the treasurer of such sale or transfer, giving at the same time the number of the bonds transferred and his postoffice address, and every transfer shall be noted on the record. The treasurer shall also report, under oath, to the board, semi-annually, a statement of all bonds sold or exchanged by him since the preceding report, and the date of such sale or exchange, and, when exchanged, a list or description of the county indebtedness exchanged therefor, and the amount of accrued interest received by him on such sale or exchange, which latter sum shall be charged to him as money received by him on bond fund, and so entered by him on his books; but such bonds shall not be sold or exchanged for any indebtedness of the county, except by the approval of the board of county commissioners of said county. No sale shall be made of any such bonds except to the highest bidder, after advertising bids for the purchase of the same for not less than three weeks in at least one newspaper published in the county, if there be a newspaper published in the county, and if not, then in some newspaper of general circulation published in the state, the right being reserved in such advertisement to reject any and all such bids.

1412. (516.) Tax levy to pay interest and principal. The board of county commissioners shall cause to be assessed and levied each year, upon the taxable property in the county, in addition to the levy authorized for other purposes, a sufficient tax to pay the interest on outstanding bonds issued in conformity with the provisions of this chapter, accruing before the next annual levy, and in the tenth year after the issue of such bonds and in each year thereafter, a tax sufficient to pay one-tenth of the total amount of bonds issued; and the money arising from such levies shall be known as the bond fund, and shall be used for the payment of bonds and interest coupons, and for no other purpose whatever; and the treasurer shall open and keep in his books a separate and special account thereof, which shall at all times show the exact condition of said bond fund.

1413. (517.) Bond fund. Payment of bonds. Whenever, after ten years from the date of the bond, the amount in the hands of the treasurer belonging to the bond fund, after setting aside the sum required to pay the interest maturing before the next levy, is sufficient to redeem five or more bonds, he shall notify by mail the owner of such bond or bonds, that he is prepared to pay the same, with all interest accrued thereon, and that if not presented for payment or redemption within forty days after the date of such notice, the interest on such bond shall cease, and the amount due thereon shall be set aside for its payment whenever presented. The notice shall be directed to the owner's postoffice address, as shown by the record kept in the treasurer's office. If said bonds are not so presented, interest shall cease, and the amount due shall be set aside as specified in said advertisement. All redemptions shall be made in the exact order of their issuance, beginning at the lowest or first number, and the notice herein required shall be directed to the postoffice address of the owner, as shown by the record kept in the treasurer's office.

CREATING BONDED INDEBTEDNESS

1414. (518.) Bond issues for specific purposes. Election. Refunding. The board of county commissioners may contract a bonded indebtedness other than such as is authorized by § 1410 as follows: The board shall by order specify the particular purpose for which the indebtedness is to be created, and the amount of bonds which it is proposed to issue; and shall further provide for submitting the question of the issue of said bonds to the qualified electors of the county, at the next general election or at a special election to be called by the board for that purpose, and none but such qualified voters as shall have paid a property tax in the county in which the election is being held in the year next preceding such election shall be permitted to vote upon the question of bonds. If the question is submitted at a special election, it shall be held, except as herein otherwise provided, as nearly as possible in conformity with the general election laws of the state. Notice shall be given of such election by publication in some newspaper or newspapers published in the county, for four weeks prior thereto; if there be no newspaper so published, then by posting notices for the same time in each election district in the county and at the courthouse door. Ballots shall be printed by the board and furnished to the qualified electors, which shall read: "For the issue of bonds: Yes. No." If a majority of those voting thereon shall have voted in favor of incurring such debt, and not otherwise, the board may proceed to issue and sell the amount of bonds specified, which bonds may be in registered or coupon form, and the board shall levy the tax necessary to pay the interest and to create a sinking fund for the payment of said bonds in each and every year after their issue, until the indebtedness is finally paid. The revenue derived from the sale of said bonds shall be applied to the purpose or purposes specified in the order of the board, and no other. Should there be any surplus, it shall be applied to the payment of said bonds, and in no event shall any county in this state ever become indebted to an amount, including existing indebtedness, exceeding 2 per cent of the value of the taxable property therein, the value to be ascertained by the last assessment for county purposes previous to the incurring of such indebtedness. Any bond or bonds heretofore or hereafter issued or assumed by any county may be refunded at any time by the board of county commissioners when a lower rate of interest, or better terms, can be obtained, or to provide means for the payment of maturing bonds. Bonds for refunding shall be issued as provided in this section, except that the provisions as to elections shall not apply. Am'd '17, p. 287.

Limitation on county indebtedness, Con. art. 14, secs. 3, 4, and notes; § 1364, and note.

A proposition to issue county bonds in the sum of $30,000; $25,000 for building bridges and $5,000 for building and repairing roads, is one general object, and does not state two purposes required to be submitted separately.

State ex rel. Horsley v. Carbon County et al., 38 U. 563; 114 P. 522.

A notice of a special election to determine the question of the issuance by a county of

bonds, though it does not designate polling places and does not prescribe qualifications of electors, but does state that "special election has been ordered and will be held in and for the county on a designated date as is provided by law, etc.," is sufficient.
State ex rel. Whitmore v. Carbon County, 36 U. 394; 104 P. 222.

ORDINANCES.

1415. (519.) Enacting clause. Attesting. Taking effect. Publication. The enacting clause of all ordinances of the board shall be as follows: "The board of county commissioners of the county of ..... ordains as follows:" Every ordinance shall be signed by the chairman of the board and attested by the clerk. On the passage of all ordinances the votes of the several members of the board shall be entered on the minutes and all ordinances shall be entered at length in the "ordinance book." No ordinance passed by the board shall take effect within less than fifteen days after its passage, and before the expiration of the said fifteen days the same shall be published, with the names of the members voting for and against the same, for at least one week, in some newspaper published in the county, if there be one, and if there be none published in the county, then such ordinance shall be posted at the courthouse door at least one week. An order entered on the minutes of the board that such ordinance has been duly published or posted shall be prima facie proof of such publication or posting.

Ordinances for government of highways, etc., § 1400x27.
The provisions of this section are mandatory, and a county ordinance published without the names of the commissioners voting for and against it is invalid.
Summit County v. Gustaveson, 18 U. 351; 54 P. 977.

WITNESSES BEFORE THE BOARD.

1416. (520.) Subpœna. Whenever the board of county commissioners of any county shall deem it necessary or important to examine any person as a witness upon any subject or matter within the jurisdiction of such board, or to examine any officer of the county in relation to the discharge of his official duties, as to the receipt, possession, or disposition by him of any money or other property belonging to the county, or to use, inspect, or examine any book, account, voucher, or document in the possession of such officer or other person, or under his control, relating to the affairs or interests of such county, the chairman of such board shall issue a subpœna, commanding such person or officer to appear before such board, at a time and place therein specified, to be examined as a witness, and such subpœna may contain a clause requiring such person or officer to produce on such examination all books, papers, and documents in his possession or under his control, relating to the affairs or interests of the county.
Contempt in such cases, § 7072.

1417. (521.) Id. Service. It shall be the duty of the sheriff or any deputy sheriff of the county to whom the subpœna may be delivered, to serve the same in the manner provided by law for serving subpœnas, and his official return thereon, of the time and place of such service, shall be prima facie evidence thereof.

1418. (522.) Powers of committee. Whenever the board of county commissioners shall have appointed any member of its body a committee upon any subject or matter of which the board has jurisdiction, and shall have conferred upon such committee power to send for persons and papers, such committee for such purposes shall possess all the powers and be liable to all the duties herein given to and imposed upon the chairman of the board of county commissioners.

1419. (523.) Compensation of witnesses. The witnesses summoned to testify on behalf of the county in matters of public concern before the board of county commissioners are not entitled to have their fees prepaid; but the board must allow them reasonable compensation for their attendance.

CONTRACTS.

1420. (524.) Buildings and bridges erected and repaired by contract. The board of county commissioners shall not erect, construct, or repair any

courthouse, jail, hospital, or other public building, or any bridge, the cost of which will exceed $200, until the plans and specifications shall have been made therefor and shall have been adopted by the board. All such buildings and bridges must be erected or repaired by contract let to the lowest responsible bidder, after publication of notice for at least twenty days in a newspaper of general circulation published in the county, or, if there be no newspaper published in the county, after posting such notice for at least twenty days, in at least five public places in the county; *provided,* that the board of county commissioners may reject any and all bids. The person to whom any such contract is awarded shall be required to execute a bond, to be approved by the board, for the faithful performance of such contract.

General power of county to make contracts, § 1363.

Members must not be interested in contracts, § 1379.

1421. (525.) Changing plans after adoption. Whenever the board of county commissioners shall have adopted plans and specifications for the erection, alteration, construction, or repair of any public building, bridge, or other public structure, such plans and specifications shall not be altered or changed in any manner whereby the cost of such building, bridge, or structure shall be increased, unless the board shall first so order by a unanimous vote.

1422. (526.) Alterations of contract, how made. Extras. Whenever the board of county commissioners shall have entered into a contract for the erection, construction, alteration, or repair of any public building, bridge, or other public structure, such contract shall not be altered or changed in any manner unless the board shall, by unanimous vote, and with the consent of the contractor, first so order. And whenever any such change or alteration shall be so ordered, the particular change or alteration shall be specified in writing, and the cost thereof agreed upon between the board and the contractor. In no other case shall the board ever pay or become liable to pay for any extra work done on such building or public structures.

Extra allowance forbidden, Con. art. 6, sec. 30.

1423. (527.) Stationery for certain counties. Bids. It shall be the duty of the county auditor of each county having a population of 10,000 or more, on or before the 1st day of June of each year, to prepare separate estimates of the books, blanks, and stationery required for the use of the county officers during the year beginning July 1st; and, during the first week in June, he shall publish for one week a brief advertisement in a newspaper published in the county, or having a general circulation therein, stating the probable quantity of each item of books, blanks, and stationery required by such county during the ensuing year, and inviting bids therefor, which bids shall be filed with the auditor on or before the 1st day of July. All bids shall state separately the price of each item of books, blanks, and stationery to be furnished.

Neb. (1895) § 2259*.
Cited in: Salt Lake County v. Clinton, 39 U. 462; 117 P. 1075.

1424. (528.) Id. Contract to lowest bidder. The board of county commissioners shall, at its first meeting in July of each year, open said bids and award to the lowest competent bidder the contract for the furnishing of such books, blanks, and stationery; *provided,* that the board may accept or reject any or all bids, or may accept or reject a part of any bid. The person to whom the contract is awarded shall give a bond for the faithful performance of his contract.

Neb. (1895) § 2260*.

1425. (529.) Bids for publishing notices, etc. Contract. At the time of inviting bids for books, blanks, and stationery, the auditor shall also invite bids for the publishing of county reports, notices, and advertisements during the ensuing year beginning July 1st. The bids for the same must be filed with the auditor on or before the 1st day of July, and at the time of opening bids for furnishing books, blanks, and stationery, the board of county commissioners shall open the bids for publishing reports, notices, and advertisements, and shall award the same to the lowest competent bidder, circulation

considered; *provided,* that the board of county commissioners may reject any or all bids and readvertise.

Cited in: Salt Lake County v. Clinton et al., 39 U. 462; 117 P. 1075.

1426. (530.) Accounts for stationery, how paid. Distribution of stationery, etc. The accounts for books, blanks, and stationery furnished under such contracts, and accounts for publishing reports, notices, and advertisements shall be audited and paid as other accounts against the county. It shall be the duty of the county auditor to procure all such books, blanks, and stationery as may be necessary, and distribute the same to the various county officers.

CLAIMS AND WARRANTS.

1427. (531.) Claims. Form. Time of presentation. The board of county commissioners shall not hear or consider any claim of any person against the county, nor shall the board credit or allow any claim or bill against the county, unless the same be itemized, giving names, dates, and particular service rendered, nor until it has been passed upon by the county auditor. If the claim is for service of process, it shall state the character of process served, upon whom, the number of days engaged, and the number of miles traveled; if for materials furnished, to whom, by whom ordered, quantity, and price agreed upon. Every claim against the county must be presented to the county auditor within a year after the last item of the account or claim accrued. In all cases claims shall be duly verified as to their correctness and as to the fact that they are justly due, by the claimant or his authorized agent. If the board shall refuse to hear or consider a claim because it is not properly made out, it shall cause notice of the fact to be given to the claimant or to his attorney, and shall allow sufficient time for the same to be properly itemized and verified.

Board to settle and allow accounts, § 1400x7; examination by auditor, § 1545.

Commissioners personally liable for allowing illegal charges, § 1381.

What are county charges, § 1434.

Unlawful allowances void, § 1365.

A complaint which fails to allege that a claim which is the cause of the action has been first presented to the county court, fails to state a cause of action against the county.

Fenton v. Salt Lake County, 3 U. 423; 4 P. 241.

There being no statute in this state which expressly prohibits the bringing of an action on a claim against a county before a duly itemized and verified statement has been presented to the board of county commissioners, an objection that the complaint does not allege presentation and rejection of such a claim, being raised for the first time in this court, cannot avail the defendant. (Distinguishing Fenton v. S. L. Co., 3 U. 423; 4 P. 241.)

Auerbach v. S. L. County, 23 U. 103; 63 P. 907.

A county, although having the power to rescind and refuse to pay a contract created for it in fraud, cannot be permitted, after it has had sufficient opportunity to rescind and has not done so, to retain the goods, and at the same time refuse to pay the fair market value therefor to the innocent holder of a warrant

Id.

Claim for a refund of taxes collected on property not subject to taxation not to be made under this section.

Nielsen v. Sanpete County, 40 U. 560; 123 P. 334.

1428. (532.) Id. Allowance or rejection. When the board finds that any claim presented is not payable by the county, or is not a proper county charge, it must be rejected. If it is found to be a proper county charge, but greater in amount than is justly due, the board may allow the claim in part, and may order a warrant drawn for the portion allowed. If the claimant is unwilling to receive such amount in full payment, the claim may be again considered by the board.

1429. (533.) Action on rejected claim. A claimant dissatisfied with the rejection of his claim or demand, or with the amount allowed him on his account, may sue the county therefor at any time within one year after the first rejection thereof by the board, but not afterward; and if, in such action, judgment is recovered for more than the board allowed, on presentation of a certified copy of the judgment, the board must allow and pay the same, together with the costs adjudged; but if no more is recovered than the board allowed, the board must pay the claimant no more than was originally allowed.

Action for a refund of taxes collected on property not subject to taxation is barred by the four-year statute of limitations, and not by this section.

Nielsen v. Sanpete County, 40 U. 560; 123 P. 334.

1430. (534.) Payment of judgment. Assessment to pay. When any judgment is obtained against a county the same must be paid as are other county charges. The board of county commissioners shall have power at any time after the expiration of six months from the rendition thereof to assess and collect a sufficient amount of revenue to pay off and discharge such judgment, in addition to the ordinary expenses of the county, but the property of the county and of the persons owning property situated or liable to taxation therein shall in no case be liable to judgment lien nor to seizure or sale upon execution or other process of any court.

N. Dak. (1895) § 1889. Mont. Pol. C. § 4199*.

A judgment against a county when duly filed becomes an audited claim, and plaintiff, in case of failure from lack of funds or refusal to pay the same, can resort to his writ of mandamus.

Emery Co. v. Burresen, 14 U. 328; 47 P. 91.

The property of a county is not subject to execution and sale on a judgment, in the absence of a statute granting such right in express terms.

Id.

1431. (535.) Claims by commissioners. Rejection. All claims against the county presented by members of the board of county commissioners for expenses must be itemized and verified as other claims, and must state that the service has been actually rendered, and, before allowance, such claims must be presented to the county attorney, who must indorse thereon, in writing, his opinion as to the legality thereof. If the county attorney declare the claim illegal, he must state specifically wherein it is illegal, and the claim must then be rejected by said board.

1432. (536.) Officers not to advocate claims of others. No county officer shall, except for his own services, present any claim, account, or demand for allowance against the county, nor in any way advocate the relief asked in the claim or demand made by any other. Any person may appear before the board and oppose the allowance of any claim or demand made against the county.

1433. (537.) Warrants. Form. Payment. Registration. County charges to be audited. Warrants drawn by order of the board of county commissioners on the county treasurer for current expenses during each year, must specify the liability for which they are drawn, when they accrued, and the funds from which they are to be paid, and must be paid in the order of presentation to the treasurer. If the fund is insufficient to pay any warrant, it must be registered, and thereafter paid in the order of registration. Accounts for county charges of every description must be presented to the board of county commissioners, to be audited as prescribed in this title.

Warrant must specify liability, § 1548. Registering warrants, § 1479.

1434. (538.) County charges, what are. The following are county charges:

1. Charges incurred against the county by virtue of any of the provisions of this title;

2. The necessary expenses of the county attorney, incurred in criminal cases arising in the county, and all other expenses necessarily incurred by him in the prosecution of criminal cases;

3. The expenses necessarily incurred in the support of persons charged with or convicted of crime and committed therefor to the county jail;

4. The sums required by law to be paid to jurors in civil cases;

5. The accounts of justices of the peace acting at inquests;

6. All charges and accounts for services rendered by any justice of the peace for services in the trial and examination of persons charged with crime, not otherwise provided for by law;

7. The necessary expenses incurred in the support of the county hospitals, poorhouses, and the indigent sick and otherwise dependent poor, whose support is chargeable to the county;

8. The contingent expenses necessarily incurred for the use and benefit of the county;

9. Every other sum directed by law to be raised for any county purposes under the direction of the board of county commissioners, or declared to be a county charge;

10. The fees of constables for services rendered in criminal cases;

11. The necessary expenses of the sheriff and his deputies incurred in civil and criminal cases arising in the county, and all other expenses necessarily incurred by such sheriff or his deputies in the performance of the duties imposed upon them by law;

12. The sums required by law to be paid by the county to jurors and witnesses serving at inquests and in criminal cases in justices courts.

Board to settle and allow accounts, § 1400x7, § 1427.

The state is not required to pay mileage and attendance of jurors in civil cases.

Salt Lake Co. v. Richards, 14 U. 142; 46 P. 659.

Does not make county liable for services of an attorney appointed by court to defend an indigent accused.

Pardee v. S. L. County, 39 U. 482; 118 P. 122.

In view of §§ 5761 and 5762, county attorney means public prosecutor, and he is authorized to incur necessary expenses in the prosecution of criminal cases in the district court and to make them county charges; county board may ratify, in whole or in part, any contract for expert services which it could have originally authorized.

Kytka v. Weber County, 48 U. 421; 160 P. 111.

1435. (539.) Costs on removal of criminal action before trial. When a criminal action is removed before trial, the costs accruing upon such removal shall be a charge against the county in which the indictment or information was found.

Cited in: Pardee v. Salt Lake County, 39 U. 482; 118 P. 122.

1436. (539x.) Costs on change of venue refunded. In all civil cases where any change of venue is granted from one county to another, excepting where said change is granted because the action should have been begun in the county to which the case is taken for trial, the costs and expenses connected with the trial of the action that are payable by the county shall be refunded by the county in which the cause of action originated, to the county in which the case is tried, upon the county clerk of the county wherein the case is tried certifying the amount of said costs so paid to the county clerk of the county wherein the action arose. '03, p. 40.

1437. (539x1.) Burial of certain deceased soldiers, by county. Whenever an honorably discharged soldier, sailor, or marine of the United States shall die in this state, not leaving sufficient means to defray the expenses of his burial, upon proof of such facts, by affidavit, such expenses shall be borne by the county in which he may have died, and upon the presentation of the bills of expense of such burial duly verified, it shall be the duty of the board of county commissioners of such county to audit and pay the same in like manner as other county expenses; *provided, however,* that no county shall be liable for the payment of more than $75 in any such case. '01, p. 6; '03, p. 14.

1438. (539x2.) County of soldier's residence to refund. If any such deceased person was at the time of his death a resident of a county in this state, other than that in which he died, the county of his residence shall reimburse the county which may have paid such burial expenses.

'01, p. 6; '03, p. 14.

1439. (539x3.) Soldiers must not be buried with paupers. No person whose burial is contemplated by §§ 1437, 1438, shall be buried in any portion of any cemetery or burial ground used for the burial of paupers.

'01, p. 6; '03, p. 14.

CHAPTER 5.

COUNTY OFFICERS.

1450. (540.) Eligibility. No person is eligible to a county, district, or precinct office, who, at the time of his election, is not an elector of the county, district, or precinct in which the duties of the office are to be exercised.

1451. (541.) Officers enumerated. The officers of a county are: Three county commissioners, a county treasurer, a sheriff, a county clerk, a county auditor, a county recorder, a county attorney, a county surveyor, an assessor,

a county superintendent of district schools, and such other officers as may be provided by law; *provided,* that in counties having an assessed valuation of less than $20,000,000, the county clerk shall be ex officio auditor of the county and shall perform the duties of such office without extra compensation therefor.

Salaries of county officers, §§ 5086-5093. When elected, § 1460.

1452. (542.) Consolidation of offices. In counties where the board of county commissioners, by proper ordinance, shall so elect, the duties of the above mentioned officers may be consolidated in such manner as the board may decide; and in counties where the duties of said officers have been or may hereafter be consolidated, the board of county commissioners thereof, by proper ordinance, may elect to separate the duties so consolidated and reconsolidate them in any other manner, or may separate said duties without reconsolidation and provide that the duties of each office shall be performed by a separate person, whenever, in their discretion, the public interest will be best subserved thereby; *provided,* that no such ordinance shall be passed to take effect within less than three months after the passage thereof, and every such ordinance shall take effect on the first Monday of January next succeeding a general election.

Salary when offices consolidated, § 5093.
In the absence of a formal consolidation, one person cannot hold two offices.
State v. Woolfenden, 26 U. 167; 72 P. 690.

1453. (543.) Id. Duties of person elected. When offices are united and consolidated, but one person shall be elected to fill the offices so united and consolidated, and he must take the oath and give the bond required for and discharge all the duties pertaining to each.

1454. (544.) Creation of precincts. Officers enumerated. Proviso respecting cities of the first class. The officers of a precinct are one justice of the peace and one constable, except as otherwise herein provided. The board of county commissioners, as public convenience may require, shall divide their respective counties into precincts for the purpose of electing justices of the peace and constables; *provided,* that cities of the first class, of 40,000 or more inhabitants, shall not be divided into precincts for the purpose of electing precinct officers, but such cities shall be deemed one precinct for the purpose of electing two justices of the peace and two constables therefor, and that cities having a population of more than 15,000 and less than 40,000 inhabitants shall be deemed one precinict for the purpose of electing one constable therefor and for the purpose of providing a justice of the peace therefor, but no justice of the peace shall be elected therein, and the municipal judge of such cities shall be ex officio precinct justice therefor; *provided, further,* that no person shall act as justice of the peace in cities of the first class unless such person has been regularly admitted by the supreme court of Utah to practice as an attorney at law in the courts of this state.

Am'd '01, p. 109; '03, p. 181; '15, p. 186.

Justice of the peace, §§ 1628, 1790-1794.
Constable, duties, etc., § 1627.
Municipal judge ex officio justice of the peace, §§ 1773-1778.

The provisions of this chapter do not render the justice of the peace and constable city officers, and, as a class by themselves, subject to special legislation.
Love v. Liddle, 26 U. 62; 72 P. 185.

The fact defendant was one of five justices who held office before the precincts were merged into one, did not except him from this section.
Nystrom v. Clark, 27 U. 186; 75 P. 378.

When such statute went into effect abolishing the precincts, the terms of office of the several justices not only expired, but their offices ceased to exist.
Id.

The provisions of this section are not void under Con. art. 6, sec. 23, requiring the subject of each act to be clearly expressed in its title, and are not in conflict with §§ 7533-7536.
Id.

This section is constitutional.
Martineau v. Crabbe, 46 U. 327; 150 P. 301.

1455. (544x.) Appointment of additional officers. Within thirty days after the passage of this chapter, it shall be the duty of the county commissioners of the county within which cities of the first class of 40,000 or more inhabitants are located to appoint one justice of the peace and one constable to serve in such cities until the next ensuing general election, and until their successors are duly elected and qualified. '15, p. 186.

1456. (544x1.) Jurisdiction of certain justices of the peace. All causes of criminal action, arising within the limits of cities of the first class of 40,000

or more inhabitants and over which justices of the peace have jurisdiction, shall be brought before the respective justices of the peace in and for such cities of the first class where the causes of action arise; *provided, further,* that nothing in this section shall be construed to restrict or in any way affect the jurisdiction of any city or municipal court as at present constituted. '15, p. 186.

The proviso, that all causes of criminal action shall be brought before the respective justices of the peace, is in conflict with Con. art. 8, sec. 21, but this does not affect the validity of the rest of the act.
Martineau v. Crabbe, 46 U. 327; 150 P. 301.

1457. (544x2.) Salary of justices. The annual salaries of justices of the peace in cities of the first class of 40,000 or more inhabitants shall be $2400 each, payable monthly out of the county treasury of the county in which such cities are located. '15, p. 186.

1458. (544x3.) Repeal. All acts and parts of acts in conflict herewith are hereby repealed.

1459 (544x4.) Clerk of justice's court. Appointment. Duties. The county commissioners of the respective counties within which cities of the first class of 40,000 or more inhabitants are located, shall appoint a clerk of the court of the justice of the peace and such deputy clerks as they may deem necessary, and shall fix the compensation of such officers. It shall be the duty of the clerk of said court to act as custodian of all the files, papers, indexes, and dockets of justices of the peace within said cities of the first class, and the said clerk shall be responsible for the care and safe keeping of all such records, and shall collect all fees as provided by law for justices of the peace, and shall turn the same into the county treasury monthly '15, p. 186.

1460. (545.) Certain county and precinct officers to be elected. The elective county and precinct officers, except otherwise provided for in this title, and except justices of the peace and constables in cities having a population of more than 15,000 and less than 40,000 inhabitants, shall be elected at a general election to be held in November, 1898, and every two years thereafter, unless otherwise provided, and shall take office at twelve o'clock meridian, on the first Monday in January next following the date of their election. Commissioners shall be elected as provided by law. All officers elected under the provisions of this title shall hold office until their successors are elected or appointed and qualified. Am'd '01, p. 117; '03, p. 117.

Election of county officers, tie vote, etc., §§ 2101-2107.
Vacancies filled by county board, § 1400x5.
Under an act of congress vacating offices, etc., the governor might appoint a successor to the defendant, a probate judge, elected in 1880 for the term of two years and until his successor should be elected and qualified, no successor having been elected in 1882 in consequence of the provisions of an act of congress.
Wenner v. Smith, 4 U. 238; 9 P. 293.
Under § 5028, providing that an incumbent of an office shall hold until his successor be duly elected or appointed and qualified, one holding by appointment will hold over for the succeeding term, if no election occurs at the time provided for by statute.
People ex rel. Murphy v. Hardy, 8 U. 68; 29 P. 1118.

1461. (546.) Deputies and assistants. Every county, precinct, or district officer, except a county commissioner or a judicial officer, may, by and with the consent of the board of county commissioners, appoint as many deputies and assistants as may be necessary for the prompt and faithful discharge of the duties of his office. The appointment of a deputy must be made in writing, and filed in the office of the county clerk, and, until such appointment is so made and filed and until such deputy shall have taken the oath of office, no one shall be or act as such deputy; *provided,* that any officer appointing any deputy shall be liable for all official acts of such deputy; and, *provided, further,* that the board shall allow the county clerk such deputies and assistants to transact the business pertaining to the district courts as may be deemed necessary and advisable by the judge or judges of the district court.

1462. (547.) "Principal" includes "deputies." Whenever the official name of any principal officer is used in any law conferring power or imposing duties or liabilities, it includes deputies.

Principal may include deputy, § 5848.

1463. (548.) Offices at county seats, when. The clerks, recorders, and treasurers of all counties, and, except in counties having a population of less

than 8,000, all other county officers, must have their offices at the county seats; and in counties having a population of 20,000 and over, the clerk, sheriff, recorder, auditor, treasurer, and attorney must keep their offices open for the transaction of business from nine o'clock a. m. until five o'clock p. m.

1464. (549.) Liability on bond. Whenever, except in criminal prosecutions, any special penalty, forfeiture, or liability is imposed upon any officer for non-performance or mal-performance of his official duties, the liability therefor attaches to the official bond of such officer and to the principal and sureties thereon.

Sup. Cal. C. (1893) p. 607. Mont. Pol. C., § 4324.

1465. (550.) Officer absent from county. No county officer shall absent himself from the county for a period of more than thirty days without the consent of the board of county commissioners.

1466. (551.) Bonds of county officers. Premiums. Qualifications of sureties. Approval and record. The board of county commissioners of each county in the state shall prescribe by ordinance the amount in which the following county and precinct officers shall execute official bonds before entering upon the discharge of the duties of their respective offices, viz.: County treasurer, county clerk, county auditor, sheriff, county attorney, county recorder, county assessor, county surveyor, county superintendent of district schools, justice of the peace, and constable, *provided,* that the premium for the county treasurer's bond, if a corporate surety bond be required by the board, shall be paid out of the county funds. The judge or judges of the district court shall prescribe the amount in which each member of the board of county commissioners must execute an official bond before entering upon the discharge of the duties of his office. The bonds and sureties of county commissioners must, before the bonds can be recorded and filed, be approved by the judge or one of the judges, if there be more than one, of the district court. The bonds and sureties of all other county and precinct officers must be approved by the board of county commissioners before they can be filed and recorded. All persons offered as sureties on official bonds shall be examined on oath touching their qualifications, and no person shall be admitted as surety on any such bond unless he is a resident and freeholder within this state, and is worth, in real or personal property, or both, situate in this state, the amount of his undertaking, over and above all just debts and liabilities exclusive of property exempt from execution. All official bonds shall be recorded in the office of the county recorder and then filed and kept in the office of the county clerk. The official bond of the county clerk, after being recorded, shall be filed and kept in the office of the county treasurer.

Am'd '17, p. 127.

Power to fix bonds and require renewal, § 1400x3. Official bonds generally, §§ 4266-4271.

1467. (552.) Officers to complete business at end of term. It shall be the duty of all officers in this title named, to complete the business of their respective offices to the time of the expiration of their respective terms; and, in case an officer at the close of his term shall leave to his successor official labor to be performed for which he has received compensation, or which it was his duty to perform, he shall be liable to pay his successor the full value of such service, which may be recovered in any court of competent jurisdiction.

CHAPTER 6.

COUNTY TREASURER.

1475. (553.) Duties. The county treasurer shall:

1. Receive all money belonging to the county and all other money by law directed to be paid to him, safely keep the same, and apply and pay it out, and render an account thereof as required by law;

2. Keep an account of the receipts and expenditures of all such money in books provided for the purpose, in which must be entered the amount, the time when, from whom, and on what account any money was received by him; the amount, time when, to whom, and on what account all disbursements were made by him;

3. Disburse county money only on county warrants issued by the county auditor, except on settlements with the state;

4. Disburse the money in the treasury on such warrants only when they are based on orders of the board of county commissioners, or upon order of the district court, or as otherwise provided by law;

5. File and keep the certificates of the auditor delivered to him when money is paid into the treasury;

6. So keep his books that the amount received and paid out on account of separate funds or specific appropriations are exhibited in separate and distinct accounts, and the whole receipts and expenditures shown in one general or cash account;

7. Perform such other duties as are or may be required by law.

Salary, § 5087.
Fees of treasurer, § 2524.
Ex officio treasurer; county hospital § 2778; irrigation districts, § 3521-3524.
Duty respecting non-resident grazing license, § 137.
Receive proceeds from sale of property under liquor prohibition act, § 2358.
Duties respecting drainage district taxes, § 2055.
Duties as to taxes, see Taxation.
Duty as to migratory stock fund, § 5901.
Duty as to state road fund, § 2857.
Collect and receipt for poll tax, §§ 4465-4468.
Duty respecting earnings of delinquent husband or father, §§ 8112-8115.
Collect and turn over school taxes, §§ 4585, 4625, 4704.
County pays bond premium, § 1466.

1476. (554.) Auditor's certificate to accompany money. He must receive no money into the treasury except taxes unless accompanied by the certificate of the auditor provided for in chap. 8 of this title.

Sup. Cal. C. (1893) p. 609*.

1477. (555.) Must give receipt. When any money is paid into the county treasury, he must give to the person paying the same a receipt therefor, which must forthwith be deposited with the county auditor, who must charge the treasurer therewith, and give the person paying the same a receipt.

Sup. Cal. C. (1893) p. 609.

1478. (556.) Payment of warrants. When a warrant is presented for payment, and there is money in the treasury for that purpose, he shall pay the same, and write on the face thereof "paid," the date of payment, and sign his name thereto; *provided, however,* that the treasurer shall not receive, or pay, or indorse any warrant until he shall have received from the clerk of the board of county commissioners the certified list mentioned in sub. 4 of § 1385, and not then unless a claim or order upon which said warrant is based appears upon such list.

Warrants must specify liability and be paid in order of presentation, §§ 1433, 1548.
County auditor to draw warrants, § 1547.
Certification of bonds and warrants, §§ 466-469.

1479. (557.) Unpaid warrants to be registered. Interest. When any warrant is presented to the treasurer for payment, and the same is not paid for want of funds, the treasurer must indorse thereon "not paid for want of funds," and annex the date of presentation and sign his name thereto, and from that time until funds are on hand to pay the same the warrant shall bear interest at the rate of five per cent per annum.

Warrants to be registered, when, § 1433.
A county warrant issued prior to 1896, and void as in excess of the debt limit and also containing an invalid provision for payment of 8 per cent interest, was validated as to principal only by chap. 64, Laws 1896, and the holder was entitled to 5 per cent interest from June 5, 1896.
McIntosh v. S. L. County, 23 U. 504; 65 P. 483.

1480. (558.) Id. Subsequent call and payment. When there is sufficient money in the treasury to pay warrants drawing interest, the treasurer must give notice in some newspaper published in the county, or if none is published therein, then by written notice posted at the front door of the county courthouse, stating therein that he is ready to pay such warrants. From the first publication or posting of such notice such warrant shall cease to draw interest.

1481. (559.) Id. Notice required. In advertising warrants under the provisions of the next preceding section, the treasurer need not publish the warrants in detail, but need give notice only that county warrants which were presented for payment prior to a date stated in the notice, are payable. When a part only of the warrants presented for payment on the same day are payable, the treasurer must designate such payable warrants in the advertisement.

1482. (560.) Warrants to be paid in order. Fund for same. Warrants drawn on the treasurer, and properly attested, are entitled to preference as to payment out of money in the treasury properly applicable to the payment of such warrants, according to the priority of time in which they were presented. The time of presenting such warrants must be noted by the treasurer, and, upon receipt into the treasury of money not appropriated, he must set apart the same, or so much thereof as is necessary, for the payment of such warrants.

Registered warrants paid in order of registration, § 1433.

1483. (561.) Waiver of right by non-presentation. Should such warrants not be again presented for payment within thirty days from the time the notice hereinbefore provided for is given, the fund set aside for the payment of the same must be, by the treasurer, applied to the payment of unpaid warrants next in order of registry. The board of county commissioners may, on application and presentation of warrants properly indorsed which have been advertised, make an order directing the treasurer to pay them out of any money in the treasury not otherwise appropriated.

1484. (562.) Interest paid. When the treasurer pays any warrants upon which any interest is due, he must note on the warrant the amount of the interest paid thereon, and enter on his account the amount of such interest distinct from the principal.

Warrants void because issued in excess of debt limit validated as to principal only by legislature. Daggett v. Lynch, 18 U. 49; 54 P. 1095. McIntosh v. S. L. County, 23 U. 504; 65 P. 483.

1485. (563.) Treasurer's settlement with auditor. The treasurer must settle his account relating to the collection, care, and disbursement of public revenue of whatsoever nature and kind, with the auditor, on the first Monday of each month. For the purpose of making such settlement, he must make a statement under oath of the amount of money or other property received prior to the period of such settlement, the sources whence the same was derived, the amount of payments or disbursements, with the amount remaining on hand. He must, in such settlements, deposit all warrants redeemed by him and take the auditor's receipt therefor. He must also make a full settlement of all accounts with the auditor, annually, on the second Monday of January.

1486. (564.) Reports. Each county treasurer must make a detailed report, whenever required so to do by the county commissioners at any regular or special meeting of the board of all money received by him, and the disbursements thereof, and of all other proceedings in his office, so that the receipts into the treasury and the amount of disbursements, may clearly and distinctly appear.

1487. (565.) Penalties. If any county treasurer shall neglect or refuse to settle or report as in this chapter provided, he shall forfeit to the county the sum of $500 for every such neglect or refusal, and the county attorney must institute suit for the recovery thereof.

Sup. Cal. C. (1893) p. 611.

1488. (566.) Treasurer to sue attorney, when. If the county attorney refuses or neglects to account for and pay over money received by him, as required by this title, the county treasurer must bring an action against him for the recovery thereof, in the name of the county, and may recover in such action, in addition to the amount so received, twenty per cent thereon by way of damages.

County attorney to pay over moneys, § 1610.

1489. (567.) Attorney to sue justice, when. If any justice of the peace

fails to deliver to the treasurer, within thirty days after an inquest upon a dead body, any money or property found upon such body, unless claimed in the meantime by the adminstrator or other legal representatives of the decedent, the county attorney must proceed against such justice of the peace to recover the same, by civil action, in the name of the county.

Justice to pay over money and property, § 3238.

1490. (568.) Property found on dead body. Disposal. The treasurer, upon receiving from a justice of the peace money found on a dead body, must place it to the credit of the county. On receiving other property, in like manner, he must, within ninety days, sell it at public auction, upon reasonable public notice, and must, in like manner, place the proceeds to the credit of the county. All said money must be kept in a separate fund.

1491. (569.) Id. When claimed. If the money in the treasury is demanded within six years by the legal representatives of the decedent, the treasurer must pay it to them, after deducting the fees and expenses of the justice and of the county in relation to the matter, or the same may be so paid at any time thereafter upon the order of the board of county commissioners.

1492. (570.) Treasurer not to lend public money. The county treasurer must safely keep all money belonging to this state, or to any city or county of this state, until disbursed according to law. He shall not lend the same, and he shall be liable therefor on his official bond.

1493. (571.) Suspension of treasurer. Whenever an action, based upon official misconduct, is commenced against any county treasurer, the board of county commissioners may, in its discretion, suspend him from office until such suit is determined, and may appoint some person to fill the vacancy, who shall qualify and give such bond as may be required by the board.

1494. (572.) Death of treasurer. Books, etc. In case of the death of any county treasurer, his legal representative must deliver up to the person appointed to fill the vacancy occasioned by such death, all the official moneys, books, accounts, papers, and documents which come into his possession.

1495. (573.) Accounts subject to inspection. The books, accounts, and vouchers of the treasurer are at all times subject to the inspection and examination of the board of county commissioners, the county attorney, the county auditor, and the grand jury.

CHAPTER 7.

SHERIFF.

1500. (574.) "Process" and "notice" defined. "Process" as used in this chapter includes all writs, warrants, summons, and orders of the courts of justice or judicial officers. "Notice" includes all papers and orders, except process, required to be served in any proceeding before any court, board, or officer, or when required by law to be served independently of said proceedings.

Style of all process shall be, "The State o f Utah," Con. art. 8, sec. 18.

1501. (575.) Duties of sheriff. The sheriff shall:

1. Preserve the peace;
2. Make all lawful arrests;
3. Attend, in person or by deputy, all courts organized under the laws of the state, except justices' and police courts, held within his county, and obey their lawful orders and directions;
4. Command the aid of as many male inhabitants of his county as he may think necessary in the execution of these duties;
5. Take charge of and keep the county jail and the prisoners therein;
6. Receive and safely keep all persons duly committed to his custody,

and file and preserve all commitments by which persons are committed, and keep a record of each, showing the name, age, and place of birth, particularly describing the person, in a book kept for that purpose;

7. Release on the record all attachments of real property when the attachment placed in his hand has been released or discharged;

8. Indorse upon all process and notices the year, month, day, hour, and minute of reception, and issue therefor, to the person delivering it, upon payment of fees, a certificate showing the names of the parties, title of paper, and the time of its reception;

9. Serve all process and notices in the manner prescribed by law;

10. Certify, under his hand, upon process or notices, the manner, time, and place of service, or, if he fails to make service, the reason of his failure, and return the same without delay;

11. Extinguish fires occuring in the undergrowth, growing trees, shrubs, or forests on the public domain within his county.

Salary, § 5087.
Release of attachment, § 6729.
A county officer, § 1451, election, § 1460.
Collect non-resident grazing license, § 136.
Enforce act for prevention of rabies, §§ 150-158.
Duties under live stock commission act, §§ 181-191.
County to be paid for certain services, § 228.
Superintend labor of delinquent husband or father, § 815.

1502. (576.) Use of jails. The common jails in the several counties of the state shall be kept by the sheriffs of the counties in which they are respectively situated, and shall be used as follows:

1. For the detention of persons committed in order to secure their attendance as witnesses in criminal cases;

2. For the detention of persons charged with crime and committed for trial;

3. For the confinement of persons committed for contempt, or upon civil process, or by other authority of law;

4. For the confinement of persons sentenced to imprisonment therein upon a conviction of crime.

1503. (577.) Id. Keeping certain prisoners apart. Persons committed on criminal process and detained for trial, persons convicted and under sentence, and persons committed upon civil process, must not be kept or put in the same room, nor shall male and female prisoners, except husband and wife, be kept or put in the same room. Females shall be under the supervision of a suitable matron who shall be appointed by the sheriff.

1504. (578.) Service on prisoner. A sheriff or jailer upon whom a paper in a judicial proceeding, directed to a prisoner in his custody, is served, must forthwith deliver it to the prisoner, with a note thereon of the time of its service. For neglect to do so he is liable to the prisoner for all damages occasioned thereby.

1505. (579.) Temporary guard for jail. The sheriff, when necessary, may, with the assent in writing of the district judge, employ a temporary guard for the protection of the county jail, or for the safe keeping of prisoners, the expenses of which shall be a state or county charge, as the case may be.

1506. (580.) Must receive and provide for prisoners. The sheriff must receive all persons committed to jail by competent authority, and provide them with necessary food, clothing, and bedding, for which he shall be allowed a reasonable compensation, to be determined by the board of county commissioners, and, except as provided in § 1508, to be paid out of the county treasury.

May be required to attend on supreme court, § 1660.

1507. (581.) U. S. prisoners to be held in county jails. Expenses. Persons convicted of crime in any of the courts of the United States in the state of Utah, as well as prisoners held to answer before such courts for a violation of any of the laws of the United States, shall be received and held in the jails of any county of this state under the same regulations and laws govern-

ing prisoners held under the authority of this state, and upon such terms as to compensation as may be agreed upon by the county authorities and the United States.

1508. (582.) Persons committed on civil process. Expenses. Whenever a person is committed upon process in a civil action or proceeding, except when the state is a party thereto, the sheriff is not bound to receive such person unless security is given on the part of the party at whose instance the process is issued, by deposit of money, to meet the expenses for him of necessary food, clothing, and bedding, or to detain such person any longer than the expenses are provided for. This section does not apply to cases where a party is committed as a punishment for disobedience to the mandates, process, writs, or orders of court.

Civil arrest, §§ 6630-6655.

1509. (583.) Process returnable to another county. When process or notice is returnable to another county, he may inclose such process or notice in an envelope addressed to the officer from whom the same emanated, and deposit it in the postoffice, prepaying the postage.

1510. (584.) Return is prima facie evidence. The return of the sheriff upon process or notice is prima facie evidence of the facts in such returns stated.

1511. (585.) Sheriff to make prompt return. If a sheriff does not return without delay a process or notice in his possession, with the necessary indorsement thereon, he is liable to the party aggrieved for all damages sustained by him.

1512. (586.) Neglecting to serve execution. Damages. If the sheriff, to whom a writ of execution is delivered, neglects or refuses, after being required by the creditor or his attorney, the fees having first been paid or tendered, to levy upon or sell any property of the party charged in the writ which is liable to be levied upon and sold, he shall be liable to the creditor for the value of such property.

1513. (587.) Neglecting to pay over money. Damages. If he neglects or refuses to pay over on demand, to the person entitled thereto, any money which may come into his hands by virtue of his office, after deducting all legal fees, the amount thereof with twenty-five per cent damages, and interest at the rate of ten per cent per month, from the time of demand, may be recovered by such person; *provided*, that such sheriff may pay such money into the court, or to the clerk thereof, issuing the writ or process upon which such money is collected or received, and from the time of such payment the sheriff shall be relieved of all liability therefor, unless the detention is shown to have been wrongful.

1514. (588.) Liability for escape of imprisoned debtor. A sheriff who suffers the escape of a person arrested in a civil action, without the consent or connivance of the party in whose behalf the arrest or imprisonment is made, is liable as follows:

1. When the arrest is upon an order to hold to bail, or upon a surrender in exoneration of bail before judgment, he is liable to the plaintiff as bail;

2. When the arrest is on an execution or commitment to enforce the payment of money, he is liable for the amount expressed in the execution or commitment;

3. When the arrest is on an execution or commitment other than to enforce the payment of money, he is liable for the actual damages sustained;

4. Upon being sued for damages for an escape or rescue, he may introduce evidence in mitigation and exculpation.

Liability of sheriff, §§ 6652-6654.

1515. (589.) Liability for rescue of same. He is liable for the rescue of a person arrested in a civil action equally as for an escape.

1516. (590.) Not liable if person returns or is retaken. An action cannot be maintained against the sheriff for a rescue or for an escape of a person

arrested upon an execution or commitment, if, after his rescue or escape, and before the commencement of the action, the prisoner returns to the jail, or is retaken by the sheriff or by any other person.

1517. (591.) Neglect excused by written direction only. No direction or authority by a party or his attorney to the sheriff, in respect to the execution of process or the return thereof, or to any act or omission relating thereto, is available to discharge or excuse the sheriff from a liability for neglect or misconduct, unless it is contained in a writing, signed by the attorney of the party, or by the party if he has no attorney.

1518. (592.) Commitment of sheriff vacates office, when. When the sheriff is committed under an execution or commitment, for not paying over money received by him by virtue of his office, and remains committed for sixty days, his office is vacant.

1519. (593.) Must execute all process. A sheriff or other ministerial officer is justified in the execution of, and must execute, all process and orders regular on their face and issued by competent authority.

Sheriff or deputy not to act as attorney nor have a partner who is an attorney, § 345.

To serve all process from city courts, § 1721.

1520. (594.) Officer must show process. The officer executing process must then, and at all times subsequent, as long as he retains it, upon request show the same with all papers attached, to any person interested therein.

1521. (595.) Sheriff to act as crier, when. The sheriff in attendance upon court must, if required by the court, act as crier thereof, call the parties and witnesses and other persons bound to appear at the court, and make proclamation of the opening and adjournment of court and of any other matter under its direction.

1522. (596.) Service upon sheriff. Authority of successors. Service upon the sheriff of a paper other than process, may be made by delivering it to him or to one of his deputies, or to a person in charge of his office during office hours; or if no such person be there, by leaving it in a conspicuous place in the office. When any process remains with the sheriff unexecuted, in whole or in part, at the time of his death, resignation of office, or at the expiration of his office, said process shall be executed by his successor or successors in office; and when the sheriff sells real estate, under and by virtue of an execution or order of court, he or his successors in office shall execute and deliver to the purchaser or purchasers all such deeds and conveyances as are required by law and necessary for that purpose, and such deeds and conveyances shall be as valid in law as if they had been executed by the sheriff who made the sale.

1523. (597.) Disqualification to serve process. Constable to serve. In cases where it appears from the papers of any court of record that the sheriff is a party, or where an affidavit is filed with the clerk of the court stating a partiality, prejudice, consanguinity, or interest on the part of the sheriff, the clerk of the court shall direct process to any constable of the county, whose duty it shall be to execute it in the same manner as if he were sheriff.

Fees of sheriff, § 2523.

Under provisions of this section, where the sheriff is a party, in view of §§ 3606, 3607, 3609, 3611, 3615, showing that the sheriff has nothing to do with the selection and drawing of jurors, but is only required to summon them in the manner prescribed, a reversal for the denial of defendant's challenge to the panel on sole ground that sheriff served the venire, is not justified.

Whipple v. Preece, 24 U. 364; 67 P. 1072.

1524. (598.) Id. Fees of constable. The constable, for any service performed under the foregoing section, shall be paid the same fees as are or shall be provided for like service on the part of the sheriff, and such fees shall belong to the constable and not to the public treasury.

1525. (599.) Sheriff to serve process in criminal cases. It shall be the duty of the sheriff to duly serve and return all process in criminal cases to which the state is a party, lawfully issued by any court of the state, and he shall perform such duty without fee in cases where such process is issued on behalf of the state; but where the process issues from a court outside of his

county he shall be entitled to his actual expenses necessarily incurred in the service of the same, to be paid by the county where the process was issued. He shall perform such other duties as are required by law. Am'd '99, p. 73.

CHAPTER 8.

COUNTY CLERK.

1535. (600.) Ex officio duties. The county clerk is ex officio clerk of the district court and clerk of the board of county commissioners.

Ex officio clerk of district court, Con. art. 8, sec. 14.

1536. (601.) Duties as clerk of district court. As clerk of the district court he shall:

1. Take charge of and safely keep the seal of the district court;

2. Take charge of and safely keep, or dispose of, according to law, all books, papers, and records which may be filed or deposited in his office;

3. Issue all process and notices required to be issued; enter a synopsis of all orders, judgments, and decrees proper to be entered, unless the law or the court shall require them to be entered at length; keep a "register of actions," in which must be entered the title of each cause, with the date of its commencement, the names of the attorneys, a memorandum of each subsequent proceeding therein, with date thereof, and an itemized account of all fees charged, showing by whom paid; keep an index of all suits labeled "general index—plaintiffs," alphabetically arranged, each page of which shall be divided into three columns, under their respective heads, as follows: "Number of suit," "defendants," "plaintiffs"; also an index labeled reverse index—defendants," alphabetically arranged, each page of which must be divided into three columns, under their respective heads, as follows: "Number of suit," "defendants," "plaintiffs";

4. Keep a "minute book," in which shall be entered a record of the daily proceedings of the court;

5. Keep a "fee book," as provided by law;

6. Keep a "register of criminal actions," properly indexed, in which shall be entered the title and number of each criminal action, with a memorandum of every paper filed, or order or proceeding had therein, with the date thereof;

7. Keep two books, properly indexed, in one of which shall be entered the names of all persons who, from the organization of the court, have declared or may hereafter declare their intention to become citizens of the United States, and the date of such declaration, which book shall be labeled "naturalization—declarations of intention"; and in the other of which must be entered the names of all persons who have been or who may hereafter be admitted citizens of the United States, by the court of which he is clerk, which book shall be labeled "naturalization—final papers," which must show the country of which such person was before a citizen or subject, the date of his admission as a citizen of the United States, and the page of the minute book, or book of record, containing the order admitting him to citizenship;

8. Keep a book of "jurors' certificates," in which must be contained the blank certificates and stubs to be filled as provided by law;

9. Keep a "witness book," in which shall be contained blank certificates and stubs to be filled as provided by law;

10. Keep a record of the attendance of all jurors, and of witnesses in criminal actions, and compute the mileage of each;

11. Keep an "execution book," as provided by law;

12. Keep a "judgment book," as provided by law;

13. Keep a "judgment docket," as provided by law;

14. Issue certificates of the attendance and mileage of all jurors, and of witnesses in criminal cases;

15. Take and certify acknowledgments and administer oaths;

16. Keep a "register of probate and guardianship proceedings," properly indexed, in which must be entered the name of the estate, the register number, the names of the attorneys, with a memorandum of every paper filed, or order or proceeding had therein, with the date thereof and an itemized account of the fees charged;

17. Keep a "probate record book," properly indexed, in which shall be recorded all wills, bonds, letters of administration, letters testamentary, and all other papers and orders of the court required by law to be recorded;

18. Index deeds and other instruments affecting real estate made by a sheriff, master in chancery, special commissioner, executor, administrator, guardian, trustee, or other person acting in behalf of another, in the name of the person whose land is sold or affected as grantor, indicating by a note in the index in what capacity the deed was made;

19. Keep such other records, and perform such other duties as are prescribed by law.

Clerk of district court to post notice of terms and of adjournments, §§ 1672-1674.
Duty as to adjournments, §§ 1808-1810.
Fees of clerk of district court, § 2521.
To keep record of jurors and witnesses and issue certificates, §§ 2543-2548.
To record articles of incorporation, § 865.
Attorney to designate paper, § 7028.
Duty as to tax on stock, § 5901.
When venue of action is changed, refund of costs made to county of trial, §§ 1435, 1436.
Findings left with the clerk to be filed are as effectually filed as if he placed his file mark upon them.
Fisher v. Emerson, 15 U. 517; 50 P. 619.
Billings v. Parsons, 17 U. 22; 53 P. 730.

1537. (601x.) Record of notaries public to be kept. It shall be the duty of the clerk of the district court of each county receiving certifications (of notaries public) to keep and maintain an indexed record to be kept for that purpose, showing the names of all persons holding notarial commissions, together with dates of issuance and expiration of the same. '03, p. 120.

Secretary of state to certify list of notaries to clerk, §§ 5706, 5707.

1538. (602.) Duties as county clerk. As county clerk he shall:

1. Issue all marriage licenses and keep a register of marriages as provided by law;

2. Keep separate registers, to be known as the "register of births," and the "register of deaths," in which the births and deaths certified to him must be entered and numbered in the order in which they are reported. There must be stated in each register, in separate columns, properly headed, the various facts contained in the certificates and the name of the official or the person making the report. The county clerk must carefully examine each report, and register the same birth or death but once, although it may be reported by different persons.

Registry of births and deaths, §§ 5039-5046.

3. Execute under his seal, in the name of the county, all deeds and conveyances for the county, pursuant to resolutions of the board of county commissioners, of all real estate conveyed by the county to any person, firm, or corporation;

4. Take and certify acknowledgments and administer oaths;

5. Keep a "fee book" as provided by law;

6. Take charge of and safely keep the seal of the county clerk, and keep such other records and perform such other duties as are prescribed by law.

Fees of county clerk, § 2521.
County clerk shall not act as attorney nor have a partner acting as such, § 345.
Duties as clerk of board, §§ 1384-1386.
To certify bonds and warrants to be within debt limit, §§ 466, 2073.
Ex officio recorder marks and brands, §§ 213, 219.

1539. (602x.) County clerks to certify names of officers elected. Within ten days after July 1, 1907, every county clerk of this state shall, and it is hereby made his duty so to do, prepare and forward to the secretary of state, on a suitable form to be prepared and furnished by the secretary of state, a certified statement, as of July 1, 1907, containing the name of each elected or appointed officer of his county, excepting justices of the peace and constables, together with the name of the office held by such person, the date of the election or appointment, and the date of the expiration of the term of such officer. '07, p. 204.

1540. (602x1.) Id. Every county clerk of this state shall, on and after July 1, 1907, and it is hereby made his duty so to do, within ten days after the issuance by such clerk of any certificate or certificates of election of elective county officers, excepting justices of the peace and constables, and after the issuance by such clerk of any certificate or certificates of appointment made by the board of county commissioners of such county to fill vacancies in elective county offices, excepting justices of the peace and constables, prepare and forward to the secretary of state a certified statement, on a suitable form to be prepared and furnished by the secretary of state, of every such certificate or certificates issued as aforesaid. Every such statement shall show the name of the county, the name of the county office to which the person was elected or appointed, the date of the election or appointment of such person, the date of the expiration of the term for which the person was elected or appointed, the date of the certificate of election or appointment, and the date of the qualification of the person so elected or appointed. '07, p. 204.

Secretary of state to provide forms and to keep a record of elected county officers, § 5703.

UTAH STATE PRISON

CHAPTER 9.

COUNTY AUDITOR.

1545. (603.) Shall investigate all claims. It shall be the duty of all persons holding claims against the county to present the same to the county auditor, and he shall investigate and examine into all such claims, and report the same together with his findings to the board of county commissioners at the next regular session after such investigation shall have been completed, with his approval or disapproval indorsed thereon; and he shall keep, in a book kept for that purpose, a complete record of all such claims and of his action thereon and the reasons for the same, and the action of the board thereon All bills, claims, accounts, or charges for materials of any kind or nature that may be purchased by or on behalf of the county by any of the county officers or contracted for by the board of county commissioners, shall be investigated, examined, and inspected by the county auditor, who shall indorse his approval or disapproval thereon before any warrant for the payment of the same can be drawn.

Examination by auditor, § 1400x7.
Claims to be presented to auditor, § 1427.
A county officer, § 1451; election, § 1460.
Certification of bonds and warrants, as being within debt limit, §§ 466-469.
Fees of auditor, § 2525.

1546. (604.) Examine accounts of debtor of county. The auditor must examine and state the accounts of all persons indebted to the county or holding money payable into the county treasury, and must certify the amount to the treasurer, and, upon the presentation and filing of the treasurer's receipt therefor, give to such person a discharge, and charge the treasurer with the amount received by him.

1547. (605.) Must draw warrants, when. The auditor must draw warrants on the county treasurer in favor of all persons entitled thereto, in payment of all claims and demands chargeable against the county which have been legally examined, and allowed and ordered paid by the board of county commissioners; *provided, however,* that the auditor must not draw a warrant on the county treasurer in favor of any person until said auditor shall have received from the clerk of the board of county commissioners a certified list mentioned in sub. 4 of § 1385. The auditor must also draw his warrant on the county treasurer for all debts and demands against the county, when the amounts are fixed by law, and which are not directed to be audited by some other person or tribunal.

Payment of warrants, §§ 1478-1484.
Counties have no authority to incur indebtedness bearing interest, or to incur interest-bearing warrants, without express legislative authority.
Daggett v. Lynch, 18 U. 49; 54 P. 1095.

1548. (606.) Warrants must state liability, etc. All warrants must distinctly specify the liability for which they are drawn, and when it accrued.

Warrants must specify liability and be paid in order, § 1433.

1549. (607.) Must keep books, how. The auditor shall keep the books of the county in such a manner as will show the amount of receipts from and disbursements of each department.

1550. (608.) Accounts current. The auditor must keep accounts current with the treasurer.

1551. (609.) Form of warrants. Canceled when uncalled for. All warrants issued by the auditor during each year, commencing with the 1st day of January, must be numbered consecutively, and the number, date, and the amount of each, and the name of the person to whom payable, and the purpose for which drawn, must be stated thereon; and they must, at the time they are issued, be registered by him, and after such warrants have remained uncalled for for two years they shall be canceled.

1552. (610.) May administer oaths. The auditor is authorized to administer any oath or affirmation rendered necessary to the performance of the duties of his office, and shall have power to issue process and compel the attendance of witnesses before him to examine into any matter that he may deem necessary.

Mont. Pol. C., § 4564*.

1553. (611.) Books. Preservation. Inspection. The auditor shall keep and carefully preserve all documents, books, records, and papers required to be kept in his office, and the same shall be open to public inspection during office hours.

Mont. Pol. C., § 4565*.

1554. (612.) To examine books of county officers. Report. It shall be the duty of the auditor to make an examination of the books and accounts of the county treasurer, the county clerk, the county recorder, the sheriff, and the county surveyor, during each month; and to examine the books of justices of the peace as often as he may deem necessary, and for that purpose, he shall have free access to all the books, records, and papers in each of said offices. If the county auditor finds that the books of any of the officers mentioned are not kept according to law, or that improper or incorrect returns have been made by such officers, it shall be his duty to report the same at the next regular meeting of the board of county commissioners.

Authority of county board over officers and their books, § 1400x3.

1555. (613.) To publish detailed statement annually. The county auditor shall prepare and publish during the month of July of each year, in some newspaper having general circulation in the county, a detailed statement of the financial condition of the county and of all receipts and expenditures for the previous year ending June 30th, showing:

1. The total receipts of the county, stating particularly the source of each portion of the revenue;
2. The amount of cash on hand at the date of the last report;
3. The amount of sinking fund and how invested;
4. The number, date, and amount of every bond issued or redeemed and the amount received or paid therefor;
5. The indebtedness of the county, funded and floating, stating the amount of each class and the rate of interest borne by such indebtedness or any part thereof;
6. A concise statement of all property owned by the county, with an approximate estimate of the value thereof, and the amount of cash in the county treasury and in its several funds;
7. Each warrant issued, to whom, and on what account; *provided,* that if more than one warrant has been issued to one individual on the same account during the year, the aggregate amount shall be shown in the statement as one warrant; and, *provided, further,* that various items paid out to individuals that are charges on the county shall not be published, but the same

may be stated as a total, and the itemized statement of the same shall be on file in the auditor's office.

1556. (614.) Joint statement of auditor and treasurer. The auditor and the treasurer of each county must, on the second Monday in February of each year, and at such other times as the board of county commissioners may require, make a joint statement to the board of county commissioners, showing the whole amount of collections, stating particularly the source of each portion of the revenue, from all sources paid into the county treasury; the funds among which the same was distributed and the amount of each; the total amount of warrants drawn and paid, and on what funds; the total amount of warrants drawn and unpaid, and accounts or claims audited or allowed and unpaid, and the fund out of which they are to be paid; and, generally, make a full and specific showing of the financial condition of the county.

1557. (615.) Auditor's seal. Where the county auditor is not also county clerk, he shall have a seal, to be furnished by the board of county commissioners, the impression of which shall contain the following words: "State of Utah, County Auditor," together with the name of the county in which the same is to be used.

1558. (616.) Duties generally. The auditor must discharge such other duties as are required by law.

Auditor to procure and distribute stationery, § 1426.

1559. (616x.) Auditor to file statement. On the first Monday in December, 1903, and semi-annually thereafter, on the first Monday in June and December of each year, it shall be the duty of the county auditor of each county to prepare a full and complete itemized statement, verified under oath, of all warrants drawn by him since the date of the last statement, for the salaries of the county assessor and his deputies and assistants, and for the salaries of the county treasurer and his deputies and assistants. Such statement shall set forth in detail the number of each warrant so drawn, the date of same, the name of the person or persons in whose favor drawn, and the nature of the service rendered. '03, p. 183.

1560. (616x1.) To apportion amount. The county auditor shall thereupon apportion the said total amount so ascertained to each taxing fund or district appearing on the tax rolls of the county, omitting special tax levies of school districts, in the proportion that the total tax assessed to such taxing fund or district bears to the total taxes assessed on the entire roll of the county, omitting the special taxes assessed for school districts; *provided,* that the sum so apportioned to the state and state school funds shall be borne and paid by the state, the amounts so apportioned to the county and county school funds shall be borne and paid by the county, and the amounts so apportioned to cities of the first and the second class and the schools of said cities of the first and the second class shall be borne and paid by said cities of the first and second class, and the amounts so apportioned to cities of the third class and incorporated towns shall be borne and paid by said cities of the third class and incorporated towns. '03, p. 183.

Apportionment by county superintendent of schools, § 4565.

1561. (616x2.) What statement to contain. Said statement shall also show the total tax assessed to each taxing fund or district, not including special tax levies of school districts, and the sum apportioned to each such taxing fund or district as herein provided, and a copy of said statement shall be filed by the county auditor with the state auditor, and the auditor, recorder, or clerk of each city or town within the county, who shall thereupon, unless he find the same to be incorrect, draw his warrant in favor of the treasurer of the county filing said statement in the sum shown by said statement to be due the said county from said state, city, or town. '03, p. 184.

1562. (616x3.) Special school district taxes. Special taxes of school districts shall be assessed and collected as already provided by law; *provided,* that each school district shall pay to the county in which it is situated one-half

of one per cent on the amount of taxes collected, and such payments shall be in full for the services and compensation of the county in assessing and collecting and paying over said taxes. '03, p. 184.

Sec. 4624, providing that the county treasurer shall collect the taxes for the school board without additional compensation for assessing and collecting, and that he shall pay the same to the treasurer of the board, being the last legislative enactment, controls, and the treasurer is not entitled to compensation from the school board for services in assessing and collecting the taxes.

Board of Education v. Daines, 50 U. —; 166 P. 977.

CHAPTER 10.

COUNTY RECORDER.

1575. (617.) Books and supplies. County records. The recorder must procure from the county auditor such books and supplies as the business of his office requires, but orders for the same must first be obtained from the board of county commissioners. The books used may contain printed forms of deeds, mortgages, or other instruments of general use. He shall have the custody of, and must keep all books, records, maps, and papers required by law to be kept or recorded in his office.

A county officer, § 1451; election, § 1460.

1576. (618.) Manner of recording documents. He must, on the payment of the fees for the same, record in books provided for the purpose, in a fair hand, or by means of a typewriter, camera, or other machine, all papers, documents, records, and other writings required or permitted by law to be recorded. Am'd '15, p. 122.

1577. Photographic copies of records. Fees. The county recorders are authorized to make and furnish to interested persons certified photographic copies of any of the records in their said offices contained, said records not being confidential and privileged in character, upon payment of fees and charges provided herein. Certified copies of such records may be supplied to officers of the county for their official use without the payment of any charge. The following schedule of fees for such photographic copies is hereby provided:

1. For photographic copies, 25 cents fee each sheet;

2. For certifying an authenticated copy and affixing thereto the seal of the officer certifying, 25 cents. '15, p. 122.

Fees of recorder, § 2522.
Ex officio mining recorder, § 3897.
All instruments filed in his office to be recorded, § 1594.

1578. (619.) Id. To give receipt. On the filing of any instrument in writing for record in the recorder's office, the recorder shall, when requested, give to the person leaving the same to be recorded, a receipt therefor.

1579. (620.) To keep certain books, enumerated. Every recorder must keep:

1. An "entry book," in which he shall immediately upon receipt of any instrument to be recorded, or, upon the entry upon the margin of any record of any cancellation, satisfaction, or discharge of any instrument in writing, enter in the order of its reception or entry, as the case may be, the names of the parties thereto, its date, the day of the month, the hour, and the year of filing any such statement or marginal entry, and a brief description of the premises, endorsing upon each instrument and marginal entry a number corresponding with the number of such entry;

2. A "grantor's index," in which shall be indexed all deeds, final judgments, or decrees partitioning or affecting the title to or possession of real property; which shall show the number of the instrument, the name of each grantor, in alphabetical order, the name of the grantee, date of instrument, time of filing, kind of instrument, consideration, the book and page in which it is recorded, and a brief description of the premises;

3. A "grantee's index," in which shall be indexed all deeds, final judgments, or decrees partitioning or affecting the title to or possession of real porperty; which shall show the number of the instrument, the name of each grantor, in alphabetical order, the name of the grantee, date of the instrument, time of filing, kind of instrument, consideration, the book and page in which it is recorded, and a brief description of the premises;

4. A "mortgagor's index," in which shall be entered all mortgages, deeds of trust, liens, and all other instruments in the nature of an incumbrance upon real estate, which shall show the number of the instrument, name of each mortgagor, debtor, or person charged with incumbrance, in alphabetical order, the name of the mortgagee, lienholder, creditor, or claimant, date of instrument, time of filing, nature of instrument, consideration, the book and page in which it is recorded, and a brief description of the property charged;

5. A "mortgagor's index," in which shall be entered all mortgages, deeds of trust, liens, and all other instruments in the nature of an incumbrance upon real estate, which shall show the number of the instrument, name of each mortgagor, debtor, or person charged with the incumbrance, in alphabetical order, the name of the mortgagee, lienholder, creditor, or claimant, date of instrument, time of filing, nature of instrument, consideration, the book and page in which it is recorded, and a brief description of the property charged;

6. An "abstract record," which shall show by tracts every conveyance or incumbrance recorded, the date and character of the instrument, time of filing the same, and the book and page where the same is recorded, which book shall be so kept as to show a true chain of title to each tract and the incumbrances thereon, as shown by the records of his office;

7. An index of chattel mortgages, labeled "chattel mortgages," each page divided into seven columns, namely: "date of filing," "book," "page," "canceled," "from," "to," and "remarks";

8. An index to recorded maps, plats, and subdivisions;

9. An index of powers of attorney, labeled "powers of attorney," each page divided into six columns, viz: "date of filing," "book," "page," "from," "to," "revoked";

10. A miscellaneous index in which shall be entered all instruments of a miscellaneous character not otherwise provided for in this chapter, each page divided into seven columns, viz: "date of filing," "book," "page," "instrument," "from," "to," "remarks";

11. An index of transcripts of judgment, labeled "transcripts of judgments," each page divided into seven columns headed, respectively, "judgment debtors," "judgment creditors," "amount of judgment," "where recovered," "when recovered," "when transcript filed," "when judgment satisfied";

12. A general filing index in which shall be indexed all executions and writs of attachments, and any other instruments not provided by law to be spread upon the records, and in separate columns he must enter the names of the plaintiffs in the execution, the defendants in the execution, the purchaser at the sale and the date of the sale, and the filing number of the document;

13. The indexes, provided for in subs 7, 9-12, shall be alphabetically arranged, and in each case a reverse index shall be kept. '15, p. 52.

Certain live stock leases to be indexed, § 133.

1580. Documents to be recorded in printed books. Fees. By and with the concurrence of the board of county commissioners in the several counties of this state, it shall be the duty of the county recorders, wherever a sufficient number of documents of the same general form are presented for recording, to provide printed books of such forms, and they shall record such documents therein, and the fees for recording in such books shall be the legal charge for the words actually written therein. '15, p. 52.

1581. (621.) Recording maps and plats. It shall be unlawful for any

recorder to record any map, plat, or subdivision of land, situated in any city or town, until the same shall have been approved by the legislative authority of the city or town in which such land may be situated, or by some city or town officer for that purpose to be designated by resolution or ordinance of said legislative authority, and, in the absence of said legislative authority, by the legislative authority of the county in which the town is situated, except the said map, plat, or subdivision be attached to or form a part of a conveyance and relate to the property or some part thereof embraced in said conveyance. And it shall be unlawful for any recorder to record any map, plat, or subdivision of land situated outside of any city or town until the same shall have been approved by the board of county commissioners of the county in which such land is situated, or by some county officer for that purpose designated by resolution or ordinance of said board, except that the said map, plat, or subdivision be attached to or form a part of a conveyance and relate to the property, or some part thereof, embraced in said conveyance. For each and every violation of this section by any recorder, his deputy, or employe, each recorder shall forfeit and pay to the county the sum of $200, to be recovered in any court of competent jurisdiction.

Approval of map, etc., §§ 5021-5023.

1582. (622.) Indexing deed of sheriff, etc. Deeds and other instruments affecting real estate made by a marshal, sheriff, master in chancery, special commissioner, executor, administrator, guardian, trustee, or other person acting in behalf of another, shall be indexed in the name of the person whose land is sold or affected as grantor, and a note shall be made in the index indicating in what capacity the deed was made.

1583. (623.) Record of judgments. The recorder must, when filed with him for that purpose, record in the record of deeds certified copies of final judgments or decrees partitioning or affecting the title or possession of real property, any part of which is situate in the county of which he is recorder.

1584. (624.) Id. Notice imparted. Every such certified copy, from the time of filing the same with the recorder for record, imparts notice to all persons of the contents thereof; and subsequent purchasers, mortgagees, and lienholders purchase and take with like notice and effect as if such copy was a duly recorded deed, grant, or transfer.

Filing for record imparts notice, §§ 4875, 4900.

1585. (625.) Manner of filing and recording. When any instrument, paper, or notice authorized by law to be filed or recorded is deposited in the recorder's office for record, the recorder must indorse upon the same its proper number, the time when it was received, noting the year, month, day, hour, and minute of its reception, the amount of fees for recording, and must record the same without delay, together with the acknowledgments, proofs, and certificates written upon or annexed to the same, with the plats, surveys, schedules, and other papers thereto annexed, in the order and as to the time when the same was received, and must note at the foot of the record the exact time of its reception. If any such instrument, paper, or notice contains a specific reference by book and page to any other document recorded in the recorder's office, the recorder shall note on the margin of the record of the document so referred to the book and page of the record of the document making such reference.

1586. (626.) Id. Endorsement and return. He must also endorse upon each instrument, paper, or notice, the book and page in which it is recorded, and must thereafter deliver it up upon the request of the party leaving the same for record, or to his order, after a reasonable time has elapsed for him to have spread the same upon the records.

1587. (627.) Searches and abstracts. The recorder shall, upon the application of any person, and upon the payment or tender of the fee therefor, make searches for conveyances, mortgages, and all other instruments, papers,

or notices recorded or filed in his office affecting the title to any piece of property, and furnish a certified abstract thereof; if any such abstract or certificate is incomplete, erroneous, or defective in any important particular, affecting the property in respect to which the abstract is requested, the county shall be liable to the party aggrieved for the amount of the actual damage sustained; *provided, however,* such liability shall not accrue in favor of any person who had actual notice of the error or mistake complained of.

1588. (628.) Recorder may take acknowledgments, administer oaths. It shall be the duty of recorders to take acknowledgments of all instruments authorized by law to be acknowledged, and to administer oaths.

Am'd '05, p. 8.

1589. (629.) Licensed abstractors. Every person desiring to open and conduct an abstract business shall, before entering upon such business, make application for a license to the board of county commissioners of the county in which he proposes to conduct said business. Said commissioners shall, if they deem said applicant a proper and competent person, issue a license authorizing said applicant during all reasonable business hours and under the authority of the county recorder to have free access to said records; *provided,* such license shall not issue until said applicant shall file a bond with approved sureties in the penal sum of not less than $10,000, conditioned for the faithful abstracting of said records and the issuing of correct abstracts of title. Said bond shall also provide that the said person, his agent, or employe shall be held liable for any mutilation of the records in his possession. Every person conducting an abstract business shall be liable to the person aggrieved for mistakes and errors in abstracts for the amount of actual damages sustained; *provided,* that such liability shall not accrue in favor of any person who had actual notice of the error or mistake complained of.

1590. (629x.) Abstracts of title admissible in evidence. Any abstract of title to any piece, parcel or parcels of real estate, or mining claim or claims, certified to by any licensed abstractor or county recorder of the state of Utah, shall be admissible in evidence in any action or proceeding in any court existing by virtue of the laws of the state of Utah, and shall be prima facie evidence of the facts therein stated without further proof, and the certificate to the same of such licensed abstractor or county recorder shall be prima facie evidence of the authority of such licensed abstractor or county recorder.

'99, p. 54.

1591. (629x1.) How certified. The abstracts mentioned in the preceding section, in order to be admissible in evidence as therein provided, shall be certified to under the hand and seal of such licensed abstractor or county recorder, which certificate shall set forth what such abstract purports to contain and shall also contain a statement of the authority of the maker thereof.

'99, p. 54.

1592. (630.) Damages for neglect, etc. If any recorder to whom any instrument proved or acknowledged according to law, or any paper or notice which may by law be recorded, is delivered for record:

1. Neglects or refuses to record such instrument, paper, or notice within a reasonable time after receiving the same; or

2. Records any instrument, papers, or notices, wilfully or negligently untruly, or in any other manner than is hereinbefore directed; or

3. Neglects or refuses to keep in his office such indexes as are required by this chapter, or to make the proper entries therein; or

4. Neglects or refuses to make the searches and to give the certificate required by this chapter; or

5. Alters, changes, or obliterates any record or paper deposited in his office, or inserts any new matter therein,

He shall be liable to the party aggrieved for three times the amount of damages which may be occasioned thereby.

1593. (631.) Fees must be paid in advance. He shall not record any instrument, or file any paper or notice, or furnish any copies, or render any service connected with his office, until the fees for the same, as prescribed by law, are paid or tendered.

1594. (632.) Records open to inspection. Copies in pencil only. All books of record, maps, charts, surveys, and other papers on file in the recorder's office, must, during office hours, be open to public inspection free of charge, and any person copying the same or taking notes therefrom may do so in pencil only.

1595. (632x.) All instruments to be recorded. Exception. All papers, notices, and instruments of writing required by the laws of Utah to be filed in the office of the county recorders, shall hereafter be recorded, except chattel mortgages. '05, p. 60; Am'd '15, p. 53.

1596. (632x1.) Present ownership maps and plats to be prepared and kept. Certain records validated. In all counties of this state the county recorder shall prepare and keep present ownership maps and plats drawn to a convenient scale, which shall at all times show the record owners of each tract of land in the county, together with a description of such tract; *provided, however,* that maps and such descriptions, now in possession of the county assessor shall constitute the basis of establishing the ownership as of February 6, 1899, at twelve o'clock noon, and the county recorder shall not be required to trace any title back of said last mentioned date and hour, to prove the accuracy of such assessor's plats.

'99, p. 61; '01, p. 100; '03, p. 70; Am'd '15, p. 123.

1597. (632x2.) Id. Copies transmitted to county assessor, when. Costs pro-rated. The county recorder shall, between the first Monday in October of each year and the first Monday after the first Tuesday in January of the following year, prepare complete copies of the ownership maps and plats and descriptions, such copies to show record owners at noon on the first day of January, and the county recorder shall, on or before the first Monday after the first Tuesday in January of each year, transmit said copies of maps and plats and descriptions to the county assessor. The cost of making copies of maps and plats and descriptions for use of the assessor as provided in this section shall be paid for, one-half by the state and one-half by the county; *provided,* that the state shall not pay any part of the cost of making such copies, in counties where real estate is not assessed to the record owners thereof; and *provided, further,* that in any county having an assessed valuation for the current tax year of less than $10,000,000, the state's portion of making and revising maps and plats for said year shall not exceed 1 per cent of the state, state school, and state high school taxes levied in said county for such year; and in any county having an assessed valuation of $10,000,000 or more for the current tax year, the state's portion of the cost of making and revising maps and plats shall not exceed one-half of 1 per cent of the total state, state school, and state high school taxes levied in such county for such year. '99, p. 61; '05, p. 64; '07, p. 217; Am'd '15, p. 123.

County surveyor to make maps for assessor, § 1618.

1598. (632x3.) Id. Returned to recorder. The plat books and descriptions delivered to the county assessor by the recorder as provided in § 1597 shall be returned by the assessor to the recorder for extension, alterations, and carrying to date for the ensuing year, not later than the first Monday in October of each year. '99, p. 61.

1599. (632x4.) Water users' associations. It shall be the duty of the county recorders of counties in which water users' associations are organized in conformity with the requirements of the United States, under the reclamation act of June 17, 1902, to provide record books containing printed forms of the articles of incorporation and stock subscriptions to the stock of water users' associations; and to use such books for recording stock subscriptions of

such associations; and the charges for the recording thereof shall be the actual cost of the labor performed, and not for the printed forms or records.
'07, p. 32.

1600. (632x5.) Plats of cemeteries must be recorded. Within six months after the passage and approval of this chapter, the executive officers in control of all cemeteries, and all individuals offering burial lots for sale in any county of this state, shall file and cause to be recorded in the office of the county recorder of the county within which said cemeteries are situated an accurate plat of the cemeteries or cemetery under their control, which said plat shall clearly show the sections of burial lots which have been disposed of, and the names of the persons owning or holding the same, and the sections of burial lots held for disposal, and thereafter the executive officers of any of said cemeteries shall file additional plats of any additions to said cemeteries before offering for sale any burial lots therein; the said recorder shall not collect any fees for filing and recording the said original plats. '05, p. 246.

1601. (632x6.) Certificate of burial rights. Every purchaser of a lot or burial right therein shall be furnished by the executive officers or individual owner of said cemeteries with a certificate of burial rights properly signed by them, and the same may be filed and recorded by the county recorder of the county within which the said cemetery is situated. '05, p. 246.

1602. (632x7.) Transcripts of burial rights to be filed with recorder. Penalty. On the first day of January and of July in each year, the executive officers of all cemeteries and individual owners offering burial lots for sale shall file with the county recorder of the county within which said cemeteries are situated, a transcript duly certified by such executive officers of any and all deeds or certificates of sale, or evidences of burial rights, issued by them during the preceding six months. The said county recorder shall file said abstract without charge and make any and all necessary notations upon the plats of said cemetery theretofore filed with him as in § 1600 provided. A failure to comply with the requirements of §§ 1600-1602 by the executive officers or individual in control of any cemetery shall be a misdemeanor.
'05, p. 247.

1603. (632x8.) To record land selections. It shall be the duty of the county recorder, immediately upon receipt of certified transcript or transcripts, as provided for in §§ 5704-5705, to enter same upon the records of his office, for which service he shall make no charge. '07, p. 266.
Secretary of state to certify list of state lands selected, §§ 5704, 5705.

1604. (632x9.) Id. Evidence of conveyance. Any such certified transcript or transcripts, mentioned in preceding section, when so recorded, shall be accepted in lieu of the original approved lists, and shall be sufficient evidence of the conveyance of the lands therein described by the United States to the state of Utah. '07, p. 266.

CHAPTER 11.

COUNTY ATTORNEY.

1610. (633.) Public prosecutor. Duties. The county attorney is a public prosecutor, and must:

1. Conduct on behalf of the state all prosecutions for public offenses, in justices' courts;

2. Institute proceedings before the proper magistrate for the arrest of persons charged with or reasonably suspected of any public offense, when he has information that any such offense has been committed, and for that purpose must attend in person or by deputy upon the magistrates in case of arrest, when required by them;

3. Defend all suits brought against the county; prosecute all actions for the recovery of debts, fines, penalties, and forfeitures accruing to his county;

4. Deliver receipts for money or property received in his official capacity, and file duplicates thereof with the county treasurer;

5. On the first Monday of each month, file with the auditor an account, verified by his oath, of all money received by him in his official capacity during the preceding month, and at the same time pay it over to the county treasurer;

6. Give, when required, and without fee, his opinion in writing to county, district, and precinct officers on matters relating to the public duties of their respective offices;

7. Examine, and when approved by him, attach his approval and signature to the certificate of attendance and mileage of all jurors and of witnesses in criminal cases issued by the clerk of the district court;

8. At the request of the district attorney, assist him in the prosecution of public offenses, and perform such other duties as are or may be required by law;

9. At the request of the juvenile court, appear in the juvenile court or juvenile proceedings to represent the interests of any child charged with delinquency before said court; and at the request of the juvenile court, represent the state in any proceeding pending before such courts where any rights to the custody of any juvenile charged before such court are asserted by any third person, and prosecute before the court any person charged with contributing to the delinquency, neglect, or dependency of a juvenile.

Am'd '01, p. 37; '07, p. 218.

Counsel to assist, § 1400x8.
Assist industrial commission in prosecutions, § 3085.
When attorney pro tempore appointed, Con. art. 8, sec. 10.

Attempted amendment of this section by laws of 1899, pp. 77-80, relating to district attorneys, held unconstitutional because indirect. State v. Beddo, 22 U. 432; 63 P. 96. But see Mill v. Brown, 31 U. 473; 88 P. 609.

1611. (634.) Legal adviser to county board. The county attorney is the legal advser of the board of county commissioners. He must attend their meetings when required, and must attend and oppose all claims and accounts against the county, when he deems them unjust or illegal.

Must audit claims of county commissioners, § 1431.
Must recover money unlawfully paid, § 1382.

1612. (635.) Not to present claim except for services. The county attorney, except for his own services, must not present any claim, account, or demand for allowance against the county, nor in any way advocate the relief asked on any claim or demand made by another.

No county officer must present or advocate claim of any other person, § 1432.

CHAPTER 12.

COUNTY SURVEYOR.

1615. (636.) Duties. The surveyor must make any survey that may be required by an order of court or by the board of county commissioners; keep a correct and fair record of all surveys made by him, in an indexed record furnished by the board of county commissioners, number them in the order made, and preserve a copy of the field notes and calculations of each survey and indorse thereon its proper number, a copy of which, and a fair and accurate plat, together with a certificate of survey attested by seal of office, must, upon application, be furnished by him to any person upon payment of the fees allowed by law. He shall also have power to administer and certify oaths whenever necessary in the discharge of his official duties.

1616. (637.) Offices, stationery, etc. Plats and maps. The board of county commissioners may furnish an office, furniture, and all stationery and record books necessary for the surveyor's office; and all records, maps, plats, profiles, calculations, and field notes of any and all surveys made by him in his

official capacity during his term of office shall be the property of the county, and shall be delivered by the surveyor to his successor in office. These shall be open to the inspection of any person free of charge.

1617. (638.) To copy maps filed for record. It shall be the duty of the county surveyor to copy, plat, or trace maps and plats filed for record in the office of the county recorder.

1618. (639.) To make certain maps. In certain cases commissioners may contract for making maps. The county surveyor shall plat, trace, blueprint, or otherwise make all county, precinct, road, and district, assessors', and all maps for the county of which he is surveyor. All such maps which shall be platted, traced, blueprinted, or otherwise made as aforesaid, shall be filed in the county surveyor's office, together with all data obtained by the county surveyor from other sources, and the same thereafter shall become the property of the county; *provided,* that in counties of the fifth class to fifteenth class, inclusive, or in counties where the salary of the county surveyor is not intended to cover the expenses of this class of work, the board of county commissioners may enter into a contract or other arrangement with the county surveyor or other surveyor for all such mapping and platting as is required under the laws of the state. Am'd '01, p. 101.

Maps for assessor, § 5916.
Plats of highways to be made, § 2808.
Preparation of "present ownership" maps, § 1596.

1619. (640.) Survey of land on county line. Any person owning or claiming lands which are divided by county lines, and wishing to have the same surveyed, may apply in writing to the surveyor of any county in which any part of said land is situate, and on such application being made, the surveyor must make the survey, which is as valid as though the lands were situate in the county of the surveyor making the survey.

Fees of county surveyor, § 2526.

1620. (641.) Id. By order of court. When land, the title to which is in dispute before any court, is divided by the county line, the court making an order of survey may direct the order to the surveyor of any county in which any part of the land is situate.

1621. (642.) Marking corners. Tying surveys. All corners of surveys made by each surveyor must be distinctly marked on the ground by a good and sufficient stone or stake and a record made of the same. All official surveys made by the county surveyor must be tied by course and distance with the nearest government land corner and recorded by him in his office.

1622. (643.) Re-establish old corners and lines. It shall be the duty of each county surveyor on order of the county commissioners to at once re-establish the missing or obliterated government lines and corners in his county and perpetuate the same by suitable stone monuments.

1623. (644.) County surveying and engineering. The county surveyor shall, on order of the board of county commissioners, make all surveys of county roads, road district lines, precinct and school district lines that are not already made and recorded, and perform such other engineering work as the board of county commissioners may direct. All such maps and field notes of surveys shall be filed in the office of the county surveyor, and the same shall thereafter be and remain the property of the county. It shall be the duty of the county surveyor to advise the board of county commissioners regarding all engineering work, and perform all engineering for the county not otherwise provided for.

1624. (645.) Other duties. He shall perform such other services as may be required of him by law.

CHAPTER 13.

OTHER OFFICERS.

1625. (646.) Assessor. The assessor shall perform the duties prescribed by law.

Duties as to assessments, etc., see Taxation, §§ 5876 et seq.

1626. (647.) County superintendent of schools. The county superintendent of district schools shall perform the duties prescribed by law.

When now elected, § 4649.

1627. (648.) Constables. Every constable shall attend the court of the justice of the peace within his precinct whenever so required, and, within his county, shall execute, serve, and return all process and notices directed or delivered to him by a justice of the peace of such county, or by any competent authority, and shall perform such other duties as are prescribed by law; *provided,* that in cities of the first class constables may serve all civil process notices and writs of the city courts of such cities. Am'd '17, p. 392.

Constable a precinct officer, § 1454.
Constable is poundkeeper, duties, §§ 50-73.
Constable not to act as attorney nor have a partner acting as such, § 345.
Constable may serve process from district court, when, §§ 1523, 1524.
Fees of constable, § 2530.
Enforce prevention of rabies act, §§ 150-156.
Assist in maintaining quarantine, § 181.
Enforce liquor prohibition act, § 3360.
Duties under search and seizure, § 3354.
Duties under seizure, § 3359.
Seize gambling divices, and prosecute gambling, §§ 8162-8167.
A constable has no authority to serve a summons and order of arrest beyond the limits of his county. Ex parte Dixon, 1 U. 193.
A constable may, when he is sick or unable to act, appoint, for a specific purpose, a deputy pro tempore; but he cannot make the appointment permanent.
Kaysen v. Steele, 13 U 260; 44 P. 1042.

1628. (649.) Justice of the peace. Justices of the peace shall exercise such powers and perform such duties as are prescribed by law.

Jurisdiction, §§ 1790-1794.
Duty as to inquests, §§ 3220-3239.
Justice a precinct officer, § 1454.
Fees of justice, § 2527.

TITLE 21.

COURTS.

CHAPTER 1.

ENUMERATION.

1640. (650.) Courts enumerated. The following are the courts of justice of this state:

1. The senate sitting as a court of impeachment;
2. The supreme court;
3. The district courts;
4. Justices' courts.

Judicial powers vested where, Con. art. 8, sec. 1.
City courts, §§ 1700-1736, and notes.
Municipal courts, §§ 1750-1779, and notes.
City justice of the peace, §§ 600, 630, and notes.
Juvenile courts, §§ 1826-1844, and notes.

1641. (651.) Courts of record. The courts enumerated in the first three subdivisions of the preceding section are courts of record.

Courts of record and have seals, Con. art. 8, sec. 17.

CHAPTER 2.

SUPREME COURT.

1642. (652.) Number of justices. Qualifications. Quorum. Terms. Compensation. Election. The supreme court shall consist of five justices, three of whom shall constitute a quorum to hold court or render a decision, but one alone may adjourn from day to day. The term of office of justices of the supreme court, except as otherwise hereinafter provided, shall be ten years and until their successors are elected and qualified, and the annual compensation of such justices, except as to the justices heretofore elected and now in office, shall be $5000. There shall be elected at the next general election, in addition to the election of a successor of the justice now in office whose term then expires, two justices of the supreme court. The term of the justice elected to succeed the present incumbent shall be six years, and the terms of the two additional justices shall be, respectively, eight and ten years. And the terms of the justices elected thereafter shall be ten years and until their successors are elected and qualified; said justices to have the qualifications prescribed in the constitution, and the two vacancies in said court created by this section shall be filled by appointment by the governor, such appointees to serve until their successors shall have been elected and qualified, as hereinbefore provided. Am'd '17, p. 186.

Election, qualifications, term, duties, powers, Con. art. 8, secs. 1-27, and notes.
Salary $5000 per annum, § 5072.
Although the judges of the supreme court of a territory are appointed by the president under an act of congress, the courts they are authorized to hold are not courts of the United States.
Clinton v. Englebrecht, 80 U. S. 434.
Provision when justice disqualified, Con. art. 8, sec. 2.
When a judge disqualified, § 1795.
A justice disqualified from sitting in a case tried before him in the lower court can be counted as a member of the court to make the quorum.
Nephi Irrigation Co. v. Jenkins, 8 U. 452; 32 P. 699.

1643. (654.) Jurisdiction. The supreme court shall have original jurisdiction to issue writs of mandamus, certiorari, prohibition, quo warranto, and habeas corpus. Each of the justices shall have power to issue writs of habeas corpus to any part of the state, upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself or the supreme court, or before any district court or judge thereof in the state. In other cases, the supreme court shall have appellate jurisdiction only; and, in the exercise of such appellate jurisdiction, may review all final judgments of the district court, and all final orders and decrees of the district court in the administration of decedent estates and in cases of guardianship, and shall have power to issue writs necessary and proper for the exercise of that jurisdiction. In equity cases the appeal may be on questions of both law and fact; in cases at law the appeal shall be on questions of law alone.

Original jurisdiction, Con. art. 8, sec. 4, and note.
Appellate jurisdiction, Con. art. 8, secs. 4, 9, and notes.
Appeals from final judgments only, Con. art. 8, sec. 9, and note.
Review in cases at law, in equity cases, and in probate cases, Con. art. 8, sec. 9, and note.
Decisions on mandamus, §§ 7390-7403, and notes; certiorari, §§ 7376-7386, and notes; prohibition, §§ 7407-7410, and notes; quo warranto, §§ 7354-7371, and notes; habeas corpus, §§ 2672-2698, and notes.
Supreme court may affirm, reverse, or modify judgment, § 6695, and note.
Record on appeal, assignments of error, presumptions, etc., note to § 6694.
Make rules and forms of procedure for land registration, § 4929.
May suspend orders of public utilities commission during writ of review, § 4835.
May issue mandamus or writ of review against public utilities commission, § 4834.
Public utilities commission cases, precedence, § 4836.
Precedence of corrupt practices cases, § 2398.
Supreme court is exclusive judge of its own jurisdiction.
First Nat. Bk. v. Lewis, 13 U. 507; 45 P. 890.

1644. (656.) Concurrence of three necessary for judgment. The concurrence of three justices of the supreme court is necessary to pronounce a judgment; if three do not concur, the case must be reheard. Am'd '17, p. 186.

Majority necessary to form quorum, Con. art. 8, sec. 2.

1645. (657.) Rules. The court may make rules of practice and procedure not in conflict with law, which rules shall be published.

Rules for admission of attorneys, § 319.
Limitation on making of rules, § 1803.
Rules take effect in thirty days after publication, § 1804.

1646. (658.) Supreme court at capital. Terms. The supreme court

shall be held at the capital of the state, and shall convene and hold three terms in each year, viz: On the second Mondays of February, May, and October. The court may adjourn from time to time as it may deem proper.
Am'd '99, p. 117.

Shall hold at least three terms a year, Con. art. 8, sec. 4.

1647. (659.) Docket cleared at each term. Judgments at any time. Each of such terms of court shall be for the submission and determination of causes, and for the transaction of such other business as shall come before the court. All causes on the docket shall be heard at each term, unless continued or otherwise disposed of by the court. Decisions, rulings, and orders in causes submitted, and orders authorized by law to be made by the court or any justice thereof, may be made and entered at any time. Where a decision in a cause is rendered during a recess of the court, and the opinion signed by the justices, or a majority of them, shall have been filed with the clerk, it shall operate as a judgment of the court. The clerk shall immediately give notice to the respective parties, and the time for filing petition for rehearing shall run from the time of such notice; *provided,* that the same may be extended by any justice of the court for cause shown.

Decisions to be filed, Con. art. 8, sec. 25.

1648. (660.) Clerk. The supreme court shall appoint a clerk, who shall hold his office during the pleasure of the court, and shall receive such salary as may be provided by law.

Fees of clerk of supreme court, § 2513.
Appointment of reporter, Con. art. 8, sec. 14.
Salary $2100 per annum, § 5071.
Judge not to appoint a relative, Con. art. 8, sec. 15.
Appointment of clerk, Con. art. 8, sec. 14.

1649 (661.) Id. Bond. The clerk of the supreme court must execute an official bond to the state in the sum of $10,000, conditioned for the faithful performance of his duties. Such bond must be approved by the court.

1650. (662.) Id. Duties generally. The clerk of the supreme court shall keep his office at the capital of the state, and he shall keep a complete record of all the proceedings of the court, and shall keep the seal of the court and its records and files.

Keep roll of attorneys, § 322.

1651. (663.) Id. Duties and powers. The clerk shall have power to take acknowledgments, administer oaths, issue all process, writs, and notices required to be issued out of such court; to make transcripts and copies of papers and records when required, and certify the same under seal of the court. The clerk shall not allow any written opinion of the court to be removed from his office, but shall permit anyone to examine or copy the same, and he shall perform such other duties as may be required by law and the supreme court.

All decisions shall be free to publishers, Con. art. 8, sec. 23.

1652. (664.) Clerk as librarian. The clerk shall act as law librarian for the state; he shall take charge of, keep and preserve the law library of the state as provided by law, and perform all the duties connected with the care and custody of the state law library.

Provisions concerning state library, §§ 3699- 3709.

1653. (665.) Clerk may adjourn court, when. The clerk shall, in the absence of all the justices of the court, at the beginning of any term, or of any adjourned term, adjourn the court from day to day, until the arrival of a justice.

1654. (666.) Deputy clerk and assistants. The clerk shall appoint a deputy clerk, and may appoint such assistants as may be necessary for the transaction of the business of the office, who shall be paid by the clerk out of the salary allowed him. Am'd '01, p. 32.

1655. Copies to be furnished on dates decision announced. The clerk of the supreme court of the state of Utah is hereby authorized and required to have made and prepared copies of the decisions of the supreme court of the

state of Utah and to deliver, or forward same by mail, postage prepaid, on the days when such decisions are first announced, to the district judges, the attorney-general, district attorneys, and to counsel for respective parties in the case decided. '15, p. 121; Am'd '17, p. 187.

1656. Appropriation, how paid. For the purpose of carrying into effect the provisions of this chapter there is hereby appropriated to such clerk the sum of $1200 for the fiscal years 1917 and 1918, or so much thereof as may be necessary, out of any moneys in the state treasury not otherwise appropriated, which said sum shall be paid to said clerk quarterly upon presentation of said clerk's duly verified claims to the state auditor therefor; and the state auditor is hereby instructed and empowered to draw his warrant upon the state treasury in payment of said claims. '15, p. 121; Am'd '17, p. 187.

1657. Stenographer, appointment. Salary. The supreme court shall appoint a stenographer, who shall hold his office during the pleasure of the court, whose duty it shall be to act as stenographer for the members of the court, and who shall receive a salary of $1800 per annum, payable quarterly, in the manner provided by law for the payment of the salaries of other state officers. '01, p. 32; '03, p. 4; '09, p. 27.

District court stenographer, §§ 1900-1909.

1658. (667.) Stationery, etc., for court. The supreme court shall make a requisition through its clerk upon the secretary of state for stationery, postage, and supplies necessary for the transaction of its business, which shall include the printing of the court docket, and the secretary shall furnish the same when so demanded.

1659. (668.) Appointment of bailiffs and janitors. The court is hereby authorized to appoint and remove at pleasure the necessary bailiffs to attend the court, and to perform such other duties and execute such orders as may be directed or ordered by the court. The court may also appoint and remove at pleasure a janitor who shall perform such duties as the court may order or direct, and who shall receive a salary of $750 annually, to be paid monthly out of the state treasury. '11, p. 270.

1660. (669.) Attendance of sheriff. The court may at any time require the attendance and service of any sheriff in the state.

CHAPTER 3.

DISTRICT COURTS.

1665. Two judges in second judicial district. From and after the passage and approval of this chapter, there shall be two district judges in and for the district court of the second judicial district of this state. '11, p. 43.

Election, qualifications, term, duties, powers, Con. art. 8. Judicial districts of the state, Con. art. 8, secs. 5, 6, 16.

1666. (669x.) Five judges in third judicial district. From and after the passage and approval of this chapter, there shall be five district judges in and for the district court of the third judicial district of this state. '03, p. 50; Am'd '11, p. 42.

The provisions of this section increasing the number of judges to four are valid, and not in conflict with Con. art. 8, sec. 5, 6, and 16. State ex rel. v. Lewis, 26 U. 120; 72 P. 388.

1667. (670.) Jurisdiction, generally. The district court shall have original jurisdiction in all matters civil and criminal, not excepted in the constitution, and not prohibited by law; appellate jurisdiction from all inferior courts and tribunals, and a supervisory control of the same. The district courts, or any judge thereof, shall have power to issue writs of habeas corpus, mandamus, injunction, quo warranto, certiorari, prohibition, and other writs necessary to carry into effect their orders, judgments, and decrees, and to give them a general control over inferior courts and tribunals within their respective jurisdictions.

Original jurisdiction, Con. art. 8, sec. 7, and note.
Appellate jurisdiction, Con. art. 8, sec. 9, and note.
Place of trial, Con. art. 8, sec. 5, and note; §§ 6525-6529.
Decision on mandamus, §§ 7390-7403, and notes; certiorari, §§ 7376-7386, and notes; prohibition, §§ 7407-7410, and notes; quo warranto, §§ 7354-7371, and notes; habeas corpus, §§ 2672-2698, and notes.
Jurisdiction, after service, § 6559.
Action to quiet title, § 7247, and note.
When jurisdiction given, means to enforce implied, §§ 1802-1825.
Courts may make rules, § 1803.
Precedence of corrupt practices prosecutions, § 2398.
Court of land registration, §§ 4923-4957.
Enforce certain court-martial judgments, § 3858.
Appoint special counsel corrupt practice prosecution, §§ 2397, 2406.
Conduct inquisitions, § 3374.
Disposition cases on creation new county, § 1356.

The act of the territorial legislature conferring on probate courts a general jurisdiction in civil and criminal cases and in both chancery and common law, was inconsistent with the organic act, and therefore void.
Perrin v. Higley, 87 U. S. 375.

District courts have no original jurisdiction of an offense involving the violation of a city ordinance, and, where the record does not show how the case came into the district court, the appeal will be dismissed.
Spanish Fork City v. Thomas, 4 U. 485; 11 P. 667.

GENERAL POWERS OF COURT:

Under the acts of congress granting the territorial district courts exclusive original chancery jurisdiction, such courts have the inherent power to refer a case to a master to take testimony and report findings, and such power is exclusive of the statutory provisions concerning referees.
Nephi Irr. Co. v. Jenkins, 8 U. 369; 31 P. 986.

A district court has power to enjoin the issuing of execution on a judgment, and to grant a new trial on the ground that the records of the cause in which the judgment was rendered have been destroyed by fire.
Bailey v. Stephens, 11 U. 175; 49 P. 828.

A court of equity has the right to re-form notes in accordance with the understanding of the parties.
McClure v. Little, 15 U. 379; 49 P. 298.

A court of chancery has control of a sale made in a foreclosure suit until the final disposition of the cause, and has an inherent power to enforce its decrees and judgments, and it can make any order necessary for such purpose.
Gray v. Denhalter, 17 U. 312; 53 P. 976.

The district court has power to control its process and to set aside an execution sale.
Post v. Foote, 18 U. 235; 54 P. 975.

A court having obtained jurisdiction of all parties to an adverse suit for possession of a mining claim, may grant full relief and restore possession to the party entitled thereto.
Silver City v. Lowry, 19 U. 334; 57 P. 11.

In an action to reform a written instrument on the ground of mistake, a court of equity will not only reform the instrument in which the mistake occurred, but all subsequent instruments which have perpetuated such mistake, so as to administer a full measure of relief, avoid circuity of action and promote justice. (Modified on rehearing, 23 U. 470; 65 P. 203, so as to reform mortgage only.)
Marks v. Taylor, 23 U. 152; 63 P. 897.

A court of equity in a suit to quiet title, under a general prayer for relief, in addition to quieting the title, may restrain defendant from asserting any claim adverse to plaintiff's right and prohibit him from doing any act that would tend to impair that right.
Richey v. Beus, 31 U. 262; 87 P. 903.

The right of one accused of crime to "a speedy public trial by an impartial jury," guaranteed by Con. art. 1, sec. 12, cannot be defeated by reason of the want of any legislative remedy for a wrong inflicted during a criminal trial, for the court will resort to the common law if it affords a remedy, and if it does not, then courts, by virtue of their inherent power and their duty in criminal cases to guard the rights of persons, will, if possible, devise new remedies.
State v. Morgan, 23 U. 212; 64 P. 356.

JURISDICTION OF THE PERSON AND THE CAUSE:

All persons, residents and non-residents, are equally subject to the remedial law when found within the state.
Steed v. Harvey, 18 U. 367; 54 P. 1011.

Where defendant, a natural person, is a non-resident, and action is for a money demand and not in rem, he must, in absence of voluntary appearance, be brought into court by personal service before a judgment in personam can be entered against him.
Greiner v. Ogden Ry. Co., 21 U. 158; 60 P. 548.

While an attachment proceeding without personal service forms no basis for a personal judgment in the state of New York, and can affect only property found within the jurisdiction, Idaho county warrants made payable to bearer and capable of transfer without indorsement, found within the state of New York, are there subject to attachment; the res being within the state, the court had jurisdiction of it.
Thum v. Pingree, 21 U. 348; 61 P. 18.

Where, in a divorce suit, plaintiff had acquired a legal residence, and defendant, a non-resident, submitted herself to the jurisdiction of the court, the court had jurisdiction of the whole case and could award relief to defendant.
Fisk v. Fisk, 24 U. 333; 67 P. 1064.

Where in an action for divorce, the defendant appears and joins issue by answer, the nature of the proceeding is thereby changed from a proceeding in rem to one in personam.
Gibbs v. Gibbs, 26 U. 382; 73 P. 641.

The court may have jurisdiction of the parties and of the subject matter, and yet be without jurisdiction to try the case on a holiday.
Davidson v. Munsey, 27 U. 87; 74 P. 431.

Neither failure to object to the jurisdiction of a court nor consent to its exercise, when the court would otherwise have none, will confer it; the doctrine of waiver having no application in such case.
Davidson v. Munsey, 27 U. 87; 74 P. 431.
Anderson v. Halthusen Merc. Co., 30 U. 31; 83 P. 560.
State v. Mortensen, 26 U. 312; 73 P. 562.
Konold v. R. G. W. Ry. Co., 16 U. 151; 51 P. 256; but see note to Con. art. 8, sec. 5.
State v. Morrey, 23 U. 273; 64 P. 764.
Myers v. East Bench Irr. Co., 32 U. 215; 89 P. 1005.

At common law, a court had no power to compel one suing for a personal injury to submit to a physical examination by a physician appointed by the court; and in the absence of a statute authorizing it, a court of law in Utah has no power to compel such an examination.
Larson v. S. L. City, 34 U. 318; 97 P. 483.

The court has no power to order a physical examination by a physician selected by defendant in the presence of plaintiff's physician and father.
Sharp v. Ogden Rapid Trans. Co., 48 U. 481; 160 P. 438.

An action to foreclose a chattel mortgage may be started in a county where the note is payable though the property is in, and the defendants reside in, another county.
Emerson, Brantingham Imp. Co. v. Giles, 52 U. —; 173 P. —.

1668. (671.) Id. Appellate. Appeals shall lie from the final judgments of justices of the peace, in civil and criminal cases, to the district courts, on both questions of law and fact, with such limitations and restrictions as are or

may be provided by law; and the decision of the district courts on such appeals shall be final, except in cases involving the validity or constitutionality of a statute.

Jurisdiction of appeals from justices' courts, Con. art. 8, sec. 9, and note; also § 7514. Jurisdiction of appeals from city court, § 1717; from municipal courts, § 1756.

1669. (672.) Terms. There shall be held at the county seat of each county at least three terms of the district court in each year.

Four terms until otherwise provided, Con. art. 8, sec. 5. Sheriff to act as crier, § 1521.

1670. (673.) Adjournment in one county pending session in another. A district court may adjourn a term of court in one county to a future day certain and, in the meantime, hold court in another county.

1671. (674.) Adjournments construed as recesses. Adjournments from day to day, or from time to time, are to be construed as recesses in the sessions or terms, and shall not prevent the court from sitting at any time.

1672. (675.) Fixing terms. Notice. The judges of the district courts shall, in December of every year, fix the times of holding terms of court in each of the counties composing their respective districts during the ensuing calendar year. The judge or judges of the several districts shall cause a copy of such order to be transmitted to the secretary of state and also entered upon the journal of the court in each county of the district. County clerks shall cause a copy of such order to be conspicuously posted in their respective offices.

1673. (676.) Court must be held at time fixed. Exceptions. Court shall be held at the time fixed as provided in the previous section, and the times shall not be changed, except for sickness of the judge of said district, or when said judge shall be called into another district at the time appointed for any term, or by request of the governor, or when the business in any other county shall necessarily extend the sitting beyond the time appointed for the term.

Where the terms of court are fixed at stated periods, and the court fails to convene at that time, and by reason thereof is not legally in session, the parties to the action cannot, by agreement, confer jurisdiction upon the court to render a judgment binding upon the parties. Myers v. East Bench I. Co., 32 U. 215; 89 P. 1005.

1674. (677.) Clerk to give notice of adjourned terms. Whenever, for any of the reasons enumerated above, the regular term of court appointed for any county shall be adjourned, the clerk of that county shall so notify the clerk of each county in the district, and it shall be the duty of said clerk, upon receipt of said notification, to post publicly in his office a notice of said change.

County clerk is ex officio clerk of court, Con. art. 8, sec 14. Duties of clerk of district court, § 1536.

1675. (678.) Disagreement of judges as to terms. In case the judges of any district are unable to agree as to the manner and time of holding terms of court, or as to the counties in which they shall severally sit, they shall refer the matter to the chief justice of the supreme court, who shall determine the same.

Iowa, McClain's An. C., § 626.

1676. (679.) Judge sitting in another district. Any district judge may hold a district court in any county at the request of the judge of the district, and upon the request of the governor, it shall be his duty to do so; and in either case the judge holding the court shall have the same power as the judge thereof.

By request of another judge or the governor, Con. art. 8, sec. 5.

1677. (680.) Ex parte applications from other districts. A judge of the district court may, in his own district, hear any ex parte application and make any order concerning the same, in any action or proceeding pending or about to be commenced in another judicial district, in the following cases:

1. Upon the written request of the judge of the district in which the action or proceeding is at the time pending or is about to be commenced;

2. When it shall be made to appear by affidavit to the satisfaction of such judge that the judge of the district court in which the action or pro-

ceeding is at the time pending, or is about to be commenced, is absent from his district, or is incapacitated, or is disqualified to act therein; such application shall be made only to the judge of an adjoining district.

Disqualification of judge, Con. art. 8, sec. 13.

1678. (681.) When judgments may be entered. Judgments and orders of the district court may be entered either in term time or vacation, and at chambers in any county within the district. Am'd '03, p. 55.

Applied, Russel v. Hank, 9 U. 309; 34 P. 245.

1679. (682.) Powers at chambers. The judge's chambers are co-extensive with his district, and at any convenient place therein, when and where the judge will act. The judge or judges of the district court may, at chambers, issue, hear, and determine writs of habeas corpus, mandamus, injunctions, quo warranto, certiorari, prohibition, and other original and remedial writs, and grant all orders and writs, which are usually granted in the first instance, upon ex parte application, and hear and dispose of such order, and writs, and of motions for new trials; and may also, at chambers, make any order, issue any process, and hear and determine any matter necessary, in the exercise of the powers of the court, in matters of probate, or any action or proceeding provided by law. Am'd '03, p. 55.

Mont. C. Civ. P., § 171*.
Jurisdiction, Con. art. 8, secs. 7, 9, and notes; art. 24, sec. 9.
Powers of judge out of court, § 1817.
Judgments entered at chambers, § 1678.
Judge could excuse jurors at chambers before court convened.
State v. Bates, 25 U. 1; 69 P. 70.

1680. (683.) Stipulation to hold court at unusual place. The parties to an action or special proceeding, in a court of record, may, with the consent of the judge who is to try or hear it, without a jury, stipulate in writing, that it shall be tried, or heard and determined, elsewhere than at the place appointed for holding said court. The stipulation must specify the place of trial or hearing, and must be filed in the office of the clerk.

Consent will not confer jurisdiction, note to § 1667.

1681. (684.) Judge pro tempore. Any cause pending in a district court may be tried by a judge pro tempore, who shall be a member of the bar of the supreme court of the state.

Judge pro tempore, Con. art. 8, sec. 5.
Disqualification of judge, Con. art. 8, sec. 13; § 1795.

1682. (685.) Id. Appointment. Powers. Whenever all the parties to any cause pending in a district court or their attorneys of record shall enter into a written stipulation appointing a judge pro tempore for the trial of the cause, and the person appointed shall take and subscribe an oath to faithfully try and determine the issues joined between the party or parties plaintiff, naming them, and the party or parties defendant, naming them, and any other parties, if such there be, naming them, it shall be the duty of the clerk of the court in which such action is pending to attach together said stipulation and oath, and to place them on file, and also to record them at length upon the minutes of the court; whereupon the person appointed shall be vested with the same power and authority and shall be charged with the same duties as to the cause in and as to which he is appointed as though he were the regularly elected and qualified judge of the district court; *provided,* that parties may, by the terms of their stipulation, limit the power of the judge pro tempore to the trial and determination of any specified issue or issues, either of law or fact, and in such case, the oath of the person appointed shall correspond to the terms of the stipulation.

1683. (686.) Id. Compensation. Judges pro tempore shall serve without compensation from any public treasury, but it shall be lawful for the parties to agree upon and express in their written stipulation any mode or amount of compensation, together with any further agreement as to the taxing of the same as costs.

CHAPTER 4.

CITY COURTS.

1700. (686x.) City court created. There is hereby created within cities of the first class in this state, a court to be known as the city court of ..... (naming the city), and there is also created the office of city judge, whose election, qualifications, duties, and term of office shall be as hereinafter provided. '01, p. 110.

City justice of the peace, jurisdiction, etc., §§ 630-635.
Judge of city court not to practice law, § 1786.
Constable may serve all process, § 1627.
Under the provisions of this chapter, city courts are inferior courts similar to justice's courts, and, under provisions of §§ 1796 and 8015, a judge of a city court is not debarred from appearing in an action filed in the district court in the first instance. (Prior to statute of 1905, p. 8.)
Nichols v. O. S. L. R. R. Co., 28 U. 319; 78 P. 866

1701. (686x1.) Judges of the city court to be elected. Term. At the municipal election, to be held on the Tuesday following the first Monday of November, in the year 1901, and quadrennially thereafter, there shall be elected in each of the cities of the first class of this state, two judges, to be known as judges of the city court, whose term of office shall be for four years, beginning at twelve o'clock noon on the first Monday of January succeeding their election, and to hold office for the period of four years, and until their successors are elected and qualified, as hereinafter stated. The said judges shall be elected by the qualified electors of the respective cities of the first class, and under the laws and regulations governing general elections; *provided, however,* that the first election shall be held under the laws and regulations governing municipal elections; and, *provided, further,* that the judges so elected at the first election herein provided for, shall hold office for the term of three years, and until their successors are elected and qualified, and their successors shall be elected at the general election to be held on Tuesday next following the first Monday in November, 1904. '01, p. 110.

1702. (686x2.) Qualifications. No person shall be eligible to the office of judge of the city court, who, at the time of his election, is not a qualified elector and a bona fide resident of the city of the first class, for which he may be elected, nor shall any person be eligible to said office who has not been admitted to practice in, and is not in good standing in, the supreme court of this state. '01, p. 110.

1703. (686x3.) Oath. Upon entering upon the duties of the said office, each judge shall take the constitutional oath. '01, p. 111.

1704. (686x4.) Failure to perform duties or absence from state forfeits office. Vacancy filled by appointment by mayor. In case any judge of the city court shall fail or refuse to perform the duties of his office for a period of thirty consecutive days, without reasonable excuse, or in case he shall absent himself from the state for ninety days, he shall be deemed to have forfeited his office, except that such absence may be extended as provided by the constitution of this state, in the case of judicial officers, and in case any vacancy occurs in the office of judge of the city court by death, resignation, absence, failure, or refusal to perform his duties, or otherwise, the said office shall be filled by the mayor of said city, by and with the consent of the city council, and the appointee shall hold his office for the same time, as provided in the case of appointees to state and judicial offices. '01, p. 111.

1705. (686x5.) Municipal officers. Paid by city. Judges of the city court shall be deemed to be municipal officers, and their salaries, as are herein provided, shall be paid by the city in which they are elected, in the manner prescribed for the payment of other municipal officers, which salary they shall take in lieu of all other compensation. '01, p. 111.

1706. (686x6.) Salaries. The annual salaries of judges of the city court shall be $2,500 each, payable out of the city treasury of the city in which they are elected. '01, p. 111.

1707. (686x7.) Must reside and hold court in city. Every judge of a

city court shall reside in and hold a court in the city for which he is elected, and the city council of cities of the first class shall provide suitable rooms for holding the city courts, together with attendants, furniture, lights, and stationery, sufficient for the transaction of business, the expenses of which shall be paid out of the general funds of the city treasury. '01, p. 111.

1708. (686x8.) Recorder is ex officio clerk. Duties. The city recorder of such cities of the first class is ex officio clerk of the city court. As clerk of the city court, he shall:

1. Take charge of, and safely keep, or dispose of, according to law, all books, papers, and records, which may be filed or deposited in his office;

2. Issue all process and notices required to be issued; enter a synopsis for all orders and judgments proper to be entered, unless the law or the court shall require them to be entered at length; keep a register of actions, in which must be entered the title of each cause, and the date of its commencement, names of the attorneys, a memorandum of each subsequent proceeding therein, with date thereof, and the final disposition, or judgment therein, and indexes as are required by law to be kept by the clerk of the district court; also a register of criminal actions;

3. Administer oaths, and perform such other duties as may be required by law. '01, p. 111.

1709. (686x9.) Rules. Every city court may make rules, not inconsistent with the law, for its own government, and the government of its officers, which rules shall take effcet ten days after the same are posted. '01, p. 112.

Courts of record, rules, §§ 1803, 1804.

1710. (686x10.) Jurisdiction. City courts shall have civil jurisdiction of the following causes:

On actions arising within the county, where said city is situated, and causes of action arising without the state, viz:

1. In actions arising on contract, for the recovery of money only, if the sum claimed is less than $500;

2. In actions for damages for injury to the person, or for taking or detaining personal property, or for injury to personal property, or for an injury to real property where no issue is raised by the answer involving the plaintiff's title to or possession of the same, if the damages claimed be less than $500;

3. In actions for a fine, penalty, or forfeiture, less than $500, given by statute or by the ordinances of an incorporated city or town where no issue is raised by the answer involving the legality of any tax, impost, assessment, toll, or municipal fine;

4. In actions upon bonds or undertakings conditioned for the payment of money, if the sum claimed is less than $500, though the penalty may exceed that sum. When the payments are to be made by instalments, an action may be brought for each instalment as it becomes due;

5. In actions to recover the possession of personal property when the value of such property is less than $500;

6. To take and enter judgment on the confession of a defendant, when the amount confessed is less than $500. '01, p. 112.

Concurrent jurisdiction with district courts, § 1712.

Jurisdiction of cases arising under city ordinance, § 1713.

City courts are courts of inferior jurisdiction, similar to justice's courts.
Nichols v. O. S. L. R. R., 28 U. 319; 78 P. 866.

The city court has jurisdiction of an action for false imprisonment.
Wrathall v. Miller, 50 U. —; 169 P. 946.

1711. (686x11.) Limitation on jurisdiction. The parties to an action in a city court cannot give evidence upon any questions which involve the title or possession of real property, or which involve the legality of any tax, impost, toll, or municipal fine, nor can any issue presenting such question be tried by such court; and if it appear from the answer of the defendant verified by his oath, or that of his agent or attorney, that the determination of the action will necessarily involve the question of title or possession to real property, or

involve the legality of any tax, impost, toll, or municipal fine, the court must suspend all further proceedings in the action, and certify the pleadings to the clerk of the district court of the county in which said city court is situated; and from the time of filing such pleadings or transcript with the clerk, the district court has over the action the same jurisdiction as if it had been commenced therein; *provided,* that in cases of forcible entry and detainer, of which city courts have jurisdiction, any evidence otherwise competent may be given, and any question properly involved therein may be determined.

'01. p. 112.

Similar limitation on justices' courts, § 7433, and notes.

1712. (686x12.) City court has concurrent jurisdiction. The city court shall have concurrent jurisdiction with the district courts within their respective counties, viz:

1. In actions of forcible entry, forcible detainer, or unlawful detainer, where the whole amount of the rent and damages claimed is less than $500;

2. In actions to enforce and foreclose liens on personal property, where the amount of the liens and the value of the property are each less than $500;

3. In actions for an accounting where the final amount involved does not exceed $500 and in which the title to real property is not involved;

4. In any action in equity relating wholly to personal property where the sum involved and the value of the property are each less than $500.

'01, p. 113; '05, p. 31.

Concurrent jurisdiction of justices' courts, § 1792.

1713. (686x13.) Exclusive jurisdiction under city ordinances. The city court shall have exclusive original jurisdiction of cases arising under, or by reason of the violation of, any city ordinances, and shall have the same powers and jurisdiction as justices of the peace in all other criminal actions, and the judges of said courts shall be magistrates, with all powers and jurisdiction of justices of the peace as magistrates. '01, p. 113.

Actions for violations of ordinances, procedure, etc., §§ 585-597.

The provisions of this section, in so far as they confer jurisdiction on judges of city courts to act as committing magistrates, are not in conflict with Con. art. 8, Sec. 12, providing which judges may hold preliminary examinations in cases of felony.

State v. Shockley, 29 U. 25; 80 P. 865.
State v. Hay, 51 U. —; 172 P. 721.

1714. (686x14.) Commencing action in city court. The manner of commencing an action in a city court, the requisites of a summons, and the manner of service and return of summons, shall conform as nearly as may be to the practice prescribed for district courts; *provided,* that the summons must contain a direction that the defendant must appear within ten days after the service of summons if served in the county in which the action is brought, otherwise within twenty days after its service. If a copy of the complaint is not served with the summons, the words "of which a copy is herewith served upon you," may be omitted or erased, and in place thereof may be inserted the words, "which within five days after service of this summons upon you, will be filed in said court."

If a copy of the complaint be not served with the summons, and a copy thereof be not deposited with the clerk of said court within five days after service of the summons, the copy of the summons served on the defendant may be filed with the clerk of the court by the defendant, and thereupon the clerk shall docket said action, and the same shall be dismissed by the court, on motion of the defendant, at the cost of plaintiff.

'01, p. 113; '03, p. 33; '05, p. 55.

Issuance, service, and return of summons, §§ 6538-6559.

1715. (686x15.) Demurrer. Reply. The plaintiff may demur to the answer or to the counterclaim, or if he do not demur thereto, reply to the counterclaim within five days after the service of the several pleadings, and the defendant may, within five days after the service thereof, demur to the reply, or any defense therein, in conformity with the practice in district courts. '01, p. 113.

1716. (686x16.) Judgments. Judgments in city courts must be entered

substantially in the form in which they are required to be entered in district courts. When the amount found due to either party exceeds the sum for which the court is authorized to enter judgment, such party may remit the excess, and jugment may be rendered for the residue. '01, p. 113.

Findings of fact and conclusions of law, §§ 6829-6831. Judgments, §§ 6844-6853.

1717. (686x17.) Motion for new trial. Appeal. From all final judgments of a city court a motion for a new trial may be made, and an appeal may be taken by either party in a civil case, or by the defendant in a criminal case, to the district court of the county, in the manner and with like effect as is now or may be provided by law for appeals from justices' courts in similar cases, and from all final judgments in the district courts, rendered upon such appeals, an appeal may be taken to the supreme court in like manner as if such actions were originally commenced in the district court; *provided, however,* when the amount in controversy does not exceed $100, exclusive of costs, that the same shall be final and no appeal shall lie therefrom; and *provided, further,* that in all cases involving the validity or constitutionality of a statute or ordinance there shall be a right of appeal to the supreme court; and *provided, further,* that the state in state cases, and the city in cases arising under the city ordinances, shall have the right to appeal to the district court in like manner, and upon the same grounds as now provided by chap. 41 of the code of criminal procedure for appeals, in cases arising in the district court. '01, p. 113; '03, p. 48; '09, p. 186.

Decisions on appellate jurisdiction of supreme and district courts, note to Con. art. 8, sec. 9.

New trials and appeals, justices' courts, §§ 7512-7521.

Under laws of 1903, p. 48, authorizing appeals from final judgments in the district court on appeals from city courts, provided that when the judgment of the district court does not exceed $100, exclusive of costs, it shall be final, and no appeal shall lie therefrom, where judgment is rendered in favor of defendant for costs on appeal from a city court, the plaintiff is not entitled to appeal therefrom regardless of the amount in controversy.

Garcia v. Free, 31 U. 389; 88 P. 30.

McCashland v. Keogh, 32 U. 11; 88 P. 680.

Said law of 1903 is not violative of the constitutional provision prohibiting a special law where a general law is applicable.

Id.

Application for rehearing of order denying motion for new trial is not recognized by practice of this state, hence pendency of such application does not affect running of statute limiting the taking of appeals from district court to six months from the time judgment becomes final by the disposition of a motion for a new trial.

Luke v. Coleman, 38 U. 383; 113 P. 1023.

There is no appeal to the supreme court where the defendant was convicted of violating an ordinance in both courts and where the penalty is a fine.

Salt Lake City v. Lee, 49 U. 197; 161 p. 926.

1718. (686x18.) Trials with and without a jury. Provisions applicable. All actions before a city court, arising under the city ordinances, shall be tried and determined by such court without the intervention of a jury, except in cases where imprisonment for a longer period than thirty days is made a part of the penalty, or where the maximum fine may exceed $50. The defendant shall demand a trial by jury before the commencement of the trial, and when such a demand shall be made, a jury shall be impaneled in the same manner as provided for the impaneling of a jury in justices' courts. All the provisions of law which are applicable to jurors and juries in civil and criminal actions in justices' courts, except as otherwise provided in this chapter, are applicable to city courts and the proceedings therein. '01, p. 114.

Actions under city ordinances, in city justices' courts tried without a jury, § 632.

Trials in justices' courts, civil procedure, §§ 7474-7489.

Trials in justices' courts, criminal procedure, §§ 9436-9445.

Fees of jurors in justices' courts, §§ 2550-2552.

1719. (686x19.) Abstracts docketed by clerk of district court. Lien. Execution. An abstract of a judgment of the city court may be filed in the office of the clerk of the district court of any county in the state, and must be docketed in the judgment docket of the district court thereof in the same manner as abstracts of judgments of justices' courts, and when the same is so docketed, it shall be a lien upon the lands of the judgment debtor, and an execution may be issued thereon, and it shall have the same effect and force as a judgment of a justice's court, duly docketed in the office of the clerk of the district court. '01, p. 114.

Docketing justices' judgments in district court, §§ 7501-7503.

1720. (686x20.) Executions and process issued by ex officio clerk. Executions upon judgments and all writs and process except summons of the city court, shall be issued by the ex officio clerk thereof, and shall conform as nearly as may be to executions, writs, and process issued by the clerk of the district court. '01, p. 114.

1721. (686x21.) Service by sheriff. Executions upon judgments, and all writs and process, except summons out of a city court in civil actions, must be issued to and served by the sheriff of the county. '03, p. 54.

1722. (686x22.) Fees of clerk. For services rendered by the ex officio clerk of the city court, he shall collect in advance the fees hereinafter enumerated, and pay the same into the city treasury: For all services performed by him in any action or proceeding, including the entry and docketing of judgment by default, $2, to be collected in advance from the party commencing the action; for trial of an issue of fact, $2; for entering judgment by confession, $3; for issuing execution, 25 cents; for abstract of a judgment, 25 cents; for services in proceeding supplementary to execution, $1; for transcript on appeal and certificate thereto, $1; for all other services not herein enumerated, a reasonable compensation, to be fixed by the judges of the city court. '01, p. 114; '03, p. 50.

1723. (686x23.) Fees of witness in civil cases in city courts and municipal courts. Witnesses in city courts and municipal courts, when legally required or in good faith requested to attend in civil matters, shall be entitled to the same fees and mileage as are provided for witnesses in the district court. '07, p. 82; Am'd '11, p. 51.

Fees and mileage of witnesses, district courts, $2.00 per day and 20 cents per mile, § 2545.

1724. (686x24.) Ex officio clerk custodian of papers and records. The ex officio clerk shall be the custodian of all the files, papers, indexes, and dockets of justices of the peace of cities of the first class, whose term of office shall have expired, and said justices of the peace are hereby required and directed, on the termination of their offices, to deliver to said clerk all of their papers, files, indexes, and dockets, and the said clerk is hereby made responsible for the care and safe keeping of all such records, and the said city courts are hereby authorized and directed to proceed to hear and determine all actions and causes so pending before such justices of the peace, and to issue final process therein, and to receive such fees therefor as are now or herein may be provided by law. '01, p. 114.

1725. (686x25.) Certain fees to be paid by county. The fees, charges, and amounts for services rendered by the city courts for services in the trial and examination of persons charged with crimes under the state laws, shall be as now provided by law for justices of the peace, and one-half of the same shall be paid to the clerk by the county in the manner now provided by law. All sums now required by law to be paid to jurors and witnesses in criminal cases in justices' courts, arising under the state laws, shall be paid by the county in the manner now provided by law, and all sums now required by law to be paid to jurors and witnesses in cases arising in justices' courts under the city ordinances, shall be paid in the manner now provided by law. '01, p. 115.

Fees of justice of the peace, §§ 2527, 2528. Fees of jurors and witnesses, §§ 2550-2552.

1726. (686x26.) Fees collected in city courts paid to city and county. All fees collected by the ex officio clerk of city courts, and all fines and costs, collected for the violation of city ordinances, and one-half of the fines collected, and one-half of the costs for violation of state laws, shall be paid in by him to the city treasury of the city of the first class, wherein said courts are established, and the remainder of the fines and costs collected for the violation of state laws shall be paid in by him to the state treasury; *provided,* that in all criminal cases appealed to the district court from the city court, where a fine, or a fine and costs is imposed by the district court, and collected by the county clerk, one-half of such fine shall by him be covered into the state treasury, and one-half into the city treasury. '01, p. 115; '03, p. 27.

1727. (686x27.) Parties may appear in person or by attorney. Parties in city courts may appear and act in person, or by attorney. If any person shall practice law in a city court without having a license as attorney and counselor, as provided by law, he is guilty of contempt of court. '01, p. 115.

Who may act as attorneys in city and in justices' courts, § 7438.

1728. (686x28.) Court open every day, except. City courts shall be open for the transaction of business every day except Sundays, legal holidays, and the day on which a general election is held; *provided,* it can be open upon any of said days for the following purposes:

1. To give, upon their request, instructions to the jury when deliberating on their verdict;

2. To receive a verdict or discharge a jury;

3. For the exercise of the powers of the magistrate in a criminal action, or in a proceeding of a criminal nature, and to try persons charged with violating city ordinances; *provided,* that in civil causes orders of arrest may be made and executed, writs of attachment and executions may be issued and served, proceedings to recover possession of personal property may be had, and suits and process after obtaining any such writs, and proceedings, including criminal actions, may be instituted, issued, and served on any day. '01, p. 115.

Business that may be transacted on a holiday, § 1806.

1729. (686x29.) Rules of practice. The sections of the code of civil procedure, and the amendments thereto, relating to the rules of practice and mode of procedure in the district court, and providing for provisional remedies, and prescribing the practice and procedure in special proceedings, and all the laws of this state, except as in this chapter otherwise provided, are applicable to the city court, the necessary changes and substitutions being made herein. In order that the powers, rules of practice and mode of proceedings of the city court shall conform as nearly as possible to that of the district court, as the same are, or may hereafter be, prescribed by law, all those sections of the code of criminal procedure, and the amendments thereto, relating to the trial of criminal actions in justices' courts, and the procedure and practice of committing magistrates, are likewise made applicable to the city court, the necessary changes and substitutions being made therein. '01, p. 115.

What provisions of code applicable to justices' courts, §§ 7468-7472, 7544.

Trial of criminal actions in justices' courts, §§ 9426-9445.

Preliminary examinations, §§ 8737-8769.

Powers of courts respecting conduct of proceedings, §§ 1802, 1818.

Cited in: Utah Assoc. Credit Men v. Bowman, 38 U. 326; 113 P. 62.

Section 7005 is applicable to appeals where an attachment has been issued.

Wells v. Loofbourow, 49 U. 200; 162 P. 375.

The city court has jurisdiction to entertain a motion to set aside a garnishment judgment and release the garnishee, and its order thereon was final and appealable.

Hewlett Bros. v. Mallett et al., 39 U. 357; 117 P. 68.

1730. (686x30.) Change of venue in city court. In any action now pending, or which may be hereafter commenced, in any city court in this state, either party to said action may, in the discretion of the court, be entitled to change of judge when it shall appear therein by affidavit or otherwise:

1. That the judge before whom the action is pending and about to be tried, is a material witness for either party;

2. That either party cannot have a fair and impartial trial before such judge by reason of the interest, prejudice, or bias of such judge;

3. When, from any cause, a judge is disqualified from acting;

4. When a judge before whom an action is pending is sick or unable to act. '03, p. 28.

1731. (686x31.) Id. But one motion for change. A change of judge cannot be had on motion of the same party, more than once in any pending action. '03, p. 28.

1732. (686x32.) Id. In certain cases to district judge. Judge pro tempore. Whenever, by reasons of a change of judge granted, there is no other judge of concurrent jurisdiction before whom a pending cause may be tried, the judge granting the change shall, except in cases hereinafter mentioned, certify all pleadings and a transcript of the proceedings in said cause to date

to the district court, in and for the county where said action is pending, where, within thirty days, the party at whose instance the change was granted must docket said cause.

Thereafter, said cause shall in all respects be treated as if originally commenced in the district court; *provided,* that in all cases wherein a change of judge is granted, and such change would result in certification of said cause, to the district court, the parties litigant may, by written stipulation filed in said cause, agree upon a judge pro tempore for the trial of said cause. The party so agreed upon as judge pro tempore, must be a member of the bar in good standing, and, when appointed by stipulation in any cause, shall in said cause have and exercise all the powers and jurisdiction of a regularly elected judge of the city court. '03, p. 28.

Appointment of judge pro tempore generally, § 1682.
Disqualification of judge, Con. art. 8, sec. 13; § 1795.

1733. (686x33.) Fees of judge pro tempore. The fees of a judge pro tempore in the city court, unless otherwise agreed upon by the parties litigant and the party acting as judge pro tempore, shall be $10 per day, to be taxed as costs by the successful party. '03, p. 28.

1734. (686x34.) City court seal. All city courts in cities of the first class shall have a seal, which, after this chapter goes into effect, shall be affixed to all writs and process issued out of such courts. '03, p. 32.

1735. (686x35.) Id. Form. Such seal shall be in circular form, not to exceed two inches in diameter, and shall contain in its impression nothing but the words "City Court of ..... (inserting the name of the city) seal," surrounded by a scroll. '03, p. 32.

1736. (686x36.) Id. Custodian of. The clerk of the court shall be the custodian of the seal. '03, p. 32.

CHAPTER 5.

MUNICIPAL COURTS.

1750. (686x37.) Court created. Qualification and election of judge. Term. Salary. In all cities of this state having a population of more than 15,000 and less than 40,000 inhabitants, there is hereby created a court to be called "the municipal court for ..... city, Utah." Said court shall consist of a judge. The judge thereof to be eligible to hold said office, must be at least twenty-five years of age, and admitted to practice in the supreme court of this state, and must, at the time of his election, be an elector of the city in which said court is established. Said judge shall be elected at the election to be held in November, 1901, and biennially thereafter, and his term of office shall begin on the first Monday in January, 1902, and shall hold office for the term of two years, and until his successor is elected and qualified. Said judge shall not engage in the practice of law during his term of office, nor shall he have a partner engaged in the practice of law in any of the courts of this state. The salary of said judge shall be $1800 per annum, payable quarterly from the city treasury. '01, p. 117; '07, p. 80.

The creation of such court not unconstitutional.
State v. Howell, 26 U. 53; 72 P. 187.
Chap. 107 Laws '17, amending this section and 1756, 1758 and 1759 was declared unconstitutional and inoperative.
State ex rel Shields v. Baker, 50 U. —; 167 P. 262.

1751. (686x38.) Shall have seal. Said municipal courts shall have a seal, and all process out of said court shall be attested by said seal. Said seal shall contain the following: "Municipal court of ..... city, ... county, state of Utah." '01, p. 118.

1752. (686x39.) Change of judge. Cause for. In any action now pending, or which may be hereafter commenced, in any municipal court in this state, either party to said action may, in the discretion of the court, be entitled to change of judge when it shall appear therein by affidavit or otherwise:

1. That the judge before whom the action is pending and about to be tried, is a material witness for either party;

2. That either party cannot have a fair and impartial trial before such judge by reason of the interest, prejudice, or bias of such judge;

3. When, from any cause, a judge is disqualified from acting;

4. When the judge before whom the action is pending is sick or unable to act. '01, p. 118; '03, p. 179; '05, p. 172.

Disqualification of judge, Con. art. 8, sec. 13; § 1795.

1753. (686x40.) Only one change. A change of judge cannot be had on motion of the same party, more than once in any pending action. '05, p. 172.

1754. (686x41.) Proceedings on change. Whenever a change of judge is granted, as hereinbefore provided, the judge granting the change shall, except in cases hereinafter mentioned, certify all pleadings and a transcript of the proceedings in said cause to date to the district court, in and for the county where said action is pending, where, within thirty days, the party at whose instance the change was granted must docket the said cause. Thereafter, said cause shall in all respects be treated as if originally commenced in the district court; *provided,* that in all cases wherein a change of judge is granted, and such change would result in certification of said cause to the district court, the parties litigant may, by written stipulation filed in said cause, agree upon a judge pro tempore for the trial of said cause. The party so agreed upon as judge pro tempore must be a member of the bar in good standing, possessing the other statutory qualifications of a municipal judge, and, when appointed by stipulation in any cause, shall in said cause have and exercise all the powers and jurisdiction of a regularly elected judge of the municipal court. '05, p. 172.

Judge pro tempore generally, § 1682.

1755. (686x42.) Fees. The fees of the judge pro tempore in the municipal court, unless otherwise agreed upon by the parties litigant and the party acting as judge pro tempore, shall be $5 per day, to be taxed as costs by the successful party. '05, p. 173.

1756. (686x43.) Appeals. In all cases, appeals shall lie from said municipal court to the district court of the district in which said city may be situated, and for that purpose the procedure and practice relating to appeals from justices' courts to district courts, shall be the procedure and practice for taking appeals from said municipal court. '01, p. 118.

Decisions on appellate jurisdiction of supreme and district courts, note to Con. art. 8; sec. 9.

Appeals from justices' court, §§ 7514-7520.

The legislature did not intend to give other or different rights, on appeal to the supreme court from judgments of the district court in cases appealed from municipal court, than is given in cases appealed to the district court from the justice's court.
State v. Olsen, 39 U. 177, 115 P. 968.

1757. (686x44.) New trials. New trials may be had and obtained in said municipal courts, according to the course and practice of new trials in courts of the justices of the peace, and for that purpose the procedure and practice relating to new trials in courts of justices of the peace shall be the procedure and practice relating to new trials in said municipal court. '01, p. 118.

New trials in justices' courts, §§ 7512, 7513.

1758. (686x45.) Civil jurisdiction. The civil jurisdiction of said municipal court shall be the same as that exercised by courts of justices of the peace, and in addition thereto, said court is given like jurisdiction in all cases arising in said county where said court is established. '01, p. 118.

Jurisdiction of justices of the peace, Con. art. 8, sec. 8; §§ 630, 1796, 1792, 1794.

Powers of courts over conduct of proceedings, §§ 1802, 1818.
State v. Olsen, 39 U. 177; 115 P. 968.

1759. (686x46.) Criminal jurisdiction. The criminal jurisdiction of said municipal court shall be the same as is now possessed by justices of the peace of cities of the second class, or county justices of the peace. '01, p. 118.

City justice of the peace, jurisdiction, etc., §§ 630-635.

Criminal jurisdiction of justice of the peace, § 1794.
State v. Olsen, 39 U 177; 115 P. 968.

1760. (686x47.) Id. Provisions applicable. The provisions of the code of criminal procedure relating to the change of the place of trial in justices' courts are hereby made applicable to said municipal court. '01, p. 119; '03, p. 179.

Changes of place of trial, criminal procedure, § 9427.

1761. (686x48.) Procedure in jury trials. The provisions of the code of civil procedure, relating to jury trials in justices' courts, shall govern and control the matter of jury trials in said municipal court. '01, p. 119.

Jury trials, justices' courts, §§ 7485-7487.

1762. (686x49.) Procedure in certain cases. The provisions of the code of civil procedure, relating to contempts, attachments, garnishments, claim and delivery, arrest of absconding debtors, in justices' courts, are hereby made applicable to like proceedings in the municipal court herein created, the necessary changes and substitutions being made therein. '01, p. 119.

Contempts, justices' courts, §§ 7525-7529. Attachment, garnishment, etc., §§ 7462-7472.

1763. (686x50.) Procedure. The code of civil and criminal procedure relating to justices' courts shall be the code of procedure of said municipal court, except as otherwise provided for in this chapter. '01, p. 119; '03, p. 179.

Provisions of code applicable to justices' courts, § 7544. Who may practice in municipal courts, § 7438. State v. Olsen, 39 U. 177; 115 P. 968.

1764. (686x51.) Fees. Upon the filing of a complaint in said municipal court the party filing the same shall pay the sum of $1.50, and at the time of the entering of the judgment, other than a judgment of dismissal without trial, the further sum of $1 shall be paid, which said sums shall be payments in full of all costs in said action (exclusive of officers' fees, relating to service of process and other papers, fees of witnesses and fees relating to jury trials), which said costs so collected as aforesaid, shall be paid by said court monthly into the treasury of the city where said court is established. '01, p. 119.

1765. (686x52.) Court provided with necessary blanks and books. Dockets. Said municipal court shall be provided by said cities of the second class, with the necessary blanks, dockets, indexes, file cases, and receptacles for keeping the records and proceedings of said court, and to preserve the papers and files of any case filed in said court, and the clerk of said court must enter upon the dockets, both civil and criminal of said court, such entries as are now provided to be kept and entered by justices of the peace. '01, p. 119.

1766. (686x53.) Clerk of court to be appointed by judge. Duties. Salary. The clerk of said court shall be appointed by the judge thereof, by and with the advice and consent of the city council or governing body, and which clerk shall be paid a salary of not more than $125 per month, by the city where said court is established. The duties of said clerk shall be to keep the records and seal of said court, and may issue any and all process required to be issued under the seal of said court, and perform such other duties as may be required of him in relation to said court, by the judge thereof, and as may be prescribed by ordinance. '01, p. 119; '07, p. 80.

1767. (686x54.) Precincts abolished. The now existing precincts embraced within cities having municipal courts, are hereby abolished for the purpose of this chapter. '03, p. 181.

Justice of the peace precinct officer; when a city a precinct, §§ 1454, 1790.

1768. (686x55.) Duties of clerk. The clerk of the municipal court in cities having such a court shall be the custodian of all the files, papers, indexes, and dockets of the justices of the peace in such cities, whose precincts are hereby abolished, and said justices of the peace are hereby required and directed, at once upon the approval of this chapter, to deliver to said clerk all their papers, files, indexes, and dockets, and said clerk is hereby made responsible for the care and safe keeping of all such records, and the municipal court is hereby authorized and directed to proceed to hear and determine all actions and causes pending before such justices, and to issue final process

therein, and to receive such fees therefor as are now provided by law in said municipal court. '03, p. 181.

1769. (686x56.) Summons. Form of. The summons issued out of said court shall be substantially in the following form:

(Title of court and cause.)

The state of Utah to said defendant:

You are hereby summoned to appear before the above entitled court within ten days after the service of this summons upon you, if served within the county in which this action is brought; otherwise within twenty days after this service, and defend the above entitled action; in case of your failure to do so, judgment will be rendered against you according to the demand of the complaint.

Witness the Hon. ....., judge of said court, with the seal thereof this ..... day of ....., 19.....

.....

[Seal.] Clerk.

'01, p. 119.

Issuance, service, and return of summons, §§ 6538-6559. Summons by publication, § 1779.

1770. (686x57.) Court must give notice of trial. Said municipal court shall give notice of the trial of any case at issue in said court, to the attorneys of record, and in case the parties are not represented by attorneys, to the parties themselves, and in case said parties, or either of them, fail to appear at the time and place designated in said notice, and after proof of the service of said notice, the court shall proceed to try the case. '01, p. 120.

1771. (686x58.) All fees paid into city treasury. Said judge of said municipal court shall receive no fees in addition to the salary herein provided for, and any and all fees charged and collected by him, by virtue of his office, shall be turned into the city treasury. '01, p. 120.

1772. (686x59.) Fees. Said court shall charge and collect as fees in all civil actions, after judgment is rendered, such fees as are now charged and collected by and provided for justices of the peace, which fees shall be paid by said court, monthly into the city treasury. The fees, charges, and amounts for services rendered by the municipal court, for services in the trial and examination of persons charged with crimes under state laws, shall be as now provided by law, for justices of the peace, and shall be paid to said court by the county in the manner now provided by law, and said fees, charges, and amounts for services rendered by the municipal court, shall be paid into the city treasury. All sums now required by law to be paid to jurors and witnesses in criminal cases in justices' courts, arising under the state laws, shall be paid by the county, in the manner now provided by law, and all sums now required by law to be paid to jurors and witnesses in cases arising in justices' courts under the city ordinances shall be paid in the same manner as now provided by law. '01, p. 120; '03, p. 179.

1773. (686x60.) Judge to be ex officio city and precinct justice. Said judge of said municipal court shall be ex officio city justice of the peace and precinct justice of the peace, and, as such municipal judge aforesaid, shall perform the duties of the offices of said city justice of the peace and of said precinct justice of the peace. '01, p. 120.

City justice of the peace, election, § 600; jurisdiction, etc., §§ 630-635. Precinct justice of the peace, §§ 1454, 1790, 1794.

Cited in: State v. Olsen, 39 U. 177; 115 P. 968.

1774. (686x61.) Process, to whom to run. All process from municipal courts shall run to the sheriff or any constable of the county, and in criminal actions in which the city is plaintiff, also to the chief of police or any policeman of the city; *provided,* that in civil actions in which process is to be served outside of the county in which said court is located, process shall run to the sheriff or any constable of the county in which said process is to be served. '01, p. 120; '03, p. 179; '05, p. 6.

1775. (686x62.) Procedure in preliminary examinations. Chap. 16 of

title 119 (§§ 8737-8769), relating to preliminary examinations, is hereby made applicable to the municipal court hereby created, and said municipal court is hereby given all of the powers and duties bestowed by said chapter upon justices of the peace. '01, p. 120.

Preliminary examinations, §§ 8737-8769.

1776. (686x63.) Mayor to fill vacancies by appointment. In case of a vacancy occuring in the office of the judge of said court, by death, resignation, removal, failure, or refusal to perform his duties, or otherwise, the mayor of said city, by and with the consent of the city council, shall have power to appoint a judge for the unexpired term. During the absence of the municipal judge from the city, in case of his sickness or inability to act, the mayor shall have power to appoint, by and with the consent of the city council, a judge pro tempore, during such absence, sickness, or inability to act, and said judge pro tempore, so appointed, shall possess all the qualifications required of the municipal judge, and shall be vested with the same powers and authority; *provided,* that if said municipal judge shall absent himself from the city for more than thirty days at any one time, he shall be deemed to have forfeited his office. '01, p. 120; '03, p. 180.

1777. (686x64.) Judge and clerk to qualify. The judge of said court, before entering upon the discharge of his duties, shall take the constitutional oath of office, and give bond for the faithful performance of his duties, in the sum of $5000. The clerk of said court shall take a like oath and give a like bond to be approved by the mayor of said city, and, together with said oaths of office, filed with the city recorder. '01, p. 120.

1778. (686x65.) Judge is successor to justices of the peace. Said municipal judge, as ex officio justice of the peace, as provided for in this title, is hereby made the successor of the justices of the peace now qualified or acting in the precinct embraced within said cities of the second class. '01, p. 121.

Justices of the peace, §§ 1454, 1780, 1784.

1779. (686x66.) Service of summons by publication. A summons issued out of this court may be served by publication, and §§ 6549-6552, providing for the publication of summons issued out of the district court, are made applicable to municipal courts, the necessary changes and substitutions being made therein. '05. p. 124.

CHAPTER 6.

JUSTICES' COURTS.

1780. (687.) Place of residence and of holding court. Every justice of the peace shall reside in and shall hold a justice's court in the precinct or city for which he is elected; *provided,* that where more than one precinct is embraced within the limits of any incorporated city or town, the justices of the peace of such precincts may hold court at any place within their respective cities or towns.

City justice of the peace in cities of 15,000 and less, §§ 600, 630.

Justice of the peace a precinct officer, § 1454, when a city precinct, § 1454.

Place of trial generally, § 7426.

Municipal judge is ex officio justice of the peace, §§ 1773-1778.

Office forfeited for wrongfully issuing liquor permits, § 3345.

A justice of the peace selected for a precinct embraced within the corporate limits of a city containing several precincts, may hold court anywhere within such city. The provisions of this section are not in conflict with Con. art. 8, sec. 8.

Briscoe v. Rich, 20 U. 349; 58 P. 837.

Saunders v. Sioux City Nursery Co., 6 U. 431; 24 P. 532.

A justice of a precinct other than that in which a town is situated has no jurisdiction of a violation of a town ordinance.

Garland v. Maughn, 35 U. 426; 100 P. 934.

1781. (688.) Civil jurisdiction. Justices' courts. The justices' courts shall have civil jurisdiction within their respective precincts or cities:

1. In actions arising on contract for the recovery of money only, if the sum claimed is less than $300;

2. In actions for damages for injury to the person, or for taking or de-

taining personal property, or for injury to personal property, or for an injury to real property where no issue is raised by the answer involving the plaintiff's title to or possession of the same, if the damages claimed be less than $300;

3. In actions for a fine, penalty, or forfeiture, less than $300, given by statute or by the ordinances of an incorporated city or town where no issue is raised by the answer involving the legality of any tax, impost, assessment, toll, or municipal fine;

4. In actions upon bonds or undertakings conditioned for the payment of money, if the sum claimed is less than $300, though the penalty may exceed that sum. When the payments are to be made by instalments, an action may be brought for each instalment as it becomes due;

5. In actions to recover the possession of personal property, when the value of such property is less than $300;

6. To take and enter judgment on the confession of a defendant, when the amount confessed is less than $300. Am'd '99, p. 25.

Criminal procedure, justice's court, §§ 9419-9468.

Jurisdiction, etc., Con. art. 8, sec. 8.

Jurisdiction in criminal cases, § 1794, and notes.

Jurisdiction in forcible entry and in foreclosure of liens on personal property, § 1782.

Jurisdiction of city justice under city ordinances, § 630.

Issue search and seizure warrant, §§ 3354-3358.

Jurisdiction in certain first class cities, §§ 1454-1459.

Jurisdiction in bastardy proceedings, §§ 380-405.

Issue permits for foreclosure intoxicating liquors, § 3348.

Docket and enforce certain court-martial judgments, § 3858.

A justice of the peace acting within his jurisdiction is not liable for mistakes of judgment, although the facts do not warrant his conclusion.

Marks v. Sullivan, 9 U. 12; 33 P. 224.

A justice of the peace cannot include in his judgment interest on the sum claimed from the time the suit was brought, if it makes the total amount of the judgment exceed $300.

McCormick Har. M. Co. v. Marchant, 11 U. 68; 39 P. 483.

The statute prescribing the jurisdiction of justices' courts, and applying to the state at large, cannot be restricted in its application by a special law affecting only justices in cities of the first class; limiting their jurisdiction to amounts less than $10.

Love v. Liddle, 26 U. 62; 72 P. 185.

In an action to recover for kiling cattle of the total value of $200, where such amount with interest accruing from the day of injury exceeded $300, the justice was without jurisdiction, and the district court on appeal is without jurisdiction, and the plaintiff could not before judgment waive all damages and interest in excess of $299.

Whealey v. O. S. L. R. R. Co., 49 U. 105; 162 P. 86.

The justice's court has jurisdiction of an action for false imprisonment.

Wrathall v. Miller, 50 U. —; 169 P. 946.

1782. (689.) Concurrent jurisdiction. The justices' courts shall have concurrent jurisdiction with the district courts within their respective precincts and cities:

1. In actions of forcible entry, forcible detainer, or unlawful detainer, where the whole amount of the rent and damages claimed is less than $300;

2. In actions to enforce and foreclose liens on personal property, where the amount of the liens and the value of the property are each less than $300.

Concurrent jurisdiction of city courts, § 1712.

Where title to real property involved, § 7433, and note.

Question of possession of real property may be adjudicated by justices of peace in forcible entry or detainer actions.

Hyndman v. Stowe, 9 U. 23; 33 P. 227.

1783. (690.) Process to any part of county. Mesne and final process of justices' courts may be issued to any part of the county in which they are held.

1784. (691.) Criminal jurisdiction. Justices' courts have jurisdiction of the following public offenses committed within the respective counties in which such courts are established:

1. Petit larceny;

2. Assault or battery not charged to have been committed upon a public officer in the discharge of his duties, or to have been committed with such intent as to render the act a felony;

3. Breaches of the peace, committing a wilful injury to property, and all midemeanors punishable by a fine less than $300, or by imprisonment in the county jail or city prison not exceeding six months, or by both such fine and imprisonment.

Criminal procedure, justice's court, §§ 9419-9468.

In certain first class cities all cases brought before, § 1456.

Authority to impose a fine in any sum less than $300, and an imprisonment for a term not exceeding six months, is in excess of the jurisdiction which the legislature could confer on justices of the peace under the organic act.

People, ex rel. Yearian v. Spiers, 4 U. 385; 11 P. 509.

In re Lewis, 10 U. 47; 41 P. 1077.

The legislature of the territory could confer on justices of the peace no jurisdiction in

criminal cases, except that usually exercised by such justices of the peace at the date of the passage of the organic act.
Id.
Justices of the peace, under the statutes of the territory, have jurisdiction to try an offender charged with the crime of battery. (Overruling Yearian v. Spiers, 4 U. 385.)
People v. Douglass, 5 U. 283; 14 P. 801.
A failure to state in general terms in the complaint the place where liquor was sold is not jurisdictional and does not vitiate the judgment of conviction.
Bruce v. East, 43 U. 327; 134 P. 1175.

CHAPTER 7.

DISQUALIFICATION OF JUDGES.

1785. (692.) When disqualified. Except by consent of all parties, no justice, judge, nor justice of the peace shall sit or act as such in any action or proceeding:

1. To which he is a party, or in which he is interested;
2. When he is related to either party by consanguinity or affinity within the third degree, computed according to the rules of law;
3. When he has been attorney or counsel for either party in the action or proceeding.

But the provisions of this section shall not apply to the arrangement of the calendar or the regulation of the order of business, nor to the power of transferring the action or proceeding to some other court.

Disqualification of judge, Con. art. 8, sec. 13.
Even though a justice is disqualified, the prosecution should originate in his court and then it may be transferred.
Garland v. Maughn, 35 U. 426; 100 P. 934.

1786. (693.) Judge cannot act as attorney. Exception. A justice of the supreme court, or a judge of the district court, or a judge of a city court, or a judge of a municipal court, cannot act as an attorney or counsel in the court of which he is a judge, or in any other court, except in an action or proceeding to which he is a party of record; *provided,* that a judge of a city court and a judge of a municipal court, shall be permitted to practice before the district courts in this state in uncontested probate matters. Am'd '05, p. 8.

Who may practice law in city, municipal, and in justices' courts, § 7438.
Prior to statute of 1905, p. 8, the judge of a city court was not prohibited from practicing in the district court.
Nichols v. O. S. L. Ry., 28 U. 319; 78 P. 866.

1787. (694.) Judge's partner acting as attorney. No judge or other judicial officer shall have a partner acting as attorney or counsel in any court of this state.

CHAPTER 8.

GENERAL PROVISIONS.

1788. (695.) Sittings public. The sittings of every court of justice are public, except as provided in the next section.

Right to a speedy public trial, Con. art. 1, sec. 12, and note.

1789. (696.) Id. Exceptions. In an action for divorce, criminal conversation, seduction, abortion, rape, or assault with intent to commit rape, the court may, in its discretion, exclude all persons who are not directly interested therein, except jurors, witnesses, and officers of the court; *provided,* that in any cause the court may, in its discretion, during the examination of a witness, exclude any and all other witnesses in the cause.

1790. (697.) Powers of courts respecting conduct of proceedings. Every court has power:

1. To preserve and enforce order in its immediate presence;
2. To enforce order in the proceedings before it, or before a person or persons empowered to conduct a judicial investigation under its authority;
3. To provide for the orderly conduct of proceedings before it, or its officers;

4. To compel obedience to its judgments, orders, and process, and to the orders of a judge out of court, in an action or proceeding pending therein;

5. To control, in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto;

6. To compel the attendance of persons to testify in an action or proceeding pending therein, in the cases and manner provided by law;

7. To administer oaths in an action or proceeding pending therein, and in all other cases where it may be necessary in the exercise of its powers and duties;

8. To amend and control its process and orders so as to make them conformable to law and justice;

9. To devise and make new process and forms of proceedings consistent with law, necessary to carry into effect the powers and jurisdiction possessed by it.

Contempts generally, §§ 7058-7073.
Powers of judicial officers generally, § 1806.
May issue writs necessary to carry judgment into effect, Con. art. 8, sec. 4, 7.
When jurisdiction given, means to enforce implied, § 1813.
Decisions on jurisdiction and control of process, note to § 1667.
Punish for contempt, §§ 3358-3360.
Contempt out of presence of court, §§ 3654, 3655, 3658.

1791. (698.) Rules of court. Every court of record may make rules, not inconsistent with the laws of this state, for its own government and the government of its officers; but such rules must neither impose any tax or charge upon any legal proceeding, nor give any allowance to any officer for services.

Supreme court may make rules, § 1645.
Courts are authorized to make rules not inconsistent with law.
Riddle v. Quinn, 32 U. 341; 90 P. 893.
A rule of court imposing limitations and requirements not imposed by statute is null and void.
Nichols v. Cherry, 22 U. 1; 60 P. 1103.

1792. (699.) Id. Time of taking effect. The rules adopted by any court take effect thirty days after their publication.

1793. (700.) When courts may sit. Courts of justice may be held and judicial business transacted on any day, except as provided in the next section.

Court open for every purpose connected with the cause when jury is out, § 6814.

1794. (701.) Id. What business may be transacted on holidays. No court can be opened nor can any judicial business be transacted on Sunday, on any day on which a general election is held, or on any legal holiday, except for the following purposes:

1. To give, upon their request, instructions to a jury when deliberating on their verdict;

2. To receive a verdict or discharge a jury;

3. For the exercise of the powers of a magistrate in a criminal action, or in a proceeding of a criminal nature; *provided,* that in civil causes orders of arrest may be made and executed; writs of habeas corpus and attachment, executions, injunctions, and writs of prohibition may be issued and served; proceedings to recover possession of personal property may be had, and suits and process for obtaining any such writs and proceedings may be instituted, issued, and served, on any day.

Holidays, etc., §§ 2860, 5843, 5844.
The hearing of contempt proceedings being prohibited by the omission to include them within the exceptions to this section, a judgment in contempt proceedings heard on a legal holiday is void, as being without the jurisdiction of the court.
Davidson v. Munsey, 27 U. 87; 74 P. 431.

1795. (702.) Id. When appointed time of holding court falls on holiday. If any of the days mentioned in the preceding section happen to be the day appointed for the holding of a court, or to which it is adjourned, it is deemed appointed for, or adjourned to, the next day.

1796. (703.) Adjournment in absence of judge. If no judge attend on the day appointed for the holding or sitting of a court, or on the day to which it may have been adjourned, before noon, the clerk shall make an entry thereof in his record, and the sheriff or clerk must adjourn the court until the next day at ten o'clock a. m.; and if no judge attend on that day before noon, the

sheriff or clerk must adjourn the court until the following day at the same hour, and so on from day to day for one week, unless the judge, by written order or telegram, directs it to be adjourned to some day certain, fixed in said order or telegram, in which case it shall be so adjourned.

1797. (704.) Id. If no judge attend for one week, and no written order or telegram is received adjourning court, the sheriff or clerk shall adjourn the session until the time appointed for the holding of the next regular session.

1798. (705.) Effect of failure of term or adjournment. When a term of court fails, or is adjourned, or the time or place of holding the same is changed, as prescribed in this chapter, an action, special proceeding, writ, process, recognizance, or other proceeding, civil or criminal, returnable, or to be heard or tried, at that term, is not abated, discontinued, or rendered void thereby; but all persons are bound to appear and all proceedings must be had, at the time and place to which the term is adjourned or changed, or, if it fails, at the next term, with like effect as if the term was held as originally appointed.

1799. (706.) Expiration of term during trial. Where the trial or hearing of an issue of fact, joined in an action or special proceeding, civil or criminal, has been commenced at a term of a court of record, it may, notwithstanding the expiration of the time appointed for the term to continue, be continued to the completion thereof; including, if the cause is tried by a jury, all proceedings taken therein until the actual discharge of the jury; or, if it is tried by the court without a jury, until it is finally submitted for a decision upon the merits.

, Vacancy or failure of term not to affect proceeding, § 1822.

1800. (707.) Changing place of holding court in certain cases. The judge or judges authorized to hold or preside at a court appointed to be held in a county, city, or town, may, by an order filed with the clerk, and published as he or they may prescribe, direct that the court may be held or continued at any other place in the city, town, or county, than that appointed, when war, insurrection, pestilence, or other public calamity, or danger thereof, or the destruction or danger of the building appointed for holding courts, may render it necessary, and may, in the same manner, revoke the order, and in his or their discretion appoint another place in the same city, town, or county for holding court.

1801. (708.) If suitable rooms be not provided. If suitable rooms for holding the district court and chambers of the judge of said court be not provided in the place or places appointed for holding said court in any county, by the board of county commissioners thereof, together with attendants, furniture, lights, and stationery sufficient for the transaction of business, the court or the judge thereof may direct the sheriff of the county to provide such rooms, attendants, furniture, fuel, lights, and stationery; and the expenses incurred, certified by the judge to be correct, are a charge against the county treasury, and must be paid out of the general fund thereof.

1802. (709.) What courts have seals. Each of the following courts has a seal:

1. The supreme court;
2. The district courts.

Supreme and district courts each have a seal, Con. art. 8, sec. 17.

City courts have seals, § 1734.
Municipal courts have seals, § 1751.

1803. (710.) Clerk keeps seal. The clerk of the court must keep the seal thereof.

1804. (711.) When seal affixed. The seal of the court need not be affixed to any proceeding therein, or document, except:

1. To a writ;
2. To a certificate of the probate of a will, or of appointment of an executor, administrator, or guardian;
3. To the authentication of a copy of a record or other proceeding of a

court, or of an officer thereof, or of a copy of a document on file in the office of the clerk.

1805. (712.) Powers of judge out of court. A judge may exercise, out of court, all the powers expressly conferred upon a judge as contradistinguished from the court.

Powers of district judges at chambers, § 1679.
Judgments and orders may be entered, when and where, § 1678.

1806. (713.) Powers of judicial officers as to conduct of proceedings. Every judicial officer has power:

1. To preserve and enforce order in his immediate presence, and in proceedings before him, when he is engaged in the performance of official duty;
2. To compel obedience to his lawful orders as provided by law;
3. To compel the attendance of persons to testify in a proceeding before him, in the cases and manner provided by law;
4. To administer oaths to persons in a proceeding pending before him, and in all other cases where it may be necessary in the exercise of his powers and duties.

Powers of courts over conduct of proceedings, § 1790.

1807. (714.) Id. Contempt. For the effectual exercise of the powers conferred by the next preceding section, a judicial officer may punish for contempt in the cases provided by law.

1808. (715.) Subsequent application to another judge. If an application for an order, made to a judge of a court in which the action or proceeding is pending, is refused in whole or in part, or is granted conditionally, no subsequent application for the same order can be made to any other judge, except of a higher court; but nothing in this section applies to motions refused for any informality in the papers or proceeding necessary to obtain the order, or to motions refused, with liberty to renew the same.

1809. (716.) Id. Contempt. A violation of the next preceding section may be punished as a contempt, and an order made contrary thereto may be revoked by the judge who made it, or vacated by a judge of the court in which the action or proceeding is pending.

1810. (717.) Proceedings not affected by vacancy. No proceeding in any court of justice, in an action or special proceeding pending therein, is affected by a vacancy in the office of all or any of the judges, or by the failure of a term thereof.

Ending of term during trial, effect, § 1799.

1811. (718.) English language used. Every written proceeding in a court of justice in this state shall be in the English language, and judicial proceedings shall be conducted, preserved, and published in no other.

1812. (719.) Abbreviations. Numbers. Such abbreviations as are in common use may be used, and numbers may be expressed by figures or numerals in the customary manner.

1813. (720.) When jurisdiction given, means to enforce implied. When jurisdiction is, by statute, conferred on a court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of the jurisdiction, if the course of proceeding be not specifically pointed out by statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of the statute or of the codes of procedure.

Writs necessary to carry judgment into effect may be issued, Con. art. 8, secs. 4, 7.
Power of court respecting its process and the conduct of proceedings, § 1790, and note.
Court may devise suitable process and forms, § 1790.
Decisions on jurisdiction and control of process of district courts, note to § 1667.

The court has the power, where it appears that the mortgaged property is perishable or that it is livestock, to call on the mortgagor to consent to sell or to require indemnity bond from him, or order the property sold, or otherwise, to protect the rights of the parties.
Watts v. Greenwood, 49 U. 118; 162 P. 72.

CHAPTER 9.

JUVENILE COURTS.

('13, p. 81.)

1814. (720x.) Special court. Judge. Term. Salary. Juvenile court commission. Powers and duties. Secretary. In each judicial district of the state there is hereby created a special court to be known as the juvenile court. The juvenile court commission, hereinafter defined, shall appoint, for each such district, one or more judges to be known as judges of the juvenile court. Each judge shall hold office for a term of two years, or until his successor is appointed and qualified; *provided,* that the judge may be removed by the juvenile court commission at its discretion. The salary of said judges shall be fixed by the juvenile court commission. There is hereby created a commission to be known as the juvenile court commission, which shall consist of the governor, attorney-general, and state superintendent of public instruction. Said commission shall have general control and supervision over juvenile courts and probation officers, including the power of fixing salaries, providing court rooms and necessary equipment and supplies. The juvenile court commission shall also appoint a secretary, who shall serve during the pleasure of the commission, whose duties shall be prescribed by the commission. The secretary shall receive such salary as may be fixed by the commission. The expenses of said commission and the cost of maintaining said courts shall be paid out of the general funds of the state. The judge of the juvenile court in each district shall, by and with the consent of the juvenile court commission, appoint a clerk of the juvenile court, who shall keep a register of the proceedings of said court in a book to be known as the juvenile court register, and perform all clerical work and discharge such duties as the judge may assign in said court. And in addition thereto said clerk shall be a probation officer and shall receive a salary to be fixed and paid by the juvenile court commission. '05, p. 182; '07, p. 207; '09, p. 324.

1815. (720x1.) Jurisdiction. The juvenile court shall have jurisdiction in all cases relating to the custody, detention, guardianship of the person, probation, neglect, dependency, delinquency, examination, trial, and care of children who are under eighteen years of age, and also have jurisdiction over adult persons for all misdemeanors committed by them relating to the custody, detention, guardianship, probation, neglect, dependency, delinquency, and care of children who are under eighteen years of age, as is now or may be provided for by law. In any case in which the court shall find a child neglected, dependent, or delinquent, it may, in the same or in any subsequent proceedings, upon the parents of said child or either of them being duly summoned or voluntarily appearing, proceed to inquire into the ability of such parent or parents to support the child or contribute thereto. The court may enter such order or decree as shall be according to equity in the premises, and may enforce the same in any way in which a court of equity may enforce its orders or decrees. '05, p. 182; '07, p. 208; am'd '09, p. 324; Am'd '11, p. 77.

Dependent neglected children, §§ 1834 et seq.
Adult delinquency, §§ 1842-1852.
Detention school, §§ 1853-1859.
Employment of children, §§ 1860-1873.

The proceedings of juvenile courts do not come within what is known as criminal proceedings, nor are children considered as criminals.

Mill v. Brown, 31 U. 473; 88 P. 609.

A parent cannot be deprived of the custody of his child, except upon the finding of a court having jurisdiction in a proper proceeding.

Id.

Laws 1905, chap. 117, P. 182, creating juvenile courts, with jurisdiction to provide for custody of "delinquent children," as defined by it, not being a criminal law, but having for its object the surrounding of such children with proper environments, violates no constitutional provisions because not providing for trial by jury, for arraignment and plea, a warrant, etc.; nor because of the manner of trial and examination, and the child being required to be a witness.

Id.

The act of the juvenile court, in making an order of commitment upon the first hearing and then conditionally suspending it by an order of probation, and after violation of the probation ordering a commitment, while somewhat irregular, was not void.

Stoker v. Gowans, 45 U. 556; 147 P. 911.

The delinquent, or anyone in her behalf, may apply for a modification of the judgment and determination of the rights of her custody, with the right of appeal, so that the rights of the delinquent may be enforced without recourse to habeas corpus.

Id.

1816. (720x3.) Practice and procedure. In all matters or cases relating to guardianship, neglect, or abandoned children, and delinquencies of children, the practice and procedure of juvenile courts shall conform as nearly as possible to the practice and procedure, as is now or may be provided by law or practice for district courts, and in all cases of misdemeanors of adults for contributing to the dependency, neglect, or delinquency of any juvenile, the practice and procedure shall conform to the practice and procedure as is now or may be provided by law for justice courts; *provided,* such changes as may be necessary shall be made in the form of the complaint and warrant and the consent or approval of the county attorney shall not be necessary on the warrant. The qualification of and manner of summoning jurors to serve in juvenile courts shall be the same as is now or may be prescribed by law for justice courts, and the judges of the juvenile court shall have all the powers in relation thereto of a justice of the peace. All expenses of a jury or other trial of any adult person shall be certified by the judge and paid by the county treasurer of the county wherein such trial is held. All fines, penalties, and forfeitures imposed and collected by the juvenile court shall be paid to the county treasurer of the county wherein they are collected.
'05, p. 184; '07, p. 208; '09, p. 326; '11, p. 78.

1817. (720x4.) Complaints. Proceedings in the interest of juveniles as defined in this chaper shall be commenced by a complaint or sworn statement filed with the clerk of said court, which shall in a general way state the facts or acts constituting the delinquencies complained of. Said proceedings shall be entitled: "State of Utah in the interest of ..... delinquent." '05, p. 184; '07, p. 208; Am'd '09, p. 326.

1818. (720x5.) Hearing. Upon filing such complaint, the clerk or court shall set the same for hearing; notice of said hearing shall be served by the probation officer, or sheriff or any peace officer, on the parents, parent, custodian, or legal guardian of said child residing within the state of Utah, which notice shall be substantially in the following form, to wit:

(Title of court and cause.)

To ..... (here designate relationship). You are hereby notified to appear within two days after the service of this notice upon you, if served within the county wherein the above proceeding is pending, otherwise within five days, and assert and defend any rights to custody, control, or guardianship you may have or claim over or in the above named child; otherwise your default will be entered and the court will proceed to hear and determine your said rights or supposed rights in accordance with the law and the evidence.

The return of the officer showing such service shall be conclusive.
'05, p. 185; '07, p. 209, Am'd '09, p. 327.

1819. (720x6.) Probation officer to produce delinquent. It shall be the duty of the probation officer or an assistant to produce the alleged delinquent before the court at the time fixed for hearing, and to this end a warrant or other process shall not be necessary. '05, p. 183; '07, p. 209.

1820. (720x7.) Equity jurisdiction. Procedure. In all matters relating to the delinquency of children and their disposition, the court shall be regarded as exercising equity jurisdiction. The court shall first inquire into the alleged delinquency, and to this end may adopt any form of procedure which is deemed best suited to ascertain the truth in the particular case. Such juvenile may be compelled to testify to the alleged delinquency. The court may hear evidence in the absence of the said juvenile, and the court may compel the probation officer or any other person to testify respecting any facts or information ascertained as the result of an investigation of the matter. If the court determines that the juvenile is not delinquent within the meaning of this chapter, the juvenile shall be discharged, and the proceedings dismissed. If the court finds that said juvenile is delinquent, then the court shall find from the evidence introduced in such matter, as to the

fitness or unfitness of the parents or other person having the custody of such juvenile, to continue to hold such custody, and shall render its judgment accordingly. '05, p. 184; '07, p. 209; Am'd '09, p. 327.

Power of courts to devise forms and process, §§ 1790, 1813.

1821. (720x8.) Hearing may be continued. The court may, at any stage of the proceeding, continue the hearing from time to time, and during any such continuance may provide for probationary supervision over the child, or may order such other disposition of the delinquent as may seem proper, having due regard to the rights of the parents; *provided,* that on resuming such hearing any person who appeared and asserted any rights in the delinquent at the first hearing shall be entitled to notice of the time and place of such resumed hearing, unless such notice has been waived in writing or in open court. Said notice shall conform substantially to the original notice. '05, p. 184; '07, p. 209.

1822. (720x9.) Finding of facts. At the conclusion of the hearing, if the juvenile is adjudged to be delinquent, the court shall enter in writing, briefly and concisely, the facts found by him, stating separately and distinctly the facts constituting delinquency and the facts relating to the fitness of the parents, parent, custodian, or guardian, which findings, with the judgment rendered thereon, shall be filed with the clerk. '07, p. 210.

1823. (720x10.) Decree and judgment. Upon the entry of such finding of fact, the court shall render a decree and judgment that the juvenile is a delinquent, and that the parents, parent, custodian, or guardian is or are fit or unfit to continue in control and custody of the juvenile in accordance with the fact. In case judgment is rendered that the parents, parent, custodian, or guardian is or are fit to have control or custody of the juvenile, the court may commit the child to the care of the probation officer, allowing it to remain in its own home subject to the visitation of the probation officer, such child to report to the court or probation officer as often as may be required, and subject to be returned to the court for further proceedings whenever such action may appear necessary. In case it is adjudged and decreed that the parents, parent, custodian, or guardian is or are unfit to have control and custody of the juvenile, the court may further adjudge and decree as follows:

1. That the juvenile be committed to its own home under the care, control, and visitations of a juvenile officer;
2. That the juvenile be committed to any suitable family home open to the court for that purpose, subject to the care, control, and visitation of a probation officer;
3. That the juvenile be committed to any institution within the state incorporated or organized for care, correction, or advancement of children;
4. That the juvenile be committed to any institution that may be provided by the state or county for the care, correction, or advancement of children;
5. That the juvenile be committed to the state industrial school;
6. That the juvenile may be fined in any sum not exceeding $25;
7. That the juvenile be disposed of in any other way, except to commit it to jail or prison, that may, in the discretion and judgment of the court, under all the circumstances, be for the best interest of the child, to the end that its wayward tendencies shall be corrected and the child be saved to useful citizenship.

No judgment or decree so entered shall operate after the child reaches the age of twenty-one years.

All orders, judgments, and decrees so made and entered by the court shall be under its control, and may be modified, amended, or recalled at any time until the child reaches the age of twenty-one years. Am'd '09, p. 327.

Disposition of dependent neglected children, § 1836.

Detention schools, §§ 1853-1859.
Where children to be confined, §§ 1844, 1854.

1824. (720x12.) Appeal. An appeal may be taken from any final judg-

ment or decree of said court depriving any parent, custodian, or guardian of the custody by the parent, custodian, or guardian of said juvenile, to the supreme court of the state of Utah in the same manner and with the same effect as is now or may be provided by law for taking appeals from judgments or decrees of the district courts. Appeals from final judgment or decree in all cases of misdemeanors of adults in contributing to the dependency, neglect, or delinquency of any juvenile may be taken to the district court in and for the county in which the juvenile court is held, in the same manner and with the same effect as is now or may be provided by law for taking appeals from justice courts. '07, p. 211; '09, p. 328.

Appeals from district courts, Con. art. 8, sec. 9; §§ 6990-7013.

1825. Chief probation officer. Assistants. Term. Ex officio officers. In each judicial district of the state there shall be appointed by the juvenile court commission one discreet person of good moral character, who shall be known as the chief probation officer, and as many assistants as may be necessary, who shall serve during the pleasure of the commission; *provided,* that said chief probation officer shall also, at the request of the judge of the juvenile court, act as clerk of said court; and said chief probation officer and the judge of the juvenile court shall recommend persons to the commission for such appointments as assistant probation officers. The trustees, superintendent, and assistant superintendent of the state industrial school shall be ex officio probation officers to serve without compensation.

'03, p. 173; '05, p. 183; '07, p. 211; Am'd '09, p. 329.

Probation officer to take delinquent without a warrant, §§ 1820, 1835. Warrant for dependent neglected children, § 1841.

1826. Id. Cities may appoint deputy probation officers. Compensation. In addition to the chief probation officer herein provided for, each city of the state, upon recommendation of the juvenile court judge, may appoint one or more deputy probation officers, who may be paid a sum not to exceed $4 per day while actually on duty, to be paid from the general funds of the city; *provided,* that the judge of the juvenile court may appoint as probation officers such other discreet persons of good moral character who are willing to serve without compensation.

1827. (720x16.) Duties of probation officers. The duties of probation officers shall be:

1. To investigate all cases of alleged delinquency coming to their knowledge or in any way brought to their attention within the district for which they are appointed;

2. To make complaint before the court of any case of neglect, dependency, or delinquency coming to their knowledge;

3. To bring before the court at the time fixed for the hearing any juvenile charged with delinquency or any offense;

4. To execute, serve, and return all process and notices directed or delivered to them by the judge of the juvenile court, and carry out the orders of the court;

5. To make an investigation of every case pending before the court, and to report to the court whenever required the result of such investigation;

6. To be present in court to represent the interest of the child when the case is heard;

7. To furnish the court information and assistance whenever required, and to take charge of any child both before and after hearing, as may be directed by the court; and the court may direct a probation officer or other peace officer to convey said juvenile to the industrial school or other institution to which said juvenile may have been committed. The expense of conveying the boy or girl so committted to such institution by said court shall be paid by the county from which such child shall have been committed, and the expense of returning him or her to his or her parents or guardian after being released therefrom shall be paid by the state;

8. To exercise a friendly supervision and visitation over the child in accordance with the direction of the court;

9. To act for the state in the filing of complaint and conducting proceedings against persons guilty of contributing to the delinquency, neglect, or dependency of children; *provided, however,* that at the request of the judge of the juvenile court, the county attorney of the county or city attorney of any city wherein such case is pending shall conduct such proceedings against said persons. '03, p. 173; '05, p. 183; '07, p. 212.

To take delinquent without a warrant, §§ 1820, 1835.

Any peace officer may take without a warrant certain boys and girls, § 1835.
Employment of children, § 1864.

1828. (720x17.) Reports. On or before the 15th day of each month, the juvenile judge and chief probation officer of each district shall submit to the secretary of the juvenile court a report in writing showing the number of and disposition of delinquent children brought before the court during the month, and such report shall contain such other useful information regarding such cases as may by them be deemed important or of value, including the facts in connection with the parentage of such children; and on or before the 31st day of December of each year, or oftener if so requested, said secretary shall furnish to said juvenile court commission a report showing the above facts, together with any other information he may deem proper.

'03, p. 173; '05, p. 183; '07, p. 212.

1829. (720x18.) Construction. "Delinquent child" defined. The provisions of the juvenile court chapter shall apply only to children eighteen years of age or under, not inmates of a state institution or any institution incorporated under the laws of the state for the care and correction of delinquent children; *provided,* that the provisions of this chapter shall not apply to any former inmate of the state industrial school who shall have been returned to the county from which said former inmate was committed, as provided under the provisions of § 5379.

"Delinquent child" shall include any child eighteen years of age or under such age, who violates any law of this state, or any city or town ordinance, or who commits an offense not punishable by death or imprisonment for life, or who is incorrigible; or who knowingly associates with thieves, vicious, or immoral persons, or who is growing up in idleness or crime; or who knowingly visits or enters a house of ill repute; or who knowingly patronizes or visits any policy shop or place where pools are sold, or place where any gambling device is or shall be operated; or who patronizes or visits any saloon, dram shop or other place where intoxicating liquors are sold or dispensed; or who patronizes or visits any public pool or billiard room or bucket shop, or who is found in or upon any of the streets, alleys, or public places in the state of Utah, between the hours of 9 p. m. and 4 a. m., unless accompanied by a parent or guardian; or who habitually wanders about any railroad tracks; or jumps on or attempts to board any moving train; or enters any car or engine without lawful authority; or is guilty of defacing or of writing on any wall, fence, or building or any public or private place, any vile, obscene, vulgar, profane, or indecent language, or drawing any obscene or vulgar picture or pictures; or is guilty of any immoral conduct in any public or private place or about any school house. Any child committing any of the acts herein mentioned shall be deemed a juvenile delinquent person, and shall be proceeded against as such in the manner provided in this chapter. A disposition of any child under this chapter, or any evidence in such cause, shall not, in any civil, criminal or other cause or proceedings whatever in any court, be lawful or proper evidence against such child for any purpose whatever excepting in subsequent cases against the same child under this chapter. The word child or children may mean one or more children, and the word parent or parents may mean one or both parents when consistent with the intent of this chapter.

'05, p. 185; '07, p. 213; am'd '11, p. 79.

The law relating to juvenile delinquents is not suspended when the delinquent marries.

Stoker v. Gowans, 45 U. 556; 147 P. 911.

1830. (720x20.) Court sittings. The court shall sit at such time and place as shall be determined by the judge, provided that any judge of the juvenile court may hold court in any other district at the request of the juvenile judge of said district; and upon the request of the juvenile court commission it shall be his duty to do so; and in either case the judge holding the court shall have the same power as the judge thereof. '05, p. 187; '07, p. 214.

1831. (720x21.) Process. The laws governing justice courts relative to the service of process, subpœnaing, and paying witnesses and other costs connected therewith are hereby made applicable upon the same subject in the juvenile courts, where not otherwise provided for in this chapter. '05, p. 187; '07, p. 214.

Issuance and service of process from city court, §§ 1720, 1721.
Fees of witnesses, city courts, § 1723.
Process from municipal courts, § 1774.

1832. (720x22.) Construction of provisions of this chapter. The provisions of this chapter shall be construed in accordance with the provisions of § 7892, to wit: That the care and custody and discipline of the child shall approximate as nearly as may be that which should be given by its parents, and that as far as practicable any delinquent child shall be treated, not as a criminal, but as misdirected and misguided, and needing aid, encouragement, help, and assistance. '05, p. 187; '07, p. 214.

1833. Not to bar actions pending. Nothing in this chapter contained shall be construed to affect any act heretofore done or prosecution begun or pending in any court in this state. '13, p. 81.

CHAPTER 10.

DEPENDENT NEGLECTED CHILDREN.

1834. (720x23.) Children's aid society. Meaning of terms. For the purposes of this chapter, "children's aid society" shall mean any duly organized society incorporated under the laws of the state of Utah, and having among its objects the protection of children from cruelty, and the care and control of neglected and dependent children, and such articles of incorporation as may be granted for the purpose of carrying out the provisions of this chapter must specifically provide that any abuse of the rights granted under the provisions of this chapter shall subject such corporation to an action by the attorney-general, under the provisions of §§ 7354-7371.

"Institutions" shall mean any building, or buildings, public or private, under the control of a competent board of managers, and used as a home or place of detention, correction, or punishment for delinquent or dependent children.

"Court of summary jurisdiction" shall mean and include any municipal court, city court, or district judge, except in such counties where a certain branch of court has been designated by law as the court in which all juvenile causes shall be heard.

"Municipality" shall mean any city or town.

"Parent," when used in relation to a child, shall include guardian and every person who is by law liable to maintain a child.

"Place of safety" shall include any industrial school, or reform school for boys or girls, or any shelter or temporary home established by any children's aid society, orphan's home, or other institution for the protection of children, duly incorporated under the laws of the state of Utah, for the purposes of this chapter.

"Street" shall include any highway or public place, whether a thoroughfare or not. '03, p. 170.

"Delinquent child" defined, § 1829.

1835. (720x24.) Who may be apprehended. Any probation officer, constable, sheriff, police, or other peace officer may apprehend without warrant,

and bring, before any court of summary jurisdiction as neglected, any child, apparently under the age of fourteen, if a boy; of sixteen, if a girl, who comes with one of the following descriptions, namely:

1. Who is dependent upon the public for support, or is found begging or receiving alms, or thieving in any street, thoroughfare, tavern, place of public resort, or elsewhere, or sleeping at night in the open air;

2. Who is found wandering about at a late hour at night, and not having any home or settled place of abode or proper guardianship; or a child whose only surviving parent or guardian is an habitual drunkard, or a person of notorious and scandalous conduct, or a reputed thief or prostitute, or an habitual idler;

3. Who is found associating or dwelling with a thief, drunkard, or vagabond, or other dissolute or degraded person; or who by reason of neglect or drunkenness or other vices of its parent or guardians is suffered to be growing up without salutary parental control and education, or in circumstances exposing the child to an idle or dissolute life;

4. Who is found in or frequenting any saloon or place where intoxicating drink is sold, or is found in or frequenting any house of ill-fame, either with or without the parent or guardian, or in company with a reputed prostitute;

5. Who is found in the custody of vicious, corrupt, or immoral people, or surrounded by vicious, corrupt, or immoral influences;

6. Who is found destitute, being an orphan or deserted by its parents, or having a single surviving parent who is undergoing imprisonment for a crime;

7. Who fails to receive proper care and training because its parents, or parent are insane, having been adjudged so by a proper authority;

8. Or, a child who is in the custody of either a drunken, vicious, or dissolute father or mother. '03, p. 171; am'd '09, p. 331.

Probation officer to take delinquent without a warrant, § 1820.

General duties of probation officers, § 1827.

1836. (720x25.) Disposition of children. Any child apprehended under the next preceding section may be turned over by the apprehending officer to any children's aid society which will receive it without compensation from the public treasury and will become responsible for the safe keeping of the child until such time as the child's case can be brought into court for hearing; and the said society shall, for the time being, be considered to have legal custody of the child, and to be for this purpose, but for this purpose only, an officer of the court; for examination within three days after such apprehension; and it shall thereupon be the duty of the court to investigate and ascertain whether such child is dependent and neglected, as described in the next preceding section; its age, and the name and residence of its parents; and the said court shall have the power to compel the attendance of witnesses, and may, at his discretion, request the attendance of the county attorney for such examination, and if requested, it shall be the duty of the county attorney to attend accordingly. The parents, if their whereabouts is known, or persons having actual custody of such child, shall be duly notified of such examination not less than two days before the day set for such examination; and any friend may appear in behalf of any child, and at the discretion of the court any duly authorized representative of any children's aid society or institution may be asked to appear in behalf of any child; and if on such examination the court finds that any child is dependent or neglected, within the meaning of the next preceding section, or so as to be in a state of habitual vagrancy, or ill treated, so as to be in peril of life, health, or morals, by continued personal injury or misconduct on the part of parents or guardians, he shall enter such findings by proper order to that effect, and shall deliver such child to such children's aid society or institution as in his judgment is best suited to deal with said child, or order it to any suitable family home open to the court for the purpose, subject to the care, control,

and visitation of a probation officer. And the finding of said court may further specify that the said children's aid society shall become and remain legal guardian of the child during the minority of such child, and as guardian said society shall, subject to the order of the court, report to the court from time to time. The court shall deliver to such children's aid society or institution a certified copy of the order made in the case, which shall contain, besides the finding, a statement of facts, so far as ascertained, as to the age of such child, name, nationality, and residence, other members of the family and occupation of parents or either of them, whether either of them is dead or has abandoned the child; and in case two or more from the same family at the same time are under examination, a separate copy of such finding shall be given for each child. Parents who have been deprived of their child, under the provisions of this chapter, may petition the board of managers of the society to which it has been committed, asking that the child be returned to them, on the grounds that they have reformed, or are in a condition to properly care for their child, and if the board, after a careful investigation of the facts, deems it for the best interests of the child, it may be returned to its parents, and the board shall file, with the clerk of the court in which the original proceedings were held, a copy of the resolutions of the board, and, when so filed, the guardianship of the society shall terminate, and the parents resume their natural relationship to such child. '03, p. 172; Am'd '09, p. 331.

1837. (720x26.) Legal guardian. Regulations. Any children's aid society or institution, to the care of which any child may be committed under the provisions of this chapter, shall, subject to § 1839, be the legal guardian of such child, and all the powers and rights of the parents in respect of that child shall vest in said society or institution; and it shall be the duty of said children's aid society or institution to use special diligence in providing suitable homes for such children as may in this way be committed to their care, and such society or institution is hereby authorized to secure for such children legal adoption in such families as may be approved by the said society or institution, or a written contract providing for their education in the public school where they may reside, for teaching them some occupation, and for kind and proper treatment, as members of the family where placed, and for payment to them on the termination of such contract, any sum of money that may be provided for in the said instrument. Such contract shall cover the entire period of said child's legal minority, or such a portion of it as may be stipulated in the contract, and such contract shall contain a clause, reserving the right to withdraw the child from any person having the custody of such child when, in the opinion of the children's aid society or institution placing out such child, the welfare of the child requires it. '03, p. 173.

1838. (720x27.) Custody forfeited. No parent or guardian or other person, who, by instrument of writing, surrenders or has surrendered heretofore, the custody of a child to any children's aid society or institution, shall thereafter, contrary to the terms of such instruments, be entitled to the custody or control or authority over, or any right to interfere with, any such child, and these same conditions shall prevail where the child is or has been delivered to the children's aid society or institution by the action of any proper court. '03, p. 173.

Under this section a parent may, in this state, in pursuance of an instrument in writing, duly executed, surrender and forfeit his right to the custody of his infant child. Stanford v. Gray et al., 42 U. 228; 129 P. 423.

1839. (720x28.) What trustees may do. Notwithstanding the provisions of any by-laws, rules or regulations for the government or control of any institution, it shall be lawful for the trustees or governing body of such institution, and for the several boards of county commissioners, to take advantage of § 1837 by transferring, from time to time, children under their care, to any children's aid society duly organized and chartered by the state, to be placed by said children's aid society in pursuance of this chapter; in such cases all legal claims to said children are transferred to said children's aid

society, and the child is to be placed out and supervised as any other children belonging to said children's aid society. '03, p. 174.

1840. (720x29.) Abuse of children, penalty. Any person over eighteen years of age, who, having the care, custody, control, or charge of a child under eighteen, wilfully ill-treats, neglects, abandons, or exposes such child, or causes or procures such child to be ill-treated, neglected, abandoned, or exposed in any manner likely to cause such child unnecessary suffering or serious injury to its health or morals, shall be guilty of an offense under this chapter, and, on conviction thereof, shall be liable, at the discretion of the court, to a fine not exceeding $100, or to imprisonment for a term not exceeding three months, or to both such fine and imprisonment. '03, p. 174; Am'd '09, p. 331.

1841. (720x30.) Warrant to issue for offenders. If it appears to any court of summary jurisdiction, as defined herein, or any court that may especially be designated by law to consider juvenile cases, on motion made before such court, under oath, by any person who, in the opinion of the court, is bona fide acting in the interest of any child, that there is reasonable cause to suspect that such child under eighteen years has been or is being ill-treated or neglected, in any place within the jurisdiction of such court, in manner likely to cause the child unnecessary suffering, or to be injurious to its health or morals, such court or judge having jurisdiction over juvenile cases may issue a warrant, authorizing any probation officer or other peace officer named therein to search for the child, and to take it, and detain it in a place of safety until it can be brought before the proper court; and the court before whom the child is brought may cause it to be dealt with in a manner provided for by § 1837. The court or judge issuing such warrant may, by the same warrant, cause any person accused of an offense in respect of the child to be apprehended and brought before the proper court, and proceedings to be taken to punish such person according to § 1840. Any person, authorized by warrant under this section to search for any child and to take it and detain it in a place of safety, may enter, if need be, by force, any house, building, or other place specified in the warrant, and may remove the child therefrom. '03, p. 174; Am'd '09, p. 331.

Taking child without a warrant, §§ 1819, 1835.

1842. (720x31.) Inducing children to leave. Penalty. It shall be unlawful for any person to induce any child to leave the building, or the premises, or custody or control of any children's aid society, or of any duly incorporated boys' or girls' home or ophanage, or children's or infants' home, or to induce or attempt to induce a child to leave or quit any service or apprenticeship, or any place in which or where the child has been or may be lawfully placed, for the purpose of being nursed, supported, educated, or adopted, or to induce or attempt to induce any child to break any article of apprenticeship or agreement lawfully entered into by or with the authority of the trustees or governing body of any such home, children's aid society, or asylum, respecting any such child, or to detain or harbor any such child, after demand made by or on behalf of any officer of any such institution for delivery of such child. Any person who violates the provisions of this section shall be liable, upon conviction before any court of competent jurisdiction, to a fine not exceeding $20 and costs, and, in default of payment thereof, to imprisonment not exceeding thirty days. '03, p. 175.

Adult delinquency, §§ 1848-1852. Employment of children, §§ 1860-1873.

1843. (720x32.) Provision for support. Any board of county commissioners shall, upon the application of any incorporated children's aid society or institution to whose custody and control a child has been committed by any court of summary jurisdiction, make an order for the payment out of the treasury of the county to which the child belongs, of a reasonable sum, not to exceed 50 cents per day for the actual number of days the said children's aid society or institution is actually providing for said child; and said sum per day shall be considered to cover all expenses incurred on the

part of the said children's aid society or institution in temporarily caring for said child, finding a home for it, and subsequent supervision of it, the county being exempt from all further responsibility and expense of said child until it is of legal age. When any child has resided in a county outside of any city of the first or the second class, then the board of county commissioners of said county may, under the circumstances above set forth, make an order for the payment out of the county treasury to such children's aid society of a sum not to exceed 50 cents per day, as above provided in the case of cities of the first class and the second class. Any child shall be deemed to belong to the county in which said child has last resided for the period of one year, but, in the absence of evidence to the contrary, residence for one year in the county from which the child was taken into custody shall be presumed. '03, p. 175; Am'd '09, p. 331.

Detention school, §§ 1853-1859.

1844. (720x33.) Where children to be confined. In any and every incorporated municipality, children under the age of sixteen years, who are brought before any court of summary jurisdiction for examination, under any of the provisions of this chapter, shall not, before trial or examination, be confined in the jails, lock-ups, or police cells, used for ordinary criminals or persons charged with crime, nor, save as hereinafter mentioned, shall children be tried or have their cases disposed of in the police court ordinarily used as such. It shall be the duty of such municipalities to make separate provisions for the custody and detention of such children prior to their trial or examination, whether by arrangement with some member of the police force or other person or society who may be willing to undertake the responsibility of such temporary custody or detention on such terms as may be agreed upon, or by providing suitable premises entirely distinct and separate from the ordinary jails, lock-ups, or police cells; and it shall be the duty of the court to try all such children, or examine into their cases, and dispose of them, where practicable, in premises other than the ordinary police court premises, or, where this is not practicable, in a private office of the court, if he have one, or in some other room in the building; if this be not practicable, then in the ordinary police court room, but only in such last mentioned case when an interval of two hours shall have elapsed after the criminal trials or other examinations for the day have been disposed of. The court may exclude from the room or place where any child under sixteen years of age is being tried, or having its case examined, or any parent charged with an offense in respect to a child under this chapter, or otherwise with neglect or cruelty to his child, is being tried or examined, all persons other than the counsel and witnesses in the case, officers of the law or of any children's aid society or institution, and the relatives of the child or parent. '03, p. 176.

Detention school, §§ 1853-1859. Where children to be confined, § 1823.

1845. (720x34.) Child presumed under age, when. When a person is charged with an offense under this chapter in respect to a child who is alleged to be under any specific age, and the child appears to the court to be under that age, such child shall, for the purposes of this chapter, be deemed to be under that age, unless the contrary is proven. '03, p. 176.

1846. (720x35.) Record to be kept. All children's aid societies and institutions shall keep a complete record of such children, so far as can be obtained, giving the name, nationality, whole number of children in the family, name of mother, when and where the parents were married, time and place of child's birth; also, whether either or both are living, and if so, where; also, whether or not the parents are divorced, and if so, when and where, and who was given the custody of this child. '03, p. 176.

1847. (720x36.) Inspection and visitation. Statement. All societies or associations receiving children under the provisions of this chapter shall be subject to visitation, inspection, and supervision by the board of county commissioners of the county in which they conduct their institution. The courts hereinbefore mentioned may require such information and statistics from as-

sociations, or children's aid societies or institutions, as desire to have children committed to their care, under the provisions of this chapter, as said judges deem necessary in order to enable them to exercise a wise discretion in dealing with children. Every such association shall file with the county commissioners of each county from which they have received children during the year, an annual written report, which shall include a statement of the number of children cared for during the year, the number received, the number placed in homes, the number who have died, the number returned to friends; also, a financial statement, showing the receipts and disbursements of the association. The statements of receipts shall indicate the amount received from public funds, the amount received from donations, and the amounts received from other sources. The statement of disbursements shall show the amount expended for salaries and other expenses, specifying the same; the amount expended for lands, buildings, and investments. '03, p. 176.

CHAPTER 11.

ADULT DELINQUENCY.

1848. (720x37.) Aiding dependency or delinquency. Penalty. Any person over eighteen years of age who, by any act, words, or conduct, or by the omission to do something required by law to be done, aids, abets, encourages, contributes to, or becomes responsible for the dependency, neglect, or delinquency of any juvenile, so defined by the laws of this state, shall be deemed guilty of a misdemeanor, and the juvenile court shall have jurisdiction to administer such penalty or punishment as is or may be prescribed by law for misdemeanors. '07, p. 247; am'd '11, p. 77.

Inducing children to leave, § 1842.

1849. (720x38.) Court may suspend sentence. Bond. The court may suspend any sentence hereunder, or release any person sentenced under this chapter from custody upon condition that such person shall furnish a good and sufficient undertaking to the state of Utah, to be approved by the judge of the juvenile court, or, where there is no such court, by the district judge, in such penal sum not exceeding $250 as the court shall fix, conditioned for the payment of such sum as the court may order, not exceeding $10 per month for each child for whose delinquency, neglect, or dependency said person is adjudged responsible as aforesaid, for the support, care, and maintenance of such child while under the guardianship or in custody of any individual or any public or private home, building, or institution, to which the child may have been committed under the provisions of the laws of the state concerning dependent, neglected, or delinquent children. '07, p. 247.

1850. (720x39.) Id. Without bond. The court may also suspend any sentence imposed under this chapter, without bond, and may permit any dependent, neglected, or delinquent child to remain in the custody of such person found guilty hereunder, upon conditions to be prescribed or imposed by the court as seem most calculated to remove the cause of such dependency, neglect, or delinquency, and while such conditions are accepted and complied with by any such person, such sentence may remain suspended, and such person shall be considered on probation in said court. '07, p. 247.

1851. (720x40.) Failure to comply with conditions of bond, or conditions imposed by the court. Upon the failure of such person to comply with the terms and conditions of such bond, or of the conditions imposed by the court, such bond or the terms of probation may be declared forfeited and terminated by the court, and the original sentence executed as though it had never been suspended, and the term of any jail sentence imposed in any such case shall commence from the date of the incarceration of any such person after the forfeiture of such bond or term of probation. There shall be deducted from any

such period of incarceration any part of such sentence which may have already been served. '07, p. 247.

1852. (720x41.) Nature of undertaking. The undertaking herein provided for must be in writing and must be executed on the part of the defendant with at least two sureties to the effect that the defendant will pay the fine imposed upon him by the court or in lieu thereof the monthly charge ordered by the court to be paid by him, or that he will comply with such other terms and conditions as have been imposed upon him by the court. Said undertaking shall further provide that, if the said defendant does not make such payments at the time specified, or does not comply with said terms and conditions, judgment may be entered on motion in favor of the state of Utah and against the sureties for the amount of the fine, or of the payments due from the said defendant, or in case of his failure to comply with certain other terms and conditions specified in the bond, for the amount of the bond. '07, p. 248.

CHAPTER 12.

DETENTION SCHOOL.

1853. (720x42.) Establishment. Appointment of superintendent. Upon recommendation of the juvenile court commission, the board of county commissioners of each county shall establish and maintain in counties containing cities of the first or the second class, and may in all other counties, detention homes, one for boys and one for girls, not connected with any jail, which shall be in charge of a superintendent to be appointed by the county commissioners upon recommendation from the juvenile court having jurisdiction in the county where said homes shall be established. It shall be the duty of the county commissioners to approve or disapprove the recommendation within twenty days after the submission thereof; such recommendation shall be considered approved and the superintendent elected in case the county commissioners shall fail within said time to take any action thereon. There shall be provided instruction in branches of education similar to those of public schools of the city and county up to and including the eighth grade, and in addition thereto manual training and arts for boys and domestic science and arts for girls. Such detention homes shall be supplied with all necessary teachers, help, and convenient facilities for the care of inmates thereof; *provided,* that in lieu of teaching said branches of education at the said detention homes, the superintendents thereof, by and with the consent of the juvenile court commission, may make the necessary arrangements with the proper school board and send the inmates of said detention homes to the nearest or most convenient public schools. The employes of said detention homes shall be appointed in like manner as the superintendent. '07, p. 219; am'd '09, p. 233; '11, p. 76.

This section as amended does not interfere with the taxing power of cities nor permit their funds to be disbursed by irresponsible officials. Salt Lake County v. Salt Lake City, 42 U. 548; 134 P. 560.

1854. (720x43.) Counties having no detention home may send delinquents to another county. In any case where it becomes necessary for any juvenile court to order a delinquent child not residing in a county wherein there is established a detention home as herein provided, to a detention home in another county, the county commissioners of the county maintaining said home may charge the county from which such delinquent child is sent a reasonable sum not to exceed 50 cents per day for the support and maintenance of such child. '07, p. 219; am'd '09, p. 234.

Where children to be confined, §§ 1823, 1844.

1855. (720x44.) Record. Salaries. The superintendent shall keep a record of such children and such other information as may be required by

the juvenile court or the county commissioners. The salary of the superintendent shall be fixed by the county commissioners, but shall not exceed $1200 per year. The salaries of other employes shall be fixed by the county commissioners. '07, p. 220.

1856. (720x45.) Duty of board of education and district school board. When any child is sent to the detention school by order of the juvenile court, the board of education, if the child resides in a city, and the district school board, if the child resides in the county outside the boundaries of any city board of education's jurisdiction, shall provide such child with the proper school books and supplies, in the same manner as if the child was attending the regular school. Such child shall be permitted to take such books and supplies with him to the detention school, and return said books and supplies to the school he attended when his period of detention shall terminate. While the child is in the detention school, this school shall be held responsible for the books and supplies. '07, p. 220.

1857. (720x46.) Building to be provided. Within thirty days after March 25, 1907, the county commissioners may secure by rental or purchase a building which shall be known as the detention school, or any other name which may designate the home as a school. The building shall be so arranged, furnished, and conducted that, as near as practicable for their safe custody, the inmates shall be cared for as in a family home and public school. '07, p. 220.

1858. (720x47.) Recovery of cost of care. The county establishing and maintaining such detention school shall be entitled to recover from the cities of the first and of the second class situated in said county such sum for the care, support, and maintenance of such child as may be reasonable therefor, and in no case shall such sum be less than the per capita monthly or yearly amount of such expense in the detention school in which the child is committed, or the actual expense incurred by the county for the care and maintenance of such child. Said amounts paid by the cities of the first and of the second class for the care and maintenance of children from these cities sent to the detention school shall be paid monthly. '07, p. 220.

Support of delinquent children, § 1843.

1859. (720x48.) Funds set aside. The county commissioners of each county establishing a detention school shall set aside an amount from the general fund of the county, to be known as the detention school fund. All money collected from the cities of the first and of the second class and from parents or guardians, for the care and maintenance of children in the detention school, shall be placed to the credit of this special fund. The expenses of any child cared for in the detention school, residing in cities of the first and of the second class shall be paid out of the general fund of the city treasury, in the same manner as provided for the payment of general city expenses. '07, p. 220.

A reasonable sum for the support and maintenance of delinquent children of a city may be recovered by a county from such city.

Salt Lake County v. Salt Lake City, 42 U. 548; 134 P. 560.

CHAPTER 13.

EMPLOYMENT OF CHILDREN.

('11, p. 289.)

1860. Certain employments prohibited. Age limit. No child under the age of sixteen years shall be employed, permitted, or suffered to work in any capacity in, about, or in connection with the preparing of any composition in which dangerous or poisonous acids are used—manufacture of paints, colors, or white lead; manufacturing, packing, or storing powder,

dynamite, nitroglycerine compounds, fuses, or other explosives; manufacture of goods for immoral purposes; or in any quarry, any mine, coal breaker, laundry, tobacco warehouse, cigar factory, or other factory where tobacco is manufactured or prepared, cigar store or stand or in any cigar or tobacco store; distillery, brewery, or any other establishment where malt or alcoholic liquors are manufactured, packed, wrapped, or bottled; theater, concert hall, saloon, or pool room, or in operating any automobile, motor car or truck; in the running or management of elevators, lifts, or hoisting machines; or in bowling alleys, or in any other employment declared by the state board of health to be dangerous to lives or limbs, or injurious to the health or morals of children under the age of sixteen.

Am'd '15, p. 68; '17, p. 242.

Juvenile courts jurisdiction, § 1814.

1861. Employment certificate. An employment certificate shall be issued only by the superintendent of schools or by a person authorized by him in writing, or, where there is no superintendent of schools, by a person authorized by the school board; *provided,* that no member of a school board or other person authorized as aforesaid shall have the authority to issue such certificate for any child then in or about to enter such person's own employment or the employment of a firm or corporation of which he is a member, officer, or employe; *provided,* that no such certificate shall be issued until the person issuing the same shall have received, examined, and approved the school record of such child.

1862. Id. No employment certificate shall be issued until the child in question has personally appeared before and been examined by the officer issuing the certificate, nor until such officer, after making such examination, has signed and filed in his office a statement that the child can read and legibly write simple sentences in the English language.

1863. School record. The school record required by this chapter shall be signed by the principal or chief executive officer of the school which such child has attended, and shall be furnished on demand to a child entitled thereto. It shall contain a statement certifying that the child has attended the public schools or parochial schools equivalent thereto for not less than one hundred days during the year previous to his arriving at the age of fourteen years, or during the year previous to applying for such school record, and is able to read and write simple sentences in the English language.

1864. Duties and powers of inspectors or truant officers. Any authorized inspector or the truant officer shall make demand on any employer in or about whose place or establishment a child apparently under the age of fourteen years is employed or permitted or suffered to work, and require such employer to furnish him within ten days satisfactory evidence that such child is in fact over fourteen years of age, or shall cease to employ or permit or suffer such child to work in such factory.

Truant officers, §§ 4648, 4729.

1865. Employment of females prohibited in certain cases. No female under the age of twenty-one years shall be employed, permitted, or suffered to work in, about, or in connection with any restaurant, resort, or place of amusement where alcoholic liquors are manufactured or dispensed.

Intoxicating liquor prohibition act, §§ 3341-3375.

1866. Messenger service. In cities of the first or the second class no person under the age of twenty-one years shall be employed or permitted to work as a messenger for a telegraph or a messenger company in the distribution, transmission, or delivery of goods or messages before five o'clock in the morning or after nine o'clock in the evening of the day. And no person under the age of twenty-one years shall be permitted to deliver messages or goods to, or required to visit, in the course of any employment, any house of ill-repute, or saloon, or gambling house, or other places of objectionable character which have been disapproved by the juvenile court,

1867. Hours of labor. Exceptions. No boy under the age of fourteen years and no girl under the age of sixteen years shall be employed, permitted, or suffered to work at any gainful occupation other than domestic service, fruit or vegetable packing, or work on a farm more than eight hours in any one day nor more than forty-eight hours in any one week.

Am'd '17, p. 242.

1868. Selling newspapers, etc. Bootblacks. No male child under twelve and no girl under sixteen years of age shall, in any city of the first or the second class, sell or expose or offer for sale newspapers, magazines, periodicals, or other merchandise in any street or public place. No child shall work as a bootblack in any street or public place unless he is over twelve years of age.

1869. Id. Exceptions. Permit. No male child under sixteen years of age shall sell or expose or offer for sale in any street or public place any of the articles mentioned in § 1868 or work as a bootblack therein, unless a permit as hereinafter provided shall have been issued to him by the superintendent of schools or by a person authorized by him in writing, or, where there is no superintendent of schools, by a person authorized by the school board on the application of the parent, guardian, or other person having the custody of the child desiring such permit, or, in case said child has no parent, guardian, or custodian, then on the application of his next friend, being an adult. Such permit shall not be issued until the officer issuing the same shall have received, examined, approved, and placed on file in his office satisfactory proof that such male child is of the age of twelve years or upwards, and shall also have received, examined, and placed on file the written statement of the principal or chief executive officer of the school which the child is attending, stating that such child is an attendant at such school, that he is of the normal development of a child of his age and physically fit for such employment, and that said principal or chief executive officer approves the granting of a permit to such child.

1870. Permit. Such permit shall state the name and address of its parent, guardian, custodian, or next friend, as the case may be, and shall describe the color of the hair and eyes, the height and weight, and any distinguishing facial mark of such child.

1871. Id. No child to whom a permit is issued as provided for in § 1869 shall work as a bootblack, sell or expose or offer for sale any newspapers, magazines, periodicals, or other merchandise in any street or public place after nine o'clock in the evening.

1872. Id. In case any employer shall fail to produce and deliver to an authorized inspector or truant officer, within ten days after demand made pursuant to § 1861, the evidence of age therein required, and shall thereafter continue to employ such child, or permit or suffer such child to work in such place or establishment, proof of the giving of such notice and of such failure to produce and file such evidence shall be prima facie evidence of the illegal employment of such child in any prosecution brought therefor.

1873. Penalty. Whoever employs any child and whoever, having under his control as a parent, guardian, or otherwise, any child, permits or suffers such child to be employed or to work in violation of any of the provisions of this chapter, shall for such offense be fined not less than $25 nor more than $200, or be imprisoned for not less than ten days nor more than thirty days, or both, in the discretion of the court.

1874. Juvenile courts given jurisdiction. The juvenile court or court of like jurisdiction of the state of Utah is hereby given jurisdiction in all cases arising under this chapter.

Juvenile courts, §§ 1814-1833.

TITLE 22.

COURT STENOGRAPHERS.

CHAPTER 1.

DISTRICT COURT STENOGRAPHERS.

1875. (721.) District judge to employ stenographer. The judge of a district court may employ and contract with a stenographer to report the proceedings of such court, in the manner and under the limitations hereinafter provided. In districts where there are two or more judges, each judge thereof may employ and contract with a stenographer. Am'd '99, p. 111.

City court stenographer, §§ 1885-1887.

Supreme court stenographer, § 1657.

One appointed court stenographer, though for a single case only, by the judge, under chap. 72, laws 1899, is in the discharge of his duties a public officer, so that the contract of the parties to pay him more than provided by the statute for transcribing the testimony is void, as against public policy.

Dull v. Mammoth M. Co., 28 U. 467; 79 P. 1050.

A district judge has power to contract to pay a stenographer for mileage at the rate of 10 cents per mile without reference to the amount actually paid for such travel, and 1907 session laws, p. 172, chap. 123, making appropriations for payment of mileage of court stenographers, and limiting reimbursement to amount actually paid out, was not intended to apply to contracts for the payment of stenographer's mileage executed by the judge.

Davis v. Cutler et al., 34 U. 99; 95 P. 1071.

1876. (722.) Contract. Duties. Fees. Mileage. The judge of such district court may make a written contract with a competent person qualified to report stenographically the proceedings of the court. Said contract shall expressly provide that the stenographer shall attend all sittings of the court, when ordered to do so by the judge thereof, take full stenographic notes of the testimony and of all proceedings given or had thereat, except when the judge dispenses with his services in a particular cause, or with respect to a portion of the proceedings thereof; that the stenographer shall file with the clerk forthwith the original stenographic notes taken at the trial or hearing so required to be taken; that all objections made to the rulings, decisions, and opinions of the court, and the exceptions taken during the trial or hearing, shall be written out at length, or typewritten, by the stenographer and filed with the clerk forthwith after the close of the trial or hearing, if required by either party to the action; that the stenographer shall furnish upon request, with all reasonable diligence, to the defendant in a criminal cause, or a party or his attorney in a civil cause, in which he has attended the trial or hearing, a copy written out at length from his stenographic notes of the testimony and proceedings, or a part thereof, upon the trial or hearing, upon payment by the person requiring the same, of such fees as shall be provided in said contract. Such contract shall expressly provide that the compensation of such stenographer shall be at a certain rate per day, for attendance at each sitting of the court, which shall not exceed the sum of $8, and for the compensation of such stenographer for transcribing into long hand or typewriting his stenographic notes of the testimony and proceedings, or a part thereof, shall not exceed the sum of 12 cents per folio, and not to exceed 4 cents per folio for additional copies when furnished to the same party ordering the original, not exceeding two such additional copies. Such contract shall further provide that the said stenographer shall hold his employment at the pleasure of the judge of the court appointing him, or his successor, and may also provide that said stenographer shall be paid not to exceed 10 cents per mile for each mile actually traveled by him in the performance of his part of said contract; *provided,* that no mileage shall be paid where free transportation is used, and the amount of such mileage shall be certified by the court to the state auditor, who shall draw his warrant upon the state treasurer for the amount so certified, and the same shall be paid out of the state treasury. Such contract may contain such other stipulations and conditions as may be agreed upon by the said judge and the said stenographer. '99, p. 112; am'd '11, p. 282.

Fees of district court stenographer, §§ 1881, 1883, 2537.

A claim by a stenographer for mileage is a claim for compensation fixed by contract, not by law within the exception to Con. art. 7, sec. 13 and § 2482.

Davis v. Edwards, 33 U. 243, 93 P. 720.

1877. (723.) Assistant. The stenographer may, when necessary, with the consent of the court, employ an assistant, who shall receive the same compensation as the stenographer, and whose minutes, transcripts, and certificates shall have force and effect as though made by the official stenographer. Am'd '99, p. 112.

1878. (724.) Objections. The objections and exceptions to the rulings, decisions, and opinions of the court, which shall be written out by the stenographer and filed with the clerk, as provided in said contract, may be settled thereafter in a bill of exceptions. Am'd '99, p. 113.

1879. (725.) Transcript is correct statement of testimony. The report of the stenographer so employed when written out in long hand writing, or typewritten, and certified by him as being a correct transcript of the testimony and proceedings in the case, is prima facie a correct statement of such testimony and proceedings. Am'd '99, p. 113.

1880. (726.) Bond. Before any stenographer so employed shall enter upon the discharge of his duties under the said contract, he shall give a bond with sufficient surety, conditioned for the faithful performance of said contract, in the sum of $2500, or such further sum as the judge shall fix. Said bond shall run to the judge in his official capacity, but an action thereon may be maintained by any person whose rights are affected by the failure of the stenographer to perform any condition of the said contract.
Am'd '99, p. 113.

1881. (727.) Fees. When defendant is impecunious, cost paid by state. Fees in criminal cases paid by state. In cases where a transcript has been ordered by the court, the fees for transcribing must be paid by the respective parties to the action or proceedings in equal proportion, or by such of them and in such proportion as the court in its discretion may order. In no case shall a transcript be taxed as costs unless ordered either by the plaintiff or defendant, or by the court; nor shall the stenographer be required in any civil case to transcribe his notes until the fees therefor be tendered him, or a sufficient amount to cover the same be deposited in court for that purpose. The party ordering the stenographer to transcribe any portion of the testimony or proceedings must pay the fees to the stenographer therefor. If the defendant in a criminal case desires to have the stenographer transcribe his notes taken on the trial, he must pay the stenographer's fees therefor, or deposit a sum equivalent thereto with the clerk of the court therefor, or the court must refuse to order the stenographer to transcribe his notes; *provided,* that if it appear by affidavit, made by the defendant in person, that said defendant is impecunious and unable to pay the stenographer's fee for transcribing his notes, and that a transcript of the same is necessary in perfecting an appeal on behalf of the defendant, and said facts are not successfully controverted by the county attorney or by affidavit of some person cognizant of the facts, the court may issue an order directing that the stenographer transcribe his notes taken on the trial of the defendant, or so much thereof as the court may deem necessary, at the cost of the state. In criminal cases, when the proceedings have been taken down or transcribed upon the order of the court, the fees of the stenographer shall be certified by the court to the state auditor, who shall draw his warrant upon the state treasurer for the amount so certified, and the same shall be paid out of the state treasury. Am'd '99, p. 113.

Where two full days' time was allowed the court stenographers, the refusal of the court to retax costs will not be reversed on appeal where the record does not show clearly the number of hours the stenographer was employed.
Anderson v. Ogden Depot Co., 7 U. 396; 26 P. 1119.

Where accused, on appealing from a conviction, has not shown himself to be impecunious, as provided herein, he is liable, on affirmance of his conviction, for costs provided for by supreme court rule 11, relating to the printing of briefs on appeal, but not for fees otherwise payable to the clerk.
Salt Lake City v. Robinson, 39 U. 260; 116 P. 442.

1882. (728.) Certificate of judge. The judge of said court shall certify, when requested by the stenographer, the time which he shall have been

employed in attendance upon the court, except on the trial of criminal cases, and the amount to which he is entitled therefor. Upon the presentation of such certificate of the judge to the county auditor, said auditor shall draw warrant in favor of said stenographer upon the county treasurer for the amount so certified, which warrant shall be a sufficient voucher for the payment of the same by the county treasurer. '99, p. 114.

1883. (728x.) Fee upon filing each case. A stenographer's fee of $3 shall be collected by the clerk of the court, in each case, upon the filing of said case, which shall be paid to the county treasurer, by said clerk, and may be taxed as costs in the action; *provided,* that no stenographer's fee shall be charged or collected in probate matters unless the same be contested, and then the fees shall be paid by the party contesting; *provided,* that in all actions now pending the clerk of the court shall at once collect the fee as herein provided; and *provided, further,* that in no case shall the state be liable for such fee. '99, p. 114; '05, p. 59.

Fees, §§ 1876, 1881, 2537.

1884. (728x1.) No liability except as provided herein. Neither the judge employing and contracting with such stenographer, nor the state nor any department thereof, shall be liable to the stenographer for any compensation, fee, or mileage, except as provided herein. Am'd '99, p. 114.

CHAPTER 2.

CITY COURT STENOGRAPHER.

1885. (728x2.) Judge may employ. Any judge of the city court in cities of the first class may employ and contract with a competent stenographer to report the proceedings in any civil case in such court, where the amount involved in controversy exceeds the sum of $100, and upon the request of either party to such action. '07, p. 83.

District court stenographer, §§ 1875-1884.

1886. (728x3.) Compensation. How paid. The amount to be paid such stenographer shall not exceed $6 per day for actual services rendered in reporting, and he shall be allowed to charge 8 cents per folio for a transcript of his notes. The per diem shall be paid out of the city treasury. '07, p. 83.

1887. (728x4.) Reporter's fees. The party requesting the reporter's services shall pay to the clerk the sum of $3 as reporter's fees, and the same shall be taxed as costs in the action. '07, p. 83.

TITLE 23.

CROP PEST COMMISSION, STATE.

('17, p. 339.)

1888. (1168.) Membership. Qualifications. Terms. A state crop pest commission is hereby created, consisting of five members to be appointed by the governor, by and with the consent of the senate, one of whom shall be an entomologist, one a plant pathologist, one a practical farmer, one a practical horticulturist, and one, who shall be the state crop pest inspector, who shall have technical and expert training in insect pests and plant diseases as well as a practical knowledge of them. The members of said commission shall hold office for a term of two years and until their successors are appointed and qualified.

1889. (1170.) Organization. Officers. Inspector. Deputies. Bonds.

Said commission shall have an office at the state capitol, and within ten days after the approval of this title they shall meet and organize by electing a president. Said commission shall appoint a competent clerk to have charge of the office, and they may appoint, when an emergency exists, special deputy inspectors and others as may be needed, whose salaries shall not exceed $4 per day, together with their necessary traveling expenses; *provided,* that before entering upon their duties the members of the state crop pest commission shall qualify by subscribing to the constitutional oath of office. Said inspector shall file with the secretary of state a bond with good and sufficient sureties in the sum of $1000 conditioned upon the faithful performance of his duties.

1890. Duties of inspector. The duty of the state crop pest inspector shall be to visit each county, to instruct the county inspector, and to perform such special inspection and other duties in the interest of agriculture as the commission may require.

1891. (1172.) Salaries of officers. Payment. The state crop pest inspector shall receive a salary to be fixed by the governor, but not to exceed $2500 per annum, and his actual and necessary expenses in the performance of his duties, which expenses shall not exceed $1000 per annum. Other members of the commission shall receive no salary; *provided, however,* that said members shall be paid their actual and necessary expenses in attending meetings of said commission. It is further provided that the office clerk shall receive a salary, to be fixed by the commission, not to exceed $800 per annum. The salaries herein provided for shall be paid each month, and the other expenses as in the case of other officers.

1892. Custodian of property of horticultural commission. The commission shall take charge of and be the custodian of all property of whatsoever kind now in possession of the existing state horticultural commission, which belongs to the state of Utah. The secretary of the said state horticultural commission shall carefully list all such property of the state now in the possession of said commission, and shall furnish a copy to the state crop pest commission and file a copy with the secretary of state within ten days after the approval of this title.

1893. Duties of commission. The commission shall adopt such regulations and perform such other work as will promote and protect the agricultural interests of the state. They shall supervise the work of the state crop pest inspector, and shall issue bulletins and pamphlets for the promotion and protection of the agricultural industries of the state, and shall have supervision over the enforcement of the provisions of this title.

Fix grades of fruit, § 8458.

1894. (1173.) Office hours. Expenses. The office shall be open each day in the year, excepting Sundays and legal holidays; *provided,* that the necessary office expenses, approved by the commission, shall be paid from the funds hereinafter appropriated as other expenses are paid.

1895. (1174.) Gifts, donations, and bequests. Disbursement. The state treasurer is hereby authorized to receive gifts, donations, or bequests of money or property for the promotion of agricultural interests of Utah, and to disburse the same upon the warrants of the state auditor, which said warrants shall be drawn only upon the order of a majority of the commission, and for the purpose named in this title.

1896. (1175.) Authority to enforce quarantine. The state crop pest commission is hereby vested with the necessary authority to enforce quarantine against any state or county, or against any infested tract of land, building, or place where any trees, plants, shrubs, vines, scions, seeds, buds, fruit, or article within the state, when the same is, in its judgment, liable to spread insects, pests, and funguses or other diseases injurious to crops or plants, and provide the necessary rules and regulations to govern the same when not in conflict with the provisions of this title.

1897. (1176.) Regulations for quarantining and disinfection. For the purpose of preventing the introduction into the state or the spreading within the state of infectious or contagious diseases, insect pests, or fungous growths among trees or plants, for the prevention and treatment, cure or destruction of either fruit, tree, or plant pests, and for the disinfection or destruction of either trees or plants, box, package, or article harboring or containing contagious or infectious disease, insects, or pests detrimental to trees, plants, vines, or shrubs, said commission shall make regulations for the quarantining and the disinfection thereof, which said regulations shall be circulated by the commission in printed form among the fruit growers, farmers, dealers in plant products, common carriers, and nurserymen of the state by publishing the same at least four successive times in some newspaper having a general circulation in the state, and by posting copies thereof in three conspicuous places in each county, one of which shall be at the county courthouse. Such rules or regulations, when so published and circulated, shall be held to have imparted due notice of their contents to all persons within the state, and shall be binding upon them.

1898. (1177.) County inspectors. Qualifications. Duties. Bonds. Compensation. Within thirty days after this law goes into effect, the board of county commissioners of each county shall appoint one crop pest inspector and as many deputies as is deemed necessary to carry out the provisions of this title. Said inspector and deputies shall pass an examination, which shall be conducted by any member of the state crop pest commission, and shall hold a certificate from said commission showing that they are qualified to properly inspect trees, plants, vines, shrubs, and pests, and are competent judges of various diseases and pests to which fruit, trees, seeds, and plants are subject, together with the methods necessary for their destruction and control. The authority of any person, not holding such certificate issued by the state crop pest commissioners, shall not be recognized, and he shall not be a qualified inspector under the terms of this title. Such inspectors shall hold office for two years and until their successors are appointed and qualified, unless sooner removed for cause. They shall qualify by taking and subscribing the constitutional oath, and by giving a bond, with good and sufficient sureties, in the sum of $500, conditioned upon the faithful performance of their duties, and to secure the payment of actual damage arising from their wrongful inspection or treatment of orchards, fruits, plants, seeds, or nursery stock, which shall be filed with the county clerk; said inspector shall be paid out of the county treasury for the time and services actually rendered at such rate per day as the county commissioners shall fix, not to exceed $4 per day for inspectors and $3 per day for deputies, with reasonable transportation expenses when on official duty. The county inspectors shall carry out the provisions of this title and the regulations of the state crop pest commission; *provided,* that it shall be unlawful to spray, with any arsenical or other poisonous material, any tree, plant, or shrub when the same is in bloom; *provided, further,* that in case of any county inspector failing, refusing, or neglecting to do his duty, nothing in this title shall be construed to prevent the crop pest commissioners from enforcing in such county the provisions of this title and the regulations of the crop pest commissioners either in person or by special deputy.

Examine closed packages of fruit, § 8460.

1899. (1179.) Right of inspection. Notice of infections. Abatement. The county crop pest inspector or deputies in each county shall make an inspection of every farm, orchard, nursery, vineyard, storeroom, or seed-house, where plants are sold or kept for sale, fruit shed or packing house, cold storage house, storeroom, salesroom, warehouse, or any other place, box, barrel, or article connected with agriculture within their jurisdiction as often as is deemed necessary for the protection of the agricultural interests of the county. If, upon such inspection, any fruit, tree, plant, vine, shrub,

or article used in the transportation or handling of fruit, trees, vines, or plants shall be found to be infected or infested with insect pests, funguses or other diseases, eggs or larvae injurious to the agricultural interests of the county, they shall notify the owner, or the owners, person, or persons in charge or possession of the infected or infested fruit, trees, plants, vines, or shrubs, or places, or articles as aforesaid, that the same is infected or infested with insects, disease, eggs, or larvae injurious to the agricultural interests, and shall require that such person or person destroy or disinfect the same and make application of such treatment as prescribed by the state crop pest commission, within a certain time to be specified in said notice. Said notice may be served upon the person or persons owning or having charge of such infested or infected plants, trees, fruits, places, or articles aforesaid, by any inspector or member of the crop pest commission. In addition to the above, inspection shall be made and the nuisance abated under the above provisions, upon the complaint of three persons showing that a public nuisance or menace to their interests is maintained in any orchard, lot, field, storeroom, or place. If the owner or owners, person or persons in charge or possession of any nursery, orchard, trees, plants, shrubs, vines, fruits, places, or articles infected or infested with said diseases, insects or any of them, their eggs or larvae, after having been notified as above, by said inspector or commissioners, to destroy or disinfect the same as directed shall fail to so destroy or disinfect, he or they shall be deemed guilty of maintaining a public nuisance, and any nursery, orchard, lot, place, trees, plants, vines, shrubs, or articles thus infected shall be adjudged and the same is hereby declared a public nuisance and shall be proceeded against as such. It shall be the duty of the county inspector, in whose county said nuisance shall exist, to cause such nuisance to be abated at once by destroying said disease, insects, pest, larvae or eggs, by disinfecting or destroying the infected or infested fruit, trees, plants, places, or articles as aforesaid, and the costs thereof shall be assessed against the owner or owners, person or persons in charge of said property or premises, and if the same is not paid within thirty days from the demand the said expense shall become a county charge and the county commissioners shall allow and pay the same out of the general fund of the county. Any and all sums so paid shall be and become a lien on the property and premises from which said nuisance has been removed or abated in pursuance of this title, and may be recovered by an action against the owner or owners, person or persons having in charge such property or premises.

1900. Sale of infected fruits prohibited. Power to destroy. It shall be unlawful to sell or dispose of, or offer to sell or dispose of, or to have in one's possession for sale or barter, any fruit which is or has been infected with San Jose scale, or other scale insects, or the larvae of the codling moth, and the fact that such fruit bears the mark of any scale, or is worm-eaten by the larvae of the codling moth, shall be deemed conclusive evidence that said fruit is infected within the meaning of this section; and the state and county inspector and the deputies are hereby given power to seize and destroy such infected fruit whenever they shall find that the same has been packed, sold, shipped, or offered for sale, or where the same has been exposed for sale, or is being held in any warehouse, store, salesroom, or other place for the purpose of being sold, bartered, shipped, or exposed for sale or bartered; and it is hereby made the duty of said state inspector and said county inspectors and deputies to enforce the provisions of this section, and any person who shall violate the provisions of this section shall be deemed guilty of a misdemeanor; *provided, however,* that any qualified inspector or deputy shall, immediately upon being notified, inspect any shipments of fruits, and issue certificate of release or inspection; *provided, further,* that nothing in this section shall be construed to prevent the utilization of such infected fruit in the manufacture of fruit products within the state where said fruit has not been packed, sold, shipped, stored, or offered or exposed for sale as

fruit; *provided,* that such infected fruit can be sold for such purpose only by the grower.

1901. (1180.) Reports by inspectors and commission. Publications. The county inspector shall make a report monthly to the county commissioners and the state crop pest commission on forms furnished by the commission. Such report shall contain a report of the labor of the inspector and his deputies, and the general condition of agriculture within the county. The state crop pest commission shall make a report biennially to the governor by the first day of December preceding the meeting of the state legislature, and the secretary of state shall cause three thousand copies of the same to be published in a pamphlet or book form for distribution as other state publications.

1902. (1181.) Handling nursery stock. No corporation, firm, person, or persons shall engage or continue in the business of selling within the state or of importing into the state, any fruit trees, shade trees, shrubs, vines, or plants known as nursery stock, without having first obtained a license to do business in this state as in this title provided.

1903. (1182.) License. Fee. Bond. Revocation. Any corporation, firm, or person may obtain a license from the state crop pest commission to engage in the business, as provided in the preceding section, upon payment of the fee of $2.50 and by filing with the state crop pest commission a bond, with good and sufficient sureties, in the sum of $500, conditioned that the principal will comply with the provisions of this title, and will pay the cost of fumigating or disinfecting all nursery stock, materials, or goods imported into the state or sold within the state by said principal, his or their agents, and the expense of destruction of any infected nursery stock. License granted under this title shall be for one year; *provided, however,* that such license may be revoked at any time for any violation of this title or the rules and regulations of the state crop pest commission at the discretion of the commission.

1904. (1182x.) Inspections of nursery stock. Certificates. All nursery stock grown or growing within the state to be used for sale, gift, or distribution or transportation shall, after being dug and before the same shall have been packed for delivery, be inspected by the county inspector or his deputy, and shall be disinfected or treated by such method as shall be prescribed by the state crop pest commission. After such inspection and treatment of the stock he shall issue his certificate to the manager of said nursery stock; said certificate shall entitle him to use said stock so inspected and disinfected or treated for filling orders for the next current delivery, and such certificate issued in accordance with the provisions of this title shall be deemed sufficient, and said stock shall not be subjected to further inspection until after delivery to the planter; excepting in case where delivery is made to any nursery or nurseryman it then shall be again inspected before being stored, planted, or reshipped. Said manager shall give to the county inspector of the county in which the nursery stock is located due notice of the time when such stock shall be ready for inspection under the provisions of this title.

1905. (1182x1.) Importations of nursery stock. Quarantine. Disinfection. Release. It shall be unlawful for any corporation, firm, or person to sell, give away, or distribute any imported trees, plants, shrubs, or vines within this state, until the same shall have been disinfected or treated. Importations of any sort of nursery stock shall be held in quarantine at owner's risk until disinfected, at the cost of the importer. Said disinfection or treatment shall be made to the satisfaction of the inspector in charge, when he shall release the same and issue certificate for its removal or distribution.

1906. (1182x2.) Notice by common carrier of arrival of stock. Every corporation, firm, or person, his or their agent, doing business as common

carriers within the state shall, upon the arrival of all nursery stock, trees, plants, vines, shrubs, cuttings, or scions at the station or other place to which such nursery stock is consigned, immediately notify the county crop pest inspector or his deputy of such arrival, and to whom consigned, with date and place of arrival, and shall hold the shipment twenty-four hours after said notice of arrival has been sent, when it may be delivered to the consignee; *provided,* that, where such shipment is accompanied by a certificate of any county inspector or deputy inspector within the state, the stock may be delivered immediately after said notice is sent.

1907. (1182x4.) Disposition of funds. All sums of money collected under the provisions of this title shall be turned into the state treasury.

1908. (1182x5.) Agricultural exhibits. Awards. The state crop pest commission may have charge, either in person or by appointment of a suitable person, of any agricultural exhibit; *provided, however,* this shall not interfere with the exhibits arranged by private parties; and shall have power to arrange for and provide such exhibit and may award ribbon premiums for such exhibits.

1909. Term "plant" defined. For the purposes of this title, the term "plant" or "plants" shall include trees, shrubs, vines, forage, and cereal plants, and all other plants, cuttings, grafts, scions, buds, and all other parts of plants; fruit, vegetables, roots, bulbs, and seed.

1910. (1182x6.) Penalty. Any person, firm, or corporation violating any of the provisions of this title shall be deemed guilty of a misdemeanor.

1911. Appropriation. There is hereby appropriated out of the general fund of the state of Utah, not otherwise appropriated, the sum of $10,000, or so much thereof as may be required, for carrying into effect the provisions hereof. '09, p. 53; '17, p. 339.

TITLE 24.

DAIRY AND FOOD PRODUCTS.

CHAPTER 1.

STATE DAIRY AND FOOD BUREAU.

('09, p. 180.)

1917. Bureau created. Membership. Terms. Expenses. Report. There is hereby created a state dairy and food bureau, which shall consist of five resident citizens of the state. The state chemist and the state dairy and food commissioner shall be members of the said board; and three members shall be appointed by the governor on or before the first day of April, 1909, as follows: One member of this bureau shall be a practical manufacturer of dairy food products; one member shall be a merchant engaged in the sale of food products, and one member shall be a non-producer of food products. Members of this bureau shall hold office for the period of four years and until their successors are appointed and qualified; *provided,* that the first members appointed under this section shall be appointed for terms, so that their terms shall expire in one, two, and three years respectively. Any vacancy shall be filled by appointment by the governor for the unexpired term. The members of said bureau shall serve without compensation, but shall receive their actual and necessary traveling expenses, and within twenty days after their appointment shall take the oath of office as required by the constitution; and they shall thereupon meet and organize by electing a chairman, a secretary, and a treasurer. Any one of them

may be removed by the governor for neglect or violation of duty. They shall make report in detail to the legislature not later than the first day of December next preceding the meeting thereof.

1918. Duties. It shall be the duty of the state dairy and food bureau to formulate and prescribe such rules and regulations for the operation of creameries, butter and cheese factories, dairies, slaughter houses, confectioneries, bakeries, hotels, fruit and vegetable canneries, flour mills, farm dairies, or any other factory, establishment, store, or house where dairy or food products of whatsoever nature are bought, sold, manufactured, prepared, stored, or exposed for sale for public use, as shall be deemed necessary by such bureau to fully carry out the provisions of this chapter, and all laws now in force or that may be enacted relative to dairy and food products, and for the promotion and maintenance of the public health and safety, and for prevention of false grades, weights, and measures, and also for advancing the value of Utah food and dairy products. Such rules and regulations shall conform as near as may be to the rules and regulations that have been or shall be promulgated by the agricultural department of the United States under and by the authority of a law known as the pure food and drug act of June 30, 1906, as well as an act of Congress, approved June 30, 1906, governing meat inspection. The dairy and food commissioner shall execute the rules and regulations of the bureau, and the bureau shall provide him with deputies, agents, and such assistants as may be deemed necessary from time to time, it being the object of this law to protect the consumer of food products against fraudulent, unwholesome, and adulterated food, and for the promotion and maintenance of the public health and safety; and it shall be the duty of this bureau to promote improvements in dairy and food products, and educate the producer in the care of all dairy and food products and their economical production.

1919. Penalty. Any person violating any provisions of this chapter or any rule or regulation of the dairy and food bureau shall be guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than $25 nor more than $200. '09, p. 180.

CHAPTER 2.

DAIRY AND FOOD COMMISSIONER.

1920. (729.) Office created. Term. Salary. The office of dairy and food commissioner for the state of Utah is hereby created. Such commissioner shall be appointed by the governor, by and with the consent of the senate, and his term of office shall be four years from the date of his appointment and until his successor is appointed and qualified; *provided,* that such commissioner may be removed for cause by the governor, and vacancies occurring in the office for any cause shall be filled by appointment for the balance of the unexpired term. The salary of the commissioner shall be $2400 per annum, together with his necessary and actual expenses incurred in the discharge of his official duty, which shall be paid in the same manner as the salaries of other state officers.

R. S. '98, § 2446; '03, p. 16; '07, p. 230; '13, p. 97.

As the chapter does not prohibit and punish the same act as a city ordinance, the latter did not conflict with the statute in imposing a different penalty than provided by it, and was valid.
Salt Lake City v. Howe, 37 U. 170; 106 P. 705.

1921. (730.) Duty of commissioner. It shall be the duty of the commissioner, and he is hereby invested with the powers, to enforce all laws that now exist or that may hereafter be enacted in this state, regarding the production, manufacture, or sale of dairy and creamery products, or the adulteration of any article of food, and regarding the use of skimmed or adulter-

ated milk, and the feeding of unwholesome food to cattle, and the keeping of cattle having infectious or contagious diseases; and said commissioner shall personally, or by his deputy, inspect any article of food made or offered for sale within this state, which he may suspect or have reason to believe is impure, unhealthy, adulterated, or counterfeit. He shall also visit and inspect the various dairies, cheese and butter factories of the state, and shall have power to enforce proper sanitary regulations in their management and surroundings. Said commissioner shall personally, or by his deputy, when complaint is made of the violation of any law relating to the feeding of any unwholesome food for cattle, or keeping upon the premises any cattle afflicted with any contagious or infectious diseases, immediately investigate said charge, and may prosecute any person, firm, or corporation violating any of the laws of this state, which it is the duty of said commissioner to enforce. R. S. '98, § 2447; '99, p. 59; '01, p. 72; '03, p. 16; '07, p. 230.

Inspection of cattle, etc., before slaughter, §§ 1990-1995.
Inspection of milk, dairies, etc., §§ 1933-1942.
Inspectors may be deputized to enforce prohibition act, § 3344.
Ex officio superintendent weights and measures, § 6278.
Employ assistants to enforce hotel inspection, § 2954.
Supervise and make rules for cold storage, §§ 844, 850.
Standardize sizes of packages, § 6296.
Enforce branding cans, bottles, etc., §§ 6150-6156.
Inspection of cans, bottles and premises, § 1938.
Stamp inspected meat, § 1940.
Inspect canneries, creameries, etc., § 1970.

1922. (731.) Powers of commissioner. Deputy, inspector, etc. The said commissioner, deputy commissioner, and such inspectors, agents, chemists, and counsel as shall be duly authorized for the purpose, shall have access, ingress, and egress to and from all places of business, factories, farms, buildings, carriages, and cars used in the manufacture, transportation, or sale of any article of food as defined in this chapter, and also into restaurants, dining halls, cafes, hotels, and all rooms thereof, and all other places where food is prepared, stored, or served to patrons. They shall also have power and authority to open any package, can, or vessel containing or supposed to contain any article manufactured, sold, or exposed for sale, or held in possession with intent to sell, in violation of the provisions of this chapter or other laws of this state, and may inspect the contents thereof, and may take samples therefrom for analysis. All dealers, clerks, bookkeepers, express agents, railroad officials, employes, or common carriers shall render to them all the assistance in their power, when so requested, in tracing, finding, or discovering the presence of any article prohibited by law, and in securing samples thereof as herein provided for. Any refusal or neglect on the part of such dealers, clerks, bookkeepers, express agents, railroad officials, employes, or common carriers to render such friendly aid or to furnish such sample for analysis as provided for in this section, shall be deemed a misdemeanor and shall be punished as hereinafter provided. R. S. '98, § 2448; '03, p. 17; '07, p. 230.

State chemist, duties, etc., §§ 5751-5753.
Unfair competition and discrimination in purchase and distribution of dairy products, §§ 8333-8336.

1923. (732.) Sample to be marked or sealed. The person taking such sample, as provided for in this chapter, shall mark or seal such sample with a paper seal or otherwise, and shall write his name thereon and number said sample, so as to properly identify the same, and shall tender to the manufacturer or vendor of such article or product, or the person in whose control or possession such article or product may be at the time the same is taken, the value thereof; but if the person from whom such sample is taken shall request him to do so, he shall at the same time and in the presence of the person from whom the same is taken, seal with proper seals or otherwise two samples of the article taken, on each of which said samples, or on the seals placed thereon, shall be placed the name of the person taking said sample and also the number above provided for, the one of which samples shall be delivered to the person from whom the same is taken, and the other shall be taken by the person so procuring the same to the state chemist or other competent person appointed for the purpose of making examinations or analyses of samples so taken; *provided,* that the person procuring said sample

may securely pack and box said sample and send the same to the state chemist, or other competent person appointed hereunder for the purpose of making examinations or analyses of samples, and his testimony that he did procure the samples, and that he sealed and numbered the same as herein provided, and that he wrote his name thereon, and that he packed and boxed said sample and sent the same to the state chemist or other competent person appointed hereunder to analyze such sample; and the testimony of the person to whom said sample is addressed that he received said box or package in apparent good order, that said sample was sealed, and that the number and name of the sender, as herein provided for, was on said sample, and that the seal at the time the same was received was unbroken, shall be prima facie evidence that the sample so received is the sample that was sent, and that the contents thereof are the same and in the same condition as at the time the person so procuring said sample parted with the possession thereof, and the testimony of said two witnesses as above shall be sufficient to make such prima facie proof. R. S. '98, § 2448; '03, p. 17; '07, p. 231.

1924. (733.) Standard of purity. The standards of quality, purity, and strength for foods, liquors, and drinks that have been or shall be adopted by the U. S. department of agriculture are hereby declared to be the standards of purity, quality, and strength of foods, liquors, and drinks in the state of Utah, except where otherwise specified. '07, p. 232.

1925. (734.) Unlawful to adulterate or misbrand foods, drugs, etc. Penalty. Every person who, by himself, his agent, or servant, or as agent or servant of any other person, shall manufacture for sale, sell, exchange, or deliver, or offer to sell, exchange, or deliver, or have in his possession with intent to sell, exchange, or deliver any adulterated or misbranded article of food, drink, drug, or confectionery, or who shall adulterate or misbrand any article of food, drink, drug, or confectionery shall be guilty of a misdemeanor. '03, p. 22; '07, p. 232; am'd '13, p. 97.

1926. (735.) "Food" defined. The term "food" as used in this chapter, shall include all articles used for food, drink, confectionery, or condiment by man or other animals, whether simple, mixed, or compound. '03, p. 22; '07, p. 232.

1927. (736.) Term "drug" defined. Adulteration. The term "drug," as used in this chapter, shall include all medicines and preparations recognized in the United States Pharmacopœia or National Formulary for internal or external use for the cure, mitigation, or prevention of disease of either man or animals.

For the purpose of this chapter an article shall be deemed to be adulterated: In the case of drugs:

1. If, when a drug is sold under or by a name recognized in the United States Pharmacopœia or National Formulary, it differs from the standard of strength, quality, or purity, as determined by the test laid down in the United States Pharmacopœia or National Formulary official at the time of investigation; *provided,* that no drug defined in the United States Pharmacopœia or National Formulary shall be deemed to be adulterated under this provision if the standard of strength, quality, or purity be plainly stated upon the bottle, box, or other container thereof, although the standard may differ from that determined by the test laid down in the United States Pharmacopœia or National Formulary;

2. If its strength fall below the professed standard or quality under which it is sold.

In the case of confectionery:

If it contain terra alba, barytes, talc, chrome yellow, paraffine, or other mineral substance or poisonous flavor or color, or other ingredient deleterious or detrimental to health, or any vinous, malt, or spirituous liquor, or compound or narcotic drug.

In case of foods:

1. If any substance has been mixed or packed with it so as to reduce or lower or injuriously affect its quality or strength;

2. If any substance has been substituted, wholly or in part, for the article;

3. If any valuable constituent of the article has been wholly or in part abstracted;

4. If it is mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed;

5. If it contain any added poisonous or other added deleterious ingredients which may render such article injurious to health;

6. If it contain any added antiseptic or preservative substance except common salt, saltpeter, cane or beet sugar, vinegar, spices, or wood smoke; *provided,* that when, in the preparation of food products for shipment, they are preserved by any external application applied in such a manner that the preservative is necessarily removed mechanically or by maceration in water or otherwise and directions for removal of said preservative shall be printed on the package, the provisions of this chapter shall be construed as applying only when said products are ready for consumption. And furthermore, the provisions of this chapter shall not apply to the addition of benzoate of soda in those foods in which generally heretofore it has been used; *provided,* that each container or package is plainly labeled to show the presence and amount of benzoate of soda;

7. If it consist in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, or any portion of any animal unfit for food, whether manufactured or not, or if it is a product of a diseased animal, or one that has died otherwise than by slaughter;

8. If it contain saccharine or other artificial sweetening agent.

'03, p. 22; '07, p. 232; am'd '13, p. 97.

1928. (737.) Term "misbranded" defined. How applied. The term "misbranded," as used herein, shall apply to all drugs or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device, regarding such article, or the ingredients or substances contained therein, which shall be false or fraudulent in any particular, and to any food or drug product which is falsely branded as to the state, territory, or country in which it is manufactured or produced. For the purpose of this chapter an article shall also be deemed to be misbranded: In case of drugs:

1. If it be an imitation of or offered for sale under the name of another article;

2. If the contents of the package as originally put up shall have been removed in whole or in part, and other contents shall have been placed in such package, or if the package fail to bear a statement on the label of the quantity or proportion of any alcohol, wood alcohol, denatured alcohol, morphine, opium, cocaine, heroin, alpha or beta eucaine, chloroform, Cannabis indica, chloral hydrate, or acetanilide, or any derivative or preparation of any of such substances contained therein; *provided,* that wood or denatured alcohol be not allowed in any article of food or medicine intended for internal use;

3. If its package or label bear or contain any statement, design, or device regarding the curative or therapeutic effect of such article or any of the ingredients or substances contained therein, which is false and fraudulent.

In case of foods:

1. If it be an imitation of or offered for sale under the distinctive name of another article;

2. If it be labeled or branded so as to deceive or mislead the purchaser, or purport to be a foreign product when not so, or if the contents of the package as originally put up shall have been removed in whole or in part and other contents shall have been placed in such package, or if it fail to bear a state-

ment on the label of the quantity of any morphine, opium, cocaine, heroin, alpha or beta eucaine, chloroform, Cannabis indica, chloral hydrate, or acetanilide, or any derivative or preparation of any of such substances contained therein;

3. If in package form, the net quantity of the contents be not plainly and conspicuously marked on the outside of the package in terms of weight, measure, or numerical count; *provided,* that reasonable variations and tolerations shall be permitted by rules and regulations made in accordance with this chapter by the state dairy and food bureau;

4. If the package containing it, or its label, shall bear any statement, design, or device regarding the ingredients, or the substances contained therein, which statement, design, or device shall be false or misleading in any particular; *provided,* that an article of food that does not contain any added poisonous or deleterious ingredients shall not be deemed to be misbranded or adulterated in the following cases:

First. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food under their own distinctive names, and not an imitation of, or offered for sale under the distinctive name of, another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced.

Second. In case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends, and the word "compound," "imitation," or "blend," as the case may be, is plainly stated on the package in which it is offered for sale; *provided,* that the term "blend" as used herein, shall be construed to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients used for the purpose of coloring or flavoring only; and *provided, further,* that nothing in this chapter shall be construed as requiring manufacturers or proprietors of proprietary foods which shall contain no unwholesome added ingredient, to disclose trade formulas except in so far as the provisions of this chapter may require to secure freedom from adulteration or misbranding.

'03, p. 22; '07, p. 233; '13, p. 97.

1929. (738.) Articles to be labeled "imitation." No person shall, by himself or another, either as principal, clerk, or servant, directly or indirectly, manufacture for sale, have in his possession with intent to sell, offer, or expose for sale, or sell as fruit jelly, jam, or fruit butter, any imitation fruit jelly, jam, or fruit butter, or other similar compound, made or composed in whole or in part of glucose, dextrine, starch, or other substances under any name or designation whatever, unless the same shall be composed entirely of ingredients not injurious to health, and every can, pail, or package of such jelly, fruit jam, or fruit butter sold, offered for sale, or kept for sale in this state, shall be distinctly and durably labeled in a conspicuous place immediately preceding the name of the article sold with the word "imitation" preceding the name of the fruit jelly, jam, or fruit butter the article is intended to imitate; *provided,* any fruit jelly, jam, or fruit butter containing no foreign ingredient other than glucose may be labeled and sold as "glucose" (or corn syrup) jelly, fruit jam, or fruit butter, as the case may be, to conform in name to the fruit or fruits used in its preparation. '07, p. 234.

1930. (739.) "Extracts" defined. A flavoring extract is a solution in ethyl alcohol of proper strength of the sapid or odorous principles derived from an aromatic plant, or parts of the plant, with or without its coloring matter, and must conform in name to the plant used in its preparation.

The flavoring extracts herein described are intended solely for food purposes and are not to be confounded with a similar preparation described in the pharmacopœia for medicinal purposes. The term flavoring extract includes solutions sold for food purposes as flavors, flavorings, essences, and tinctures.

Lemon extract is a flavoring extract prepared from oil of lemon, or from lemon peel, or both, and must contain not less than five per cent by volume of lemon oil.

Vanilla extract is a flavoring extract prepared from vanilla beans, with or without sugar or glycerine, and must contain, in one hundred cubic centimeters, the soluble matters from not less than ten grams of the vanilla bean.

A double extract is, or represents, twice the strength of an ordinary extract. In other words, a double extract of lemon must contain ten per cent of the oil of lemon. A triple extract of lemon must contain fifteen per cent oil of lemon.

A double extract of vanilla would mean that it contains the soluble matter of not less than twenty grams of vanilla bean per hundred cubic centimeters of the extract.

All extracts artifically prepared, that is, not made from the natural fruit, berry, bean, or other part of the plant, must be labeled in letters similar in size and immediately preceding the name of the article, "imitation," "substitute," or "artificial," and if artificially colored it must in like manner be labeled "artifically colored."

The standards of other flavoring extracts, unless otherwise provided, shall be the standards adopted by the United States department of agriculture, and all extract must be labeled with the name and address of the manufacturer or distributor thereof. '07, p. 235; am'd '13, p. 97.

1931. (740.) Spirituous, fermented, or malt liquors. No person shall, within this state, by himself, his servant, or agent, or as a servant or agent of any other person or corporation, manufacture, brew, distill, have, or offer for sale, or sell any spirituous or fermented or malt liquor, containing any drug, substance, or ingredient not healthful or not normally existing in said spirituous, fermented, or malt liquor, or which may be deleterious or detrimental to health when such liquors are used as a beverage, and the following drugs, substances, or ingredients shall be deemed to be not healthful, or not normally existing in spirituous, fermented, or malt liquor, and shall be deemed to be deleterious or detrimental to health, when contained in such liquors, to wit:

Cocculus indicus, chloride of sodium, copperas, opium, cayenne pepper, picric acid, Indian hemp, strychnine, arsenic, tobacco, darnel seed, extract of logwood; salts of zinc, copper, or lead; alum, methyl alcohol and its derivatives, and any extract or compound of any of the above drugs, substances, or ingredients.

And any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor. '07, p. 235.

1932. (741.) Baking powder standard. Every person, who, by himself, his agent or servant, or as the agent or servant of any other person, shall make or manufacture any baking powder or any other mixture or compound intended for use as baking powder; or sell, exchange, deliver, or offer to sell, exchange, or deliver, or have in his possession with intent to sell, exchange, or deliver, any baking powder or any mixture or compound for use as baking powder which shall contain less than ten per cent of available carbon dioxide; or without the common commercial names of all ingredients thereof printed on the package containing the same, shall be guilty of a misdemeanor. The term alum shall be construed to include all salts and compounds of aluminum, and every person, who, as aforesaid, shall sell, exchange, deliver, or offer to sell, exchange, or deliver, or have in his possession with intent to sell, exchange, or deliver, any baking powder containing any of the salts of aluminum without the package containing the same being labeled "alum," or "soda alum," as the case may be, shall be guilty of a misdemeanor. '07, p. 236; am'd '13, p. 97.

1933. (742.) Milk standard. Skimmed milk. Every person who, by himself, his agent or servant, or as the agent or servant of any other person, shall sell, exchange, deliver, or offer to sell, exchange, or deliver,

or have in his possession with intent to sell, exchange, or deliver any milk which is not whole milk or which contains less than 3.2 per cent butter fat, or less than 12 per cent solids; or any milk from which any cream has been removed which is not labeled or sold as "skimmed milk," or any milk which contains any coloring matter or preservatives, or which is impure, unwholesome, or adulterated; or any milk from any cow which is diseased or fed upon any food which is in a state of putrefaction or is deleterious to health, shall be guilty of a misdemeanor; *provided,* the above standard of butter fat shall not apply to milk sold to creameries or condensed milk factories. R. S. '98, § 729; '99, pp. 53, 73; '03, p. 18; '07, p. 236; '13, p. 97.

1934. (743.) Id. Diluted, evaporated milk. No person shall sell, exchange, deliver, or have in his custody or possession with intent to sell, exchange, or deliver milk from which the cream or any part thereof has been removed, unless in a conspicuous place, above the center, upon the outside of every vessel, can, or package from or in which milk is sold, the words "skimmed milk" are distinctly marked in uncondensed gothic letters, each not less than one inch in height. Such skimmed milk shall contain not less than nine per cent of milk solids, exclusive of fats. No person shall sell, exchange, or deliver, or have in his custody or possession with intent to sell, exchange, or deliver, any evaporated milk which has been diluted to represent the proportions of natural milk unless in a conspicuous place above the center, upon the outside of every vessel, can, or package from or in which such milk is sold, the words "diluted, evaporated milk," are distinctly marked in extended gothic letters, each not less than one inch in height.

R. S. '98, § 731; '03, p. 18; '07, p. 236.

1935. (744.) Tests to determine quality of milk. Proofs of adulterations and skimming may be made with such standard tests and lactometers as are used to determine the quality of milk, or by chemical analysis. Cream of standard purity shall be cream produced from normal milk, free from all kinds of additions. There shall be recognized three standards of percentage of cream, known as first, second, and third grades. The minimum percentage of the first grade shall be not less than thirty per cent. The minimum percentage of the second grade shall be not less than twenty-four per cent. The minimum percentage of the third grade shall be not less than eighteen per cent; *provided,* that no person shall sell cream containing a less percentage of butter than is represented. The sale of cream other than in conformity with the foregoing standard is prohibited.

R. S. '98, § 732; '03, p. 18; '07, p. 236.

1936. (745.) Sale of adulterated dairy products prohibited. Every person who, by himself, his agent, or servant, or as the agent or servant of any other person, shall sell, exchange, deliver, or consign, or offer to sell, exchange, deliver, or consign, or have in his possession with intent to sell, exchange, deliver, or consign, to any person any milk, cream, or other dairy product, or deliver to any creamery or factory to be manufactured into butter or cheese, any milk, cream, or other dairy product to which any boracic acid, formaldehyde, salicylic acid, viscogen, or other compound has been added, shall be guilty of a misdemeanor.

Every person who, by himself, or by his agent, or servant, or as the agent or servant of any other person, shall sell, exchange, deliver, or consign, or offer to sell, exchange, deliver, or consign, or have in his possession with intent to sell, exchange, deliver, or consign any butter not made wholly and exclusively from normal milk or cream, free from all additions, except salt and harmless coloring matter, as provided or permitted by law, or containing less than eighty per cent butter fat, or more than sixteen per cent moisture, or, if in package form, without the name and address of the manufacturer or distributor plainly and conspicuously printed upon the outside of the package, shall be guilty of a misdemeanor.

Every person who, as aforesaid, shall sell, exchange, deliver, or consign,

or offer to sell, exchange, deliver, or consign, or have in his possession with intent to sell, exchange, deliver, or consign any cheese not made wholly and exclusively from normal milk or cream, salt, and rennet, with or without harmless coloring matter as provided and permitted by law, or containing less than thirty per cent butter fat, shall be guilty of a misdemeanor; *provided*, that cheese containing less than thirty per cent butter fat shall not be deemed a violation of this chapter if it shall be stamped with the words "skimmed milk cheese" with printed letters in plain gothic type, not less than one inch in length and so that the words cannot be easily erased, which label shall be placed upon the cheese and also upon the cloth covering the same and upon the top and side of every box or package containing such skimmed milk cheese.

R. S. '98, § 733; '01, p. 71; '03, p. 18; '07, p. 237; '13, p. 97.

1937. (746.) Cattle having tuberculosis or other infectious or contagious diseases. No person selling or exchanging, furnishing or delivering milk or dairy products shall have in his possession, at any place where milch cows are kept, any cattle having tuberculosis, or other infectious or contagious disease. It shall be the duty of the dairy and food commissioner of this state, in case he shall find that cattle are kept in violation of the provisions of this chapter, to cause all such cattle having any contagious or infectious disease to be killed. '99, p. 73; '03, p. 19; '07, p. 237.

Inspection of cattle for slaughter, § 1990.
Live stock board may condemn and kill, § 192.

1938. (746x2.) Premises, etc., shall be kept in clean and sanitary condition. All premises, cans, bottles, and utensils employed or used in the production, transportation, sale, or delivery of milk or cream for consumption, or employed or used in the manufacture or sale of any food products, shall be kept in a clean and sanitary condition, and no person shall sell, offer for sale, or have in his possession with intent to sell, any milk, cream, or other food product not manufactured, transported, and offered for sale under such clean and sanitary conditions. The commissioner, or other person duly appointed by him, shall have power, when inspecting such cans, bottles, and utensils used in the production, transportation, manufacture, or sale of milk, cream, or other food products, to order the use of any such can, bottle, or other utensil, which is in an unclean or insanitary condition, discontinued until such can, bottle, or other utensil be thoroughly cleaned and put in sanitary condition; and such person so inspecting such cans, bottles, and other utensils, shall have power to brand, mark, or tag such can, bottle, or other utensil with the words, "This (can, bottle, or utensil) is unfit to contain (human food, milk or cream)" as the case may be; and any person who shall erase, change, remove, conceal, or obliterate any such brand, mark, or tag, except for the purpose of properly cleaning and putting such can, vessel, or utensil in a sanitary condition, shall be guilty of a misdemeanor and be subject to the penalties hereinafter provided. '07, p. 237.

Sanitary conditions at slaughter houses, § 1991.

1939. (746x3.) Bottles, vessels, etc., to be cleaned. Every person, firm, association, or corporation who receives any milk, cream, or ice cream, or other dairy product in any can, bottle, or vessel which has been transported over or is to be returned over any railroad, shall, immediately upon emptying such can, bottle, or vessel, cause the same to be thoroughly washed, cleansed, and aired, and every violation of this section shall be a misdemeanor. '07, p. 238; am'd '13, p. 97.

1940. (746x4.) Care of cows. Milk from unclean or diseased cows. No person, firm, or corporation shall keep cows for the production of milk in a crowded condition, or in stables which are not properly ventilated, or which are filthy from an accumulation of animal refuse or from any other cause. Nor shall milk for food purposes be drawn from cows which are themselves in a condition of filth or uncleanness, or from cows which are affected with tuberculosis, running sores, or any other form of disease, or from cows which are fed either wholly or in part upon distillery waste or

brewery grains, or the waste of vinegar, or that of sugar factories not properly dried, or upon any other form of food which will produce milk which is unhealthful or unwholesome, or from cows within fifteen days before and five days after parturition; and all milk thus produced is hereby declared to be unclean, impure, unhealthful, and unwholesome milk; and any milk to which water or any other foreign substance has been added, or from which any part of the milk commonly known as strippings has been withheld, or which has been deprived, either wholly or in part, of any constituent naturally or normally contained in milk, is hereby declared to be adulterated milk. This section shall not be construed to prevent the feeding of ensilage from silos. The having in possession by any person, firm, or corporation producing milk for market, or for sale or exchange, or for manufacturing the same into articles of food, of distillery waste or brewery grains, or the waste of vinegar, or that of sugar factories not dried as aforesaid, or any other form of food which will produce milk which is unhealthful or unwholesome, shall be considered for the purpose of this chapter as prima facie evidence of an intent to use the same contrary to the provisions of this chapter. '07, p. 238.

Sanitary conditions at slaughter houses, etc. § 1991.

1941. (746x5.) Unlawful to sell milk, etc., from premises where contagious disease exists. Every person who, by himself, or his agent or servant, or as the agent or servant of any other person, shall sell, exchange, deliver, or offer to sell, exchange, deliver, or have in his possession with intent to sell, exchange, or deliver to any person any milk, cream, or any product thereof, from any cow kept upon any premises occupied by any family while any member of or person residing with such family may have any contagious disease; or before or until a permit shall have been issued by the proper health officer stating that the premises have been properly disinfected, shall be guilty of a misdemeanor. '07, p. 239; am'd '13, p. 97.

1942. (746x6.) Articles of food manufactured from unwholesome milk prohibited. No person, firm, or corporation shall manufacture from unclean, impure, unhealthful, or unwholesome milk, or from cream from the same, any article of food. '07, p. 239.

1943. (746x7.) Imitation butter. Oleomargarine. No person shall render or manufacture, sell, ship, consign, offer for sale, expose for sale, take orders for the future delivery of, or have in his possession with intent to sell, any article, product, or compound made wholly or partly out of any fat, oil, or oleaginous substance or compound thereof, not produced from unadulterated milk, or cream from the same, and without the admixture or addition of any fat foreign to said milk or cream, which shall be an imitation of yellow butter produced from pure, unadulterated milk or cream of the same with or without coloring matter; *provided,* that nothing in this title shall be construed to prohibit the manufacture or sale of oleomargarine in a separate and distinct form and in such manner as will advise the consumer of its real character, but it must be free from coloration or ingredients that cause it to look like butter, and free from any word, brand, or marking, either upon the package or upon any wrapper or upon the contents of the same, which would in any wise tend to deceive the purchaser or consumer. R. S. '98, § 736; '03, p. 19; '07, p. 239.

1944. (746x8.) Sale of butter. It shall be unlawful for any person to sell, or offer for sale, to any person who asks, sends, or inquires for butter, any oleomargarine, butterine, or any substance made in imitation or semblance of pure butter, and not made entirely from milk of cows, with or without coloring matter. R. S. '98, § 737; '03, p. 20; '07, p. 239.

Sale of renovated butter, § 1963-1968.

1945. (746x9.) Oleomargarine. Butterine. It shall be unlawful for any person to expose for sale oleomargarine, butterine, or any similar substance, not marked and distinguished on the outside of each tub, package, or parcel thereof by a placard with the word "oleomargarine" or "butterine," and not having also upon the exposed contents of every open tub, package,

or parcel thereof a conspicuous placard with the word "oleomargarine" or "butterine." Such placard in each case to be printed in plain, uncondensed gothic letters not less than one inch long, and to contain no other words thereon. R. S. '98, § 738; '03, p. 20; '07, p. 239.

1946. (746x10.) Id. Sale of. It shall be the duty of every person who sells oleomargarine, butterine, or any similar substance, from any dwelling, store, office, or public market, to have conspicuously posted thereon the placard or sign in letters not less than four inches in length, "oleomargarine sold here," or "butterine sold here." Such placard shall be approved by the dairy and food commissioner. R. S. '98, § 739; '03, p. 20; '07, p. 240.

1947. (746x11.) Id. It shall be unlawful for any person to peddle, sell, solicit orders for the future delivery of, or deliver from any vehicle, oleomargarine, butterine, or any other similar substance, without having on the outside of both sides of said vehicle the placard in uncondensed gothic letters not less than three inches in length, "oleomargarine" or "butterine." R. S. '98, § 740; '03, p. 20; '07, p. 240.

1948. (746x12.) Oleomargarine, etc., in hotels. It shall be unlawful for any person to furnish, or cause to be furnished, in any hotel, boarding house, restaurant, or at any lunch counter, oleomargarine, butterine, or any similar substance, to any guest or patron of said hotel, boarding house, restaurant, or lunch counter, without first notifying each guest or patron that the substance so furnished is not butter. R. S. '98, § 741; '03, p. 20; '07, p. 240.

1949. (746x14.) Search warrant. When complaint shall be made, on oath to any magistrate authorized to issue warrants in criminal cases, that any article of food, drug, or confectionery that is adulterated or misbranded, within the meaning of this chapter, is in the possession or under the control of any person, persons, firm, or corporation, contrary to the provisions of the laws of this state, and that the complainant believes that such article of food, drug, or confectionery is concealed in any particular warehouse, store, or refrigerator for mercantile purposes, the magistrate, if he be satisfied that there be cause for such belief, shall issue a warrant for such property.

R. S. '98, § 744; '03, p. 20; '07, p. 240; am'd '13, p. 97.

Search warrant, generally, §§ 9368-9389.

1950. (746x15.) Id. Seizure. All such warrants shall describe and designate the place and property to be searched for and shall be directed to the sheriff of the county or his deputy, or to any constable of the county, commanding such officer to search the house, building, store, or other place where any such article of food, drug, or confectionery, and for which he is required to search, is believed to be concealed, and to bring such property, when found, and the person or persons in whose possession the same shall be found, before the magistrate who issued the warrant, or before some other magistrate or court, having cognizance of the case.

R. S. '98, § 745; '03, p. 20; '07, p. 240; am'd '13, p. 97.

1951. (746x16.) Id. Confiscation. Analysis. Evidence. Procedure. When any officer in the execution of a search warrant, under the provisions of §§ 1949-1950, shall find any article of food, drug, or confectionery that is adulterated or misbranded, within the meaning of this chapter, and for which a search has been allowed, all the property so seized shall be safely kept by the direction of the court or magistrate so long as shall be necessary for the purpose of being produced as evidence on any trial. And if, upon a trial on any such complaint, any article of food, drug, or confectionery be found to be adulterated or misbranded, within the meaning of this chapter, and if it further be found that the same, at the time of such seizure, was in the possession or under the control of any person, persons, firm, or corporation contrary to any of the provisions or requirements of the laws of this state, then, and in such case, the property so seized shall be confiscated under the direction of the court or magistrate; otherwise the

said property shall be forthwith returned to the person or persons from whom it was taken and no costs shall be charged to such person or persons.

Chapter 56, title 120, of the code of criminal procedure (§§ 9368-9389), entitled Search Warrants, is hereby made applicable for the procedure under this section, in so far as legal procedure may not be prescribed in this chapter; and if at any stage of the proceedings before any court or magistrate it shall appear that the matter will exceed the jurisdiction of such court or magistrate, the case or proceeding shall be forthwith certified to the district court of the proper county, and thereupon such district court shall assume jurisdiction and proceed and determine the matter in accordance with law. R. S. '98, § 746; '03, p. 21; '07, p. 241; '13, p. 97.

1952. (746x17.) Vinegar standard. Every person who, by himself, or by his agent or servant, or as the agent or servant of any other person, shall sell, deliver, exchange, or dispose of, or offer to sell, deliver, exchange, or dispose of, or have in his possession with intent to sell, deliver, exchange, or dispose of any vinegar without the name and address of the manufacturer or distributor in large letters in the English language upon the barrel or package containing such vinegar; or sell, deliver, exchange, or dispose of any vinegar which contains less than four per cent, by weight, of absolute acetic acid, or which contains any preparation of lead, copper, sulphuric acid, or any other mineral acid, vinegar eels, or ingredients injurious to health; or, any vinegar made by fermentation or oxidation which is not branded on the barrel or package, "fermented vinegar," with the name of the fruit or substance from which such vinegar is made, or which is not free from any foreign substance, or which contains less than one and three-fourths per cent, by weight, of solids contained in the fruit or grain from which such vinegar is fermented, or less than two and one-half tenths of one per cent ash or mineral matter, the same being the product of the material from which such vinegar is manufactured; or, any vinegar made wholly or in part from any distilled liquor which is not branded on the barrel or package "distilled vinegar" with the name of the material from which such liquor was made, and free from harmful artificial coloring matter, shall be guilty of a misdemeanor.

R. S. '98, § 4285; '99, p. 85; '03, p. 21; '07, p. 241; '13, p. 97.

1953. (746x18.) Id. No person or persons, known as retailers, who sell vinegar by the gallon, shall reduce by water or other mixtures the strength of vinegar purchased and sold by them, unless he shall mark in plain figures on said package or barrel, the strength of the vinegar still contained in the package. R. S. '98, § 4286; '03, p. 22; '07, p. 242.

1954. (746x19.) Insanitary conditions in hotels, restaurants, etc. Every owner, proprietor, or person in charge of or operating or maintaining any restaurant, hotel, bakery, confectionery, or ice cream plant, or any store, place of storage, or plant where any article of food or drink is manufactured, stored, deposited, offered for sale or sold, who shall fail, neglect, or refuse to keep such place clean and in good sanitary condition; or who shall employ any person who is afflicted with tuberculosis, syphilis, or any communicable disease in any such place, shall be guilty of a misdemeanor. The state dairy and food commissioner, or any of his deputies, upon finding any violation of this section, may forthwith order such place to be made clean and sanitary; or, if he deems it necessary, may close or order such place closed, but failure to take any such action shall not relieve the offender from prosecution. '07, p. 242; am'd '13, p. 97.

Hotel inspection, §§ 2944-2954.

1955. (746x20.) Who shall prosecute. It shall be the duty of the attorney-general, the district attorney, or county attorney, or any other state prosecuting attorney, when called upon by the state dairy and food commissioner or any of his deputies, to render any legal assistance in their power to execute laws and prosecute cases arising under the provisions of the

dairy and food laws. All fines, fees, and costs collected under prosecutions for violations of this chapter shall be paid into the state treasury.
R. S. '98, § 2449; '03, p. 17; '07, p. 242; am'd '13, p. 97.

1956. (746x21.) Report. Said commissioner shall make a biennial report to the governor, which shall contain an itemized account of all expenses incurred and fines collected, with such statistics and other information as he may regard of value. R. S. '98, § 2450; '03, p. 17; '07, p. 243.

1957. (746x22.) Defacing marks or labels. Whoever shall deface, change, erase, or remove any mark, label, or brand provided for by this chapter, with intent to mislead, deceive, or to violate any of the provisions of this chapter, shall be held liable to the penalties of this chapter.
'07, p. 243.

1958. (746x23.) Penalty for violations. Every person or corporation who shall violate any of the provisions of this chapter shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine in any sum less than $300, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment. And any article found in his or its possession in violation of this chapter shall be subject to confiscation and may be destroyed by the state dairy and food commissioner or his deputies. R. S. '98, § 742; '03, p. 23; '07, p. 243; '13, p. 97.

1959. False statements or misrepresentations. Penalty. Every person, firm, or corporation, foreign or domestic, that shall make or use any false or fraudulent statements or representations in advertising any article of food, drink, drug, or confectionery mentioned, referred to, or included in this chapter, in any pamphlet, newspaper, periodical, or advertisement shall be guilty of a misdemeanor and punished as provided in § 1958 hereof. '13, p. 97.

1960. Form of complaint. In every action arising under any of the provisions of this chapter, it shall be sufficient to charge the offense in the language of the statute without further particularity, and every exception or proviso, no matter where the same may occur, shall be deemed matter to be pleaded and proved in defense. The certificate of the state chemist, over his signature, certifying his findings in any analysis or examination of any article mentioned or referred to in this chapter, shall be admissible in any court as prima facie evidence of the facts set forth in such certificate.
'13, p. 97.

1961. (746x24.) Not liable to prosecution, when. No dealer of food or drink products shall be held liable to prosecution if he can establish that the goods were sold under a guaranty by a wholesaler, manufacturer, jobber, dealer, or other party residing in the United States from whom purchased.
'07, p. 243.

1962. (746x25.) Tainted, decayed, or spoiled food. It shall be unlawful for any person to sell, or offer for sale, or have in his possession with intent to sell, any article of food that has become tainted, decayed, spoiled, or is otherwise unwholesome or unfit to be eaten or drunk.
R. S. '98, § 4290; '03, p. 23; '07, p. 243.

CHAPTER 3.

RENOVATED BUTTER.

1963. (746x28.) Renovated butter to be branded. License for sale of. No person or persons, firm or corporation, by themselves or their agents or employes, shall sell, offer for sale, or expose for sale, or have in his or their possession for sale any renovated butter, unless the same shall have printed upon each and every package, roll, print, square, or any container of such renovated butter the words, "renovated butter," in letters not less than one-half

inch in height, or who shall not have secured from the state dairy and food commissioner, now existing under the laws of this state, a license as provided hereinafter. '05, p. 106.

Adulteration of butter, etc., § 1994. To be sold by weight, § 6298.

1964. (746x29.) Renovated butter defined. The term renovated butter, as used in this chapter, is hereby defined to mean and include butter that has been reduced to a liquid state by melting, and drawing off such liquid or butter oil and churning or otherwise manipulating it in connection with milk or any product thereof. '05, p. 106.

1965. (746x30.) License. Term. Amount of. Any person or persons, firms or corporations, desiring to manufacture or deal in renovated butter shall make application to the state dairy and food commissioner for a license, and upon payment of license fee of the amount mentioned herein, to the state dairy and food commissioner, said state dairy and food commissioner shall issue to the applicant a license. All such licenses shall expire December 31st of each year, and may be issued in periods of one year or six months, upon payment of a proportionate part of the license fee. Manufacturers of renovated butter within this state shall pay an annual license fee of $1000; wholesale dealers shall pay an annual license fee of $400; retail dealers in such renovated butter shall pay an annual license fee of $50; hotels, restaurants, boarding houses, and all other places where meals are served and payment is received therefor, either immediately or by the day, week, or month, where such renovated butter is used, shall pay an annual license fee of $25. The term wholesale dealers, as used herein, includes all persons, firms, or corporations, who shall sell renovated butter in quantities of ten pounds or more. The term retailers includes all persons who sell in quantities of less than ten pounds. All licenses while in force shall be conspicuously displayed in the place of business of the party or parties to whom they have been issued. The state dairy and food commissioner shall require all persons holding manufacturers' or wholesale licenses, as provided in this chapter, to keep a record in a form separate from all other business in which every sale of renovated butter shall be recorded, giving the quantity sold, the name and location of the buyer, and the place to which it was shipped. Such record shall be accessible at all times to duly authorized representatives of the state dairy and food commissioner. '05, p. 106.

1966. (746x31.) License to be paid into state treasury. All license fees paid to the state dairy and food commissioner under this chapter shall be paid by said dairy and food commissioner into the state treasury. '05, p. 107.

1967. (746x32.) Penalty. Whoever shall violate any of the provisions or sections of this chapter shall be guilty of a misdemeanor, and shall, upon conviction thereof, be punished for the first offense by a fine of not less than $25 nor more than $100, or by imprisonment in the county jail for not less than ten days and not exceeding thirty days; and for each subsequent offense, by a fine of not less than $50 nor more than $200, or by imprisonment in the county jail for not less than twenty days nor more than 100 days, or by both such fine and imprisonment, at the discretion of the court. '05, p. 107.

1968. (746x33.) County attorney must prosecute. Fines, where paid. It shall be the duty of the county attorney of each and every county in the state, upon application, to attend to the prosecution in the name of the state of any action brought for the violation of any of the provisions of this chapter within his district. All of the fines imposed for the violation of any of the provisions of this chapter shall be paid to the county in which the fine is imposed. '05, p. 107.

CHAPTER 4.

PURITY AND CLEANLINESS.

('11, p. 95.)

1970. Duties of state dairy and food commissioner. It shall be the duty of the state dairy and food commissioner or his deputies to visit, as frequently as they deem necessary, all creameries, cheese factories, condensed milk factories, dairies where milk and cream are bottled or prepared for sale, and farm dairies in the state of Utah, and inspect and score the same according to the score cards authorized by the bureau of animal industry of the United States department of agriculture. A copy of the score cards shall be left with the owner, and such information given as will assist the producer to improve the sanitary conditions or remedy such defects as the score card indicates. A copy of the score card shall be kept on file in the commissioner's office. All creameries, cheese factories, condensed milk factories, and dairies where milk and cream are bottled or prepared for sale and farm dairies falling below fifty points in the rating as indicated by the score card are hereby declared to be in an insanitary condition, and the state dairy and food commissioner shall immediately proceed against them according to law.

1971. Fruits and vegetables must be cleaned before bottling or canning. No person, firm, or corporation shall bottle or can fruits or vegetables or their products and offer them for sale unless said fruits and vegetables have been previously washed in clean water continuously changed preparatory to the canning or bottling.

Berries and small fruit sold by weight or specified containers, § 6301.

1972. Flavoring syrups to be labeled. Soda fountain syrups flavored with imitation flavoring extracts must be plainly and correctly labeled. If the containers of such syrups are not displayed to the customer so that the label is readily seen, conspicuous signs must be attached to the fountain where they can be readily seen by the customer. Said signs must be printed with letters not less than one-half inch deep and read as follows: "Some of the products served at this fountain are artificially flavored and colored and contain a trace of benzoate of soda."

1973. Use of dyes prohibited. Exception. The use of any dye, harmless or otherwise, to color or stain the food in a manner whereby damage or inferiority is concealed is specifically prohibited. The use in food for any purpose of any mineral dye or any coal tar dye, except the coal tar dyes hereinafter listed, shall be grounds for prosecution. The coal tar dyes hereinafter named, made specifically for use in foods, and which bear a guaranty from the manufacturer that they are made from subsidiary products and represent the actual substance the name of which they bear, may be used in foods. In every case a certificate that the dye in question has been tested by competent experts and found to be free from harmful constituents must be filed with the state dairy and food commissioner and approved by him.

The following coal tar dyes which may be used in this manner are given numbers, the numbers preceding the names referring to the number of the dyes in question as listed in A. G. Green's edition of the Shultz-Julius Systematic Survey of the Organic Coloring Matters, published in 1904.

The list is as follows:

Red shades—107, Amaranth; 56, Ponceau 3 R.; 517, Erythrosin.
Yellow shade—4, Nepthol yellow S.
Orange shade—85, Orange 1.
Green shade—435, Light Green S. F. yellowish.
Blue shade—693, Indigo disulfo acid.
Each of these colors shall be free from any coloring matter other than

the one specified, and shall not contain any contamination due to imperfect or incomplete manufacture.

1974. Slaughtering, packing, and similar establishments to be kept sanitary. All slaughtering, packing, meat canning, salting, rendering, or similar establishments shall be maintained and conducted under sanitary conditions, and shall be inspected under the following regulations by the state dairy and food commissioner or his deputies:

1. All ceilings, walls, pillars, and the interior of each establishment, including partitions, shall be kept in a sanitary condition, and shall be whitewashed or painted once a year, or oftener if required. When floors or other parts of the building, or tables or other parts of the equipment are so old or in such poor condition that they cannot be readily made sanitary, they shall be removed and replaced by suitable materials. All establishments in which animals are slaughtered or meats and meat food products are prepared, cured, packed, stored, or handled shall be properly screened against flies and other vermin. Walks, platforms, or approaches leading into establishments shall be kept clean to prevent dirt being tracked into the same.

2. All tracks, trays, and other receptacles, all chutes, platforms, racks, tables, and other appliances, and all knives, saws, cleavers, and other tools, and all utensils, machinery, and vehicles used in moving, handling, cutting, chopping, mixing, canning, or other processes shall be thoroughly cleaned before using.

3. The aprons, smocks, or other outer clothing worn by employes who handle meat or meat food products shall be of a material that is readily cleansed and made sanitary, and only clean garments shall be worn. Persons who handle meat or meat food products shall be required to keep their hands clean, and they shall be required also to pay particular attention to the cleanliness of their boots or shoes.

4. Persons affected with tuberculosis or any other communicable disease shall not be employed in any of the departments of establishments where carcasses are dressed, meat handled, or meat products are prepared. Any employe of such establishment who may be suspected of being so affected shall be reported by the inspector in charge to the manager of the establishment, and to the state dairy and food commissioner, who in turn shall report such case to the secretary of the state board of health.

5. Hogs must be kept at least one hundred feet from slaughtering houses and fed in clean troughs and pens. The offal of all slaughtered healthy animals, except hogs, may be fed to hogs; *provided,* that at least one-half of their daily rations consist of grain or vegetable matter. The offal of all hogs must be buried, burned, or tanked. The offal of animals that is not fed to hogs must be burned, buried, or tanked.

6. All yards, fences, pens, chutes, alleys, and other places belonging to the premises of such establishments, whether they are used or not, shall be maintained in a sanitary condition, and no nuisance shall be allowed in the establishment or on its premises.

7. The room or compartments in which meat or meat food products are prepared, cured, stored, packed, or otherwise handled shall be free from odors from toilet rooms, catch basins, casing departments, tank rooms, hide cellars, or other similar places, and shall be kept free from flies and other vermin, by screening, or other methods. All rooms or compartments shall be provided with cuspidors of such shape as not readily to be upset and of such material and construction as to be readily disinfected, and employes who expectorate shall be required to use them.

8. Due care must be taken to prevent meat and meat food products from falling on the floor; and in the event of their having so fallen, they must be condemned or the soiled portions removed and condemned. When meat or meat products are being emptied into tanks, some device, such as a metal funnel, must be used.

9. Only good, clean, and wholesome water and ice shall be used in

the preparation of carcasses, parts, meat or meat food products. Whenever there is any doubt regarding the sanitary condition of the water supply, notice shall be sent immediately to the state dairy and food commissioner.

10. Wagons or cars in which meat or meat products are transported shall be kept in a clean and sanitary condition. All wholesalers and retailers conveying meat to the markets are required to furnish ample and complete protection against contamination by flies, requiring covered and screened conveyances for this purpose.

1975. Use of Babcock test. In the use of the Babcock test, the standard milk measures or pipettes shall have a capacity of 17.6 cubic centimeters, and the standard test tubes or bottles for milk shall have a capacity of 2 cubic centimeters for each 10 per cent marked on the necks thereof; cream shall be tested by weight and the standard unit for testing shall be 18 grams, and it is hereby made a misdemeanor to use any other standards of milk or cream measure where milk or cream is purchased by or furnished to creameries or cheese factories and where the value of said milk or cream is determined by the percentage of butter fat contained in the same or wherever the value of milk or cream is determined by the percentage of butter fat contained in the same by the Babcock test. In sampling cream or milk from which composite tests are to be made to determine the percentage of butter fat contained therein, no such sample or sampling shall be lawful unless a sample be taken from each weighing and the quantity thus used shall be proportioned to the total weight of the cream or milk tested. Every person, corporation, or company operating a creamery when using the Babcock test as a standard to determine the value of any milk or cream received or brought by such person, corporation, or company to be manufactured into butter, shall, when paying for such milk or cream, include, in every statement or check issued to any patron in payment thereof, a statement of the number of pounds of butter fat for which payment is made. Any manufacturer, merchant, dealer, or agent in this state who shall offer for sale or sell a milk pipette or measure, test tube, or bottle, which is not correctly marked or graduated as herein provided, shall be guilty of a misdemeanor. It shall be unlawful for the owner, manager, agent, or any employe of a cheese factory, creamery, or condensed milk factory to falsely manipulate or under-read or over-read the Babcock test or any other contrivance used for determining the quality or value of milk or cream, or to make any false determination by said Babcock test or otherwise.

1976. Penalty. Whoever shall violate any of the provisions of this chapter shall be guilty of a misdemeanor, and shall, upon conviction thereof, be punished by a fine of not less than $25 nor more than $200, or by imprisonment in the county jail for not less than ten days nor more than thirty days; or by both such fine and imprisonment, at the discretion of the court.

CHAPTER 5.

INSPECTION OF CATTLE, SHEEP, SWINE, AND GOATS.

1990. (746x34.) Inspection by dairy and food commissioner. Meat to be tagged. Unwholesome meat to be destroyed. The state dairy and food commissioner is hereby empowered to examine and inspect all cattle, sheep, swine, and goats before they enter into any slaughtering, packing, meat canning, rendering, or similar establishment in which they are to be slaughtered and the meat and meat food products thereof are to be used or sold for human food; and all cattle, sheep, swine, and goats found on such inspection to show symptoms of disease shall be set apart and slaughtered separately from all other cattle, sheep, swine, or goats; and when so slaughtered, the

carcasses of said cattle, sheep, swine, or goats shall be subject to a careful examination and inspection. The dairy and food commissioner may also make a post mortem examination and inspection of the carcasses and parts thereof of all cattle, sheep, swine, and goats to be prepared for human food at any slaughtering, meat canning, salting, packing, rendering, or similar establishment in this state, and the carcasses and parts thereof of all such animals found to be sound, healthful, wholesome, and fit for human food, shall be marked, stamped, tagged, or labeled as "inspected and passed"; and said inspectors shall mark, stamp, tag, or label as "inspected and condemned" all carcasses and parts thereof of animals found to be unsound, unhealthful, unwholesome, or otherwise unfit for human food, and all carcasses and parts thereof thus inspected and condemned shall be destroyed for food purposes by the said establishment in the presence of the dairy and food commissioner or his deputy. '07, p. 223.

Inspection by live stock board, §§ 183-200. Importation of diseased animals, §§ 100, 196-200.
Diseased animals to be killed, §§ 101, 1937.

1991. (746x35.) Sanitary conditions. Rules and regulations. Penalty. All slaughtering and packing houses shall be maintained and conducted under sanitary conditions, and the state dairy and food commissioner is hereby authorized and empowered to make rules and regulations to carry out the provisions of this chapter, and any person, firm, or corporation violating any of such rules shall be declared guilty of a misdemeanor. '07, p. 224.

Sanitary conditions at dairies, §§ 1938-1941.

1992. (746x36.) Dairy and food commissioner may co-operate with national inspectors. In establishments where animals are slaughtered for human food partly for consumption within the state and partly for interstate commerce, the dairy and food commissioner may co-operate with the inspectors appointed by the national government; and all inspections made by such inspectors under the provisions of such co-operation shall be deemed a compliance with the provisions of this chapter. '07, p. 224.

1993. (746x37.) Provisions of this chapter not applicable, when. The provisions of this chapter shall not apply to any animals, or the carcasses or parts thereof, that are inspected and stamped by inspectors of the national government. '07, p. 224.

1994. (746x38.) Id. The provisions of this chapter requiring the inspection of animals to be slaughtered shall not apply to animals slaughtered by any farmer for domestic use. '07, p. 224.

1995. (746x39.) Id. Any person who shall sell or offer for sale the carcasses or parts thereof of any animals enumerated in this chapter, which have been examined and condemned, shall be guilty of a misdemeanor. '07, p. 224.

TITLE 25.

DENTISTRY.

('09, p. 35.)

2015. (748.) Board of dental examiners. A board of dental examiners, consisting of five members to be appointed by the governor, by and with the consent of the senate, is hereby created, to be known as the state board of dental examiners, whose duty it shall be to carry out the purposes and enforce the provisions of this chapter.

2016. Compensation and expenses, how paid. Report. Each member of the board shall receive such compensation as the board may determine, not to exceed $4 per day for the time actually engaged in the performance of his duties, and his actual and necessary expenses. All moneys received by said board as fees shall be paid into the state treasury at the close of

each month, and shall be placed to the credit of the state board of dental examiners. All claims for expenses incurred by the board and for all salaries paid shall be submitted to the state board of examiners, and, if approved, shall be paid by the warrant of the state auditor out of any moneys on hand in the state treasury to the credit of the state board of dental examiners. But no claims shall be allowed or warrants issued in excess of the amount of fees on hand to the credit of said board. A detailed report of the fees collected, verified under oath, shall be filed with the state auditor and the state treasurer at the time fees are deposited with the state treasurer.

'15, p. 20.

2017. (749.) Term of office. Except as hereinafter provided, the members of the board shall hold office for a term of four years, and until their successors shall be duly appointed and qualified. Immediately after this title takes effect, the governor shall, by and with the consent of the senate, appoint three members of said board to serve until the last Monday in March, 1911, and two members of said board to serve until the last Monday in March, 1913, and until their successors shall be duly appointed and qualified. Biennially thereafter the governor shall, by and with the consent of the senate, appoint a sufficient number of persons for the four-year term to complete the membership of said board. Said term of four years shall begin on the last Monday of March in the year of such appointment.

2018. Qualifications of members. No person shall be appointed to membership of said board unless he is a reputable and ethical practicing dentist, and shall have been actively and legally engaged in the practice of dentistry in this state for at least five years next preceding the date of his appointment thereto; nor shall any person be appointed to membership on said board who is a member of the faculty of any dental college or dental department of any medical college or has any financial interest in any such college.

2019. (750-751.) Organization. Bond. Record. The board shall choose a president, a secretary, and a treasurer from among its members. For the faithful performance of their duties the secretary and the treasurer, respectively, shall give such bond as the board may require. The board shall have an official seal. It shall keep a record of its proceedings, a register of all persons licensed to practice dentistry, and of all persons whose licenses have been revoked; which records shall be open to public inspection at all reasonable times. A transcript of any entry in such records, certified by the secretary under the seal of the board, shall be evidence of the facts therein stated.

2020. (752.) Meetings. Quorum. The board shall meet at least once in each year, and oftener if necessary, at such times and places as it shall provide. Notice of meetings at which the board intends to consider applications for licenses shall be given by the secretary, by publication for at least six successive issues in some newspaper having a general circulation in the state. A majority of the board shall constitute a quorum. A less number may, however, in the absence of a quorum, adjourn a meeting from time to time, and direct the secretary to give notice thereof to the absent members, which notice shall be given.

2021. Procedure. Testimony. Inspections. The board shall have the power to adopt by-laws and rules for its procedure, and to make and enforce all needful rules and regulations for the proper and effective performance of its duties, which shall not be inconsistent with the laws of the state. It may hear testimony relating to any matter properly before it, and for such purpose any member thereof may and is hereby authorized to administer oaths. The board shall also have power by itself or by a committee duly appointed by the board for that purpose, to inspect the office, equipment, instruments, laboratory, appliances, and supplies of any licensed dentist for the purpose of ascertaining if the same are kept and maintained in

a sanitary condition; and it shall be the duty of every licensed dentist to give the board or said committee free access to his or her office, instruments, laboratory, appliances, and supplies for the purpose of such examination. '17, p. 349.

2022. (759.) Unlawful to practice dentistry, when. It shall be unlawful for any person to practice dentistry without having been licensed so to do by the state board of dental examiners, and without having complied with the provisions of this title; *provided, however,* that this section shall not annul any license heretofore granted by the board of dental examiners hitherto existing, if, at the time this title takes effect, or within sixty days thereafter, such license, or certified copy thereof, shall have been filed with the county clerk as hereinafter provided.

2023. (759x.) Practicing dentistry defined. Any and all persons shall be held to be practicing dentistry, within the meaning of this title, who shall (1) by card, sign, circular, pamphlet, newspaper, or in any other way, advertise himself as a dentist; or (2) who shall, for a fee, salary, or reward, paid or to be paid directly or indirectly, either to himself or to some other person, offer or undertake by any means or method, to diagnose, treat, operate, or prescribe for any disease, pain, injury, deficiency, deformity, or physical condition of the human teeth, alveolar process, gums, or jaw, or to supply artificial teeth as substitutes for natural teeth; or (3) who shall in any way indicate that he will, by himself or his agents or servants, undertake by any means or method to diagnose, treat, operate, or prescribe for any disease, pain, injury, deficiency, deformity, or physical condition of the human teeth, alveolar process, gums, or jaws, or to supply artificial teeth as substitutes for natural teeth; or (4) who manages or conducts as manager, proprietor, conductor, operator, or otherwise, a place where dental operations are performed; and proof of any such facts shall be taken and considered, in the trial of any action for the violation of the provisions of this title, as prima facie evidence of such violation. But nothing in this title shall prohibit an unlicensed person from extracting or treating teeth, unless he practices the extraction or treatment of teeth as a specialty, or from performing merely mechanical work upon inert matter in a dental office or laboratory; or the student of a licentiate from assisting his preceptor in dental operations, while in the presence of and under the personal supervision of his instructor; or a duly licensed physician or surgeon from treating diseases of the mouth, or performing operations in oral surgery, unless he practices dentistry as a specialty; or a dental surgeon of the United States army or navy from practicing dentistry in the performance of his duties; or a legal practitioner of dentistry of another state from making clinical demonstrations before a dental society, convention, association of dentists, or a dental college. Am'd '17, p. 349.

Limitations on prescriptions of narcotics, etc., § 4432.

2024. (753.) Applications for license. Conditions. Examinations. Any person who desires to practice dentistry in this state shall file with the secretary of the board a written application for license, and furnish satisfactory evidence that he or she is at least twenty-one years of age, of good moral character, and that he or she is a graduate of a reputable dental college, recognized by the national association of dental examiners, and that he or she, before entering such dental college, was a graduate from a high school or similar institution of learning accredited by the University of Utah or any other university of equal standing, and which high school or similar institution of learning requires a four-year course of instruction for such graduation, or an academic education the equivalent thereof; or, in lieu of such graduation from high school and from such dental college, has been a duly licensed practitioner of dentistry for at least five years next preceding such application in a state having requirements as to qualifications and examinations not less than those of this state. At the first meeting of the board thereafter he or she shall appear before the board and pass

a satisfactory examination in the English language in the following subjects: Anatomy, physiology, hygiene, chemistry, materia medica, therapeutics, metallurgy, histology, pathology, bacteriology, operative, surgical, and mechanical dentistry, and shall also demonstrate in operative and mechanical dentistry, if required by the board. Am'd '17, p. 349.

2025. (754.) License. If the examination proves satisfactory to the board, it shall issue a license to the person examined, which shall be signed by the president and the secretary and the other members of the board, and have the official seal of the board affixed thereto.

2026. (756.) Id. Temporary. The secretary shall, upon the recommendation of any three members of the board, grant to any applicant for a license a temporary license to practice dentistry until the next meeting of board, at which the applicant is required to present himself for examination, at which time such license shall expire. Such temporary license shall not be granted to any person who has been rejected by the board.

2027. Licenses in force. Subject to fee. The license of any dentist in force at the time of the passage of this title shall continue in force until revoked in the manner hereinafter provided, and the annual license fee paid by such dentist under the terms of the laws of this state existing at the time of the passage of this title shall keep such license in force until the expiration of the time for which the same was paid, and thereafter the holder of such license shall be subject to the annual license fee in this title provided. Am'd '17, p. 349.

2028. (759x1.) Id. The board may, in its discretion, issue a license, without examination, to any applicant who furnishes satisfactory proof that he is a graduate from a reputable dental college and holds a license from a dental board of any other state, territory, or district of the United States, under requirements equal to those of this state, or who for five consecutive years next prior to filing his application has been in the legal and reputable practice of dentistry in any other state, territory, or district of the United States and holds a license from a similar dental board thereof, if in either case the laws of such state, territory, or district accord equal rights to a licensed dentist of this state who removes to, or resides in, and desires to practice his profession in such state, territory, or district. No license shall be issued under this section unless authorized by an affirmative vote of a majority of the members of the board.

2029. Change of residence. Any reputable dentist of good moral character who, having been in the legal practice of dentistry in this state for five years or more, who desires to change his residence into another state, territory, or district of the United States, may apply to the board for, and said board may grant to him, a certificate attesting his moral character and professional attainments.

2030. Copy of license filed with county clerk. Every person who receives a license from the board shall, within thirty days thereafter, cause a copy of such license certified by the secretary, to be filed with the clerk of the county in which such person resides, and if he engages in the practice of dentistry in any other county or counties, he shall also file a certified copy thereof with the clerk of each such counties. The original license, or a certified copy thereof, shall also be conspicuously displayed in his office. A violation of any of the provisions of this section shall work a forfeiture of such license, which shall not be reinstated except upon payment to the board of the sum of $25 as a penalty for such violation.

2031. Duty of county clerk. It shall be the duty of the county clerk of each county within this state to make, and file with the secretary of the board, on or before the first day of January of each year, a list of all licenses filed with such clerk during the preceding year.

2032. (759x2.) Revocation of license. Grounds. The court may revoke the license of any dentist for any of the following causes:

1. If he be convicted of a felony or of a misdemeanor involving moral turpitude; in which case the record of conviction or a certified copy thereof, certified by the judge or clerk of the court in which the conviction is had, shall be conclusive evidence;

2. If he be guilty of unprofessional conduct, such as obtaining any fee by fraud or misrepresentation, or by employing, directly or indirectly, any student or unlicensed dentist, or one whose license has been revoked, to perform operations of any kind, or to treat lesions of human teeth, gums, or jaws, or correct or attempt to correct malimposed positions thereof, except as hereinbefore provided, or employs what are known as cappers or steerers to obtain business; or wilfully betrays professional secrets; or advertises his dental business or treatment or devices by untruthful, improbable, or impossible statements;

3. If he uses intoxicants or drugs to such an extent as to render him unfit to practice dentistry;

4. If he maltreats his patients by reason of gross ignorance, wilfulness, or neglect;

5. If he be guilty of gross immorality;

6. If he wilfully violates any of the provisions of this title;

7. If he shall refuse to the board, or a committee appointed by it, free access to his office, instruments, laboratory, equipment, appliances, or supplies for the purpose of inspecting the same under the provisions of § 2021, or if, upon such inspection, the same shall be found to be in an insanitary condition. Am'd '17, p. 349.

2033. Id. Charges. No action to revoke a license shall be taken until the accused has been furnished a statement of the charges against him and notice of the time and place of hearing thereof. The accused may be present at the hearing in person, by counsel, or by both. The statement of charges and notice may be served personally upon the accused, or mailed to him at his last known address, at least twenty days prior to the hearing. If, upon such hearing, the board find the charges to be true, it may revoke his license, and all rights and privileges thereunder shall cease. When a license is revoked, the secretary shall certify the revocation to the clerk of the county or counties with whom the accused shall have filed his license or certified copy thereof; the board may, for good cause shown, reinstate any license so revoked, and in case of reinstatement of the license the secretary shall certify such reinstatement to said clerk. The right of appeal from the action of the board in revoking the license of any dentist is hereby granted. Such appeal shall be to the district court of the county in which such dentist is practicing, and must be taken within thirty days after notice of the action of the board in revoking such license. The appeal is perfected upon filing notice of appeal, together with an undertaking in the sum of $100 with two sureties, conditioned that if the action of the board in revoking the license be affirmed by the district court, the dentist will pay the costs of the appeal and the action in the district court. Such undertaking shall be approved by the president of the board. In lieu of the undertaking, the dentist may deposit $100 with the treasurer of the board.

2034. Guilty of misdemeanor, when. Every person is guilty of a misdemeanor, who:

1. Practices dentistry within this state without a license;

2. Continues to practice dentistry after his license has been revoked by the board;

3. Practices dentistry under a false or assumed name, with the intent to deceive;

4. Falsely pretends to be a graduate of any dental college;

5. With others, practices dentistry, under any title or name, corporate or otherwise, without causing to be displayed and kept in a conspicuous manner and place at the entrance of his place of business, his own and the name of every person employed therein in the practice of dentistry; to-

gether with the word mechanic or apprentice after the name of each unlicensed person employed;

6. Fails to furnish to said board, within ten days after demand made by the secretary, the name and address of every person practicing or assisting in the practice of dentistry in his office at any time within sixty days prior to said demand, together with a sworn statement showing under and by what license or authority said person or employe has been practicing dentistry; *provided,* said statement shall not be used as evidence against the person who has made the same in any prosecution for the violation of any of the provisions of this section;

7. Impersonates another at any examination held by the board;

8. Procures a license with intent that it shall be used as evidence of the right to practice dentistry by a person other than the one to whom such license is issued;

9. Permits a license issued to another as authority of the user to practice dentistry;

10. Uses a license issued to another as authority of the user to practice dentistry;

11. Violates any of the provisions of this title.

Unlawful to prescribe narcotic drugs, § 4412.

2035. Fees fixed. Disposition. The secretary shall collect, in advance, and pay over to the state treasurer at the close of each month for the credit of the state board of dental examiners, the following fees:

For filing an application for license and examination the sum of $20, no part of which shall be returned; *provided, however,* if the applicant shall fail to pass a successful examination he may, within six months thereafter, again apply for examination without the payment of an additional fee;

For issuance of a license, $5;

For certified copy of license, $2.50;

For issuance of license without examinatoin, $25;

For certified transcript, per folio, 25 cents;

For certificate of character and attainments, $5;

For each other certificate under seal, 50 cents. Am'd '15, p. 20.

2036. Annual fee. Default. Proceedings for revocation. Judgment. Certificate of clerk. Administration of anesthetics. (1) Every dentist licensed by the state board shall pay to the treasurer of the board an annual license fee of $1 in advance on or before the 30th day of November in each and every year for the next ensuing calendar year, except the year in which the license is issued to him. In case any person defaults in paying said annual license fee, his license may be revoked on thirty days' notice in writing from the secretary, unless within said time, the fee is paid, together with such penalty, not exceeding $10, as the board may impose; *provided,* the board may reduce or remit such fee for any year, but such reduction or remission must be made alike to all liable to pay the same.

(2) Whenever there exists cause for the revocation of a license of a practicing dentist under § 2032, then the license or certificate of such person shall be revoked or canceled in the manner hereinafter provided, by the district court of the county where the holder of such certificate or license practiced at the time of committing the act or acts constituting the ground of such revocaion, or by the district court of the county where the holder of such certificate or license resides at the time of filing such proceedings. Proceedings for such cancellation or revocation shall be brought and conducted in the manner provided by law for proceedings in civil cases, except as in this title provided. The board of dental examiners of the state of Utah shall be the plaintiff and the person charged shall be the defendant in any such proceedings. The complaint in such proceedings shall be in writing, verified by oath of one of the members of the board, or any person having knowledge of the facts constituting a cause for complaint, and shall pray for a decree of the court canceling and revoking the certificate or license of the defendant,

and an injunction enjoining him from practicing dentistry in this state. When, after trial, the defendant is found guilty as charged, or when, upon his default, which may be entered as in other civil cases, provided that the facts stated in the complaint constitute grounds for revocation as in § 2032 provided, then, in either such case, the court may decree a cancellation or revocation of the certificate or license of the defendant, and may enjoin him from practicing dentistry in this state, or may find him guilty of a misdemeanor.

Upon entry of such judgment or decree it shall be the duty of the secretary of the said board to file a certified copy of said judgment and decree with the clerk of the counties in which the certificate or license of the defendant is recorded, and said clerk must thereupon write on the margin of the copy of said certificate or license of said defendant the following: "This license was revoked and canceled by a decree of the district court of ..... county, Utah, on the ..... day of .....," giving the day, month, and year of such revocation by said court, together with the county wherein said decree was made and entered by said district court. No license shall be revoked under this section unless the accused has been guilty of the acts complained of within two years next preceding the time of the filing of the complaint, charging him with such misconduct.

(3) A licensed dentist shall have the right to administer general and local anesthetics and to prescribe drugs or medicines necessary or proper in the practice of his profession. Am'd '17, p. 349.

Unlawful to prescribe narcotic drugs, § 4412.

2037. Board or member may make complaint. The board or any member or officer thereof may make a complaint for the violation of any of the provisions of this title; and the board, by its officers, counsel, and agents, may aid in presenting the law or facts in any proceeding taken thereon; an injunction shall lie at the suit of the board to restrain any unlicensed person, or one whose license has been revoked, from practicing dentistry in this state.

TITLE 26.

DRAINAGE DISTRICTS.

('13, p. 167.)

2040. (760.) Who may propose organization. Whenever a majority of the owners of title or evidence of title of lands within a district proposed to be organized as a drainage district, who own or control not less than one-third in area of the land to be reclaimed or benefited, or whenever one-third of the owners of title of lands within a district proposed to be organized as a drainage district, and who own or control a major portion in area of the lands to be reclaimed or benefited, or lands which are susceptible of drainage, desire to provide for the drainage of the same, they may propose the organization of a drainage district under the provisions of this title, and when so organized, such district shall have the powers conferred, or that may hereafter be conferred, by law upon such drainage districts. The equalized county assessment roll next preceding the presentation of a petition for the organization of a drainage district, under the provisions of this title, shall be sufficient evidence of title for the purposes herein.

The drainage act, as it stood in C. L. 1907 §§ 760-779, was held unconstitutional, as permitting private property to be taken without due process of law; inasmuch as owners of land included in a drainage district were not given a right to a hearing on the questions whether their lands were benefited by the proposed drainage district, and whether the proposed assessments were just and equitable as compared with the assessments of other lands in the district; such a hearing before some competent tribunal prior to the time the tax lien was established or the lands sold for delinquent assessments being held to be absolutely necessary.

Argyle v. Johnson, 39 U. 500; 118 P. 487.

The drainage act, as amended by the laws of 1911, chap. 53, was held, on application for a writ of prohibition against the issuance of bonds for a proposed district, to be constitutional, and not to deprive the land owner of property without due process of law, since land

owners were given an opportunity to be heard on objections to the inclusion of their lands within a proposed district. The purpose for which property may be taken under this act by the bonding of the districts and levying and assessing taxes thereon is for a public and not a private use. Upon application for such a writ of prohibition, the court will assume that all the land within the district is similarly situated and capable of irrigation and improvement by means of the proposed district; redress for any unjust assessment or for taxation to maintain an irrigation system incapable of benefiting any particular piece of ground will be afforded by the courts in an appropriate action.

Lundberg v. Green River Irr. Dist., 40 U. 83; 119 P. 1039.

The act having been amended by the laws of '13, chap. 95, § 327, was held to be meaningless as to the notice required to be given for the special election to be held for the purpose of voting upon the issuance of bonds, and the election thereunder was held to be invalid, and the issuance of bonds thereunder was restrained, as there was no standard in the statute by which it could be determined whether the election notice was sufficient.

Moody v. Millard County Drainage District No. 1, 46 U. 24; 149 P. 480.

The act having been further amended by the laws of '15, chap. 114, was held constitutional, inasmuch as it gave property owners affected an opportunity to be heard before the board of county commissioners as to the necessity and utility of the proposed district and the justice and equity of the tax assessed upon land thereunder; nor was it invalid as preventing uniformity and equality of taxation.

Ferry v. Corinne Drainage Dist., 48 U. 1; 156 P. 921.

2041. (761.) Petition. Presentation to county commissioners. Bond. A petition shall first be presented to the board of county commissioners of the county in which the land is situated, and if the proposed district will contain lands situated in more than one county, then in the county in which the greatest portion thereof is situated, signed by the required number of holders of title, or evidence of title, of such proposed district, evidenced as above provided, which petition shall set forth and particularly describe the proposed boundaries of such district, and shall pray that the same may be organized under the provisions of this title. Such petition shall be presented at a regular meeting of said board of county commissioners, and due notice thereof shall be given as hereinafter provided. And the said petitioners shall file with the board of county commissioners, a good and sufficient undertaking in the sum of 2 per cent of the estimated cost of the proposed improvements in the said drainage district. The condition of such undertaking shall be to the effect that if the said board of county commissioners shall find no merit in the said petition and shall find that the cost of the proposed improvement or improvements shall be in excess of the benefit or benefits to be derived therefrom, that the petitioners will pay all cost of preliminary surveys and the publication of notice and such other lawful expenses as may have been incurred by the said board of county commissioners. The petition shall also contain the name proposed to be given to the drainage district.

2042. (762.) Id. Notice of hearing. Such petition for the creation of the proposed district being filed, the clerk of said county shall cause three weeks' notice of the presentation and filing of such petition to be given, addressed "to all persons interested," by posting notices thereof at the door of the courthouse of the county or counties in which the district is situated, and in at least three of the most public places in such proposed district, and also by publishing a copy thereof at least once a week for three successive weeks in some newspaper or newspapers published in the county in which the district is proposed to be formed, and if any portion of said proposed district lie within another county or counties, then said petition and notice shall be posted as above provided or published in a newspaper published or having a general circulation in each of said counties. Such notice shall state when and where said petition was and is filed; the starting point or points, route or routes, terminal or termini, and general description of the proposed work; the boundaries and general description by legal subdivisions and name of the proposed drainage district, and at what meeting of said board that petitioners will ask a hearing of said petition; *provided,* that it shall not invalidate said notice if no description of drains or ditches is given therein. If any of the land owners of said district, are non-residents of the county or counties in which the proposed district will lie, the petition shall be accompanied by an affidavit, giving the names and places of residence of such non-residents, if known, and if unknown, stating that, upon diligent inquiry, their places of residence cannot be ascertained; and the clerk shall send a copy of the notice aforesaid to each of said non-residents whose residence is known within

three days after the first publication of the same. The certificate of the clerk, or the affidavit of any other credible person, affixed to a copy of said notice, shall be sufficient evidence of the posting, mailing, and publication of said notices.

2043. Hearing. Petition may be amended. The county commissioners of the county in which said petition shall be filed may hear the petition at any regular or special meeting, and may determine all matters pertaining thereto, and all subsequent proceedings of the district when organized under this title, and may adjourn the hearing from time to time, or continue the case for want of sufficient notice or other good cause. The commissioners, upon application of the petitioners, shall permit the petition, affidavit, and orders to be amended, and no petitioner shall have the right to withdraw from said petition, except by the consent of the majority of the other petitioners thereon or where it shall be shown to the satisfaction of the commissioners that the signature of the petitioner was obtained by fraud or misrepresentation.

2044. Id. Interested parties may protest. Petition may be dismissed, when. Boundaries of district to be fixed. Board of supervisors. Term. Powers and duties. Proclamation. When such petition is presented, the said board of county commissioners shall hear the petition, and may adjourn such hearing from time to time, not exceeding four weeks in all. On the hearing of any petition filed under the provisions of this title, all parties through or upon whose land any of the proposed work may be constructed, or whose land may be damaged or benefited thereby, may appear and contest the necessity or utility of the proposed work, or any part thereof, and the contestants and petitioners may offer any competent evidence in regard thereto. It shall be the duty of the commissioners to hear and determine whether or not the said petition contains the signatures of a majority of the owners of title to the lands within said proposed district, and who represent one-third in area of the lands proposed to be affected by such work, or that the said petition is signed by one-third of the owners of the lands in said proposed district who represent a major portion in area of the lands proposed to be reclaimed or benefited, and the affidavit of any three or more of the signers of said petition, that they have examined said petition and are acquainted with the locality of said district, and that the said petition is signed by a majority of such owners, who represent at least one-third in area of the lands proposed to be affected by such work, or that said petition is signed by one-third of the owners of lands in said proposed district who represent a major portion in area of the lands proposed to be reclaimed or benefited, may be taken by the county commissioners as prima facie evidence of the facts stated therein; or the oath or affirmation before said county commissioners, or the affidavit of any person, properly taken and certified by any person or court authorized to take acknowledgments of deeds to real estate in this state, giving the age of such party, and his or her ownership of lands to be named in such oath, affirmation, or affidavit, by proper description, shall be sufficient evidence to the county commissioners of such facts; *provided,* that all deeds made for the purpose of establishing or defeating the prayers of said petition, not made in good faith and for a valuable consideration, shall be taken and held to be in fraud of the provisions of this title, and the holders thereof shall not be considered as owners thereof. If the commissioners, after hearing any and all competent evidence that may be offered before it for and against the said petition, shall find the same has not been signed as hereinbefore required, the said petition shall be dismissed at the cost of the petitioners; but, if the commissioners shall find that the petition has been signed as hereinbefore provided, the commissioners shall so find, and such finding shall be conclusive upon the land owners of such district that they may have assented to and accepted the provisions of this title; and the board of county commissioners may make such changes in the proposed boundaries as they may find to be proper, and shall establish and define such boundaries; *pro-*

vided, that said board shall not modify said boundaries so as to except from the operation of this title any territory within the boundaries of the district proposed by said petitioners which is susceptible of drainage by the system of works applicable to the other lands in such proposed district; nor shall any lands which will not, in the judgment of said board, be benefited by drainage by said system be included within such district; *provided,* that any person whose lands are susceptible of drainage by the same system may, in the discretion of the board of county commissioners, upon application of the owner to said board, have such lands included in said district. And if it shall further appear to the commissioners that the proposed drain or drains, ditch or ditches, or other works, is or are necessary or will be useful for the drainage of the lands proposed to be drained thereby for the agricultural or sanitary purposes, or conducive to the public health or welfare, the commissioners shall so find, and appoint three competent persons, who shall be known as a board of supervisors, and the term of office shall be for three years, except, however, that the term of office of the first appointees shall be as follows:

The term of office of one shall be for three years, the term of office of one shall be for two years, and the term of office of one shall be for one year; each of whom shall hold his office until his successor is appointed, as hereinafter provided, and it shall be their duty to lay out and construct such proposed work, and to levy a tax upon the lands in said drainage district, subject to the approval of the board of county commissioners, as hereinafter provided. In case the lands to be drained shall be situated in different counties, not more than two of the members of the board of supervisors shall be chosen from any one of such counties. And if the said board of county commissioners shall find that the establishment and creation of such drainage district will be a benefit as hereinbefore set forth, that the said board shall, within ten days, proclaim such district or districts created, and that such proclamation shall be published for at least ten days thereafter by posting in three public places within said county, at least one of which places shall be within said drainage district, or by publishing the said proclamation in some paper printed in the English language, and having general circulation within the said county or counties, and the said proclamation shall be substantially in the following form:

Office of the board of county commissioners, county of ....., state of Utah, A. D. 19.....

In the matter of the petition of (here insert the names of the petitioners).

The petition having been heard in the manner required by law, and the commissioners having duly examined said petition, and having heard evidence concerning the same, and considered all objections to the same, it is ordered by the county commissioners that the petition be, and the same is hereby granted; and the county commissioners further find that the work proposed in said petition to be done will be useful for agricultural or sanitary purposes to the owners of land within said proposed district; and the county commissioners also find that the persons who have signed said petition are of lawful age and are a majority of the adult land owners, representing one-third in area (or one-third of the adult land owners, owning a major portion, as the case may be) of the land to be affected by such proposed work. And the county commissioners further find that the said drainage district..... bounded as follows ..... is duly established as provided by law.

And the following named are to be known as the board of supervisors for the terms set opposite their names:

.....of.....for the term of three years,
.....of.....for the term of two years,
.....of.....for the term of one year.

Attest:

....., Clerk. .....
County Commissioners.

And upon entering such order of record said district is hereby declared by law to be organized as a drainage district by the name mentioned in the petition, and with the boundaries fixed by the order confirming the report of said board of supervisors, and said district is hereby declared to be a body corporate by the name mentioned in said order of county commissioners, with the right to sue and be sued, and to have perpetual succession, and may adopt and use a corporate seal; and the board of supervisors appointed as aforesaid and their successors in office shall, from the entry of such order of confirmation, constitute the corporate authorities of such drainage district, and shall exercise the functions conferred upon them by law. Said order shall be final.

Investigate feasibility of district, §§ 2053, 2054.
Board assesses tax, § 2055.
Board enlarges water courses, etc., § 2070.
Board has power eminent domain, §§ 2047, 2070.
Board issues bonds, § 2071.

2045. Appeal. Procedure. Certified copies of proclamation to be filed. Organization completed. An appeal from such order may be made to the district court in the county in which such district is situated. If any such appeal be made, the district court shall advance the cause to be heard, and the same shall be heard and disposed of at the earliest date. Where there are two or more appeals involving the same matters, the court may, in its discretion, order the said cases consolidated for the purposes of said appeal, when it shall appear that justice will be advanced thereby. The procedure in said appeals shall conform to the civil code as nearly as may be, but no action shall be commenced or maintained, or defense made, affecting the validity of the organization, unless the same shall have been commenced or made within six months after the making and entering of said order. Said board of county commissioners shall cause a copy of such order, duly certified, to be immediately filed for record in the office of the county recorder of each county in which any portion of such lands is situated, and must also immediately forward a copy thereof to the county clerk of each county in which any portion of such district may lie, and the board of county commissioners of any county included in any portion of such district shall not allow another district to be formed including any of the lands of such district, without the consent of the board of supervisors thereof; and from and after the date of such filing the organization of the district shall be complete, and the officers thereof shall be entitled to enter immediately upon the duties of their respective offices upon qualifying in accordance with law, and shall hold such offices, respectively, until their successors are appointed and have qualified.

2046. (767.) Board of supervisors. Oath. Bond. After said district has been established by proclamation, and after the said board of supervisors have been duly appointed, and before entering upon the duties of their office, such board of supervisors shall take and subscribe to an oath to faithfully discharge the duties of their office without favor or partiality, and to render a true account of their doings to the commissioners by whom they are appointed, whenever required by law or order of the commissioners, which oath shall be filed with the county clerk. The board of supervisors shall execute an official bond in such sum as may be fixed by the board of county commissioners. Bonds herein provided for shall be in the form prescribed by law for the official bonds of county officers.

Official bonds of county officers, § 1466.

2047. Id. Organization. Powers and duties. Appointment of engineer. Condemnation proceedings. Within thirty days after their election and qualification, the supervisors shall meet and organize as a board, and elect a president, a secretary, and a treasurer from among their own number. Each of such officers shall hold office during the pleasure of the board. The board of supervisors shall appoint a competent engineer and fix his compensation, and shall have power to adopt a code of by-laws governing the conduct of the business and affairs of the district as a corporation in connection with its association with individuals in and outside of the district, and regulating the use of its drainage system by outsiders. It shall also have the power to make

and execute all necessary contracts, to employ and appoint such agents, officers, and employes as may be required, prescribe their duties, and generally to perform such acts as shall be necessary to fully carry out the purposes of this title. The board and its agents and employes shall likewise have the right to enter upon any lands to make surveys, and may locate the necessary drainage canal or canals, and the necessary branches for the same, on any lands which may be deemed best for such location. It shall have the right also to acquire, on behalf of said district, by purchase or condemnation or other legal means, all lands and other property necessary for the construction, use, maintenance, repair, and improvement of said canal or canals, drains and works constructed (including canals, drains, or drain ditches being constructed by private owners), and all necessary appurtenances. In case of necessity for condemnation proceedings the board shall proceed in the corporate name of the district under the provisions of the law relating to eminent domain.

Compensation of engineer, § 2064. Engineer to attend meetings of board of equalization, § 2056.

2048. (768.) Duties of president. It shall be the duty of the president to preside at meetings of the board, and sign all warrants ordered by it to be drawn upon the treasurer for drainage money. In case of the absence of the president, his duties shall be performed by a president pro tempore, duly elected.

2049. (769.) Duties of secretary. It shall be the duty of the secretary to attend meetings of the board, to keep an accurate journal of its proceedings, to have the care and custody of its records and papers not otherwise provided for, to countersign warrants drawn upon the treasurer, and to prepare and submit to the board an annual statement, under oath, of receipts and disbursements during the year ending December 31. The secretary shall receive for his services such compensation as the board of supervisors may determine.

2050. (770.) Treasurer to give bond. Duties. The treasurer shall subscribe to the oath of office and give a bond to the board of supervisors with sufficient sureties and in such sum as it may require, the oath and bond to be approved by the board and filed with its secretary. The treasurer shall prepare and submit in writing a monthly report of receipts and disbursements, and pay out drainage money only upon a warrant signed by the president, and countersigned by the secretary. He shall likewise perform such other duties as the board may require, and shall receive for his services an amount to be determined by the board.

2051. (771.) Meetings of the board. Records. The board of supervisors shall meet and adjourn from time to time as the business may require. All meetings of the board must be public, and a majority of the members shall constitute a quorum for the transaction of business. All records of the board shall be open to inspection of any freeholder in said district during business hours.

2052. Quorum. Clerical assistance. A majority of the board of supervisors shall constitute a quorum, and a concurrence of a majority of their number in any matter within their duties shall be sufficient, and the said board of supervisors may appoint such clerical assistance as may be proper, and may employ such assistance and aid as may be found necessary.

2053. Board to inquire into feasibility of proposed district. Immediately after their appointment, the board of supervisors shall examine all the land proposed to be drained or protected and the lands over or upon which the work is proposed to be constructed, and determine:

1. If drainage and levee work as proposed in the petition, whether the starting points, routes, and termini of the proposed work and the proposed location thereof is or are in all respects proper and feasible; and if not, what is or are so;

2. The probable cost of the work mentioned in the petition, including all incidental expenses, and the cost of the proceedings therefor;

3. The probable annual cost of keeping the same in repair after the work is completed;

4. What lands will be injured by the proposed work, and the probable aggregate amount of all damages such lands will sustain by reason of the laying out and construction of such work;

5. What lands will be benefited by the construction of the proposed work, and whether the aggregate amount of benefits will equal or exceed the cost of constructing such work, including all incidental expenses, costs of proceedings, and damages;

6. Whether the proposed district as set out in the petition filed will embrace all the lands that may be damaged or benefited by the proposed work; and if not, to report what additional lands will be so affected.

2054. Id. Report of findings. Proceedings may be dismissed, when. If the board of supervisors of the said drainage district, upon and after their examination of the said district, as hereinbefore provided, shall find that, although the said district has been formally proclaimed, the costs and expenses of construction and maintenance and damages accruing are more than equal to the benefits which may inure to the lands in general of said district by reason of the proposed work, they shall so report, and the proceedings shall be dismissed at the cost of the petitioners.

2055. (774.) Estimate of required revenues. Annual assessment. Equalization and collection of taxes. The board of supervisors shall, on or before the first Monday of February of each year, prepare a statement and estimate of the amount of money to be raised by taxation within said district for the purpose of constructing canals, drains, drain ditches, and other works, and maintaining the same, paying the interest upon the bonded indebtedness of the district; creating a sinking fund for redeeming such bonds; and for the purpose of maintaining and repairing drainage canals, flumes, conduits, bridges, culverts, and other works within said district; and for the management and control of such drainage system; and shall assess the entire amount needed in each year against all of the land within said district in proportion to the benefits resulting to each tract of land by the construction and maintenance of such drainage system; the said board of supervisors shall view each tract of land within the district, and shall carefully consider all of the damages and benefits that each particular tract of land will receive from the construction and maintenance of such drainage system, and assess each tract of land in accordance with the benefits received by it, making proper allowance for damage, if there be any. After such assessment is made up, the secretary of the board of supervisors shall transmit the same to the board of county commissioners, and the board of county commissioners shall cause notice to be sent by mail to each land owner in the district of the amount of tax assessed upon the land owned by him within the district; and stating therein the time when and place where the board of county commissioners shall meet as a board of equalization to hear and determine complaints made against such assessments. The board of county commissioners shall sit as a board of equalization of district drainage taxes, and shall equalize and finally determine the assessments to be made and levied upon each tract of land within the district, at the time and in the manner provided for by law for equalizing state and county taxes, and shall thereupon certify the same to the county treasurer of the county within which such district is located; the county treasurer shall enter the same in the tax rolls in the county; and it shall be the duty of the county treasurer to collect such taxes at the time and in the same manner that the said county taxes are collected, and to pay the same to the treasurer of the board of supervisors as soon as moneys are received by him. '15, p. 206.

Taxes to pay bonds, § 2073.

2056. Equalization of taxes. The board of county commissioners, when

sitting as a board of equalization, may require the presence of the board of supervisors and engineer of the drainage district or districts, if there be more than one within the county. If the drainage district be in more than one county, the supervisor or supervisors resident within the county may be required to attend.

2057. County auditor to place tax on assessment roll. At the time of computing the tax, the county auditor shall place upon the assessment roll the district drainage taxes of the several districts of the county in which drainage taxes have been levied, as certified by the board of supervisors.

2058. (775.) Tax when delinquent a lien against property. All drainage taxes levied and assessed under the provisions of this title shall attach to and become a lien on the real property assessed from and after the second Monday in March. Drainage taxes shall become due and delinquent at the same time and shall be collected by the same officers and in the same manner as state and county taxes, and when collected shall be paid to the treasurer of the board of supervisors. '15, p. 207.

2059. Work to be done by contract. Award of contract. Terms. After adopting a plan of said drainage canal or canals, drains, drain ditches, and works, the board of supervisors shall proceed to give notice, by publication thereof not less than twenty days, in at least one newspaper published or having a general circulation in each of the counties composing the district and in such other publication as they may deem advisable, calling for bids for the construction of such work or of any portion thereof; if less than the whole work is advertised, then the portion so advertised must be particularly described in such notice. Such notice shall set forth that plans and specifications can be seen at the office of the board of supervisors and that the board of supervisors will receive sealed proposals therefor, and that the contract will be let to the lowest responsible bidder, stating the time and place appointed, and the same shall be opened in public, and as soon as convenient thereafter the supervisors shall let said work, either in portions or as a whole, to the lowest responsible bidder; or they may reject any or all bids. Contract for the purchase of material shall be awarded to the lowest responsible bidder. Any person or persons to whom a contract may be awarded shall enter into a bond with good and sufficient sureties, to be approved by the board, payable to said district for its use, for 50 per cent of the amount of the contract price, conditioned for the faithful performance of said contract in accordance with its provisions. The work shall be done under the direction and to the satisfaction of the engineer, and to be approved by the board of supervisors. The supervisors shall not be interested directly or indirectly in any material furnished or contract awarded by the said board of supervisors.

Interference with work, penalty, § 2062.

2060. Indebtedness. Limitation of board to contract. The board of supervisors or other officers of the district shall have no power to incur any debt or liability whatever, either by issuing bonds or otherwise, in excess of the express provisions of this title. A debt or liability incurred in excess of the express provisions of this title shall be and remain absolutely void, except that for the purpose of organization or for the purposes of this act the board of supervisors may, before the collection of the first assessment, incur an indebtedness not exceeding in the aggregate a sum equal to 90 per cent of the said assessment, and may cause warrants of the district to issue therefor, bearing interest not exceeding 7 per cent per annum. Any such indebtedness, however, so created, shall in no sense be the personal obligation of the board of supervisors, but shall constitute a lien upon the lands embraced within the said drainage district. '15, p. 207.

2061. Board to report. Public hearing. Removal from office for failure. The board of supervisors shall, as often as once in each year after their appointment, and as much oftener as the board of county commissioners shall require, make a report to the board of county commissioners of all work done,

and also showing the amount of money by them collected, and the manner in which the same has been expended, and upon the filing of such report, the board of county commissioners shall set a time, not exceeding three weeks from such filing, when such report shall be heard, and the board of supervisors shall give at least ten days' notice thereof, by posting written or printed notices in not less than four of the most public places in the district and one at the door of the courthouse in which said district was organized, or by publishing the same for ten days in some paper having general circulation in the county. At the time fixed, the board of county commissioners shall hear said report and all objections thereto, or may continue such hearing to another time fixed, and, upon hearing such report, may require evidence to be produced by the board of supervisors in support thereof, and, if found correct, may approve such report. Upon the failure of the board of supervisors, or either of them, to make such report to the satisfaction of the board of county commissioners, as required by this section, such supervisor or supervisors, on the application of any person interested, or the county commissioners without such application, shall remove such supervisor or supervisors from office.

2062. Use of works to be public. Officials and employes may enter upon private lands. The use of any canal, ditch, or the like, created under the provisions of this title, shall be deemed a public use and for a public benefit. The supervisors or their representatives from the time of their appointment may go upon the lands lying within said district for the purpose of examining the same, and making surveys, and after the organization of said district and payment or tender of compensation allowed, may go upon said lands with their servants, teams, tools, instruments, or other equipments, for the purpose of constructing such proposed work, and may forever thereafter enter upon said lands, as aforesaid, for the purpose of maintaining or repairing such proposed work, doing no more damage than the necessity of the occasion may require, and any person or persons who shall wilfully prevent or prohibit any of such persons from entering such lands for the purposes aforesaid shall be deemed guilty of a misdemeanor and upon conviction be fined any sum not exceeding $25 per day for each day's hindrance, to be recovered in an action of debt in favor of such drainage district before any court of competent jurisdiction, which sum shall be paid into the county treasury for the use of said district.

2063. Errors not to invalidate proceedings. Whenever it shall appear to the board of supervisors that any proceedings for the organization of a drainage district, or any assessments of damages or benefits under this title, or any law of this state is invalid as to one or more tracts of land, jointly or severally owned, situated in such district, or any tract of land has been omitted from such assessment by reason of clerical error or other mistake, or want of the proper notice or notices as required by law, such want of notice shall not invalidate such organization, neither shall such assessments of benefits be lost to the district; but the board of supervisors of such district may report such conditions to the board of county commissioners, and the said board of county commissioners may make such corrections, amendments, and changes in the assessment rolls, correcting any clerical mistake or want of sufficient notice as may be just; *provided,* that where such correction, amendment, or changes be made, due notice thereof be given to the persons affected thereby.

2064. Compensation of engineer and supervisors. Cost and expenses. Any engineer employed under the provisions of this title shall receive such compensation as shall be fixed and determined by the board of supervisors. Each member of the board of supervisors shall receive as compensation a sum not to exceed $3 per diem and actual expenses incurred in the performance of his duty. The salaries and all costs and expenses of the district shall be paid by the order of the board of supervisors out of the district treasury from drainage funds collected for that purpose upon warrants drawn by the secretary and signed by the president.

2065. Removal of supervisor. Vacancy. The county commissioners may, at any time, upon petition of a majority of the freeholders of any drainage district and for good cause, remove any supervisor appointed by them and appoint another in his place, and may fill all vacancies caused by death, resignation, removal, or otherwise.

2066. Interference with or destruction of works. Penalty. Any person who shall wrongfully and purposely fill up, cut, injure, destroy, or in any manner impair the usefulness of any drain, ditch, or other work constructed under this title, or heretofore constructed under any law of this state, or that may have been heretofore or may hereafter be voluntarily constructed for the purposes of drainage or protection against overflow, may be fined in any sum not exceeding $300 for each offense, to be recovered before any court of competent jurisdiction. All complaints under this section shall be in the name of the people of the state of Utah, and all fines, when collected, shall be paid over to the proper supervisors, to be used for the work so injured.

2067. Id. Further liability. In addition to the penalties provided in the preceding section, the person wrongfully and purposely filling up, cutting, injuring, destroying, or impairing the usefulness of any such drain, ditch, levee, or other work, obstructing or filling up any natural stream or outlet within or beyond the drainage district, shall be liable to the supervisors having charge thereof for all damages occasioned to such work, and to the owners and occupants of lands for all damages that may result to them by such wrongful act, which may be recovered in any court of competent jurisdiction.

2068. Right-of-way. Highways and railroads may be assessed, when. The board of supervisors shall have the right to use any part of the right-of-way of any public highway for the purposes of the work to be done, provided such use will not permanently destroy or materially impair such public highway for public use; and if in the construction of said work any public highway or railroad or any part of the same will be benefited, the board of county commissioners upon the report of the board of supervisors may assess to such public road or railroad such sum or sums as will be just and equitable for such public road or railroad to pay in proportion to the benefits received.

2069. Bridges and culverts across highways and railroads. The board of supervisors is hereby authorized and empowered to make all necessary bridges and culverts across or under any public highway or railroad right-of-way, to enable it to construct and maintain any canal, drain, or ditch necessary to be constructed as a part of the drainage system of such district, such bridges or culverts to be paid for by the drainage district; *provided, however,* that notice shall first be given by such board of supervisors to railway authorities empowered to build or construct bridges and culverts, and the railway company shall be allowed thirty days to build such bridges or culverts, at its own expense, if it should so desire, according to its own plans; *provided,* that such bridges or culverts shall be so constructed as not to interfere with the free and unobstructed flow of water, passing through the canal or drain, and shall be placed at such points as are indicated by the drainage engineer.

2070. Terms defined. Powers of board extended. The word ditch, when used in this title, shall be held to include any drain or water course, and the petition for any drainage district shall be held to mean and include any side, lateral, spur, or branch ditch or drain, whether opened, covered, or tiled, or any natural water course into which drains or ditches may enter for the purpose of outlet, whether such water course is situated in or outside of the district. And to secure complete drainage of the lands within any drainage district, the board of supervisors are hereby vested with full power to widen, straighten, deepen, or enlarge any water course, or remove any obstruction or rubbish therefrom, whether such water course is situated in, outside of, or below any drainage district; and, when it is necessary, straighten such natural water course by cutting of new channel upon other lands, the value of such lands to be occupied by such new channel

and damages, if any, made by such work may be ascertained and paid in the manner that is now or may hereafter be provided by any law providing for the exercise of the right of eminent domain in force in this state. The expenses of the work provided for in this section shall be paid from moneys arising from assessments upon lands within the district or in any lawful manner acquired.

2071. Issuance of bonds. Special election to determine. Limitation to amount. Manner of sale. Whenever the board of supervisors deem it expedient it shall have power, for the purpose of construcing drains, drainage canals, and other required improvements deemed necessary to drain lands in said district or conserve the public health or welfare, to issue bonds of the district to run not less than ten years nor more than twenty years, and to bear interest, payable semi-annually, at a rate not exceeding 7 per cent per annum to be called "drainage district bonds," which said bonds shall not be sold for less than their par value, and the proceeds of which shall be used for no other purpose than paying the cost of constructing such drain, drainage canal, or other like work deemed necessary to drain lands within said district, or conserve the public health or welfare; *provided,* that before such bonds shall be issued, the board of supervisors shall request the board of county commissioners to, and the board of county commissioners shall at once order a special election, appoint judges therefor, provide for as many polling places as will be convenient and shall call a special election to be held within a time not less than thirty nor more than sixty days from the date of filing such request, and the said board of county commissioners shall immediately give notice of the said special election by publishing the said notice for at least three successive weeks in some newspaper having a general circulation in the said drainage district, and by posting the said notice in not less than three conspicuous places in the said drainage district. Such notice shall specify the time of holding the said election; the amount of bond or bonds to be issued, and the purpose for which they are to be issued; the place or places where the polls shall be and the names of the judges who shall preside at the respective polling places or at the polling place where there is but one polling place, and the said notice shall require the electors to cast ballots which shall contain the words, "drainage bonds, ... district, yes," or "drainage bonds, ... district, no," or words equivalent thereto. Such notice shall be signed by the chairman of the board of county commissioners and attested by the clerk thereof. The board of county commissioners shall cause to be sent to the judges of election a certified copy of the equalized assessment roll for the year next preceding the said election and which shall be evidence of the facts therein contained as to who are land owners within that district. Any person shall be entitled to vote at such election who is a land owner in said district. Such election shall be conducted as nearly as practicable in accordance with the general laws of the state; *provided,* that no particular form of ballot shall be required. The said board of county commissioners shall meet on the first Monday next succeeding such election and proceed to canvass the votes cast thereat, and if upon such canvass it shall appear that a majority of all the votes are "drainage bonds, ... district, yes," the said board of county commissioners shall, by order to be entered upon its minutes, declare that such drainage bonds have been duly and affirmatively voted upon. The expenses of such election shall be paid out of the funds belonging to said drainage district. Any property owner may pay the full amount of the benefit assessed against his property before such bonds are issued and receive a receipt in full therefor. Such payment shall be made to the county treasurer, and it shall be the duty of the county assessor to certify to the treasurer the amount of any such assessment when requested to do so, and the treasurer shall enter the same upon the tax lists in his hands in a separate place provided therefor, and shall furnish the assessor with duplicate receipts given for all assessments so paid in full. The terms

and times of payment of the bonds so issued shall be fixed by the board of supervisors. The said bonds shall be issued for the benefit of the district authorizing said issue and shall bear the name and number of the said district. The board of supervisors shall keep a record of the bonds issued and sold or otherwise disposed of, and such record shall also show the lands embraced in said district and upon which the bond tax has been paid whether in full or otherwise. In no case shall the amount of bonds exceed the benefits assessed. Each bond issue shall show expressly upon its face that it is to be paid only by a tax assessed, levied, and collected on the lands within the drainage district. The said board of supervisors shall, by resolution, provide for the issuance and disposal of such bonds and for the payment of the interest thereon, the creation of a sinking fund for the ultimate redemption thereof, and for the date and manner of the redemption of said bonds. The said board of supervisors may sell or dispose of said bonds either at public or private sale. Before making any such sale, either private or public, the board of supervisors shall cause due notice of their intention to sell or dispose of said bonds, by publishing notice of sale at least twenty days in some newspaper having general circulation in the state of Utah and in the county where said district is situate. The notice shall state that sealed proposals will be received by the board of supervisors at their office, for the purchase of the bonds, until the day and hour fixed by the board of supervisors. At the time appointed the board of supervisors shall open the proposals, and award the purchase of the bonds to the highest responsible bidder, and may reject all bids. In case no bid is made and accepted as above provided, the board of supervisors is hereby authorized to use said bonds for the construction of any drain or drains, drainage canal or drainage canals, or any other required improvement deemed necessary to drain lands or for the public health or welfare. '15, pp. 207-209.

2072. (773.) Bonds a lien upon land. Whenever any such drainage district bonds shall be issued in accordance with the provisions of this title, such bonds shall constitute a lien upon all of the lands and improvements thereon within the boundaries of the district, and the board of supervisors of said district shall, from time to time, as hereinafter provided, levy a sufficient tax to pay the annual interest charge on such bonds, and, in addition thereto, such an amount as a sinking fund which shall, in the course of events and ultimately, amount to a sufficient sum to redeem said bonds.

2073. Nature of bonds. County clerk to certify. Each bond issued as provided for by § 2071 shall be signed by the president and the secretary of the said board of supervisors, and be attested by the county clerk, and said clerk shall also make a certified statement thereon, affixing his seal of office thereto, of the total amount of the assessments and rate of interest it bears, pledged for the payment of said bonds and other bonds, if any, issued; the date, number, denomination, and time due of all bonds issued which are a lien upon the assessments, or instalments of assessments of the district; when the assessments were confirmed by the county commissioners, and the number of acres of land in the district against which said assessments were made.

TITLE 27.

ELECTIONS.

CHAPTER 1.

GENERAL PROVISIONS.

2100. (780.) General elections held biennially. There must be held throughout the state on the first Tuesday after the first Monday in November in the year 1898, and biennially thereafter, an election to be known as the general election.

Elections to be free; military not to interfere, Con. art. 1, sec. 17.

General election held when, Con. art. 4, sec. 9.

2101. (781.) General election defined. A general election is for the purpose of choosing in the proper years therefor as specified by the constitution and the laws, one or more of the following officers, to wit: Representatives in congress, electors of president and vice president of the United States, state and district officers, senators and representatives in the legislature, county and precinct officers, and, when necessary, voting upon the proposed amendments to the constitution as provided in art. 23 of the constitution, and for such other purposes as may be provided by law.

Election of state officers, qualifications, etc., Con. art. 7, secs. 1-3; art. 8, secs. 2, 5; art. 24, sec. 12.

Election of presidential electors, duties, etc., §§ 2250-2254.

Election of representative to congress, § 2266.

Election of U. S. senator, §§ 2260-2263.

Direct legislation, §§ 2290-2314.

Municipal for selling power plant, § 810.

Provisions concerning election of county and precinct officers, §§ 1450-1461.

Provisions concerning election of legislators, Con. art. 6, secs. 3-7.

Where the statute provided that a general election for county collector should be held in the even numbered years, and another section provided that annually there should be a general election for officers not otherwise provided for; held, that an election for a county collector could not be held in August, 1891.

People, ex rel. Murphy v. Hardy, 8 U. 68; 29 P. 1118.

2102. (782.) Special election defined. Special elections are such as are held at other times, for any purpose required by law, except municipal and school elections.

Municipal election, general provisions, §§ 2330-2334.

School election, §§ 4664-4668.

2103. (783.) Election proclamation by governor. At least sixty days before a general election, and not less than ten days before a special election to fill a vacancy in the office of representative in congress or a member of the legislature, the governor must issue an election proclamation, under his hand and the great seal of the state, and transmit copies thereof to the boards of county commissioners of the counties in which such elections are to be held. Such proclamation must contain a statement of the time of election and the offices to be filled.

2104. (784.) Id. Vacancy for legislator or congressman. When a vacancy or a failure to elect by reason of a tie vote or for any reason whatever, occurs in the office of representative in congress or member of the legislature, the governor must at once issue a proclamation calling an election to fill such vacancy; *provided,* that if there be no session of the legislature or of congress, as the case may be, between the happening of such vacancy and the next general election occuring forty-five or more days thereafter, such vacancy shall be filled at the general election.

Minn. (1894) § 15.

Governor to issue writ to fill vacancies in legislature, Con. art. 6, sec. 13.

2105. (785.) Vacancy in executive or judicial office. Appointment. Election. If a vacancy occurs in the office of judge of the supreme or of the district court, secretary of state, state auditor, state treasurer, attorney-general, or superintendent of public instruction, the governor shall appoint a person to hold the office until the election and qualification of a successor to fill the vacancy, which election shall take place at the next succeeding

general election, and the person so elected shall hold the office for the remainder of the unexpired term.

Appointive power of governor, Con. art. 7, secs. 9, 10.

Where a person claiming to be an officer de facto was in hiding, had no place of business, and could not be found after diligent search, nor communicated with through the postoffice; held, that he was not an officer de facto.
Williams v. Clayton, 6 U. 86; 21 P. 398.

An office is in contemplation of law vacant when the incumbent has never been legally in the exercise of it.
People, ex rel. Dickson v. Clayton, 4 U. 421; 11 P. 206; see 132 U. S. 632.

People, ex rel. Dickson v. Jack, 4 U. 438; 11 P. 213; see 132 U. S. 643.

The term of office of a district judge appointed in 1896 to fill a vacancy caused by the resignation of a judge whose term extended until January, 1901, expired upon the qualification of his successor elected in November, 1896.
Ritchie v. Richards, 14 U. 345; 47 P. 670.

2106. (786.) Highest number of votes elects. The person receiving at any election the highest number of votes for any office to be filled at such election is elected thereto.

In county election, §§ 2243, 2411.

2107. (787.) Tie in election for state officers; presidential electors; county officers. In case any two or more persons have an equal and the highest number of votes for either governor, secretary of state, attorney general, state auditor, state treasurer, or superintendent of public instruction, the two houses of the legislature, at its next regular session, shall elect forthwith, by joint ballot, one of such persons for said office. In case any two or more persons have an equal and the highest number of votes for presidential electors, justice of the supreme court, or judge of a district court, the secretary of state must transmit to the governor a certified statement showing the vote cast for such persons, and thereupon the tie shall be decided by lot in the presence of the governor and secretary of state at a time fixed by the governor. In case any two or more persons have an equal and the highest number of votes for a member of a board of county commissioners, and by reason of such tie there is a failure to elect, the tie shall be decided by lot, in the presence of the county clerk, at a day designated by him. In case any two or more persons have an equal and the highest number of votes for any precinct or county office, except county commissioner, the tie shall be decided by lot in the presence of the board of county commissioners, at a day designated by said board.

2108. (788.) Correcting error in published nominations or on official ballot. Costs. Whenever it shall appear by affidavit of a candidate or his agent that an error or omission has occured in the publication of the names or description of the candidates nominated for office or in the printing of sample or official ballots, the district court, or judge thereof, either in term time or in vacation, may, upon petition of such candidate or his agent, by order require the county clerk, city recorder, or town clerk, charged with the duty in respect to which an error or omission has occured, to forthwith correct such error or show cause why such error should not be corrected. Costs, including a reasonable attorney's fee, may be taxed, in the discretion of such judge or court, against either party; *provided,* that no fee shall be required for filing such petition.

Provisions to be liberally construed, § 2113.

2109. (789.) Id. Controversy to be decided by court. The county clerk, city recorder, or town clerk shall also, on his own motion, correct without delay any error in all ballots which he may discover, or which shall be brought to his attention, and which can be corrected without interfering with the timely distribution of the ballots as herein provided. Whenever any controversy shall arise between any official charged with any duty or function under this title and any candidate, or the officers or representatives of any political party, or persons who have made nominations, upon the filing of a petition by any such official or persons, setting forth in a concise form the nature of such controversy and the relief sought, which petition shall be under oath, it shall be the duty of such court, or the judge thereof in vacation, to issue an order commanding the respondent in such petition to be and appear before the court or judge and answer under oath to such petition; and it shall be the duty of the court or judge to summarily hear and dispose

of any such issues, with a view of obtaining a substantial compliance with the provisions of this title by the parties to such controversy, and to make and enter orders and judgments and issue the writ or process of such court to enforce all such orders and judgments.

2110. (790.) Computations of time include Sundays. Sunday shall be included in all computations of time made under the provisions of this title.

2111. (791.) Opening and closing polls. Proclamation. At all elections, the polls shall be opened at seven o'clock a. m., and continue open until seven o'clock p. m. of the same day; *provided,* that if a full board of judges of election shall not attend at the hour fixed for opening the polls, and it shall be necessary for the electors present to appoint judges to conduct the election as provided by law, the election may, in that event, commence at any hour before the time for closing the polls shall arrive, as the case may require. Upon the opening of the polls, proclamation shall be made by one of the judges, and, thirty minutes before the closing of the polls, proclamation shall be made in like manner, that the polls will close in thirty minutes.

When voters appoint judges, § 2213.

2112. (792.) Notice of time and place of election. Each registry agent shall, at least five days prior to any election, except school elections, held in his district, post notices in at least five conspicuous places within the same, stating the date and place of election and the hours during which the polls will remain open.

2113. (793.) Provisions to be liberally construed. The provisions of this title shall be liberally construed, so as to carry out the intent of this title, and of political parties, nominees, and others in proceedings under this title.

Informalities in return not fatal, § 2249. Correction of error in name of candidate, etc., § 2108.

2114. (794.) Secretary of state to publish election law. It is the duty of the secretary of state to cause to be published, in pamphlet form, a sufficient number of copies of this title, and such other provisions of law as bear upon the subject of elections, and to transmit the proper number to each county clerk, whose duty it is to furnish each election officer in his county with one of such copies.

CHAPTER 2.

REGISTRATION.

2115. (795.) Registration agents. Appointment and politics of. It shall be the duty of the board of county commissioners to appoint as registration agent for each election district, a person who, at the time of the appointment, belongs to the political party which, in the district for which such registration agent is appointed, cast the highest number of votes for representative to congress at the election next preceding the appointment of such registration agent, and in cases where the election districts have been altered since such election, the appointment shall be made as follows:

1. Where two or more election districts have been created out of a single election district, each registration agent shall be a member of the political party which cast the higest number of votes for representative to congresss in such single election district at the preceding election.

2. Where an election district is created by combining two or more or the parts of two or more election districts, then such registration agent shall be a member of the political party which cast the highest number of votes for representative to congress in the district which either in whole or in part forms the major part of such newly created district. The true intent and meaning of the provisions of this chapter, with reference to the appoint-

ment of registration agents, is that the registration agent in each district shall belong to the political party which, at the preceding election, cast the highest number of votes for representative to congress in the territory forming the election district at the time of the appointment, and the registration agent appointed shall be selected by the board of county commissioners from a list of not less than three names to be furnished and certified by the chairman and secretary of the political party from which the appointment is to be made. If such chairman and secretary fail to furnish such list of names for a period of ten days after being notified so to do by the county clerk, the said board shall proceed to make the appointment without such list.

Registration agents, qualifications, terms, etc., § 2139.

In determining the appointment of registrar of election, under provisions of this section, the vote cast for each political party should be separately returned, and the highest vote for any one political party for member of congress should be the basis for such appointment, without counting the votes cast by any other party for the same candidate on any ticket.
Hamer v. Adams, 23 U. 643; 66 P. 294.

A special election for congress, held in April, was the next preceding congressional election under this section, providing that appointment of registrar shall be based on the votes for representative to congress at the election next preceding such appointment.
Id.

2116. (796.) Id. Vacancy, how filled. It is the duty of the chairman of the board of county commissioners of any county of the state, when he has received notice from any citizen of the death, disqualification, or resignation of any registry agent, after the opening and prior to the closing of the books of registration, to immediately, without giving notice, appoint some competent person as provided in § 2115 to fill such vacancy, and it is the duty of the person so appointed to qualify within two days after receiving notice of such appointment.

2117. (797.) Id. Failure to qualify. Voters may register elsewhere. If the person so appointed fails to qualify within the time herein provided, voters may, upon producing evidence as to their right to vote, be registered in any other district in said county, and any person so registered in any other district must, upon presentation and surrender of a certificate of registration to the judges of election, signed by the registry agent of said district, be considered a legal voter in the district in which he is a resident.

2118. (798.) Registering in another district. Oath. Certificate. If any person applies to be registered in any district other than the one in which he resides, and is entitled, upon proof, to a certificate of registration, as provided in the next preceding section, such applicant, in addition to the proof required by this chapter to entitle him to registration, must take and subscribe to an oath before the registry agent, in substantially the following form:

....., Utah, ..., 19.....

I do solemnly swear that I make this application for registration in district No..... of ..... county, state of Utah, because there is no registry agent within district No....., which is the district where I reside and am entitled to vote.

.....(Signature.)

Subscribed and sworn to before me this ..... day of ....., 19.....

.....
Registry agent.

Whereupon such person is entitled to receive from the registry agent of such district, a certificate, which must be substantially in the following form:

REGISTRATION CERTIFICATE.

I hereby certify that ..... is a citizen of the United States, and will have been such for ninety days prior to the election on the ..... day of ....., 19.....; that .....he will have attained the age of twenty-one years and upwards, and will have been a resident of the state of Utah one year and of the county of ..... four months, and of the precinct of ..... in the county of ..... for sixty days, at the time of the election on the ..... day of ....., 19.....,

and that .....he is in all respects a qualified, registered elector under the laws of Utah; and I further certify that the reason .....he applies for, and I give, this registration certificate, is because within district No..... where .....he resides, there is no registry agent, and I further certify that .....he is under the law entitled to vote in district No..... of ..... county, Utah.

Witness my hand in ..... district No..... of ..... county, Utah.

.....

Registry agent, district No. ....., ... county, Utah.

2119. (799.) Stationery for registration agents. Official register. The boards of county commissioners of the several counties must provide for the registry agents in their respective counties, when and where required, all proper and necessary books and stationery to carry out the provisions of this chapter. They must furnish to each registry agent a bound book, prepared for the alphabetical entry of names, which shall be known as the official register, and it must be ruled in columns of suitable dimensions to provide for the following entries opposite the name of each elector, to wit: Date of registration; name of elector; column for writing "voted"; age of elector; where born; location of residence, including street number, and number of room, where party resides in a building the rooms of which are numbered; certificate of naturalization exhibited, or a certified copy thereof; the postoffice address.

2120. (800.) Registration only at office. Registration days. It shall be the duty of the registry agents, when called upon to do so at their respective offices, and not elsewhere, at any time between the hours of eight o'clock a. m. and nine o'clock p. m., of the second Monday and third Tuesday and the last Saturday of August, and of the fourth Tuesday and of the fourth Wednesday and of the third Tuesday and of the first Tuesday, and, in presidential years, of the first Wednesday, prior to any general election, to receive and register the names of all persons applying for registration, who on election day will be legally qualified and entitled to vote in that election district, according to the provisions of law under which such election may be held. Am'd '05, p. 244.

Registration for municipal election, § 2137.

Under provisions of §§ 2120, 2141, the failure of the register to act does not deprive the legal voter, who has properly applied for registration, of the constitutional right to vote. Earl v. Lewis, 28 U. 116; 77 P. 235.

2121. (801.) Entries on official register. Request to give residence. Registry agents must enter upon the official register, under the proper heading, the date of registration, the names alphabetically arranged according to surnames, with the first or given name in full, the age and activity of the elector, together with the location of residence of elector as directed in § 2119, and when the person so registered is of foreign birth, the fact of the exhibition of, or failure to exhibit, his certificate of naturalization, or a certified copy thereof, must be noted in the column provided for that purpose, which list, properly entered, as in this section required, is known as the official register of electors of their respective districts. If any person fails or refuses to give his residence, with the particularity required in this chapter, he must not be registered; *provided,* that should any person applying to be registered refuse to give his or her age, when requested so to do by the registry agent, it shall be sufficient to entitle him or her to registration if they take and subscribe to the registration oath required by § 2123, and in such case the registry agent will enter in the proper column the fact that such person will be twenty-one years and upwards on the day of election. Am'd '05, p. 244.

Register, special election, § 2138.

2122. (802.) Notice of time and place of registration. Each registry agent must post, in not less than five conspicuous places within his district, for ten days before the first day provided for registration, a notice signed by him to the effect that the time and place for registration of the names of the qualified electors in election district No....., prior to the .....

election (specifying the election) to be held on the ..... day of ....., 19....., for the county of ....., Utah, will be between the hours of eight o'clock a. m. and nine o'clock p. m. on the ..... days of....., 19....., at the office of said agent (specifying the place, which must be within the election district, where electors may apply for registration).

Agent to post notice of time and place of election, § 2112.

2123. (803.) Registration oath. Every person applying to be registered must, before he or she is entitled to have his or her name registered, take and subscribe the following oath or affirmation, which must be administered by the registry agent: "I do solemnly swear (or affirm) that I am a citizen of the United States and shall have been such for ninety days prior to the election on the ..... day of ....., 19.....; that I shall have attained the age of twenty-one years and upwards, and shall have been a resident of the state of Utah one year, and of the county of ..... four months, and of the precinct of ..... in the county of ..... for sixty days at the time of the election on the ..... day of ....., 19.....; and that I now reside in election district No.....; so help me God (or under the pains and penalties for perjury)." The registry books and lists must be open at any reasonable time for inspection by any person.

Qualifications of voter at municipal election, § 2332.

2124. (804.) Examination of applicant to register. Challenges. When any person appears and demands to be registered whom the registry agent does not know to be entitled to registry under the qualifications required by law, for the election then ensuing, the registry agent must question the applicant generally, under oath, as to his qualifications as an elector; and, if satisfied, must enter his name in the register, but if the registry agent is not fully satisfied, or if the applicant be challenged by a qualified elector of the county stating distinctly the grounds of challenge, the registry agent must require the applicant to answer truly, under oath or affirmation, the following questions, together with such other questions as said registry agent may consider necessary or proper testing his qualifications as an elector for the ensuing election, to wit:

1. Are you a citizen of the United States; if so, are you native born or naturalized; and if naturalized, when and where were you naturalized?

2. Are you now, or will you be twenty-one years of age prior to the day of the next ensuing election?

3. On the day of the next ensuing election will you have resided in Utah one year, in this county four months, and in this precinct sixty days next preceding the day of said election?

If any of the foregoing questions are answered in the negative, the applicant must not be registered. If the applicant answers all the foregoing questions in the affirmative, and if the answers to the other questions propounded do not show him to be disqualified, the applicant must be registered.

Qualifications of electors, Con. art. 4, secs. 1, 2, 5-7.

Registering naturalized citizens, § 2127.

Unlawful registration a felony, § 2339.

2125. (805.) Resident defined. A resident within the meaning of this title must be construed to mean a person who has resided or will have resided continuously within this state for one year, and in the county four months, and in the precinct sixty days next preceding the day of the next ensuing election.

2126. (806.) Rules governing place of residence for purpose of registration. For the purpose of registration or voting, the place of residence of any person must be governed by the following rules as far as they are applicable:

1. That place must be considered and held to be the residence of a person, in which his habitation is fixed, and to which, whenever he is absent, he has the intention of returning.

2. A person must not be held to have gained or lost residence by reason of his presence or absence while employed in the service of the United States or of this state, nor while a student at any institution of learning, nor while

kept in any almshouse, or other asylum at the public expense, nor while confined in any public prison, nor while residing upon any Indian or military reservation.

3. No soldier, seaman, or marine, in the army or navy of the United States, shall be deemed a resident of this state in consequence of being stationed at any military or naval place within the same.

4. A person must not be considered to have lost his residence who leaves his home to go into a foreign country or into another state, or precinct in this state for temporary purposes merely, with the intention of returning; *provided,* he has not exercised the right of the elective franchise in said state or precinct.

5. A person must not be considered to have gained a residence in any county into which he comes for temporary purposes merely, without the intention of making such county his home.

6. If a person removes to another state, with the intention of making it his residence, he loses his residence in this state.

7. If a person removes to another state with the intention of remaining there for an indefinite time, and as a place of permanent residence, he loses his residence in this state, notwithstanding he entertains an intention of returning at some future period.

8. The place where a man's family resides is presumed to be his place of residence, but any man who takes up or continues his abode with the intention of remaining at a place other than where his family resides, must be regarded as a resident where he so abides

9. A change of residence can only be made by the act of removal, joined with the intent to remain in another place. There can only be one residence. A residence cannot be lost until another is gained.

10. The term of residence must be computed by including the day on which the person's residence commences and by excluding the day of election.

11. Any person living upon any Indian or military reservation shall not be deemed a resident of Utah, within the meaning of this chapter, unless such person had acquired a residence in some county in Utah prior to taking up his residence upon such Indian or military reservation.

2127. (807.) Naturalized citizen to exhibit papers. Affidavit. Examination. When a naturalized citizen applies for registration, his certificate of naturalization, or a certified copy thereof, must be produced; but if it satisfactorily appears to the registry agent by the oath or affirmation of the applicant (and the oath or affirmation of one or more credible citizens as to the credibility of such applicant), that such certificate of naturalization or a certified copy thereof, is lost or destroyed, or beyond the reach of the applicant, for the time being, said registry agent must register the name of said applicant, unless he is by law otherwise disqualified; but in case of failure to produce the certificate of naturalization, or a certified copy thereof, the registry agent must propound to him the following questions:

1. In what year did you come to the United States?

2. In what state or territory, county, court, and year were you fully admitted to citizenship?

3. When did you last see your certificate of naturalization, or a certified copy thereof?

The answers to the above questions must be taken down in the form of an affidavit, which must be subscribed and sworn to by the applicant, and retained in possession by the registry agent and by him handed over to his successor. No person is required to make the affidavit twice before the same agent, or the successor of such agent, having in his possession the former affidavit.

2128. (808.) Posting of registration lists in districts. List for judges of election. When the registering of voters on the third Tuesday prior to any general election shall have been completed, each registry agent must, with all reasonable expedition, within three days, prepare and cause to be

written or printed a full, complete, and true list of all the names on the official register for his district, alphabetically arranged according to surnames, with places of residence, the same to be verified by his oath and posted in some public and conspicuous place within his district, there to remain until the close of registration on the first Tuesday or the first Wednesday, as the case may be, prior to the day of election. When the registration of electors mentioned in this chapter shall be finally closed, each registry agent must, with all reasonable expedition, prepare and cause to be written or printed, a full, complete, and corrected list of all the names on his official register, alphabetically arranged, commencing with the surname of each elector, together with the residence of each, which he must certify under oath and cause to be posted, within three days after the close of registration, in a public and conspicuous place within 200 feet of the polling place, within his district, there to remain until the closing of the polls on election day. Each registry agent must prepare and deliver personally to one of the judges of election in his district, at a time not later than the day next preceding that on which any general or municipal election is to be held, a full, complete, and true copy of his official register, verified by his oath.

2129. (809.) Registry agent to hear objections to voter, and correct errors. Challenge. The registry agents must give notice in said posted lists that they will receive objections to the right to vote of any persons so registered between the hours of six o'clock p. m. and nine o'clock p. m. on Saturday next preceding the day of election; and also requesting all persons whose names may be erroneously entered in said list to apply to the proper registry agent at the time designated and have such error corrected. Such objection to the right to vote of any person registered must be made only by a qualified elector, in writing, duly verified, setting forth the ground of objection or disqualification. The registry agent before whom any such affidavits are made must carefully preserve the same and deliver them with a copy of the official register and other papers required by this chapter to be delivered, to the election judges as herein provided, and he must write distinctly opposite the name of any person to whose qualifications as an elector objections may be thus made, and opposite the name of any person whom the registry agent believes to be dead or to have removed from that election district, the words, "to be challenged," or words to that effect. It is the duty of the judges of election, if on election days such person who has been objected to applies to vote, to test under oath his qualifications, and if he is found to be disqualified for any cause under the law, or if he refuses to take an oath, as to his qualifications, he must not be permitted to vote.

2130. (810.) Register to be transmitted to county clerk. The copy of the official register for each district, delivered to the election judges, together with the affidavits mentioned in the next preceding section of this chapter, must be preserved and transmitted by the judges of election to the county clerk as a part of the election returns, as provided by law.

2131. (811.) Failure to furnish list. Procedure. If any registration agent fails or refuses to furnish to the election judges a copy of the official register of his district, as provided for in this chapter, the said election judges are authorized to take and use the copy of the printed or written list of registered voters posted in such district, as provided for in this chapter, and their returns must show the reason for using such list instead of the copy of the official register that should have been delivered to them.

2132. (812.) Transfers to another district. Any registered elector, moving from one district to another within the same precinct (or city), prior to the day of the ensuing election, may apply to the registry agent before whom he has already been registered for that year, at any time prior to the day of election, and have his name taken off the official register, and receive from the registry agent a certificate, to be called a registry certificate, over the signature of the registry agent, showing substantially that he was, on a

certain day, duly registered in the official register of district No. ..... in ..... precinct of the county of ....., Utah, and that his name has been erased at his own request, which certificate will entitle him to have his name registered at any time before the day of election, in the same manner as other names are registered, in any other district within the same precinct or city, for said election; *provided,* it satisfactorily appears to the registry agent receiving the cetificate, and to whom application is made for the second registration, that the applicant is entitled to vote in that district at the next ensuing election. Am'd '05, p. 10.

If a person is a qualified voter in an election district by having complied with the registration laws of the state, he may rely upon that registration in voting at a local option election. Beaurgaard v. Gunnison City, 48 U. 515; 160 P. 815.

2133. (813.) Oath of registry agent. Before entering upon the duties prescribed in this chapter, the registry agents must severally take and subscribe, before an officer duly authorized to administer oaths, the constitutional oath of office, which must be filed in the office of the county clerk of their respective counties. Registry agents may take the registration oath before any person authorized to administer an oath.

2134. (814.) Compensation of registry agent paid by county. The several registry agents are entitled to receive, as full compensation for all services rendered by them under the provisions of this chapter, such sums as may be allowed by the board of county commissioners, and such compensation may be a per diem not to exceed $3. Their compensation is a county charge, and their accounts must be made out so as to clearly show the number of days spent in the performance of their official duties, which shall be sworn to and filed with the county auditor of their respective counties, and said claim must be audited and paid out of the general fund of the several counties as other county charges.

2135. (815.) County clerk's record. Notice of appointment. The county clerk must make full and minute entries of all proceedings had under this chapter, and notify in writing the registry agents of their appointment.

2136. (816.) County clerk to prepare register of voters. Prior to the time for registering voters at each general or municipal election, the county clerk of each county of the state shall prepare an official register of the voters of each election district of his county, by making a list in alphabetical order of all persons who voted at the last general or municipal election, as shown by the checked copies of the official register used, or poll lists made, at such election; which official register shall be delivered to the registry agent of the district, at least thirty days prior to the first day of registration, and shall be revised by adding the names of all persons registered on the proper days prior to the election; *provided,* that for municipal elections such alphabetical list shall be made only for such districts affected by such elections; *provided, further,* that the costs for making such list for municipal elections shall be paid for by the city or town. For all special and school elections there shall be no special registration of voters, but the "official register" last made or revised shall constitute the "official register" for such special or school election. Am'd '05, p. 245; '07, p. 250.

Municipal elections, general provisions, §§ 2330-2334 School elections, §§ 4663-4668.

2137. (817.) Duty of registry agents. It shall be the duty of the registry agents appointed as herein provided for the election districts within the several incorporated cities and towns, at any time when called upon to do so at their respective offices, and not elsewhere, between the hours of eight o'clock a. m. and nine o'clock p. m. of the first and third Tuesdays, and also in cities of the first and the second class, the fourth Tuesday, prior to the municipal or town election, to receive and register the names of all persons applying for registration who are legally qualified and entitled to vote at such election, or who will legally have acquired a residence (being otherwise qualified) and who have a right to vote at such ensuing election according to the provisions of law under which such election may be held in each election dis-

trict. The expense of such registration shall be paid by the city or town from which the same is made. Am'd '11, p. 234.

Registration generally, § 2120. Date of municipal election, § 2330.

2138. (818.) Id. Official registry. Before the day on which any special election is appointed to be held, and in cities of the first and the second class, before the day on which any primary election is appointed to be held, the registry agent must furnish one of the judges in his election district, at a time not later than one day next preceding the day on which the election is to be held, a copy of the official register for his district, but no copies need be posted. Am'd '11, p. 234.

Official register, general election, § 2121.

2139. (819.) Registry agents. Qualifications. Terms. Removal. There shall be but one registry agent for each election district. All registry agents shall be competent persons and shall be appointed by the board of county commissioners. They shall be resident qualified voters in the several election districts for which they shall be appointed. They shall be, and are hereby empowered and authorized to administer oaths and affirmations and to do such other acts as may be necessary to fully carry out the provisions of this chapter; *provided,* that no person or candidate for, or who holds a state, county, or other office, shall be eligible to or hold the office of registry agent. All registry agents shall be appointed biennially, at the regular meeting of the board of county commissioners held nearest to the 1st day of June preceding each general election, and shall hold their office for the period of two years, except as herein otherwise provided, but they shall be subject to removal at any time by the board of county commissioners. On the appointment of his successor, the registry agent shall deliver to such successor the official register for his district and all other books and documents in his possession pertaining to such office. In case any registry agent resigns or becomes a non-resident of his district, he shall at once notify the county clerk, and deliver to him all books and documents in possession of such registry agent pertaining to his office.

Appointment of registration agents, § 2115.

2140. (820.) Change of district boundaries. New registry lists. Whenever the boundaries of any election district have been changed, or a new district created, it shall be the duty of the registry agents of the districts affected to meet prior to the first day of the next ensuing registration and transfer from one official register to the other, as the case may require, the names of all voters residing within the territory affected by such change. Any registered voter whose name has been erroneously transferred from one official register to another, or erroneously allowed to remain on any official register, may be permitted to vote in the district in which he resides upon taking the registration oath before one of the election judges and presenting to such judges sufficient proof that, through the error of the registration agent, his name does not appear on the official register.

Alteration of election districts, § 2214.

2141. (821.) Person must register to vote. No person shall hereafter be permitted to vote at any general, special, municipal, or school election, or at any primary election for the nomination of officers to be voted for at municipal elections in cities of the first and the second class, without having first been registered within the time and in the manner and form required by the provisions of this chapter. Am'd '11, p. 234.

Under the provisions of §§ 2120-2141, the failure of the register to act does not deprive the legal voter, who has properly applied for registration, of the constitutional right to vote. Earl v. Lewis, 28 U. 116; 77 P. 235.

CHAPTER 3.

PRIMARY ELECTIONS.

2150. (821x.) Presiding officers and judges of elections at primary elections. Opening and closing of polls. Political parties, organizations, or associations in this state may appoint presiding officers and judges of election at any primary election that they may deem just and proper. In all cities of the first and the second class the polls at such primary election shall be open at four o'clock in the afternoon and close at nine o'clock in the afternoon of the same day on which such election is held; *provided, however,* that the foregoing provisions shall not apply to primary elections for the nomination of officers provided by law to be elected in cities of the first and the second class. In cities of the first and the second class primary elections for the nomination of officers shall be conducted as provided in § 2325.
'99, p. 118; am'd '11, p. 234.

2151. (821x1.) Who entitled to vote. No person shall be entitled to vote at any primary election unless of the age of twenty-one years, and a duly qualified voter under the laws of this state, or shall have been a duly qualified voter at the next ensuing state, city, or school election for which such primary is being held under the prescribed rules and regulations of the political party, or organization, or association so holding the primary election; *provided,* that in the selections of candidates to be voted for at elections for municipal offices, in cities of the first and the second class, all persons entitled to vote at the ensuing city election shall be entitled to participate in such primary. '99, p. 118; Am'd '11, p. 234.

2152. (821x2.) Challenge. Oath. Judges to keep record. The vote or ballot of any person offered at any primary election shall, upon challenge by any lawful voter, be rejected, unless he be sworn as to his qualifications as such voter, and the presiding officer or any judge of election at such primary is hereby empowered, and it shall be his duty, to administer an oath to such person, and to any other person offering to vote, as he may deem advisable, which oath shall be substantially as follows: "You do solemnly swear that you will true answers make to such questions as shall be put to you by any judge of this primary election, touching your qualifications to vote at the same." It shall be the duty of the judges at such primary election to keep a record of the interrogatories propounded to any person who shall have been sworn as herein provided, and also a record of his answers, which shall be deposited with the county clerk of the county in which such primary election is held. Any person who shall intentionally make false answers to any questions put to him by the officers at such primary election shall be deemed guilty of perjury. '99, p. 118.

2153. (821x3.) Fraudulent voting. If any person, teller, or officer at any primary election shall intentionally receive the vote of any individual who shall have been challenged, or who is known to him not to be entitled by the rules and regulations of the association, organization, or political party holding the primary election to vote at such primary election, unless the same shall have first been sworn in, as aforesaid, or shall in any manner fraudulently and unlawfully deposit or put any ballots into, or take any ballots from, the ballot box at such primary election, or shall fraudulently and unlawfully mix any ballots cast at any primary election, or shall intentionally make any false account, statement, or return of the ballots cast or the vote taken at such primary election shall be deemed guilty of a misdemeanor.
'99, p. 119.

2154. (821x4.) Only legal voters can vote at primaries. Any person who is not a legal voter at any election following any primary in this state, who shall vote or attempt to vote at such primary, or any person who shall vote or attempt to vote at more than one primary held in the same or different precincts, wards, or cities, or who shall attempt to vote or shall vote

at any primary in any precinct, ward, or city, where such person does not reside and is not entitled to vote, shall be deemed guilty of a misdemeanor. '01, p. 72.

2155. (821x5.) Receiving unlawful vote, etc. Any person, teller, or officer at any primary who shall intentionally receive the vote of any individual who is known to him not to be entitled to vote, or any person who shall in any manner fraudulently and unlawfully deposit, or put any ballots into, or take any ballots from, the ballot box or other receptacle for the deposition of ballots at such primary election, or shall fraudulently and unlawfully mix any ballots cast at any primary election, or shall intentionally make any false account, statement, or return of the ballots cast or the vote taken at such primary, shall be deemed guilty of a misdemeanor. '01, p. 73.

CHAPTER 4.

NOMINATIONS.

2180. (822.) By conventions. Any convention of delegates of a political party which presented candidates at the last preceding election held for the purpose of making nominations for public office, and also voters to the number and in the manner specified in § 2183, may nominate candidates for public offices to be filled by election within this state. A convention, within the meaning of this chapter, is an organized assemblage of voters or delegates representing a political party which at the election before the holding of such convention polled at least two per cent of the entire vote cast in the state, county, or other political division or district for which the nomination may be made. A committee appointed by any such convention may also make nominations to public office or fill any vacancies in the nominations made by the convention when authorized to do so by resolution duly passed by the convention at which such committee was appointed; *provided,* that nothing in this section or chapter contained shall be construed so as to authorize any number of voters, convention, or committee of any political party to nominate more than one group of candidates or have placed on the official ballot more than one group of candidates or more than one ticket, by adopting any name, emblem, or device, other than the regular name, emblem, and device of the political party represented by the voters, committee, or convention making such nomination; *provided, further,* that any voters, convention, or committee of any political party may nominate any one or more person or persons who may have been nominated by any other voters, convention, or committee, but in making such nomination, the name of such nominee shall be placed upon the regular ticket of the political party represented by the voters, convention, or committee making such nomination, and no political party shall be permited to have placed upon the official ballot, either directly or indirectly, more than one ticket or more than one group of candidates, or to group the same persons on different tickets by the same party under a different name or emblem. In cities of the first and the second class all candidates for municipal offices shall be nominated as provided by § 2325. Am'd '09, p. 11; '11, p. 234.

Primary election for nomination in city, § 2325.
Limitations on right of appointive officeholders to attend conventions, § 2394.
A party convention or its committee, prior to the amendments of 1909 and 1911, could designate as its candidate a person who was also a candidate of another party for the same office.
Payne v. Hodgson, 34 U. 269; 97 P. 132.

2181. (823.) Certificate of nomination. Form. All nominations made by such convention or committee shall be certified as follows: The certificate of nomination, which shall be in writing, shall contain the name of the office for which each person is nominated, the name, postoffice address, if any, the residence of each such person, and if in a city, the street, number of residence, and place of business, if any, and shall designate in not more

than five words the party which such convention or committee represents. It shall be signed by the presiding officer and secretary of such convention or committee, who shall add to their signatures their respective places of residence and postoffice addresses, and make oath, before an officer qualified to administer the same, that the affiants were such officers of such convention or committee, and that said certificates and the statements therein contained are true, to the best of their knowledge and belief. When the nomination is made by a committee, the certificate of nomination shall also contain a copy of the resolution passed at the convention which authorized the committee to make such nomination. In the case of electors for president and vice-president of the United States, the names of candidates for president and vice-president may be added to the political or party appellation.

2182. (824.) Id. Where filed. Certificates of nomination of candidates for offices to be filled by the voters of the entire state, or of any division or district greater than a county, shall be filed with the secretary of state. Certificates of nomination of candidates for offices to be filled by the voters of any city or town shall be filed with the recorder of such city, or the clerk of such town. All other certificates of nominations shall be filed with the clerks of the respective counties wherein the officers are to be elected.

Under provisions of this section and §§ 2186, 2205, requiring certificates to be filed with the town clerk, etc., the clerk, in the absence of objection, must place the candidate's name on the official ballot, though the certificate was not filed in the required time.
Earl v. Lewis, 28 U. 116; 77 P. 235.
Cited in: Hayes et al. v. Ross, 41 U. 580; 127 P. 340.

2183. (825.) Nominations by certificates. Candidates for public office, except candidates for municipal offices in cities of the first and the second class, may be nominated otherwise than by convention or committee in the manner following: A certificate of nomination containing the names of candidates for the offices to be filled, with such information as is required to be given in the certificates as hereinbefore provided for in other cases, except that such certificates shall designate in not more than five words, instead of a party, the political or other name which the signers shall select, shall be signed by voters residing within the district or political division and for which the officer or officers are to be elected, to the number of at least five hundred, when the nomination is for an office to be filled by the voters of the entire state; of at least one hundred, when the nominations for an office to be filled by the voters of the district less than the state and greater than a county, or by the voters of a county; and of at least fifty, when the nomination is for an office to be filled by all the voters of a precinct, town, city, or other divisions, less than a county. The signatures to a certificate of nomination need not all be appended to one paper. The certificate may designate or appoint upon the face thereof one or more persons, who, for the purposes set forth in §§ 2191-2192, shall represent the signers of said certificate. Each voter signing a certificate shall add to his signature, his place of residence, and shall, before an officer duly authorized to take acknowledgments, acknowledge his signature and take oath that he is a voter within and for the political division for which such nomination is made, and has truly stated his residence. Such certificate shall also contain a statement by the voter that the name or names of the person or persons nominated in the certificate will not be printed upon the official ballot, or upon any party ticket as the nominees of any political party or voters and that the name or names of the persons nominated in the certificate will not be printed upon the official ballot under the name or device adopted in the certificate. It is hereby made the duty of the officers making up the official ballot to erase from the certificate any name or names of nominees contained in such certificate that will otherwise appear printed upon the official ballot as the party ticket. Such certificate, when executed and acknowledged as above prescribed, may be filed as provided for in § 2182, in the same manner and with the same effect as a certificate of nomination made by a convention or committee as provided for in § 2180; *provided, however,*

that in cities of the first and the second class all candidates for municipal offices shall be nominated as provided in § 2325.

'09, p. 11; am'd '11, p. 234.

Cited in. Hayes et al. v. Ross, 41 U. 580; 127 P. 340.

2184. (826.) Names of candidates in certificate not to exceed offices in number. No certificate of nomination shall contain the names of more candidates for any office than there are offices to fill; but if any such certificate does contain the names of more candidates than there are offices to fill, only those names which come first in order on such certificates and are equal in number with the number of offices to be filled, shall be taken as nominated, and all the rest of such names shall be treated as surplusage. No person shall sign more than one certificate of nomination for any office.

2185. (827.) Certificate to be preserved two years. The secretary of state shall cause to be preserved in his office for the period of two years all certificates of nomination filed therein under the provisions of this chapter; and each county clerk, city recorder, or town clerk shall cause to be preserved in his office for a like period all certificates of nomination filed therein. All such certificates shall be open to public inspection, under proper regulations to be made by the officers with whom the same are filed.

2186. (828.) Time of filing certificates of nomination. When nominations are made by a convention or committee, the certificates of nomination to be filed with the secretary of state shall be filed not more than sixty nor less than thirty days before the day of election, and the certificates of nomination herein directed to be filed with the county clerk shall be filed not more than sixty nor less than fifteen days before election; and the certificates of nomination herein directed to be filed with the city recorder or town clerk shall be filed not more than thirty nor less than fifteen days before election. Certificates of nomination, otherwise than by convention or committee, shall, when required to be filed with the secretary of state, be filed not more than forty nor less than thirty days before election; and when required to be filed with the county clerk, shall be filed not more than thirty nor less than fifteen days before election; and when required to be filed with the city recorder or town clerk, shall be filed not more than thirty nor less than fifteen days before election.

Under provisions of this section and §§ 2182, 2205, requiring certificates to be filed with town clerk, etc., the clerk, in the absence of objection, must place the candidate's name on the official ballot, though the certificate was not filed in the required time.
Earl v. Lewis, 28 U. 116; 77 P. 235.

2187. (829.) Secretary of state to certify nominations to county clerk. The secretary of state shall, immediately upon the expiration of the time within which certificates of nomination may be filed with him and corrections thereof made, certify to the county clerk of each county, within which any of the voters may by law vote for the candidates named in the certificate, the name and description of each such candidate, together with the other details mentioned in such certificate of nomination so filed with the secretary of state.

Cited in: Hayes v. Ross, 41 U. 580; 127 P. 340.

2188. (830.) List of nominations to be published or posted. Before an election to fill any public office, the county clerk of each county, or recorder of each city, or town clerk of each town, shall publish in at least one and not more than two newspapers published within the county, city, or town, as the case may be, or post notices in at least three conspicuous places in each precinct where such election is to be held, a list of all the nominations to offices certified to him under the provisions of this chapter; *provided, however,* that in cities of the first and the second class publication of nomination of candidates shall be made as provided in § 2325. Such publication shall be made three times, except as otherwise provided in this section, the first publication to be not less than six days nor more than ten days prior to the day of election, and shall contain the name and the party or other designation of each candidate, and shall be, as far as possible, in the form of the official ballots.

In the case of municipal elections, such publication of the names of candidates for municipal offices shall be made in newspapers which are published in the municipality where the election is to be held. One of such publications shall be made in the newspapers which advocate the principles of the political party that at the last preceding state election cast the largest number of votes, and another of such publications, if more than one is to be made, shall be in the newspaper which advocates the principles of the political party which at the last preceding state election cast the next largest number of votes. The clerk or recorder, in selecting the respective papers for such publication, shall select those which, according to the best information he can obtain, have the largest circulation within the county. If there be no daily newspaper published within the county, city, or town, as the case may be, one publication in each newspaper shall be sufficient. Should the clerk or recorder find it impracticable to make the publication six days before the election day, in counties where no daily newspaper is printed, he shall make the same at the earliest possible day thereafter. One of the publications in any newspaper shall be in the last issue thereof before the day of election. In counties, cities, or towns where it is impracticable to make publication in newspapers advocating opposite political principles, publication shall be made in the newspapers having the largest circulation. In counties, cities, or towns where there are no newspapers published, the clerk or recorder shall post double the number of printed lists, and such additional lists shall be posted in other conspicuous places in different portions of the county, city, or town, as the case may be. Am'd '11, p. 237.

2189. (831.) Copies of nomination lists to registry agents. Posting. The county clerk of each county, and the city recorder of each city, and the town clerk of each town shall, at least six days before election day, send to the registry agent in each election district in such county, city, or town, at least five or not more than ten copies, for each election district, of printed lists containing the name and party or other designation of each candidate nominated, as hereinbefore provided, to be voted for by the voters of the respective counties, cities, or towns. Such lists shall, at least three days before the day of election, be conspicuously posted by such registry agents in one or more public places in each election district of the county, city, or town, one or more of which shall be duly posted where such election is to be held; *provided,* that in elections for municipal offices in cities of the first and the second class the printed lists containing the names of candidates shall be arranged as provided in § 2325. Am'd '11, p. 238.

2190. (832.) Objections to nominations to be in writing. Curing defects. All certificates of nominations which are in apparent conformity with the provisions of this chapter shall be deemed to be valid unless objection thereto shall be duly made in writing within three days after the filing of the same. In case such objection is made, notice thereof shall forthwith be mailed to all the candidates who may be affected thereby, addressed to them at their respective postoffice addresses if any, or places of residence as given in the certificate of nomination. The officer with whom the original certificate was filed shall pass upon the validity of such objection, and his decision shall be final; *provided,* that such officer shall decide such objection within at least forty-eight hours after the same is filed, and any objection sustained may be remedied or defect cured upon the original certificate, or by an amendment thereto, or by filing a new certificate within three days after such objection is sustained.

Hayes v. Ross, 41 U. 580; 127 P. 340.

2191. (833.) Notice of declination. Whenever any person nominated for public office, as in this chapter provided, shall, not less than twelve days before the day of election, if he shall have been nominated as provided in § 2180, or not less than ten days before the day of election, if he shall have been nominated as provided in § 2183, notify the officer with whom the original certificate of his nomination was filed, in writing signed by him and duly

acknowldeged, that he declines such nomination, the same shall be void, and his name shall not be printed upon the party ticket of the party certifying his nomination. The officer to whom such notification is given shall forthwith inform, by mail or otherwise, one or more persons whose names are attached to the original certificate of nomination that such nomination has been declined. Am'd '09, p. 12.

2192. (834.) Vacancies. Should any person so nominated resign or decline the nomination, as in this chapter provided, or die before election day, or should any certificate of nomination be insufficient or inoperative, because of failure to remedy or cure the same, the vacancy or vacancies thus occasioned may be filled in the same manner required in the original nomination. If the original nomination was made for a party convention which had delegated to a committee the power to fill vacancies, such committee may, upon the occurring of such vacancies, proceed to fill the same. The chairman and the secretary of such committee shall thereupon make and file with the proper officer a certificate, setting forth the cause of the vacancy, the name of the person nominated, the office for which he was nominated, the name of the person for whom the new nominee is to be substituted, the fact that the committee was authorized to fill vacancies, and such further information as is required to be given in an original certificate of nomination. The certificate so made shall be executed and sworn to in the manner prescribed for the original certificate of nomination, and shall, upon being filed at least eight days before the election, have the same force and effect as an original certificate of nomination. When such certificate shall be filed with the secretary of state, he shall, in certifying the nominations to the various county clerks, insert the name of the person who has been nominated to fill the vacancy in place of the original nominee, and in the event that he has already sent forward his certificate, he shall forthwith certify to the county clerks of the proper counties the name and description of the person so nominated to fill the vacancy, the office he is nominated for, together with the other details mentioned in the certificate of nominations so filed with the secretary of state, and the name of the person for whom such nominee is substituted. The chairman and the secretary of such committee may in like manner make and file with the proper officer a certificate, setting forth the occurrence of a vacancy by death, resignation, or otherwise, and the further fact that it is not the intention of such committee to fill such vacancy. When such certificate shall be filed with the secretary of state, he shall certify such vacancy to the several county clerks forthwith. The secretary of state shall not be required to make any certificate of new nominations or vacancies after eight days before election day, exclusive of election day; *provided, further,* that in cities of the first and the second class, should any candidate for auditor, mayor, or commissioner resign, or decline the nomination, or die before election day, or for any other reason should such nomination become vacant, void, or inoperative, then and in that event the candidate receiving the next highest number of votes at the primary election held for the nomination of such candidate as in this act provided, shall be the candidate to fill such vacancy.
Am'd '11, p. 238.

2193. (835.) Proposed constitutional amendments. Duty of secretary of state and county clerk. Whenever a proposed constitutional amendment or other question, except the incurring of a bonded indebtedness, is to be submitted to the people of the state for popular vote at any general election, the secretary of state shall duly, and not less than fifteen days before election, certify the same to the county clerk of each county of the state, designating each amendment or question by number and also by a title which shall cover the subject matter of the amendment or question submitted, and the county clerk of each county shall cause to be printed both number and title of the propositions or questions to be submitted, upon the ballot to be used on elec-

tion day, in the publication provided for by § 2188, and in the notice provided for by § 2199. Am'd '99, p. 119.

Proposing amendments to constitution, Con. art 23.

Preparation and distribution of statements concerning proposed amendments, §§ 2200-2202.

CHAPTER 5.

PREPARATION AND DISTRIBUTION OF STATEMENTS CONCERNING PROPOSED CONSTITUTIONAL AMENDMENTS.

('17, p. 203.)

2200. Persons designated to prepare statements. Submitted to secretary of state. Time fixed. Whenever the legislature shall propose any amendment to the constitution of this state to be voted upon by the electors of this state, the author of such amendment and one member of the same house who voted with the majority on the submission of such amendment shall be appointed as a committee of two by the presiding officer of such house, before the adjournment of the legislature, to draft an argument giving the reasons for the adoption of such amendment, which argument shall be not more than five hundred words in length. If the author of such amendment shall desire separate arguments to be written in favor thereof by each member of the committee, such separate arguments shall not be more than five hundred words. At the same time said committee of two is appointed, one member of the same house who voted with the minority against the submission of such amendment, if there was any such minority vote, shall be selected by the presiding officer of such house as a committee of one to write an argument against such amendment, and such argument shall be not more than five hundred words in length. These articles shall be submitted to the secretary of state within ninety days after the adjournment of the legislature, subject to amendment or change by the committee submitting them at any time within one year after such adjournment, such amendment to be substituted by the secretary of state in lieu of the original. In case either the argument for or the argument against such amendment has not been filed by a member of the legislature within one year from the final adjournment thereof, or in case no committee was appointed to write it, any elector may request the presiding officer of the house in which said amendment originated for permission to prepare and file an argument for such amendment, and any other elector may request such officer for permission to prepare and file an argument against the same. The presiding officer of such house shall grant such permission; or, if there be more than one elector requesting such permission, shall designate the person to prepare and file such statement, either for or against such amendment.

2201. Pamphlets to be distributed. Contents. How arranged. Title and number. The secretary of state shall cause to be printed one and one-fifth times as many pamphlets as there are registered voters in the state. Such pamphlets shall contain a complete copy of all constitutional amendments, a copy of the corresponding constitutional provisions as then in force, if any. The parts of the proposed amendments differing from the existing provisions shall therein be distinguished in print, so as to facilitate comparison. All constitutional amendments which are to be submitted to a vote of the people shall be printed in said pamphlets, so far as possible, in the same order, manner, and form in which the same shall be designated upon the ballot, and shall be designated thereon by the respective ballot titles or designations which may be provided therefor. Said ballot titles shall be numbered consecutively and printed on the pamphlets herein referred to immediately preceding the particular question, proposition, measure, or constitutional amendment therein referred to. There shall also be printed on said pamphlets the

copy of said ballot title or designation as the same will appear on the ballots when voted on in the order and with the proper number, which ballot title or designation shall be the method by which said constitutional amendments shall be designated on the ballots.

2202. Copies to be furnished county clerks and sent to voters and polling places. Not less than thirty days before the election next ensuant at which such amendments are to be voted on, the secretary of state shall duly certify such pamphlet and the matters contained therein, and furnish each county clerk in the state with one and one-fifth times as many copies of such pamphlets as there are registered voters in his county. The clerk of each county shall, not more than twenty-five nor less than fifteen days prior to said election, cause to be mailed to each voter a copy of such pamphlet, and no other publication of such amendments shall be necessary or authorized, except such as are provided by the constitution. Three copies of such pamphlets, to be supplied by the secretary of state, shall be kept at every polling place, while an election is in progress, so that they may be freely consulted by the electors.

CHAPTER 6.

BALLOTS AND VOTING.

2205. (836.) Official ballots, how provided. Except as otherwise provided by law, it shall be the duty of the county clerk of each county to provide printed ballots for every election of public officers in which the voters, or any of the voters, within the county participate; and to cause to be printed on the ballot the name of every candidate whose nomination has been certified to or filed with the county clerk in the manner provided for in the preceding chapter. It shall be the duty of the recorder of any city, or clerk of any town, except as otherwise provided by law, to provide printed ballots for every election of public officers in which the voters, or any of the voters, of such city or town participate; and to cause to be printed on the ballot the name of every candidate whose nomination has been certified to, or filed with, such city recorder or town clerk, in the manner provided by law. The official ballots shall be printed and in the possession of the county clerk, city recorder, or town clerk, at least four days before election, and subject also to inspection by the candidates and their agents.

Under provisions of this section and §§ 2182, 2186, requiring certificates to be filed with the town clerk, the clerk, in the absence of objection, must place the candidate's name on the official ballot, though the certificate was not filed in the required time.
Earl v. Lewis, 28 U. 116; 77 P. 235.

2206. (837.) Sample ballots. Sample ballots printed upon paper of a different color from the official ballots, but in the form of those to be used on election day, each containing the names of the candidates which are to be printed upon the appropriate official ballot, shall be printed and in the possession of the county clerk or other officers charged with the duty of preparing such ballots seven days before the day of election, subject to public inspection. Sample ballots shall be delivered to the election officers and posted with the cards of instruction provided for in the next succeeding section.

2207. (838.) Instructions for voters to be printed and distributed. The county clerk of each county, or the city recorder or town clerk, as the case may be, charged with the duty of providing ballots, shall cause to be printed on cards, and in the English language, instructions for the guidance of voters in preparing their ballots. Twelve such cards so printed shall be furnished by such clerk or recorder to the judges of election in each election district, at the same time and in the same manner as the printed ballots. The election judges shall post not less than one of such cards in each place or compartment provided for the preparation of ballots, and not less than three of such cards elsewhere in and about the polling place on the day of election. Such

cards shall be printed in large, clear type, and shall contain instructions to the voters on the following matters, to wit:

1. How to obtain ballots for voting;
2. How to prepare the ballots for deposit in the ballot box;
3. How to obtain a new ballot in the place of one spoiled by accident or mistake;
4. How to obtain assistance in marking ballots;
5. Not to vote a spoiled or defaced ballot;
6. That identification marks or otherwise spoiling or defacing a ballot will render it invalid;
7. Whenever the approval of a constitutional amendment is submitted to the vote of the people, the county clerk of each county, or the city recorder or town clerk, as the case may be, charged with the duty of providing ballots, shall cause to be printed on cards in large, clear type, the original provision of the constitution, together with the proposed amendment thereto in different type, enclosed in brackets in such manner that the nature of such amendment shall be clearly indicated. If there be more than one amendment submitted, they shall be placed upon said cards in columns in the same order as they will appear upon the official ballot, and there shall be placed at the foot of each of said proposed amendments the question as the same appears upon the official ballot. Twelve of such cards shall be furnished by such clerk or recorder to the judges of election in each election district at the same time and in the same manner as the printed ballots. The election judges shall post not less than one of such cards in each place or compartment provided for the preparation of ballots, and not less than three of such cards in and about the polling place on the day of election. Am'd '99, p. 120.

Publicity for proposed constitutional amendments, §§ 2200-2202.

2208. (839.) Form of ballot. One ballot box at each polling place. All nominations of any political party or group of petitioners shall be placed under the party name or title of such party or group as designated by them in their certificates of nomination or petition, or, if none be designated, then under some suitable title, and the ballots shall contain no other names, except that, in case of electors for president and vice-president of the United States, the names of the candidates for president and vice-president may be added to the party or political designation. It shall be lawful to designate the political party or group of petitioners, as the case may be, by an appropriate emblem or design, such as a flag, eagle, rooster, or other device, as may be set forth in the certificate of nomination; *provided,* that no two sets of nominations shall use or have the same device, and that each political party or group of petitioners shall have the prior right to use the device used by it at the last similar election. Each list of candidates for the several parties and groups of petitioners shall be called a ticket and be placed in a separate column on the ballot in such order as the authorities charged with the printing of the ballots shall decide. The columns containing the lists of candidates, including the party name and device, shall be separated by heavy parallel lines. The ballots shall be on plain white paper, through which the printing or writing cannot be seen, and in any one county must be uniform in size. The party name or title shall be printed in capital letters not less than one-fourth of an inch in height, and a circle one-half inch in diameter shall be printed immediately below the party name or title, the top of which circle shall be placed not less than two inches below the perforated line. The offices to be filled shall be plainly printed immediately above the names of the candidates for the same. The names of candidates shall be printed in capital letters not less than one-eighth nor more than one-fourth of an inch in height, and at the right of the name of each candidate a square shall be printed, the sides of which shall be not less than one-fourth of an inch in length. At the right of the ballot there must be left a blank ticket long enough to contain as many written names of candidates as there are persons to be elected, in which ticket shall be printed the names of the offices to be filled as in the other

tickets. Whenever the approval of a constitutional amendment or other question is submitted to the vote of the people, such question shall be printed on the ballot after the list of candidates. The extreme top part of each ballot above the portion which contains the party names and emblems shall be divided by a perforated line, the top portion being known as the stub, which shall be not less than one inch in width, upon which stub shall be printed the number of the same. Ballot stubs shall be numbered consecutively. On the back of each ballot shall be printed in capital letters in two line pica gothic or type not smaller in size, the indorsement: "Official ballot for .....," and after the word "for" shall follow the designation of the election district or political division for which the ballot is prepared, and the date of the election, and a fac-simile of the signature of the clerk or recorder who has caused the ballot to be printed. The ballot shall contain no caption or other indorsement except as in this section provided. Each county or town clerk, or city recorder, shall use precisely the same quality and tint of paper, and kind of type, and quality and tint of plain, black ink for all ballots furnished by him at one election. Whenever candidates are to be voted for only by the voters of a particular district, county, city, town, or other political division, the names of such candidates shall not be printed on any other ballot than those provided for use in such district, county, city, town, or political division respectively. The ballot shall be of such form and the indorsements thereon so printed that they may be folded in such a way that when so folded the whole indorsement shall be visible and the contents of the ballot shall not be exposed. There shall be but one ballot box at each polling place for receiving ballots cast for candidates for office.

Ballot shall be secret, Con. art. 4, sec. 8. A provision of law for the marking and identification of ballots by numbering them is void, being in contravention of Con. art. 4, sec. 8, requiring that all elections shall be by secret ballot.
Ritchie v. Richards, 14 U. 345; 47 P. 670.

Does not repeal provision of general election laws requiring a blank ticket at the right of the ballot, and a city recorder, in making up the official ballot, must leave a blank ticket, and the voter may vote for any person he desires by writing his name on the ballot.
Park v. Rives, 40 U. 47; 119 P. 1034.

2209. (840.) Number of ballots to be provided. The county clerk of each county, and the city recorder of each city, and the town clerk of each town, when charged by this chapter with the duty of printing and preparing ballots, shall provide for each election district in a county, city, or town, one hundred ballots for every fifty or fraction of fifty voters registered at the last preceding election in the election district. If there is no registry list in the district, such ballots shall be provided to the number of one hundred of each kind for every fifty or fraction of fifty voters who voted at the last preceding election in such district. When a district shall be divided or the boundaries changed, the county clerk, or city recorder, or town clerk, as the case may be, must ascertain as nearly as possible the number of voters in the new district or districts and provide therefor a sufficient number of ballots in the above proportion.

2210. (841.) Ballots printed at public expense. Except as otherwise provided by law, all ballots cast in elections for public officers, or for the decision of any question submitted to electors within the state, shall be printed and distributed at public expense. The printing of ballots and cards of instruction for the voters of each county, and the delivery of the same to the election officers, as hereinafter provided, shall be a county charge, the payment of which shall be provided for in the same manner as the payment of other county expenses, but the expense of printing and delivering ballots and cards of instruction to be used in municipal elections shall be a charge against the city or town in which such election shall be held.

2211. (842.) Delivery of ballots. Expense. Sealed packages. Receipts. The county clerks of the various counties of the state, and the city recorders, and the town clerks, as the case may be, shall, prior to election, cause to be delivered, at the expense of the county, city, or town, to the election judges in their respective districts, the proper number of ballots provided for the use of the voters at such election in such district. The same shall be sent in two

sealed packages for each election district in said county, city, or town, with the marks on the outside of each, clearly stating the election district and polling place in said county, city, or town for which it is intended, together with the number of ballots inclosed. Each of such packages shall contain one-half of the number of ballots intended for such election district. Such packages shall be delivered prior to Monday noon before election day, one to each of the two judges of election in each district, who are members of the political parties which cast the largest and next largest number of votes at the last general state election. Receipts for ballots thus delivered shall be given by the election judges who receive them, and filed with the clerk of the county, city, or town, as the case may be, who shall also keep a record of the time when, and the manner in which, each of said packages was sent and delivered. The several election judges receiving such packages shall, at the opening of the polls, on election day, produce the same with the seals unbroken in the proper polling place, and shall in the presence of all three judges open the said packages.

2212. (843.) Substitute ballots. If the ballots to be furnished to any election judges, as herein provided, shall not be delivered at the time above mentioned, or if after delivery they shall be destroyed or stolen, it shall be the duty of the said clerk of the county, or recorder of said city, or clerk of said town, to cause other ballots to be prepared, as nearly in the form prescribed as practicable, with the word "substitute" printed in brackets immediately under the fac-simile signature of the clerk or recorder preparing such ballots, and upon receipt of the ballots thus prepared from such clerk or recorder accompanied by a statement under oath that the same have been prepared and furnished by him, and that the original ballots have so failed to be received, or have been destroyed or stolen, the election judges shall cause the ballots so substituted to be used at the election. If from any cause none of the official ballots or substitute ballots prepared by the county clerk, the city recorder, or town clerk, as herein prescribed, shall be ready for distribution at any polling place, or if the supply of ballots shall be exhausted before the polls are closed, unofficial ballots, printed or written, made as nearly as possible in the form of the official ballots, may be used until substitutes prepared by the clerk or recorder as provided in this section can be printed and delivered.

2213. (844.) Appointment of judges of election. Vacancies. Absence. Compensation. Judges to act as clerks. Judges of election shall be appointed for each election district in the manner following: The board of county commissioners for each county in the state, between the 5th and 20th days of October in each year of a general election, shall appoint three qualified electors, at least two of whom shall be of opposite political parties, to act as judges of election in each election district, at all general and special elections, until their successors are appointed. On or before the last day of September in each year of a general election, political parties, or any committee thereof, may each file with the clerk of the board of county commissioners a list, designating six or more persons in each election district in such county, together with their residences and occupations, which list shall be subscribed by the chairman or secretary of the county organization of the political party, and an affidavit shall be added thereto, subscribed by the said chairman or secretary, stating that he is such officer or acting officer duly appointed and with authority to file such list on behalf of such party; that the names submitted are names of qualified electors of such district, respectively; that, according to the best knowledge and belief of such affiant, each of such persons named in such list is a credible, competent, and trustworthy person. The county commissioners shall appoint three persons for each polling place from the lists so submitted as judges of election. Whenever political parties shall fail to file such list or lists, or whenever such list or lists, when filed, shall be incomplete, all such omissions shall be supplied by persons selected by the board of county commissioners. Vacancies in the office of judge of election shall be

filled by said board of county commissioners; *provided,* that in case any judge of election shall fail on the morning of election to appear or from any cause shall fail or refuse to act, the qualified electors present at the polling place at the hour designated by law for the opening of the polls, provided said electors shall be not less than six in number, shall immediately fill the vacancy, by appointing another person qualified to act, who shall be a member of the same political party as the judge whose place he is appointed to fill. Judges of election shall designate which of their number shall preside and which shall act as clerks. If any board of county commissioners shall fail to comply with the provisions of this section, each and every member thereof shall be gulity of a misdemeanor and shall be punished by a fine of not more than $100 for every offense. In case of a conflict arising before such board, owing to different persons claiming the right to certify such list for any political party, the board shall have authority to decide between such lists; *provided,* that they shall select only names included in a sworn list as above mentioned; and, *provided, further,* that any person making a false statement in any such affidavit shall be guilty of perjury and punished as provided by law. Judges of election shall receive such compensation, not to exceed $3 per day, as may be fixed by the board of county commissioners.

Judges to be furnished with a copy of official register, §§ 2128-2130.
When judges fail to appear, electors present appoint, § 2111.
Vacancy in office of judge filled by county board, § 2116.
Opening and closing polls, proclamation, § 2111.

2214. (845.) Polling places, booths, ballots, etc. Alteration or division of election districts. The board of county commissioners of each county shall designate polling places for each district in such county and shall provide in each polling place designated by them a sufficient number of voting booths, or compartments, which shall be furnished with supplies and conveniences, including shelves, pens, penholders, ink, and blotting paper, as will enable the voter to prepare his ballot for voting, and in which voters may prepare their ballots screened from observation as to the manner in which they do so; and a guard rail shall be constructed and placed that only such persons as are inside such rail can approach within six feet of the ballot box and of such voting booths and compartments. The arrangement shall be such that the voting booth or compartment can only be reached by passing within such guard rail. And both they and the ballot boxes shall be in plain view of the election officers and of those outside the guard rail. Each booth or compartment shall be at least three feet square, and shall contain a shelf which shall be at least one foot wide, extending across one side of the booth or compartment at a convenient height for writing, and shall be so arranged that the voter can prepare his ballot screened from observation. No person other than the election officers and watchers provided by law, and those admitted for the purpose of voting, as herein provided shall be permitted within such guard rail, except by authority of the judges of election, and then only when necessary to keep order and enforce the law. The number of such voting booths or compartments shall not be less than one for every fifty voters who voted at the last election in the district. The officers who are charged with the duty of providing voting booths or compartments shall also furnish for each polling place a ballot box, which shall be large enough to properly receive and hold the ballots to be cast for candidates for offices, in conformity with the provisions of this chapter. The expense thereof shall be in all cases a public charge, to be provided for in the same manner as other election expenses under this chapter. At the times now prescribed by law and in each year hereafter, the officers charged by law with the division or alteration of the election districts shall alter or divide the existing election districts, whenever necessary, in such manner that each election district shall contain not more than 300 voters.

Limitation on power to change districts, § 1400x2.
Change of boundaries; new lists, § 2140.
Statements of constitutional amendments to be kept at, § 2201.

2215. (846.) Application for ballot. Challengers. Watchers. Voting

mark described. Any person desiring to vote shall give his name, and, if requested so to do, his residence, to one of the judges of election, who shall thereupon announce the same in a loud and distinct tone of voice, clear and audible, and if such name is found upon the registry list by the election judge having charge thereof, he shall likewise repeat the said name, and the voter shall be allowed to enter the space inclosed by the guard rail, as above provided. An election judge shall give him one, and only one, ballot, and before delivering such ballot to the voter, the judge of election having charge of the ballots shall indorse his initials on the stub. The name of such voters shall be immediately checked on said list with the number of such stub. Besides the election officers and watchers, not more than four voters in excess of the number of voting shelves or compartments provided shall be allowed in said inclosed space, within said guard rail, at one time, except as hereinafter provided. Each of the political parties which cast the largest and next largest number of votes at the last general election in the state shall be entitled to have one person as watcher within the guard rail during the casting and counting of votes and declaration of the result thereof. Such person shall be designated and his selection made known to the election judges by an affidavit made by the acting chairman of the county or state committee of each of such parties; *provided,* that in case of temporary absence for meals or by reason of sickness or otherwise, the person so selected may have substituted for himself some other person of like political belief, such substitute to be made known to the election judges by an affidavit of the person first to be selected as watcher. When any person shall make application for a ballot, his right to vote at that poll and election may be orally challenged by any challenger outside the guard rail, upon either or all of the following grounds:

1. That he is not the person whose name appears on the registration list, and under which name he claims the right to vote;
2. That he has not resided within the state one year next preceding the election;
3. That he has not been a citizen of the United States for a period of ninety days next preceding the election;
4. That he has not resided in the county four months next preceding the election;
5. That he has not resided within the precinct for sixty days next preceding the election;
6. That he does not live in the election district;
7. That he has voted before on that day;
8. That he is not of the age of twenty-one years or upwards; *provided,* that if the person challenged shall take an oath before any of the judges of election that the grounds of challenge are untrue, then he shall be entitled to vote. If the person applying is not entitled to vote, no ballot shall be delivered to him. Any person may also be challenged, as provided by this chapter, when he shall offer his ballot for deposit in the ballot box. Two challengers representing each political party or set of nominations shall be permitted to remain just outside the guard rail, where they can plainly see what is done within the polling place, except within the said booths or compartments. The said polling place shall be so arranged that every part thereof, except inside the said booths or compartments, may be in full view of such challengers and watchers. On receiving his ballot, the voter shall forthwith, and without leaving the inclosed space, retire alone to one of the voting shelves or compartments, and shall prepare his ballot as hereinafter provided. The voting mark shall be a cross in the circle or square, and the cross required to be used in this chapter shall consist of two straight lines as nearly equal in length and crossing each other as near the center of each line as practicable.

Duty of judges to challenge voters indicated by registry agent, § 2129.

Under the provisions of this section and §§ 2216-2218, requiring the judges to furnish voter with official ballots, etc., the voter can only use the ballot furnished, and its validity cannot be denied because of irregularity in its preparation.

Earl v. Lewis, 28 U. 116; 77 P. 235.

2216. (847.) How to mark the ticket. Any voter desiring to vote for all the candidates upon any ticket may mark in the circle above that ticket, or in the squares opposite the names of all candidates thereon, or both such markings. If the voter does not desire to vote for a candidate on a ticket the circle of which he has marked, he may draw a line through the name of such candidate, and the cross in the circle shall count as a vote for all the other candidates on the ticket. To vote for candidates on two or more tickets, he may mark in the squares opposite the names of such candidates without marking in any circle; or he may indicate his choice by marking in the circle above one ticket, drawing a line through the names of such candidates on that ticket for whom he does not desire to vote, and marking in the squares opposite the names of the candidates of his choice upon other tickets. The voter may also insert in writing in the proper place in the blank ticket the name of any person for whom he desires to vote, and he shall be deemed to have voted for that person, whether he makes or fails to make a cross mark opposite such name. The unnecessary marking of a cross in a square on the ticket below the marked circle shall not affect the validity of the vote. In case of a question submitted to the vote of the people, the voter shall mark in the appropriate margin or place a cross against the answer he desires to give.

A law providing that electors may vote for all the candidates of a party by making a cross opposite a party emblem, and requiring those who do not vote for all such candidates to make a cross opposite the name of those voted for, and providing that only the names of party candidates shall be printed upon the ticket except upon petition, held to be valid.
Ritchie v. Richards, 14 U. 345; 47 P. 670.

2217. (848.) Ballots, how counted. Rejection. Ballots thus marked shall be counted for the candidates designated by the marks in the squares, and for the candidates upon the ticket beneath a marked circle excluding the candidates through whose names the voter may have drawn a line. When a circle is marked and no lines are drawn through the name of any candidate thereunder, the ballot shall be counted for all the names upon the ticket beneath such circle. When more than one circle is marked, the ballot shall be rejected. When only one officer for any office is to be elected, if the voter marks in squares opposite the name of more than one candidate therefor; or if, having marked the circle of one ticket, he shall mark the name of a candidate on another ticket without drawing a line through the name of the corresponding candidate upon the ticket beneath the marked circle, such vote shall not be counted for such office. When two or more officers of the same kind are to be elected, if more squares opposite the names of candidates for such office are marked than there are officers to be elected to such office; or, if the aggregate number of unscratched names of such candidates on a ticket, the circle of which is marked, added to the number of such candidates on other tickets whose names are marked, shall exceed the number of officers to be elected to such office, the ballot shall not be counted for any such candidates. Any ballot marked by the voter in any other manner than as authorized in this chapter shall be rejected. No ballot properly marked by the voter shall be rejected because of any discrepancy between the printed ballot and the nomination paper, and it shall be counted for the candidate or candidates for such offices named in the nomination paper. No ballot furnished by the proper officer shall be rejected for any error in stamping or writing the indorsements thereon by the officials charged with such duties, nor because of any error on the part of the officer charged with such duty in delivering the wrong ballots at any polling place, but any ballot delivered by the proper official to any voter shall, if properly marked by the voter, be counted as cast for all candidates for whom the voter had the right to vote, and for whom he has voted.

Ballots improperly marked, § 2221.
The numbering of ballots by election officers in the honest belief that such action is proper is not placing a distinguishing mark thereon within this section.
Hardy v. Beaver City, 41 U. 80; 125 P. 679.

2218. (849.) Folding and casting ballot. Time allowed voters. Per-

sons allowed in booth. Before leaving the voting shelf or compartment the voter shall fold his ballot without displaying the marks thereon, in the same manner it was folded when he received it, so that the contents of the ballot shall be concealed and the stub can be removed without exposing any of the contents of the ballot, and he shall keep the same so folded until he has voted. Each voter who has prepared his ballot, and is ready to vote as aforesaid, shall then leave the compartment and approach the judges of election having the ballot box in charge, and give his name to one of the judges of election, who shall announce it in a loud and distinct tone of voice, clear and audible. The voter's ballot shall be handed to the judge in charge of the ballot box, who shall announce the name of such voter and the number upon the stub of his ballot; which number must correspond with the number previously checked opposite his name on the registry list when the election judge handed him his ballot; if the stub number of the ballot corresponds and is identified by the initials of the judge placed thereon, the judge shall then remove the stub from such ballot. The judge in charge of the poll list shall immediately write the name of such voter upon such list. Such ballot shall then be returned by said judge to the voter, who shall thereupon in full view of the judges of election deposit the same in the ballot box, with the official indorsement on the ballot uppermost. Each voter shall mark and deposit his ballot without undue delay, and shall quit said inclosed space as soon as he has voted. No such voter shall be allowed to occupy a voting shelf or compartment already occupied by another, nor remain within said inclosed space more than ten minutes, nor to occupy a voting shelf or compartment for more than five minutes, in case all such shelves or compartments are in use and other voters are waiting to occupy the same. No voter, not a judge of election, whose name has been checked on the registry list of the ballot officers, shall be allowed to re-enter said inclosed space during said election. It shall be the duty of each and all of the judges of election to secure the observance of the provisions of this section and other sections relative to the duties of voters and of judges and other officers of election.

2219. (850.) Ballots not to be removed. Spoiled ballots. No person shall take or remove any ballot from the polling place before the close of the polls. If any voter spoils a ballot, he may successively obtain others, one at a time, not exceeding three in all, upon returning each spoiled one. The ballots thus returned shall be immediately canceled.

2220. (851.) Assisting disabled or illiterate voter to prepare ballot. Any voter who declares under oath to the judges of election that he cannot read or write the English language, or that, by reason of physical disability, he is unable to prepare his ballot without assistance, or that he is physically unable to enter the polling place, being at the entrance thereto, shall, upon his request, receive the assistance of any two of the election judges, who are of different political parties, in the marking thereof; and such judges shall certify on the outside thereof that it was so marked with their assistance, and shall thereafter give no information regarding the same. The same two judges shall not together successively act as such assistants. The judges of election are hereby qualified to administer such oath, and a memorandum shall be made on the poll list of every instance when an oath was administered to a voter as herein provided, stating what facts were sworn to, the name of affiant, and the names of the judges who aided the voter in the preparation of his ballot. No judge who assists a voter in the preparation of his ballot, as herein provided, shall in any manner request, persuade, or induce, or seek to persuade or induce, any such voter to vote for or against any particular candidate or candidates. Nor shall any such judge reveal to another the name of any candidate for whom the voter has voted, or anything that took place while he was assisting such voter in preparing such ballot for voting. No voter shall divulge to any one within the polling place the name of any candidate for whom he intends to vote, nor shall he ask for, or receive the assistance of, any person within the polling place, in the preparation of his ballot,

except as provided in this section. When any voter, in addition to the oath required hereinbefore by this section, shall also make oath that he cannot speak, and understand when spoken, the English language, the election judges may select two persons, one from each political party, who shall act as interpreters and who shall take the oath taken by election judges as nearly as may be, which interpreters may assist such persons who cannot speak, and understand when spoken, the English language, in making up their ballots.

2221. (852.) Defective ballots. Counting or rejecting. If a voter marks in ink more names than there are persons to be elected to an office, or if, for any reason, it is impossible to determine the choice of any voter for any office to be filled, his ballot shall not be counted for such office; *provided, however,* that a defective or incomplete cross mark on any ballot in ink in a proper place shall be counted, if there be no other mark or cross in ink on such ballot indicating an intention to vote for some person or persons or set of nominations other than those indicated by the first mentioned defective cross mark. No ballot without the official indorsement shall, except as provided in § 2212, be allowed to be deposited in the ballot box, and none but ballots provided in accordance with the provisions of this chapter shall be counted. Ballots not counted shall be marked "defective" on the back thereof.

Ballots improperly marked, § 2217.

2222. (853.) Counting the votes. Excess ballots, disposal of. As soon as the polls at any election shall have finally closed, the judges shall immediately open the ballot box and proceed to count the votes polled, and the counting thereof shall be commenced and continued until finished before the judges shall adjourn. They shall first count the number of ballots in the box. If the ballots shall be found to exceed the number of names on each of the poll lists, the judges of election shall then examine the official indorsements on the outside of the ballots without opening the same, and if, in the unanimous opinion of the judges, any one or more of the ballots in excess of the number on the poll lists be deemed not to bear the proper official endorsement, it or they shall be put into a separate pile by themselves and marked "excess ballots." If there is still an excess of ballots, they shall be replaced in the box, and one of the judges, without looking, shall draw out from the box a number of ballots equal to such excess, and the same shall be laid aside and not counted. When the ballots and the poll lists agree, or, as above provided, have been made to agree, the board shall proceed to count the votes; each ballot shall be read and counted separately, and every name included in a marked ticket, set, or list of nominations, or separately marked as voted for on such ballot, where there is no conflict to obscure the intention of the voter as aforesaid, shall be read and marked upon the tally list, before any other ballot is proceeded with; and the entire number of ballots, excepting "excess" and "defective" ballots, shall be read and counted and placed upon the tally lists in like manner, and when all the ballots have been counted as herein provided, the board shall compute and declare the results.

2223. (854.) Marking tally lists. Certification. As the ballots are opened and read the judges shall, upon tally lists prepared for that purpose, carefully mark down the votes each person shall have received, in separate lines, with the name of such person at the beginning of the line, and the office it is designed by the voter such person shall fill. The judges shall certify the tally lists substantially as follows:

We, the undersigned, judges of election for district No. ....., county of ....., state of Utah, do hereby certify that the foregoing is a true and correct list of all the persons voted for at the election held in said district on the ..... day of ....., 19....., and the number of votes cast for each for the offices respectively named.

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Judges.

2224. (855.) County to furnish poll books. The board of county commissioners of each county must furnish, for the several election districts in each county, poll books, after the forms hereinafter prescribed.

2225. (856.) Delivery of poll books to judges. The county clerk, city recorder, or town clerk, as the case may be, shall cause to be delivered to one of the judges of election in each district, at the time the ballots are delivered for such district, two of such blank poll books for the use of the judges of such district.

2226. (857.) Form of poll books. The following is the form of the poll books to be kept by the judges of election, in which shall be written the poll list:

FORM.

Poll book of district No. .....

Number and names of electors voting.

No. Name. No. Name. No. Name. No. Name.

We, the undersigned, judges of an election held at ..... district, in ..... county, state of Utah, on the ..... day of ....., 19....., having first been severally sworn according to law, hereby certify that the foregoing is a true statement of the number and names of the persons voting in said district at said election, and that the total number of votes cast thereat was .....

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Judges.

2227. (858.) Disposal of ballots after counting. Marking of excess ballots. At all elections, the ballots as soon as read must be strung on a string by one of the judges, and must not thereafter be examined by any person. The "excess" and "defective" ballots, separately strung, shall, with the counted ballots, be carefully sealed in a strong envelope. Every "excess" or "defective" ballot must be marked by the judges, in writing, across the face thereof, "excluded on the ground of .....," filling the blank with a brief statement of the reasons for the rejection, which statement must be dated and signed by the judges.

2228. (859.) Judges of election to sign and certify poll books, and make returns. As soon as all the votes are counted and the ballots sealed up as aforesaid, the poll books must be signed and certified by the judges. Before they adjourn, the judges must enclose in another strong envelope and seal up and direct to the county clerk, city recorder, or town clerk, as the case may be, the official register, all certificates of registration received by them, one list of the persons challenged, one of the poll books, one of the tally sheets, and the official oaths taken by the judges of election. The judges must enclose in another envelope and direct to the county clerk, city recorder, or town clerk, as the case may be, a copy of the total number of votes received by each candidate whose name is on the official ballot, the same to be placed on file in the office of the county clerk, city recorder, or town clerk, as the case may be, for public inspection. The stubs of the counted ballots shall be immediately burned by the presiding judge of election. Am'd '09, p. 5.

2229. (860.) Statement of disposition of ballots. The election judges shall also at the same time prepare a statement in writing showing the number of ballots voted, making a separate statement of the number of unofficial ballots, if any, voted as provided in § 2212, the number of ballots delivered to voters, the number of spoiled ballots, and the number of ballots not delivered to voters, and the number of ballots returned, identifying and specifying the same. All unused ballots, and spoiled ballots, shall be returned with such statement to the county clerk, city recorder, or town clerk, as the case may be, in a sealed envelope. Any election judge who shall fail to thus ac-

count particularly for all official ballots placed in his charge shall be deemed guilty of a misdemeanor.

2230. (861.) Judges to indorse envelopes, etc. Each of the judges must write his name across the seals of the envelope or covers, and must mark on the exterior of the same the word "ballots" or "returns" or "unused ballots" or other words plainly indicating the contents of the packages and the number of the election district.

2231. (862.) Lists, etc., open to inspection. Delivery of ballot box. The judges must select one of their number to retain, open to the inspection of electors for at least six months, the other list of persons challenged, the other tally sheet, and the other poll book. The judge so selected must also deliver the ballot box and the key thereof to the district registry agent, by him to be delivered to the presiding judge at any future election during his term of office, and at the termination thereof to be delivered to his successor in office or otherwise disposed of as the county clerk may direct.

2232. (863.) Delivery of sealed packages within twenty-four hours. The sealed packages must, before the judges adjourn, be delivered to one of their number, to be determined by lot, unless otherwise agreed upon. The judge to whom such packages are delivered must, within twenty-four hours, deliver them without their having been opened to the county clerk, city recorder, or town clerk, as the case may be.

Where, in an election contest, contestant desires to introduce ballots voted in evidence, the burden is on him to establish, as a condition precedent to the introduction thereof, that they have been kept in the manner prescribed by this section and § 2234.
Farrell v. Larsen, 26 U. 283; 73 P. 227.
Where ballots were delivered to contestant, who was the incumbent of the office, and a number of the packages were unsealed and deliberately kept in an unlocked telephone room in the clerk's office, to which unauthorized persons had unrestricted access, such ballots were inadmissible.
Id.

2233. (864.) Payment of messengers delivering election returns. There shall be paid out of the treasury of each county, city, or town, as the case may be, to the person carrying the election returns to the clerk or recorder thereof, the sum of $1, and also the sum of 10 cents, one way, for every mile necessarily traveled between the polling place and the place of delivery; *provided,* that where the polling place is fifteen miles or more from the county seat, the election returns may, in the discretion of the judges of election, be sent to the county clerk, within twenty-four hours, by registered mail, from the postoffice most convenient to said voting place. Am'd '03, p. 31.

Payment of messenger for delayed returns, § 2248.

2234. (865.) Ballots to be retained one year, then destroyed. Upon receipt of the packages, the clerk or recorder must file the one containing ballots and must keep it unopened and unaltered for twelve months, after which time, if there is not a contest commenced in some tribunal having jurisdiction, he must burn the package without opening or examining the contents.

2235. (866.) Id. Ballots to be preserved till contest is determined. If within twelve months there is such a contest commenced, he must keep the package unopened and unaltered until it is finally determnied; when he must, as provided in the preceding section, destroy it, unless such package is, by virtue of an order of the tribunal in which the contest is pending, brought and opened before it, to the end that evidence may be had of its contents, in which event the package and its contents shall be in the custody of such tribunal.

2236. (867.) Returns produced for canvassing. The package containing the returns, the clerk or recorder must produce before the board of county commissioners or such other body as may be lawfully convened, when it is in session for the purpose of canvassing the returns.

The fact that the "voted" registry list contains fewer names than the number of votes actually cast is not, under § 256, C. L. U. 1888, an irregularity authorizing a recount, where the difference is less than the majority received by the successful candidate.
Page v. Utah Commission, 11 U. 119; 39 P. 499.

2237. (868.) Filing returns. Recorder to transmit poll list, etc., to county clerk. As soon as the returns are canvassed, the clerk or recorder

must file in his office the poll book, lists, and the papers produced before the board from the package mentioned in the preceding section; *provided,* that in municipal elections the town clerk or city recorder shall, on or before the 1st day of June, prior to the general election, transmit to the county clerk the checked register and poll list used at such election. Am'd '05, p. 245.

CHAPTER 7.

CANVASS OF RETURNS.

2238. (869.) County commissioners a canvassing board. Meeting. The board of county commissioners of each county is ex officio a board of county canvassers for the county, and must meet as such to canvass the returns at the usual place of meeting of the board of county commissioners, at twelve o'clock noon on Monday next after each election.

Board of county canvassers, § 1400x2. No demand is necessary upon a board whose statutory duty it is to canvass election returns to compel the performance of such duty. Lyman v. Martin, 2 U. 136.

2239. (870.) Id. Absence of commissioner. Clerk. If, at the time and place appointed for such meeting, one or more of the county commissioners should not attend, the place of the absentees must be supplied by one or more of the following county officers, whose duty it is to act, in the order named, to wit: The treasurer, the assessor, the sheriff, so that the board of county canvassers shall always consist of three acting members. The county clerk is ex officio the clerk of the board of county canvassers.

2240. (871.) Commencing the canvass. Missing returns. If, at the time of the meeting, the returns from each district in the county in which polls were opened have been received, the board of county canvassers must then and there proceed to canvass the returns; but if all the returns have not been received, the canvass must be postponed from day to day, Sundays and legal holidays excepted, until all of the returns are received, or until seven postponements have been had. If the returns from any election district have not been received by the county clerk within seven days after any election, it is his duty forthwith to send a messenger to the judges for the missing returns, who must procure such returns from the judges, or any of them, and return the same to the county clerk. Such messenger shall be paid out of the county treasury ten cents per mile for the distance necessarily traveled. If it appears to the board, by evidence, that the polls were not opened in any district, and no returns have been received therefrom, the board must certify to the same and file such certificate and the evidence, if any, with the county clerk, who must enter the same in the minutes and in the statement mentioned in § 2242.

2241. (872.) Canvass to be public. Irregularities. The canvass must be made in public by opening the returns and determining therefrom the vote of such county or precinct for each person voted for, and for and against each proposition voted upon at such election, and declaring the result thereof. In canvassing, no returns must be rejected, if it can be ascertained therefrom the number of votes cast for each person. The fact that the returns do not show who administered the oath to the judges of election, or a failure to fill out all the certificates in the poll books, or to do or perform any other act in making up the returns that is not essential to determine for whom the votes were cast, is not such an irregularity as to entitle the board to reject the same, but they must be canvassed as are other returns.

A certificate must be issued to the one shown by the certified return to have received a plurality of the votes, though the tally sheet shows a smaller number of votes cast than are shown by the certified return. Rich v. Henderson, 49 U. 258; 162 P. 621.

2242. (873.) Entry of result of canvass. The clerk of the board must, as soon as the result is declared, enter on the records of such board a statement of such result, which statement must show:

1. The whole number of votes cast in the county;
2. The names of the persons voted for, and the propositions voted upon;
3. The office to fill which each person was voted for;
4. The number of votes given at each election district to each of such persons, and for or against each of said propositions;
5. The number of votes given in the county to each of such persons and for and against each of such propositions, or in case of precinct officers, the number of votes given in each precinct to each person voted for.

Sec. 2413 requires a written statement of election contest to be filed within forty days after the board of canvassers meets to canvass the returns on the Monday next after the election, as required by § 2238, and not from the time the result is declared, as required by this section. Carbis v. Dale, 23 U. 463; 65 P. 204.

2243. (874.) Highest number of votes elects. The board must declare elected the persons having the highest number of votes given for each office to be filled by the votes of a single county or subdivision thereof.

Highest number of votes elects, §§ 2106, 2412. Grounds for election contest, § 2410.

2244. (875.) Certificate of election delivered by clerk. The county clerk must immediately make out and deliver to such person a certificate of election signed by him and authenticated with his seal.

2245. (876.) Abstract of state and district returns. When there has been a general or special election for officers, or any measure voted for by the electors of the state at large, or by the electors of two or more counties, each county clerk, as soon as the statement of the vote of his county is made out and entered upon the record of the board of county canvassers, as specified in § 2242, must make a certified abstract of so much thereof as relates to the votes given for and against such measure and for persons for said offices to be filled at such elections.

Applies to direct legislation election, § 2309.

2246. (877.) Id. Transmission to secretary of state. The clerk must seal up such abstract, endorse it "election returns," and without delay transmit it by mail, registered, to the secretary of state.

2247. (878.) Board of state canvassers, how composed. Meeting. Duties. Certificate of election. On the fourth Monday of November after the day of election, at twelve o'clock noon, or in case of special election, at twelve o'clock noon on the day following the receipt by the secretary of state of the last of the returns of such special election, the state auditor, state treasurer, and attorney general, who shall constitute a board of state canvassers, must meet in the office of the secretary of state and compute and determine the vote for officers or any measure voted for by the electors of the state at large or of two or more counties; and the secretary of state, who is secretary of said board, must make and file in his office a statement thereof, and must immediately make and deliver, to the person having the highest number of votes given for each office to be filled by such electors, a certificate of election signed by the secretary of state and authenticated by his seal. In case a secretary of state shall be elected to succeed himself, the certificate of election shall be issued by the board of state canvassers.

2248. (879.) Messenger for delayed returns. Compensation. If the returns from all counties have not been received on the fifth day before the day designated for the meeting of the board of state canvassers, the secretary of state must forthwith send a messenger to the clerk of the board of county canvassers of the delinquent county, and such clerk must furnish the messenger with a certified copy of the statement mentioned in § 2242. The person appointed is entitled to receive as compensation $4 per day for the time necessarily consumed in such service, and 10 cents for each mile necessarily traveled. His account therefor, certified by the secretary of state, after being allowed by the state board of examiners, must be paid out of the general fund of the state treasury.

Payment of messengers, § 2233.

2249. (880.) Defective returns not to cause delay. No declaration of the result or certificate must be withheld on account of any defect or in-

formality in the returns of any election, if it can, with reasonable certainty, be ascertained from such returns what office is intended and who is elected thereto.

Provisions to be liberally construed, § 2113.
Grounds for election contest, § 2410.
Election valid unless rejected vote would change result, § 2412.

In an election for members of a constitutional convention, where each voter was entitled to vote for seven candidates, and the registry list showed that in case each voter had voted for the full number of candidates, more votes would have been cast than the returns showed had been cast for all the candidates collectively; held, there was not an irregularity in the returns authorizing a recount.
Page v. Utah Commission, 11 U. 119; 39 P. 499.

The duty of a canvassing board under § 256, C. L. 1888, to determine what are the returns of an election, is not judicial, and the board cannot reject returns for informalities which do not destroy their character as such.
Id.

The act that the "voted" registry list contains fewers names than the number of votes actually cast is not such an irregularity as to authorize a recount, where the difference is less than the majority received by the successful candidate.
Id.

CHAPTER 8.

PRESIDENTIAL ELECTORS.

2250. (881.) Presidential electors. At each general election in November next preceding the choice of the president and vice-president of the United States of America, there shall be elected at large from the state as many electors of president and vice-president of the United States of America as the whole number of senators and representatives to which the state may be entitled in congress.

2251. (882.) Id. Certificate of election. Notice of meeting. The certificate of election for electors of president and vice-president of the United States of America shall be served upon each person elected, and he shall at the same time be notified to attend at the office of the secretary of state, at the capital of the state, and to report himself to the governor of this state as in attendance at the hour of twelve o'clock noon of the first business day next preceding the day upon which the electors are required by law to meet and vote for president and vice-president of the United States of America.

2252. (883.) Id. Meeting of electors to fill vacancies. The electors of president and vice-president so attending shall convene in the office of the secretary of state at the capital of the state, at the hour of twelve o'clock noon of the day fixed in § 2251, and in case there shall be any vacancy in the office of an elector, occasioned by death, refusal to act, neglect to attend by the hour of twelve o'clock noon of said day, or on account of the ineligibility of any person elected, or from any other cause, the qualified electors present shall proceed to fill such vacancy by ballot and plurality of votes, and the said electors so present shall immediately issue a certificate of election signed by those present, or a majority of them, to the person so chosen. In case of a failure to elect by the said electors by noon of the day upon which they are required by law to meet and vote for president and vice-president of the United States of America, the governor shall fill the vacancy by appointment; *provided,* that the vacancy shall be filled from the same political party represented by the elector who has occasioned such vacancy.

2253. (884.) Meeting of electors to ballot. The electors shall meet at the office of the secretary of state at the capital of the state, at noon of the second Monday of January next after their election, or at noon of such other day as the congress of the United States of America may designate, and shall proceed to the performance of their duties in conformity with the constitution and laws of the United States of America.

2254. (885.) Electors not to receive compensation. The said electors shall receive no compensation for their services.

CHAPTER 9.

UNITED STATES SENATORS.

('15, p. 54.)

2260. Election of senators. Term. At the general election to be held in the state of Utah in November, 1916, there shall be elected one United States senator to serve for a period of six years, and thereafter in each appropriate year, at the general election in such year, there shall likewise be elected one United States senator for a period of six years.

2261. Manner of election. Canvass of returns. The manner of election and canvassing of votes and all other details in respect to the election herein provided for shall be in accordance with the election laws of this state, so far as the same are applicable.

2262. Vacancy. Temporary appointment. Special election. In every case where a vacancy shall occur by death, resignation, or otherwise, the governor of the state shall make temporary appointment of a senator to serve until the people fill the vacancy by election as herein prescribed, and the governor, in the event of a vacancy, shall, by proclamation, order a special election to be held to fill said vacancy upon the date of the next regular election to be held in the state of Utah for the federal house of representatives.

2263. Determination of result. In every case the person receiving the largest number of votes cast in said election for any one person shall be declared the duly elected senator of the United States for the term aforesaid.

CHAPTER 10.

CONGRESSIONAL DISTRICTS.

2264. Two districts designated. The state of Utah is hereby divided into two districts for the election of representatives in the congress of the United States, each of which districts shall be entitled to one representative. Said representatives shall be elected at the election preceding the expiration of the terms of the incumbents.

2265. District boundaries. The limits and designation of the counties of each district shall be as follows:

The counties of Beaver, Box Elder, Cache, Carbon, Emery, Garfield, Grand, Iron, Juab, Kane, Millard, Morgan, Piute, Rich, San Juan, Sanpete, Sevier, Summit, Uintah, Wasatch, Washington, Wayne, and Weber shall constitute the first district.

The counties of Davis, Utah, Tooele, and Salt Lake shall constitute the second district. '13, p. 116.

2266. (886.) Representative to congress elected biennially. At the general election to be held in the year 1898, and biennially thereafter, there shall be elected for each congressional district one representative to the congress of the United States.

CHAPTER 11.

TWENTY-EIGHTH REPRESENTATIVE DISTRICT.

2267. District created. Duchesne county shall constitute and be known as the twenty-eighth representative district of the state of Utah, and be entitled to one representative in the legislature of said state; and said county of Duchesne shall be a part of the fifth senatorial district. '15, p. 3.

For other districts, Con. art. 9 sec. 4.

CHAPTER 12.

DIRECT LEGISLATION ELECTIONS.

('17, p. 188.)

2290. Initiation and reference of legislation. Subject to the provisions of this chapter, legal voters of the state of Utah, in such numbers as herein required, may, by joining in a petition for that purpose, filed in the office of the secretary of state as hereinafter provided, initiate any desired legislation and cause the same to be submitted to the legistlature or to a vote of the people for approval or rejection, or may require any law passed by the legislature (except those laws passed by a two-thirds vote of the members elected to each house of the legislature) to be referred to the voters of the state before such law shall take effect; *provided,* that in order to make any such petition mandatory, a majority of all the counties of the state must each furnish signatures of legal voters not less in number than the percentages herein required.

Authorized by Con. art. 6, sec. 1. Enacting clause, Con. art. 6, sec. 22.

2291. Petition. Action by legislature. Referendum. Upon the presentation to the secretary of state, at any time not less than ten days before the commencement of any regular session of the legislature, of an initiative petition signed as herein provided by legal voters of the state equal in number to 5 per cent of all the votes cast for all candidates for governor at the last preceding general election at which a governor was elected, the secretary of state shall transmit the same to the legislature as soon as it convenes and organizes. The law proposed by such petition shall either be enacted or rejected without change or amendment by the legislature. If any law proposed by such petition shall be enacted by the legislature it shall be subject to referendum petition in like manner as other laws. If any law so petitioned for be not enacted by the legislature, it shall be submitted to a vote of the people at the next ensuing general election, provided additional signatures to the petition are first obtained to bring the total number of signatures up to 10 per cent of all votes cast for all candidates for governor at the last preceding general election at which a governor was elected.

2292. Submission by direct petition. Upon the presentation to the secretary of state, at any time not less than four months before any general election, of an initiative petition, signed as herein provided by legal voters equal in number to 10 per cent of all the votes cast for all candidates for governor at the last preceding general election at which a governor was elected, proposing a law set forth in said petition, the secretary of state shall submit the said proposed law to a vote of the people at the next ensuing general election.

2293. Submission of act of legislature. Upon the presentation to the secretary of state, within sixty days after the final adjournment of the legislature, of a petition signed as herein provided by legal voters equal in number to 10 per cent of all the votes cast for all candidates for governor at the last preceding general election at which a governor was elected, asking that any act, or section or part of any act, of the legislature be submitted to the people for their approval or rejection, the secretary of state shall submit to the people for their approval or rejection such act, or section or part of such act, at the next succeeding general election.

2294. Legislative acts effective. No act passed by the legislature shall go into effect until sixty days after the final adjournment of the session of the legislature which passed the act, except laws passed by a two-thirds vote of the members elected to each house of the legislature. When a referendum petition has been filed, the act shall not go into effect unless and until it shall be approved by a vote of the people at the next ensuing general election.

2295. Elective acts effective. Veto. Amendments. Any act or law submitted to the people by either initiative or referendum petition, and approved by a majority of the votes cast thereon at any election, shall take effect five days after the date of the official proclamation of the vote by the governor. No act or law adopted by the people shall be subject to veto by the governor, but acts and laws approved by the people under the referendum provisions hereof may be amended by the legislature at any subsequent session thereof.

2296. Procedure. Sponsors. Information. The procedure to be followed in initiating or referring any act or law shall be as follows:

An application, hereinafter known as the application for "petition copies," having annexed thereto five copies of the proposed law, shall be filed in the office of the secretary of state. The application shall be signed by not fewer than five persons, hereinafter designated as "sponsors." The sponsors shall sign their names to said application, together with their residences, including the street and number of such residences, if they can be so designated. The sponsors shall be qualified electors of the state of Utah, and shall acknowledge their signatures under oath before some officer competent to administer oaths, who is personally acquainted with them; they shall likewise be required to swear before such officer that they have voted in some general election held within the county in which they reside, within three years next preceding the date of their taking the oath, and such affidavit of electoral qualification must appear on the application containing their signatures, or on a paper annexed thereto.

It shall be the duty of the secretary of state to inform any person making inquiry in regard thereto of the number of votes cast for governor in the last preceding general election at which a governor was elected, as the same appears from the official canvass of such election of record in the office of the secretary of state.

2297. Signatures. Circulating sheets. Certificates. All the signatures to any petition for the initiative or referendum shall be signed in the office and in the presence of an officer competent to administer oaths, and shall be placed on sheets of paper, known as "circulation sheets," substantially fourteen inches long and nine inches wide. Such circulation sheets shall be ruled with a horizontal line one and one-half inches from the top thereof. The space above this line shall remain blank and shall be for the purpose of binding. The circulation sheet shall be vertically divided into two columns. The first column shall be three and one-half inches in width, measured from the left edge of the sheet, and shall be for the purpose of containing the signatures. The second column shall encompass the remainder of the width of the sheet, and shall be the space on which shall be placed the postoffice addresses of the signers, together with the street numbers, if the residence of the signer can be so designated, and the address of such signer shall be written opposite his name on the same line.

At the top of each sheet, under the one and one-half inch blank margin, shall be printed in suitable type the word "Warning," under which shall be printed in eight-point type, single leaded, the following:

"It is a felony for any one to sign any initiative or referendum petition with any other name than his own, or knowingly to sign his name more than once for the same measure, or to sign such petition when he knows he is not a legal voter."

Each sheet shall contain under said printing twenty-five horizontal ruled lines, three-eighths of an inch apart. Upon the back of each sheet shall be printed the following:

State of Utah, county of ....., ss.

I, ..., of ....., hereby certify that all the names which appear on this sheet were signed by persons who professed to be the persons whose names appear thereon, and each of them signed his name thereto, in my office and in my presence; I believe that each has signed his name,

postoffice address, and residence correctly, and that each signer is a legal voter of the state of Utah.

.....,
(Notary public or other official title.)

It shall be the duty of the secretary of state, upon payment of the fees hereinafter required, to furnish the number of circulation sheets requested in the application of the sponsors, and to make them up into sets as hereinafter specified, according to instructions contained in the specifications.

2298. Form for measures by initiation. The following shall be substantially the form of petition for any measure proposed by the initiative:

INITIATIVE PETITION.

To the honorable ....., secretary of state:

We, the undersigned citizens and legal voters of the state of Utah, respectfully demand that the following proposed law (here follows proposed law), shall be submitted to the legal voters (or legislature) of the state of Utah, for their (or its) approval or rejection at the regular election to be held, (or session commencing), on the ..... day of ....., 19....., and each for himself says: I have personally signed this petition; I am a legal voter of the state of Utah; my residence and postoffice address are correctly written after my name.

2299. Form for referendum. The following shall be substantially the form of petition for the referendum to the electors of any act passed by the legislature of the state of Utah:

PETITION FOR REFERENDUM.

To the honorable ....., secretary of state:

We, the undersigned citizens and legal voters of the state of Utah, respectively order that senate (or house) bill No. ....., entitled (title of act, and if the petition is against less than the whole act, then set forth here the part or parts on which the referendum is sought), passed by the ..... session of the legislature of the state of Utah, be referred to the people of the state of Utah, for their approval or rejection, at the regular election to be held on the ..... day of ....., 19....., and each for himself says: I have personally signed this petition; I am a legal voter of the state of Utah; my residence and postoffice address are correctly written after my name.

2300. Printing petition. Upon payment of the fees, as hereinafter specified, the secretary of state shall cause to be printed copies of the form of petition above set out, properly completed by inclusion of the matter required, sufficient in number to fulfill the requirement of the sponsors, as designated by their application for petition copies.

In arriving at the number of circulation sheets and petition copies which they may require, the sponsors shall specially take into consideration the provisions of § 2301.

2301. Circulation sheets. The petition, for purpose of circulation, may be divided into sections, each section to contain not more than fifty circulation sheets. No section, however, shall be circulated for signatures, unless it has attached to the front sheet thereof a certified petition copy, as described in § 2300. The sponsors shall set out in their application for petition copies the number of sections into which each petition is to be divided for circulation, and the number of circulation sheets which it is desired that each section shall contain, it being expressly understood that there need be no uniformity as to the number of circulation sheets contained in the sections. The secretary of state shall make up the sections as specified, attaching to the front of each section a petition copy as above described, and he shall securely bind together the sheets of each section at the top thereof in such a way that the sections may be conveniently opened for

signing. The secretary of state shall number each section and keep a record of the numbers of all these sections delivered to the sponsors.

2302. Fees. Bids. Duties of secretary of state. Upon filing the application for petition copies, the sponsors shall pay a fee of $10, for all services to be performed in connection with said petition. The secretary of state shall determine from said application (or if unable to determine therefrom, shall notify the sponsors of such inability, whereupon said sponsors shall, by supplementary application, distinctly set out their instructions as to the same) the number of petition sections desired, and the number of circulation sheets required for each section. He shall forthwith, upon such determination, which determination shall be made within three days after the filing of the application, solicit, from not less than three competent printers, bids for the printing of the required number of petition copies, together with the certificate of the secretary of state that the law contained thereon is a full, true, and correct copy of the law as proposed by the sponsors for initiation, or the true and correct number and title of the law as proposed for referendum. The body of said petition shall be printed in six-point type, single leaded. The requisition for bids shall so specify. Within ten days after the filing of the application for the petition copies and circulation sheets, the secretary of state shall notify one or more of the sponsors of the lowest and best bid received from the requisitions made, and the secretary of state shall require the payment of said price into his office before he shall proceed with the petition. The secretary of state shall also require the payment of 50 cents per hundred for all circulation sheets furnished to the sponsors. Upon payment of these amounts, the secretary of state shall order, from the printer submitting the said lowest and best bid, the required number of petition copies, containing his certificate thereon as above specified. The secretary of state shall, within ten days after the payment of the amounts above specified, make up into sections said petition copies and circulation sheets, as above provided.

2303. Signatures by electors. Every person who is a qualified elector of the state of Utah may sign a petition for the referendum or for the initiation of any measure upon which he is legally entitled to vote. Any person signing any name other than his own to any petition, or knowingly signing his name more than once for the same measure at one election, or who is not at the time of signing the same a legal voter of this state, or any officer or person knowingly and wilfully violating any provision of this chapter, shall, upon conviction thereof, be punished by a fine not exceeding $500, or by imprisonment in the state prison not exceeding two years, or by both fine and imprisonment in the discretion of the court before which such a conviction shall be had.

2304. Verification of petitions. Each and every sheet of the petition containing signatures shall be verified on the back thereof, as prescribed in the blank verification printed thereon, by the officer in whose presence the sheets were signed. The forms prescribed in this chapter are not mandatory, and if substantially followed, the petition shall be sufficient, disregarding clerical and merely technical errors.

2305. Checks by county clerk and secretary of state. Recounts. Additional sheets. Mandamus and injunction. Each section of the initiative or referendum petition, when signed and verified as herein provided, shall be delivered to the county clerk of the county in which such section was circulated, and the county clerk shall check the signatures against the official registration lists of his county, and shall indicate thereon whether or not each signature is that of a duly registered voter. The county clerk shall then transmit all the sections to the secretary of state, who shall check off from his record, as they are filed, the number of the sections of the petition so filed. After such petition is filed, the secretary of state shall forthwith cause the number of verified names appearing on each verified circulation

sheet to be counted, and if the number of names so counted equals or exceeds the number of names required by the provisions of this chapter, the secretary of state shall mark upon the front of said petition the word "sufficient." If the names properly signed and verified do not equal or exceed the number required by the provisions of this chapter, the secretary of state shall mark on the front thereof the word "insufficient." The secretary of state shall forthwith notify any one of the sponsors of his finding. In case his finding is "insufficient," said sponsors, or any of them, may demand in writing a recount of the names appearing on said petition in the presence of said sponsors or any of them. If the petition is found insufficient through lack of signers, the sponsors may, by paying the costs thereof, demand as many additional circulation sheets as they may deem necessary, and the secretary of state shall bind these new sheets, to whatever sections of said petition said sponsor or sponsors may designate, and he shall allow said sponsors to withdraw said section or sections for purposes of recirculation, and the secretary of state shall keep a record of the numbers of all of said sections so withdrawn. If the secretary of state shall refuse to accept and file any petition for the initiative or for the referendum, any citizen may apply, within ten days after such refusal, to the supreme court for a writ of mandamus to compel him to do so. If it shall be decided by the court that such petition is legally sufficient, the secretary of state shall then file it, with a certified copy of the judgment attached therto, as of the date on which it was originally offered for filing in his office. On a showing that any petition filed is not legally sufficient, the court may enjoin the secretary of state and all other officers from certifying or printing on the official ballot for the ensuing election, the ballot title and numbers of such measures.

2306. Ballot title. Appeal from attorney-general. Procedure. When the petition shall, by the secretary of state, be declared to be sufficient, he shall forthwith transmit to the attorney-general of the state of Utah a copy of the law so proposed for initiation or referendum, and within ten days thereafter the attorney-general shall provide and return to the secretary of state a ballot title for said measure. The ballot title may be distinct from the legislative title of the measure, and shall express, in not exceeding one hundred words, the purpose of the measure. The ballot title shall be printed with the number of the measure on the official ballot. In making such ballot title, the attorney-genral shall, to the best of his ability, give a true and impartial statement of the purpose of the measure, and in such language that the ballot title shall not be intentionally an argument, or likely to create prejudice, either for or against the measure. A copy of every ballot title, upon being filed by the attorney-general with the secretary of state, shall, by the secretary of state, forthwith be served upon any of the sponsors, and such service may be by mail or telegraph. And if the ballot title so furnished by the attorney-general is unsatisfactory, or does not comply with the requirements of this section, upon motion of at least three of the sponsors an appeal may be taken from the decision of the attorney-general to the supreme court of the state. Said supreme court shall thereupon examine such measures, hear arguments, and in its decision thereon shall certify to the secretary of state a ballot title for the measure in accord with the intent of this section. The secretary of state shall have the title thus certified to him printed on the official ballot; *provided*, that nothing in this chapter shall be construed to require the secretary of state to have the title of any supposed law for initiation or the number of any measure for referendum printed on said official ballot, for which a sufficient petition, as herein provided, shall not have been filed in his office, at least thirty days before any general election at which said proposed measure is to be submitted.

2307. Publicity pamphlet. Whenever an act or law is submitted to the people by either initiative or referendum petition, the secretary of state

shall, not later than ninety days before the election at which such act or law is to be voted upon, prepare a "publicity pamphlet," which shall contain the following:

1. A true copy of the title and text of each measure to be voted upon at such election;

2. A copy of the number and ballot title of each question as it will appear upon the official ballot;

3. Arguments of equal length, which shall be limited by the secretary of state to not less than five hundred words and not to exceed two thousand words for and against each such measure by the proponents and opponents thereof. The actual cost of inserting and printing such arguments shall be paid by the persons presenting the same.

The secretary of state shall cause to be printed one and one-half times as many copies of such pamphlet as there are registered voters in the state, and at least sixty days before the election at which such measures are to be voted upon he shall furnish each county clerk in the state with one and one-half times as many copies of such pamphlet as there are registered voters in his county. The county clerk shall thereafter, but at least thirty days before the election, cause a copy of such pamphlet to be mailed to each registered voter in his county, but the expense of mailing, including postage, shall be paid by the state.

2308. Manner of voting. The manner of voting upon measures submitted to the people shall be as follows:

The number and ballot title as herein provided for shall be printed upon the official ballot, immediately to the right of which shall be printed the words, "for" and "against," each followed by a square in which the elector may place a cross to indicate his vote. Each elector desiring to vote "for" shall place a cross within the square following the word "for," and those desiring to vote "against" shall place a cross within the square following the word "against."

2309. Return and canvass of votes. Proclamations. Conflicting measures. Decision by supreme court. The votes on measures and questions submitted to the people of the state shall be counted, canvassed, and returned by the regular boards of judges, clerks, and officers, as votes for candidates are counted, canvassed, and returned, and the abstract made by the several clerks of votes on measures shall be returned to the secretary of state in the manner provided by § 2245, for abstracts of votes for state officers. It shall be the duty of the secretary of state, in the presence of the governor, to proceed within thirty days after the election, and sooner if the returns be all received, to canvass the votes given for each measure; and the governor shall forthwith issue his proclamation, giving the whole number of votes cast in the state for and against each measure and question, and declaring such measures as are approved by the greatest number of affirmative votes, providing such number be a majority of those voting thereon, to be in full force and effect as the law of the state of Utah. When the governor is of the opinion that two measures or the parts of two measures, approved by the people at the same election, are entirely in conflict and opposed, he shall proclaim that measure to be law which has received the greatest number of affirmative votes, regardless of the difference in the majorities which those measures have received. Within ten days after such proclamation, any qualified voter who shall have signed the petition to submit the measure which is declared by the governor to be superseded by another measure approved at the same election, may appeal by petition to the supreme court, which shall forthwith consider the matter and decide whether or not such measures are in conflict, and shall certify its decision, within ten days after the matter is submitted to it for decision, to the governor. The governor shall, within thirty days after his previous proclamation, proclaim all those measures approved by the people as law which the supreme court has decided not to be in conflict, and of all those

which the supreme court shall have decided to be in conflict, he shall proclaim the one which has received the greatest number of affirmative votes, regardless of difference in majorities, as law.

2310. Powers of voters in towns and cities. Subject to the provisions of this chapter, legal voters of any city or town, in such numbers as herein required, may initiate any desired legislation and cause the same to be submitted to the law-making body or to a vote of the people of said city or town for approval or rejection, or may require any law or ordinance passed by the law-making body of said city or town to be submitted to the voters thereof before such law or ordinance shall take effect.

2311. Requirements of petitions in cities and towns. All initiative and referendum petitions in cities and towns, to be mandatory, must be signed by legal voters of such city or town equal in number to the percentages herein required of all the votes cast in such city or town, for all candidates for governor at the last preceding election at which a governor was elected, namely:

If the total number of votes exceeds 10,000, the petition shall be signed by 10 per cent.

If the total number of votes is less than 10,000, but more than 2500, the petition shall be signed by 12½ per cent.

If the total number of votes is less than 2500, but more than 500, the petition shall be signed by 15 per cent.

If the total number of votes is less than 500, but more than 250, the petition shall be signed by 20 per cent.

If the total number of votes is less than 250, the petition shall be signed by 30 per cent.

2312. Procedure. In all cities and towns the manner of exercising the initiative and referendum powers reserved by the constitution to the people thereof shall be similar to the procedure herein prescribed for the state initiative and referendum, and the duties required of the secretary of state by this chapter as to state legislation shall be performed as to such municipal legislation by the city or town auditor, clerk, or recorder, as the case may be; the duties required of the governor shall be performed by the mayor; and the duties required of the attorney-general shall be performed by the city or town attorney. The provisions of this chapter shall apply in every city and town in all matters concerning the operation of the initiative and referendum in its municipal legislation. The printing and binding of the "publicity pamphlet" shall be paid for by the city or town; distribution of said pamphlets shall be made to every voter in the city or town, so far as possible, by the city clerk, auditor, or recorder, as the case may be, either by mail or carrier, not less than eight days before the election at which the measures are to be voted upon. Arguments supporting municipal measures shall be filed with the city clerk, auditor, or recorder not less than thirty days before the election at which they are to be voted upon; opposing arguments shall be filed not less than twenty days before said election. It is intended to make the procedure in municipal legislation as nearly as practicable the same as the initiative and referendum procedure for measures relating to the people of the state at large.

2313. Measures effective. Emergency. Referendum petitions against any ordinance, franchise, or resolution passed by a city commission or council shall be filed with the city clerk, auditor, or recorder, as the case may be, within thirty days after the passage of such ordinance, resolution, or franchise. No city ordinance, resolution, or franchise shall take effect and become operative until thirty days after its passage by the city commission or council, and approved by the mayor, unless the same shall be passed over his veto, and in that case it shall not take effect and become operative until thirty days after such final passage, except measures necessary for the immediate preservation of the peace, health, or safety of the city; and no such emergency measure shall become immediately operative unless it shall state

in a separate section the reasons why it is necessary that it should become immediately operative, and shall be approved by the affirmative vote of three-fourths of all the members elected to the city commission or council, taken by ayes and noes, and also approved by the mayor.

2314. Initiative and referendum measures in cities. If any ordinance, charter, or amendment to the charter of any city shall be proposed by initiative petition, said petition shall be filed with the city clerk, auditor, or recorder, as the case may be, and he shall transmit it to the next session of the city commission or council. The city commission or council shall either ordain or reject the same, as proposed, within thirty days thereafter, and if the commission or council shall reject said proposed ordinance or amendment, or shall take no action thereon, then the city clerk, auditor, or recorder, as the case may be, shall submit the same to the voters of the city or town at the next ensuing election held therein not less than ninety days after the same was first presented to the city commission or council. The commission or council may ordain said ordinance or amendment and refer it to the people, or it may ordain such ordinance without referring it to the people, and in that case it shall be subject to referendum petition in like manner as other ordinances; if the commission or council shall reject said ordinance or amendment, or take no action thereon, it may ordain a competing ordinance or amendment, which shall be submitted by the city clerk, auditor, or recorder, as the case may be, to the people of the said city or town at the same election at which said initiative proposal is submitted. Such competing ordinance or amendment, if any, shall be prepared by the commission or council and ordained within thirty days allowed for its action on the measure proposed by initiative petition. The mayor shall not have power to veto either of such measures. If conflicting ordinances or charter amendments shall be submitted to the people at the same election, and two or more of such conflicting measures shall be approved by the people, then the measure which shall have received the greatest number of affirmative votes shall be paramount in all particulars as to which there is conflict, even though such measure may not have received the greatest majority. Amendments to any city charter may be proposed and submitted to the people by the city commission or council, with or without an initiative petition, but the same shall be filed with the city clerk for submission not less than sixty days before the election at which they are to be voted upon, and no amendment of a city charter shall be effective until it is approved by a majority of the votes cast thereon by the people of the city or town to which it applies. The city commission or council may by ordinance order special elections to vote on municipal measures.

CHAPTER 13.

MUNICIPAL ELECTIONS.

2325. Primary elections. Candidates to be voted for at all general municipal elections in cities of the first and the second class, under the provisions of this chapter, shall be nominated by a primary election, and no other name shall be placed upon the general ballot except those selected in the manner hereinafter prescribed. The primary election for such nomination shall be held on the second Tuesday preceding the general municipal election. The judges of election appointed for the general municipal election shall be the judges of the primary election, and it shall be held at the same place, so far as possible, and the polls shall be opened and closed at the same hours.

Any person desiring to become a candidate for mayor or commissioner or auditor shall, at least ten days prior to said primary election, file with

the said recorder a statement of such candidacy, in substantially the following form:

State of Utah, county of ....., ss.

I, ..., being first duly sworn, say that I reside at ..... street, city of ....., county of ....., state of Utah; that I am a qualified voter therein; that I am a candidate for nomination to the office of ..... (stating the term) to be voted upon at the primary election to be held on Tuesday, the ..... day of October, 19....., and I hereby request that my name be printed upon the official primary ballot for nomination by such primary election for such office.

(Signed).....

Subscribed and sworn to (or affirmed) before me by ..... on this ..... day of ....., 19.....

(Signed).....

(Official character of officer taking the oath.)

And shall at the same time file therewith the petition of at least one hundred qualified voters requesting such candidacy. Each petition shall be verified by one or more persons as to the qualifications and residence, with street number, of each of the persons so signing the said petition, and the said petition shall be in substantially the following form:

PETITION ACCOMPANYING NOMINATION STATEMENT.

The undersigned, duly qualified electors of the city of ....., and residing at the places set opposite our respective names hereto, do hereby request that the name of (name of candidate) be placed on the ballot as a candidate for nomination for (name of office and term), at the primary election to be held in such city on Tuesday, the ..... day of October, 19..... We further state that we know him to be a qualified elector of said city and a man of good moral character, and qualified, in our judgment, for the duties of such office.

Names of qualified electors.	Number.	Streets.
.....	.....	.....
.....	.....	.....

Immediately upon the expiration of the time of filing the statements and petitions of candidates, the said city recorder shall cause to be published for three successive days in all the daily newspapers published in the city, in proper form, the names of the persons as they are to appear upon the primary ballot, and if there be no daily newspaper, then in two issues of any other newspapers that may be published in said city; and the said recorder shall thereupon cause the primary ballots to be printed, authenticated with a fac simile of his signature. Upon the said ballot the names of the candidates for mayor, arranged alphabetically, shall first be placed, with a square at the left of each name, and immediately below the words, "vote for one." Following these names, likewise arranged in alphabetical order, shall appear the names of the candidates for commissioner for the two-year term, with a square at the left of each name, and below the names of such candidates shall appear the words, "vote for .....," (stating the number as the case may be). Following these names, likewise arranged in alphabetical order, shall appear the names of the candidates for commissioner, for the four-year term, with a square at the left of each name and below the names of such candidates shall appear the words, "vote for .....," (stating the numbers as the case may be). Following these names, likewise arranged in alphabetical order, shall appear the names of the candidates for auditor, with a square at the left of each name, and below the names of such candidates shall appear the words, "vote for one."

The ballots shall be printed upon plain, substantial white paper, and shall be headed:

Candidates for nomination for (state the offices to be filled) of ..... city, at the primary election .....

But shall have no party designation or mark whatever.

The ballots shall be in substantially the following form; the necessary changes to be made to conform to offices and terms to be filled:

(Place a cross in the square, preceding the names of the persons you favor as candidates for the respective positions.)

OFFICIAL PRIMARY BALLOT.

Candidates for nomination for (state the offices to be filled) of ..... city, at the primary election.

For Mayor:
(Names of candidates.)
Vote for one.
For Commissioner for the two-year term:
(Names of candidates.)
Vote for .....
(State the number to be elected at the municipal election.)
For commissioner for the four-year term:
(Names of candidates.)
Vote for .....
(State the number to be elected at the municipal election.)
For Auditor:
(Names of candidates.)
Vote for one.

Official ballot attest:

.....,
City Recorder.

Having caused such ballots to be printed, the said city recorder shall cause to be delivered at each polling place a number of said ballots equal to twice the number of votes cast in such voting district at the last general municipal election for mayor. The persons who are qualified to vote at the general municipal election, and who at the time of such primary election are registered, shall be qualified to vote at such primary election, and challenges can be made by not more than two persons, to be appointed at the time of opening the polls by the judges of election; and the law applicable to challenges at a general municipal election shall be applicable to challenges made at such primary election. Judges of election shall immediately, upon the closing of the polls, count the ballots and ascertain the number of votes cast in such district for each of the candidates, and make return thereof to the city recorder within twenty hours of the closing of the polls, upon proper blanks to be furnished by the said recorder. On the day following the said primary election, the said city recorder shall canvass said returns so received from all the polling districts, and shall make and publish in all the daily newspapers of said city, at least once, the result thereof. Said canvass by the city recorder shall be publicly made. The two candidates receiving the highest number of votes for mayor shall be the candidates, and the only candidates, whose names shall be placed upon the ballot for mayor at the next succeeding general municipal election; in cities of the first class the four candidates receiving the highest number of votes for commissioners shall be the candidates, and the only candidates, whose names shall be placed upon the ballot for commissioners at such municipal election; *provided,* that at the next general municipal election held in cities of the first class, after taking effect of this chapter, the four candidates receiving the highest number of votes for commissioners for the four-year term and the two-year term respectively shall be the candidates, and the only candidates, whose names shall be placed upon the ballot for commissioners at said next municipal election, and the two candidates receiving the highest number of votes for auditor shall be the candidates, and the only candidates, whose names shall be placed upon the ballot for auditor. In cities of the second class the two candidates receiving the

highest number of votes for mayor shall be the candidates, and the only candidates, whose names shall be placed upon the ballot for mayor at the next succeeding general municipal election, and the two candidates receiving the highest number of votes for commissioner for the two-year term, and the two candidates receiving the highest number of votes for commissioner for the four-year term, shall be the candidates, and the only candidates, whose names shall be placed upon the ballot for commissioner at such municipal election, and the two candidates receiving the highest number of votes for auditor shall be the candidates, and the only candidates. The ballot at the municipal election shall be in substantially the same form as the primary ballot.

All electors of cities under this chapter who, by the laws governing cities of the first and the second class, would be entitled to vote for the election of officers at any general municipal election in such cities, shall be qualified to vote at all elections under this chapter; and the ballot at such general municipal election, so far as applicable, and in all elections in such city, the election precincts, voting places, method of conducting election, canvassing the votes, announcing the results, shall be the same as by law provided for election of officers in such cities, so far as the same are applicable and not inconsistent with the provisions of this chapter. '11, p. 240.

2330. (887.) Election. Terms. On the Tuesday next following the first Monday in November, 1917, and biennially thereafter, there shall be held in each incorporated city and town of this state an election to fill all elective offices to be vacated in said city or town at 12 o'clock meridian on the first Monday of January, 1918. Such elected officers shall continue in office for two years, unless otherwise provided, and until their successors are elected and qualified. In cities of the first class, the election and term of office of the officers shall be as follows: In the year 1917 there shall be elected at large in said cities of the first class two commissioners and an auditor, who shall be elected for a term of four years, and quadrennially thereafter. In the year 1919 there shall be elected at large in said cities of the first class a mayor and two commissioners for a term of four years, and quadrennially thereafter; *provided,* that in cities of the second class the election and term of office of the officers shall be as follows: In the year 1917 there shall be elected at large in cities of the second class a mayor and an auditor for a term of two years each, and one commissioner for a term of four years; and biennially thereafter there shall be elected a mayor, an auditor, and one commissioner, the mayor and auditor for the term of two years each, and such commissioner for a term of four years. The officers elected shall enter upon their duties at 12 o'clock meridian on the first Monday in January next succeeding their election. In cities of the third class there shall be elected in the year 1917 four councilmen at large, three of whom shall be for a term of two years and one for a term of four years, and biennially thereafter there shall be elected three for a term of two years and one for a term of four years. The municipal officers herein provided shall continue in office for their respective terms to which they are elected, as provided in this chapter, and until their successors shall be elected and qualified. '11, p. 232; Am'd '13, p. 55; '17, p. 126.

Qualifications of mayor and councilmen, §§ 533-535.
City officers elected, § 600.
Town officers elected, § 784.
Municipal election held at such time as may be provided by law, Con. art. 4, sec. 9.
Registration for municipal election, §§ 2137, 2141.

2331. (888.) Appointive officers hold till successors qualify. All appointive officers in said cities and towns shall hold their respective offices until their successors shall be appointed and qualified.

Terms of appointive officers, § 602.
Not applicable to policemen.
Everill v. Swan, 17 U. 514; 55 P. 68.

2332. (889.) Qualifications for voters at municipal elections. All qualified electors of the state who have resided in the county four months, and

in the precinct and city or town for sixty days next preceding any municipal election are entitled to vote at such election.

Qualifications of voters, Con. art. 4, sec. 2; § 2123.

2333. (890.) Appointment of judges. Voting places. Laws governing. In all municipal elections the city council and board of trustees of the town shall appoint judges of election and designate the places of voting. There must be at least one voting place in each election district in cities, at any regular election. At special elections for any purpose there shall be at least one voting place in each municipal ward. All elections must be conducted according to the general laws of the state, and all notices and lists of names required to be posted by registry agents prior to any general election shall also be posted by the registry agents prior to any municipal election, the necessary changes being made as to time of posting same. Am'd '01, p. 180.

Registration for municipal elections, §§ 2137, 2141.

Posting of notices and designation of polling places for election to determine upon issuance of municipal bonds, held to be in substantial compliance with this section.

Utah Sav. & Tr. Co. v. Salt Lake City, 35 U. 25; 99 P. 255.

Election is not illegal because proclamation does not designate the particular polling places. Id.

2334. (891.) Canvass of returns and issue of certificate. Tie votes. On the Monday following any election, the city council or the board of trustees of the town must convene and publicly canvass the result, and issue certificates of election to each person elected by a plurality of votes. When two or more persons have received an equal and highest number of votes for any one of the offices voted for, the tie shall be decided by lot in the presence of the mayor and city recorder, or the president of the board of trustees and the town clerk, as the case may be, upon a day designated by the mayor or by the president of the board of trustees.

The council has no power to inquire either into the legality of the nomination or the legality of the votes cast, or into the regularity of the official ballot, but is bound to issue a certificate of election to the person ascertained to have the largest number of votes for the particular office.

Payne v. Hodgson, 34 U. 269; 97 P. 132.

CHAPTER 14.

ELECTION OFFENSES.

2335. (892.) Offering or giving bribe. Promising employment, etc. It shall be unlawful for any person, directly or indirectly, by himself or through any other person:

1. To pay, loan, or contribute, or offer or promise to pay, loan, or contribute any money or other valuable consideration to or for any voter, or to or for any other person to induce such voter to vote or refrain from voting at any election provided by law, or to induce any voter to vote or refrain from voting at such election for any particular person or persons, or to induce such voter to go to the polls or remain away from the polls at such election, or on account of such voter having voted or refrained from voting for any particular person, or having gone to the polls or remained away from the polls at such election;

2. To give, offer, or promise any office, place, or employment, or to promise or procure, or endeavor to procure any office, place, or employment to or for any voter, or to or for any other person, in order to induce such voter to vote or refrain from voting at any election provided by law, or to induce any voter to vote or refrain from voting at such election for any particular person or persons, or to obtain the political support or aid of any such person or persons;

3. To advance or pay, or cause to be paid, any money or other valuable thing to or for the use of any other person, with the intent that the same, or any part thereof, shall be used in bribery at any election provided by law, or to knowingly pay or cause to be paid any money or other valuable thing

to any persons in discharge or repayment of any money, wholly or in part expended in bribery at any such election. Am'd '11, p. 239.

See corrupt practices, §§ 2360, 2406.

2336. (893.) Receiving bribe, employment, etc. It shall be unlawful for any person, directly or indirectly, by himself or through any person:

1. To receive, agree, or contract for, before or during an election provided by law, any money, gift, loan, or other valuable consideration, office, place, or employment, for himself or any other person, for voting or agreeing to vote, or for going or agreeing to go to the polls, or for remaining or agreeing to remain away from the polls, or for refraining or agreeing to refrain from voting, or for voting or agreeing to vote, or refraining or agreeing to refrain from voting for any particular person or persons, measure or measures, at any election provided by law;

2. To receive any money or other valuable thing during or after an election provided by law, on account of himself or any other person, for voting or refraining from voting for any particular person at such election, or on account of himself or any other person for going to the polls or remaining away from the polls at such election, or on account of having induced any person to vote or refrain from voting, or to vote or refrain from voting for any particular person or persons, measure or measures at such election.

See corrupt practices, §§ 2360, 2406.

2337. (894.) Fraud, interference, riotous conduct, destruction of ballots, etc., at election. Every person not entitled to vote who fraudulently votes, and every person who votes more than once, at any one election, or knowingly hands in two or more ballots folded together, or changes any ballot after the same has been deposited in the ballot box, or adds or attempts to add any ballot to those legally polled at any election, either by fraudulently introducing the same into the ballot box before or after the ballots therein have been counted; or adds to or mixes with, or attempts to add to or mix with, the ballots lawfully polled, other ballots, while the same are being counted or canvassed, or at any other time, or wilfully detains, mutilates, or destroys any election returns or in any manner so interferes with the officers holding such election, or conducting such canvass, or with the voters lawfully exercising their rights of voting at such election, as to prevent such election or canvass from being fairly held or lawfully conducted, or who shall be guilty of riotous conduct at any election or shall interefere in any manner with any officer of such election in the discharge of his duties, or who shall induce any officer of any election, or officer whose duty it is to ascertain, announce, or declare the result of any such election, or to give or make any certificate, document, or evidence in relation thereto, to violate or refuse to comply with his duty, or any law regulating the same, or who shall take, carry away, conceal, remove, or destroy any ballot, poll book, or other thing from the polling place, or from the possession of the person or persons authorized by law to have the custody thereof; or who aids, counsels, provides, or procures, advises, or assists any person or persons to do any of the acts aforesaid, shall be guilty of a crime, and shall be punished as hereinafter provided.

2338. (895.) Penalties under preceding sections. Any person convicted of any of the crimes or offenses mentioned in §§ 2335-2337 shall be punished by a fine of not more than $1000, or by imprisonment in the state prison for not more than five years, or by both fine and imprisonment.

2339. (896.) Fraudulent registration. Penalty. Every person who wilfully causes, procures, or allows himself to be registered, knowing himself not to be entitled to such registration; and every person who wilfully causes, procures, advises, encourages, or assists any other person to be registered, knowing or believing such person not to be entitled to such registration, is punishable by fine not exceeding $1000, or by imprisonment in the state prison not exceeding one year, or by both.

2340. (898.) Intimidating or obstructing voter. Influencing employe's vote. It shall be unlawful for any person, directly or indirectly, by himself or any other person in his behalf, to make use of any force, violence, or restraint, or to inflict or threaten the infliction by himself or through any other person, of an injury, damage, harm, or loss, or in any manner to practice intimidation upon or against any person in order to induce or compel such person to vote or refrain from voting for any particular person or persons, measure or measures, at any election provided by law, or on account of such person having voted or refrained from voting at any such election. And it shall be unlawful for any person, by abduction, duress, or any forcible or fraudulent device or contrivance whatever, to impede, prevent, or otherwise interfere with the free exercise of the elective franchise of any voter, either to give or refrain from giving his vote at any such election, or to give or refrain from giving his vote for any particular person at any such election. It shall be unlawful for any employer, either corporation, association, company, firm, or person in paying its, their, or his employes the salary or wages due them, to inclose their pay in "pay envelopes" on which there is written or printed any political mottoes, devices, or arguments, containing threats, express or implied, intended or calculated to influence the political opinion, views, or action of such employes. Nor shall it be lawful for any employer, either corporation, association, company, firm, or person, within ninety days of any election provided by law, to put up or otherwise exhibit in its, their, or his factory, workshop, mine, mill, boarding house, office, or other establishment or place where its, their, or his employes may be working or be present in the course of such employment, any hand bill, notice, or placard, containing any threat, notice, or information, that in case any particular ticket or candidate shall or shall not be elected, work in its, their, or his establishment shall cease in whole or in part, or its, their, or his establishment be closed, or the wages of its, their, or his workmen be reduced; or other threats, expressed or implied, intended or calculated to influence the political opinions or actions of its, their, or his employes. Any person or persons, or corporation violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and any person, whether acting in his individual capacity or as an officer or agent of any corporation, so guilty of such misdemeanor, shall be punished as hereinafter prescribed.

Political control of employes forbidden, Con. art. 16, sec. 3.

Deductions from wages prohibited, §§ 2352, 2389.

2341. (899.) Influencing vote of employe. It shall be unlawful for any corporation or any officer or agent of any corporation to influence or attempt to influence, by force, violence, or restraint, or by inflicting or threatening to inflict any injury, damage, harm, or loss, or by discharging from employment or promoting in employment, or by intimidation, or otherwise in any manner whatever to induce or compel any employe to vote or refrain from voting at any election provided by law, or to vote or refrain from voting for any particular person or persons, measure or measures, at any such election. Any such corporation, or any officer or agent of such corporation, violating any of the provisions of this section shall be deemed guilty of a misdemeanor and be subject to the penalty hereinafter provided, and in addition thereto, any corporation violating this section shall forfeit its charter and right to do business in this state.

Deductions from wages prohibited, §§ 2352, 2389.

Political control of employes forbidden, Con. art. 16, sec. 3.

2342. (900.) Forging election returns. Fraud. Every person who forges or counterfeits any return of any election purporting to have been held at any district in this state, where no election was in fact held, or wilfully substitutes any forged or counterfeit return of election in the place of the true return for a district where any election was actually held, or who shall in any manner do or cause any fraud in any election, is punishable by imprisonment in the state prison for a term of not less than two nor more than ten years.

2343. (901.) Altering returns. Every person who wilfully adds to or subtracts from the votes actually cast at an election, in any returns, or who alters such returns, is punishable by imprisonment in the state prison for not less than one nor more than five years.

2344. (902.) Abetting in forging, or altering returns. Every person who wilfully aids or abets in the commission of any of the offenses mentioned in the two next preceding sections, is punishable by imprisonment in the state prison for a period not exceeding two years.

2345. (903.) Exposing ballot. Interfering with voter at poll, etc. A voter who shall, except as in §§ 2180-2193 otherwise provided, allow his ballot to be seen by any other person, with an apparent intention of letting it be known how he is about to vote, or who shall make a false statement as to his inability to mark his ballot, or any person who shall interfere, or attempt to interfere, with any person when inside said inclosed space, or when marking a ballot, or who shall endeavor to induce any such voter to vote or to show how he marked his ballot, shall be punished by a fine of not less than $5 nor more than $100. Any election judge or clerk shall report any person doing so to the county attorney for the county in which the election is held, whose duty it shall be to see that the offender is forthwith prosecuted before the proper court.

2346. (904.) Destroying instruction cards, supplies, etc. Any person who shall, prior to an election, wilfully deface or destroy any list of candidates posted in accordance with the provisions of this title, or who, during an election, shall wilfully deface, tear down, remove, or destroy any card of instruction, or sample ballot, printed or posted for the instruction of voters, or who shall, during an election, wilfully remove or destroy any of the supplies or conveniences furnished to enable a voter to prepare his ballot, or shall wilfully hinder the voting of others, shall be punished by fine of not less than $5 nor more than $100, or by imprisonment in the county jail not exceeding three months, or by both such fine and imprisonment.

2347. (905.) Destroying certificate of nomination, etc. Examining or marking ballots, etc. Any person who shall falsely mark or wilfully deface or destroy any certificate of nomination, or any part thereof, or any letter of declination, or resignation, or file any certificate of nomination or letter of declination, or resignation, knowing the same or any part thereof to be falsely made, or suppress any certificate of nomination, or letter of declination, or resignation or any part thereof, which has been duly filed; or forge any letter of declination, or resignation, or falsely make the official indorsement on any ballot, or wilfully destroy or deface any ballot, or wilfully delay the delivery of any ballots, or shall examine any ballot offered or cast at the polls or found in any ballot box for any purpose other than to ascertain what candidate was elected, or who makes or places any mark or device on any ballot with the view to ascertain the name of any person for whom the elector has voted, shall be punished by fine not exceeding $1000, or by imprisonment in the county jail for not more than one year, or both such fine and imprisonment.

2348. (906.) Penalty for destroying or concealing ballots. Any person or officer having charge of such official ballots who shall destroy, suppress, or conceal them, except as in this title permitted, shall be guilty of a felony, and, upon conviction thereof, shall be punished by imprisonment in the state prison for not less than one year nor more than five years.

2349. (907.) Failure to deliver ballots and election returns. Any person or officer who has undertaken to deliver official ballots to any election district, city, town, precinct, or county officer of election, who neglects or refuses to do so, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by imprisonment in the county jail for not less than six months nor more than one year, or by a fine of not less than $250 and not more than $1000, or by both such fine and imprisonment. The fail-

ure to deliver election returns and ballots by any person who has undertaken to do so shall be deemed a felony and shall be punishable as hereinafter provided.

2350. (908.) Revealing how elector voted. Any election officer or watcher who shall reveal to any other person the name of any candidate for whom the voter has voted, or who shall communicate to another his opinion, belief, or impression as to how or for whom a voter has voted, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by imprisonment in the county jail for not less than six months nor more than one year, or by fine of not less than $250 nor more than $1000, or by both such fine and imprisonment.

2351. (909.) Electioneering at polling places. Removing, showing, or marking ballot, etc. No person shall do any electioneering on election day within any polling place or in any public street or room, or in a public manner within 100 feet of any polling place. No person shall remove any official ballot from the polling place before the closing of the polls. No person shall show his ballot after it is prepared for voting to any person in such a way as to reveal its contents, nor shall any person solicit the voter to show the same. No person, except a judge of election, shall receive from any voter a ballot prepared for voting. No voter shall receive an official ballot from any other person than one of the judges of election having charge of the ballots, nor shall any person other than such election officer deliver an official ballot to such voter. No voter shall place any mark upon his ballot, by means of which it can be identified as the one voted by him. Every voter who does not vote or deliver in the manner hereinbefore provided any ballot received by him from the election officers shall, before leaving the polling place or going outside the guard rail, return each such ballot to the officer from whom he received the same. Whoever shall violate any provision of this section shall be deemed guilty of a misdemeanor. But nothing herein contained shall prevent any person from receiving, delivering, and voting an unofficial ballot in the cotingency hereinbefore provided for.

2352. (910.) Voter may leave employment to vote. Refusing employe time to vote. Any person entitled to a vote at a general election held within this state shall, on the day of such election, be entitled to absent himself from any employment in which he is then engaged or employed for a period of two hours between the time of opening and the time of closing the polls, and any such absence shall not be sufficient reason for the discharge of any such person from such service or employment, and such voter shall not, because of so absenting himself, be liable to any penalty, nor shall any deduction be made on account of such absence, from his usual salary or wages except when such employe is employed and paid by the hour; *provided,* that application shall be made for such leave of absence prior to the day of election. The employer may specify the hours during which such employe may absent himself as aforesaid. Any person or corporation who shall refuse to his or its employes the privilege hereby conferred, or who shall subject an employe to a penalty or reduction of wages because of the exercise of such privilege, or who shall, directly or indirectly, violate the provisions of this title shall be deemed guilty of a misdemeanor.

2353. (911.) Using liquor at polling place. Saloons. It shall be unlawful for any person or any election judge to introduce into any polling place, or to use therein, or to offer to any one for use therein, at any time while any election is in progress or the result thereof being ascertained by the counting of the ballots, any intoxicating, malt, spirituous, or vinous liquors. It shall be unlawful for any officer or board of officers of any county, city, or town, who may at any time be charged with the duty of designating polling places for the holding of any general or special election therein, to select therefor a saloon or room within the distance of fifty feet, measured in a

direct line, of any saloon or other place where any intoxicating, malt, vinous, or spirituous liquors are sold, to be drunk where sold.

2354. (912.) General penalty. Forfeiture of right to vote. Offender a competent witness. All acts, omissions, and neglects of any person, official, or corporation, made an offense by the provisions of this title, and the punishment for which is not expressly designated, shall be punished by a fine of not less than $100 nor more than $1000, or by imprisonment in the county jail for not more than one year, or by both such fine and imprisonment, and shall also forfeit the right to vote at such election; and any elector whose right to vote shall be challenged for such cause shall be required to swear or affirm that the matter of the challenge is untrue, before his vote shall be received. Any person so offending against any provision of this title is a competent witness against any other person so offending, and may be compelled to attend and testify upon any trial, hearing, proceeding, or investigation in the same manner as any other person. But the testimony so given shall not be used in any prosecution or proceeding, civil or criminal, against the person so testifying except for perjury in giving such testimony. A person so testifying shall not thereafter be liable to indictment, prosecution, or punishment for the offense with reference to which his testimony was given, and may plead or prove the giving of testimony accordingly in bar of such indictment or prosecution.

When compelled to testify in an election contest the immunity of the witness is complete. Beauregaard v. Gunnison City, 48 U. 515; 160 P. 815.

2355. (913.) Chapter applicable to all elections. The provisions of this chapter shall extend, so far as applicable, to all elections provided by law, special, general, municipal, school, and primary elections in cities of the first and the second class. Am'd '11, p. 234.

CHAPTER 15.

PREVENTION AND PUNISHMENT OF CORRUPT PRACTICES IN ELECTIONS.

('17, p. 258.)

2360. Construction of terms. The following words and phrases as used in this chapter shall be construed as follows:

1. Any act shall be deemed to have been for "political purposes" when the act is of a nature, or is done with the intent, or is done in such a way, as to influence or tend to influence, directly or indirectly, any voting at any political convention, primary, or election, or if the said act is done on account of any persons having voted or refrained from voting, or being about to vote or refrain from voting, at any political convention, primary, or election.

2. The term "candidate" shall mean and include every person for whom it is contemplated or desired that votes be cast at any political convention, primary, or election, and who either tacitly or expressly consents to be so considered, except candidates for president and vice-president of the United States.

3. The term "disbursement" shall mean and include every act by or through which any money, property, office, or position or other thing of value passes, or is directly or indirectly conveyed, given, provided, paid, expended, promised, pledged, contributed, or lent, and also any money, property, office, or position or other thing of value so given, provided, paid, expended, promised, pledged, contributed, or lent.

4. The term "filing officer," when used with reference to any candidate, shall be construed to mean the officer who is authorized by law to issue a

certificate of nomination or election to such candidate if he be successful. If there be no officer authorized to issue such certificate of nomination or election, then such term shall be construed to mean the clerk of the county, city, or town in which such candidate resides.

5. The term "primary" shall mean and include any primary election held under the general election laws of this state, and also any primary held for the purpose of selecting delegates to any political convention.

6. The term "election" shall mean and include all general, special, or other elections provided for under the general election laws of this state, or under the election laws governing any election in any district, county, city, town, or other municipality therein.

7. The term "personal campaign committee" shall mean any committee appointed by a candidate to act for him as hereinafter provided.

8. The term "party commitee" shall mean any committee appointed or elected to represent any political party with a party organization in this state.

9. Every two or more persons elected or appointed by any political party or association for the purpose, wholly or partly, of raising, collecting, or disbursing money, or directing the raising, collecting, or disbursing thereof, for nomination or election purposes, and every two or more persons who shall co-operate in the raising, collecting, or disbursing of money used, or to be used, for or against the election to public office of any person or any class or number of persons, or for or against the adoption of any law, ordinance, or constitutional amendment, shall be deemed a "political committee" within the meaning of this chapter.

10. The term "committee" shall mean any personal campaign committee, party committee, or political committee unless the intent is clearly shown to be otherwise.

See elections, offenses, §§ 2335-2355.

2361. Acceptance of disbursements. Defense to prosecutions. No person shall receive or accept any money, property, or other thing of value, or any promise or pledge thereof, constituting a disbursement made for political purposes contrary to law. In any prosecution for the violation of this section, it shall be a defense if the accused person shall prove that he had neither knowledge that such disbursement constituted a disbursement made for political purposes contrary to law, nor any reasonable cause to believe that it constituted such a disbursement.

2362. Manner of disbursement. No candidate shall make any disbursements for political purposes except under his personal direction, which for every purpose shall be considered his act, or through a party committee, or through a personal campaign committee, whose authority to act shall be filed as provided by this chapter.

2363. Selection of personal committee. Revocations. Presumption as to acts. Any candidate may select a personal campaign committee to consist of one or more persons, and he may constitute himself as such committee. Before any personal campaign committee shall make any disbursement in behalf of any candidate, or shall incur any obligation, expressed or implied, to make any disbursement in his behalf, such candidate shall file with his filing officer, a written statement signed by him, setting forth that such personal campaign committee has been appointed, and giving the name and address of each member thereof, and of the secretary thereof. If a personal campaign committee consists of only one person, such person shall be deemed the secretary thereof. If the candidate acts as his own personal campaign commitee, he shall be deemed the secretary thereof. Any candidate may revoke the selection of any member of such personal campaign committee by a revocation in writing, which, with proof of personal service on the member whose selection is so revoked, shall be filed with the filing officer of such candidate. Such candidate may fill the vacancy thus created in the manner in which the original appointment is made. In civil actions and proceedings

brought under this chapter, the acts of every member of such personal campaign committee shall be presumed to be with the knowledge and approval of the candidate until it has been clearly proved that the candidate did not have knowledge of and approved the same, and that, in the exercise of reasonable care and diligence, he could not have had knowledge of and opportunity to disapprove the same.

2364. Disbursements by persons other than candidates. Exceptions. No person or group of persons, other than the candidate or his personal campaign committee, or party committee, shall make any disbursement for political purposes, otherwise than through a personal campaign committee, or a party committee, except that expenses incurred for rent of hall or other rooms, for hiring speakers, for printing, for postage, for telegraphing or telephoning, for advertising, for distributing printed matter, for clerical assistance, and for hotel and traveling expenses, may be contributed and paid by a person or group of persons residing within the county where such expenses are incurred, and except that a speaker may pay his actual traveling expenses in going to and from meetings addressed by him.

2365. Legal disbursements by candidates. No candidate for nomination or election to any elective office in this state coming within the provisions of this chapter shall make any disbursements for political purposes except the following, which are hereby declared to be legal disbursements for political purposes, to wit:

1. For his own personal hotel and traveling expenses and for postage, telegraph, and telephone expenses;
2. For payments which he may make to the state pursuant to law or for filing fees to the proper public officer;
3. For contributions to his duly registered personal campaign committee;
4. For contributions to his party committee;
5. For the purposes enumerated in § 2366, when such candidate has no personal campaign committee, but not otherwise.

2366. Disbursements by committee. No personal campaign committee or party committee, or any other political committee, shall make any disbursement except:

1. For maintenance of headquarters, and for hall rentals incident to the holding of public meetings;
2. For necessary stationery, postage, telephone, telegraph, messenger, and clerical assistance to be employed at a candidate's headquarters, or at the headquarters of the committee, incident to the writing, addressing, and mailing of letters and campaign literature;
3. For necessary expenses incident to the furnishing and printing of badges, banners, and other insignia; to the printing and posting of handbills, posters, lithographs, and other campaign literature, and the distribution thereof through the mails or otherwise;
4. For campaign advertising in newspapers, periodicals, or magazines as provided in this chapter;
5. For wages and actual necessary personal expenses of public speakers, organizers, and musicians;
6. For traveling expenses of members of the committee;
7. For preparing poll lists and for challengers at the polls;
8. For contributions to other party or political committees.

Appointive officers ineligible on party committee, when, § 2393.

2367. Bills, charges, and claims against candidate or committee. Every person who shall have any bill, charge, or claim upon or against any personal campaign or party committee or any candidate, for any disbursement made, services rendered, or thing of value furnished for political purposes, or incurred in any manner in relation to any primary or election, shall render in writing to such committee or candidate, such bill, charge, or claim, within

fifteen days after the day of the primary or election in connection with which such bill, charge, or claim was incurred. No candidate and no personal campaign or party committee shall pay any bill, charge, or claim so incurred prior to any primary or election which is not so presented within ten days after such primary or election; *provided,* that the mailing of any such bill, charge, claim, or remittance in a registered letter addressed to any candidate or committee, postage prepaid, shall be deemed a compliance with this section.

2368. Financial statements. Details. 1. Every candidate who is voted for at any primary or election held within this state, and the secretary of every personal campaign committee, and the scretary of every party committee, and the secretary of every other political committee, shall, on the second Saturday after such candidate or committee has first made a disbursement, or has first incurred any expressed or implied obligation to make a disbursement for political purposes, and thereafter, on the second Saturday of each calendar month, until all disbursements shall have been accounted for, and also on the Saturday preceding any election or primary, file a financial statement verified upon the oath of such candidate, or upon the oath of the secretary of such committee, as the case may be, which statement shall cover all transactions not accounted for and reported upon in statements theretofore filed. Each statement after the first, shall contain a summary of all preceding statements, and summarize all items theretofore reported under the provisions of this chapter.

2. The statement of any candidate and the statement of his personal campaign committee shall be filed with the filing officer of such candidate. The statement of every state committee, and of every congressional committee, shall be filed with the secretary of state. The statement of every other party committee shall be filed in the office of the county clerk of the county within which such disbursements were made.

3. Each such statement shall give in full detail:

(a) Every sum of money and all property and every other thing of value received by such candidate or committee during such period, from any source whatsoever, which he or it uses or has used or is at liberty to use for political purposes, together with the name of every person or source from which each was received, the specific purpose for which each was received, and the date when each was received, together with the total amount received from all sources in any amounts or manner whatsoever.

(b) Every promise or pledge of money, property, or other thing of value received by such candidate or committee during such period, the proceeds of which he uses or has used or is at liberty to use for political purposes, together with the name of the persons by whom each was promised or pledged, the specific purposes for which each was promised or pledged, and the date when each was so promised or pledged, together with the total amount promised or pledged, from all sources, in any amounts whatsoever.

(c) Every disbursement by such candidate or committee for political purposes during such period, together with the name of every person to whom the disbursement was made, the specific purpose for which each was made, and the date when each was made, together with the total amount of disbursements made in any amounts or manner whatsoever.

(d) Every obligation, expressed or implied, to make any disbursement incurred by such candidate or committee for political purposes during such period, together with names of the person or persons to or with whom each such obligation was incurred, the specific purposes for which each was made, and the date when each was incurred, together with total amount of such obligations made in any amounts or manner whatsoever.

Statements shall also be made by any other political committee, showing the total amount of receipts and disbursements, and for what purpose such disbursements were made. Such statements shall be filed with the clerk of the county in which the committee has its headquarters, within thirty days after any primary or election.

2369. Blanks furnished for required statements. Blanks for all statements required by this chapter shall be prepared by the secretary of state, and copies thereof, together with a copy of this chapter, shall be furnished through the county clerk, or otherwise as the secretary of state may deem expedient, to the secretary of every committee, upon request, and to every candidate upon the filing of nomination papers, and to all other persons required by law to file such statements, who may apply therefor.

2370. Public inspection. Certified copies. All such statements shall be open to public inspection in the offices where they are filed, and shall be carefully preserved there for a period of one year; and it shall be the duty of the officers having custody of the same to give certified copies thereof in like manner as of other public records.

2371. Official inspection of statements. Notice to delinquents. The several officers with whom statements are required to be filed shall inspect all statements of disbursements relating to nominations and elections filed with them, within ten days after the same are filed; and if, upon examination of the official ballot, it appears that any person has failed to file a statement as required by law, or if it appears to any such officer that the statement filed with him does not conform to law, or, upon complaint in writing by a candidate or by a voter that a statement filed does not conform to law or to the truth, or that any person has failed to file a statement which he is by law required to file, said officer shall forthwith in writing notify the delinquent person to comply with this chapter.

2372. Duty of filing officer. Notice to county attorney. Proceedings. Upon the failure of any person to file a statement within ten days after receiving notice under the preceding section, or if any statement filed discloses any violation of any provision of this chapter, the filing officer shall forthwith notify the county attorney of the county in which said violation occurred, and shall furnish him with copies of all papers relating thereto, and the said county attorney shall, on such complaint, or the complaint of any other person, forthwith enter the same in a docket kept for that purpose in his office; and within twenty days thereafter, shall examine every such case; and if the evidence seems to him to be sufficient under the provisions of this chapter, he shall, in the name of the people of the state, forthwith institute such civil or criminal proceedings as may be appropriate to the facts.

2373. No excuse from answering questions. No person, otherwise competent as a witness, shall be excused from answering any question in any proceedings under this chapter, on the ground that such answers would tend to incriminate him; but no prosecution can afterwards be had against such witness for any such offense concerning which he testified for the prosecution, except in an action for perjury in giving such testimony.

2374. Candidate's name not printed unless statement is filed. Manner of filling vacancy. The name of a candidate chosen at a nominating convention, or primary election, or otherwise, shall not be printed on the official ballot for the ensuing election unless there have been filed by or on behalf of said candidate, and by his personal campaign committee, if any, the statements of receipts and disbursements relating to nominations required by this chapter. Any vacancy on the ballot caused by such failure to file such statements shall be filled by the proper committee of his political party, in the manner authorized by law, but not by the use of the name of the candidate who has failed to file such statements.

2375. Oath, certificate, office, salary, dependent on statement. It shall be unlawful to administer the oath of office, or to issue a certificate of nomination or election, to any person nominated or elected to any public office until he has filed a statement as required by this chapter, which statement shall upon its face be complete and show a lawful compliance with this chapter; and no such person shall enter upon the duties of his office until he has

filed such a statement, nor shall he receive any salary or fees for any period prior to the filing of the same.

2376. Limitations as to disbursements. Prohibitions. Contributions. No disbursement shall be made and no express or implied obligation to make such disbursement shall be incurred by or on behalf of any candidate for any office under the constitution or laws of this state, or under the ordinance of any city, town, or municipality of this state in his campaign for nomination and election, which shall aggregate more than the amounts herein specified, namely:

1. For United States senator, $4000;
2. For representative in congress, $2000;
3. For governor, $3000;
4. For presidential elector, $500;
5. For state senator, $200;
6. For state representative, $100;
7. For any other state officer, for any judge, for any county, city, or town officer, or for any officer not hereinbefore mentioned who, if elected, would receive as salary, a sum not exceeding, in the case of an officer elected for a four-year term, 15 per cent of the salary to which such person would, if elected, be entitled during the first year of his incumbency of such office; and in the case of an officer elected for a two-year term, a sum not exceeding 10 per cent of such salary; *provided,* that no person shall be restricted to less than $100.

No sum of money shall be paid, and no expenses authorized or incurred by or on behalf of any candidate contrary to the provisions of this chapter. For the purposes of this law the contribution, expenditure, or liability of a descendant, ascendant, brother, sister, uncle, aunt, nephew, niece, wife, husband, partner, employer, employe, or fellow official or fellow employe of a corporation shall be deemed to be that of the candidate himself.

2377. Delegation of expenditure of disbursements. Any candidate may delegate to his personal campaign committee or to any party committee of his party, in writing duly subscribed by him, the expenditure of any portion of the total disbursements which are authorized to be incurred by him or on his behalf by the provisions of this chapter, but the total of all disbursements by himself and by his personal campaign committee in his behalf, shall not exceed in the aggregate the amounts in this chapter specified, except as provided herein.

2378. Limitations as to obligations and disbursements. 1. No disbursement shall be made, and no obligation, expressed or implied, to make such disbursement, shall be incurred by or on behalf of any personal campaign committee exceeding in the aggregate the total amounts theretofore delegated to such committee in writing duly subscribed as provided in § 2377.

2. The state committee of any political party entitled by law to have the names of its candidates placed upon the official ballot in a general election may, however, in addition to the disbursements delegated to it under the provisions of § 2377, make further disbursements in connection with any general election; but the aggregate of all the disbursements of any such state committee or of any other state political committee shall in no event exceed a sum equal to 12½ cents for each vote cast in the state for all candidates for governor in the next preceding general election, and every disbursement by any such committee in excess of such amount is forbidden.

3. The county committee of any political party entitled by law to have the names of its candidates placed upon the official ballot in any general election may, however, in addition to the disbursements delegated to it under the provisions of § 2377, make further disbursements in connection with any general election, but the aggregate of all the disbursements of any such county committee shall in no event exceed a sum equal to 12½ cents for each vote cast in such county for all candidates for governor in the next preceding

general election, and any disbursement by any such committee in excess of such amount is forbidden.

2379. Prohibitions as to corporations. Fines and forfeitures. No corporation doing business in this state shall pay, contribute, loan, or advance, or offer, consent, or agree to pay, contribute, loan, or advance, directly or indirectly, any money, property, free services of its officers or employes, or anything of value, to any political party, organization, committee, or individual for any political purpose whatsoever, or for the purpose of promoting or defeating the candidacy of any person for nomination, election, or appointment to any political office. No officer, agent, or employe of a corporation shall use or contribute the moneys of such corporation for political purposes or in the interest of any political candidate or party. No corporation, public or private, shall deduct, or in any manner withhold, any salaries or part of salaries, from its employes, for political campaign expenses incurred in the past, present, or to be incurred in the future. If any corporation shall be convicted of violating any of the provisions of this chapter, it shall be subject to a fine of not less than $500, nor more than $10,000, and if a domestic corporation, in addition to said fine, it may be dissolved; and if a foreign or non-resident corporation, in addition to said fine, its rights to do business in this state may be declared forfeited.

2380. Punishment for representatives of corporations. Any officer, employe, agent, attorney, or other representative of any corporation, acting for or in behalf of such corporation, who shall violate this chapter, shall be punished upon conviction by a fine of not less than $100 nor more than $5000, or by imprisonment in the county jail for a period of not less than thirty days nor more than one year, or by both such fine and imprisonment, in the discretion of the court or judge before whom such conviction is had.

2381. Evidence against corporations. Disposition of fines. The violation of this chapter by any officer of such corporation shall be prima facie evidence of said violation by such corporation. All fines or forfeitures recovered under the provisions of this chapter shall, when collected, be paid into the treasury of the county for the use of the road and bridge fund, and it is hereby made the duty of the county attorney of each county, on proper complaint, to conduct prosecutions under this chapter.

2382. Prohibitions as to publishers. No publisher of a newspaper or other periodical circulating in this state shall insert, either in its advertising or reading columns, any paid matter which is designed, or tends to aid, injure, or defeat any candidate, or any political party or organization, or any measure before the people, unless it is stated therein that it is a "paid advertisement," and unless the name of the chairman or secretary or other officers of the political or other organizations inserting the same, or the name and address of some voter who is responsible therefor, shall appear in such advertisement in the nature of a signature. No person shall pay the owner, editor, publisher, or agent of any newspaper or other periodical to induce him editorially to advocate or oppose any candidate for nomination or election, and no such owner, editor, publisher, or agent shall accept such payment.

2383. Publisher must file statements. Contents. No publisher of any newspaper or other periodical published within this state shall insert, either in its advertising or reading columns, any matter whatsoever of a political nature, or any political editorial relative to a candidate for any public office, unless the publisher thereof shall file in the office of the secretary of state, within three months before the holding of any nominating convention or primary or general election, or within ten days after the calling of and before the holding of any special election, a sworn statement which shall contain the names of the owners of such paper; and if such paper be a corporation, such statement shall be executed by some responsible officer thereof who is in a position to know the equities thereof, and shall contain the names and addresses of the owners of the shares of stock and the bonds of such corpora-

tion, together with an affidavit from each of such stockholders, and bondholders, setting forth the following facts, namely:

1. Whether or not he is the actual owner of the shares of stock or the bonds standing in his name on the books of the corporation, and if not, who is the actual owner thereof;

2. Whether or not such shares of stock or bonds, or any portion thereof, are held in trust for another person or corporation, and if so, for whom;

3. Whether or not such shares of stock or bonds, or any portion thereof, are under option to be sold to any other person or corporation, and if so, to whom;

4. Whether or not such shares of stock or bonds, or any portion thereof, have been pledged or hypothecated, and if so, to whom, for what amount, and for what purpose.

Any stockholder who shall refuse to make such affidavit shall be guilty of a violation of this chapter, but such a violation of this chapter by a stockholder or bondholder shall not excuse such corporation from otherwise complying with this chapter; and if such corporation shall otherwise comply with this chapter, and shall show in its statement filed with the secretary of state the name or names of the stockholder or stockholders, bondholder or bondholders so refusing to make said affidavit, such refusal on the part of such stockholder or bondholder shall not constitute a violation of this chapter by such corporation.

2384. Declaration as to interest in periodicals. Every candidate and every member of any personal campaign or party committee who, either in his own name or in the name of any other person, owns any financial interest in any newspaper or other periodical circulating in Utah, shall, before such newspaper or periodical shall print any matter otherwise than as is provided in § 2382, which is intended or tends to influence, directly or indirectly, any voting at any primary or election in this state, file in the office of the county clerk of the county in which he resides, a verified declaration stating definitely the newspaper or periodical in which or over which he has such financial interest or control, and the exact nature and extent of such interest or control. The editor, manager, or other person controlling the publication of any such newspaper or periodical, who shall print or cause to be printed any such matter contrary to the provisions of this chapter prior to the filing of such verified declaration from any person required by this section to file such declaration, shall be deemed guilty of a violation hereof.

2385. Soliciting matter for publication. Excess compensation prohibited. No owner, publisher, editor, reporter, agent, or employe of any newspaper or other periodical shall, directly or indirectly solicit, receive, or accept any payment, promise, or compensation, nor shall any person pay, or promise to pay, or in any manner compensate any such owner, publisher, editor, reporter, agent, or employe, directly or indirectly, for influencing or attempting to influence by means of any printed matter in such newspaper, any voting at any election or primary, through any means whatsoever, except through the matter inserted in such newspaper or periodical as "paid advertisement," and so designated as provided by law, and the compensation for inserting any such "paid advertisement" shall in no case exceed the regular rate charged by such newspaper or periodical for such service.

2386. Publication of false statement relative to candidates prohibited. No person, firm, or corporation shall knowingly make or publish, or cause to be made or published, any false statement in relation to any candidate, which statement is intended or tends to affect any voting at any primary, convention, or election.

2387. Personation. Penalty. Any person shall be deemed guilty of the offense of personation who, at any primary or election, applies for a ballot in the name of some other person, whether it be that of a person living or dead, or of a fictitious person, or who, having voted once at a primary or election,

applies at the same election for a ballot in his own name or any other name; and on conviction thereof such person shall be punished by imprisonment in the state prison at hard labor for not less than one nor more than three years. Any person who aids, abets, counsels, or procures the commission of the offense of personation shall, upon conviction, be subject to the same penalty.

2388. Bet or wager on elections prohibited. Any candidate who, before or during any primary or election campaign, makes any bet or wager of anything of pecuniary value, or in any manner becomes a party to any such bet or wager, on the result of the primary or election in his electoral district, or in any part thereof, or on any event or contingency relating to any pending primary or election, or who provides money or other valuable thing to be used by any other person in betting or wagering upon the results of any impending primary or election, shall be guilty of a violation of this chapter. Any person who makes any bet or wager of anything of pecuniary value on the result of such primary or election, or on any event or contingency relating thereto, shall be guilty of a violation of this chapter, and in addition thereto, any such act shall be a ground of challenge against his right to vote. Any person who, directly or indirectly, makes a bet or wager with any voter, depending upon the result of any impending primary or election, with the intent thereby to procure the challenge of such voter, or to prevent him from voting at such primary or election, shall be guilty of a violation of this chapter.

2389. Payments for service, deduction of wages, and furnishing conveyances prohibited. It shall be unlawful for any person to pay another for any loss due to attendance at the polls or in registering; *provided,* that this shall not be construed to permit an employer to make any deduction from the usual salary or wages of any employe while in attendance at the polls for the purpose of voting. No person shall pay for personal service performed or to be performed on the day of a caucus, primary, convention, or any election, or for any purpose connected therewith, tending in any way, directly or indirectly, to affect the result thereof, except for the hiring of persons whose sole duty it is to act as challengers and watch the count of official ballots. No person, corporation, committee, or organization shall convey or furnish any vehicle for conveying, or bear any portion of any expense of conveying, any voter to or from the polls or registraion places, or any part of the way; *provided,* that the committees or any two or more political parties may co-operate, at joint expense, in conveying sick, disabled, aged, or infirm voters to the polls or registration places, but no conveyance so furnished shall have any banner or party worker upon it. But this provision shall not apply to persons of the same household, nor shall it prohibit two or more voters from providing joint transportation for themselves by mutual agreement at their own expense.

Deductions from wages prohibited, § 2352.

2390. Promises of appointment prohibited. No person shall, in order to aid or promote his nomination or election, directly or indirectly, himself or through any other person, appoint or promise to appoint any person, or secure or promise to secure, or aid in securing, the appointment, nomination, or election of any person to any public or private position or employment, or to any position of honor, trust, or emolument. Nothing herein contained, however, shall prevent a candidate from stating publicly his preference for, or support of, any other candidate for any office to be voted for at the same primary or election; nor prevent a candidate for any office in which the person elected will be charged with the duty of participating in the election or nomination of any person as a candidate for any office, from publicly stating or pledging his preference for or support of any person for such office or nomination.

2391. Rewards for refraining to be candidates prohibited. No person shall pay or reward, or promise to pay or reward, another in any manner or

form for the purpose of inducing him to be or to refrain from or cease being a candidate, and no person shall solicit any payment, promise, or reward from another for such purpose.

2392. Soliciting and contributing for public organizations prohibited. No person shall demand, solicit, ask, or invite any payment or contribution for any religious, charitable, or other causes or organization supposed to be primarily or principally for the public good, from a person who seeks to be or has been nominated to any office; and no such candidate shall make any such payment or contribution, if it shall be demanded or asked, during the time he is a candidate for nomination or election to any office. No payment or contribution for any purpose shall be made a condition precedent to the putting of a name on any caucus or convention ballot or nomination paper or petition, or to the performance of any duty imposed by law on a political committee.

2393. Public appointees not to serve as delegates or committeemen. No holder of a salaried position other than an office filled by the voters shall be a delegate to a convention that nominates the officer or board under whom he directly or indirectly holds such position, nor shall he be a member of a party committee for the state, district, or municipality by which he is employed.

2394. Exchange of credentials prohibited. No person or persons shall invite, offer, or effect the trade, transfer, or exchange of any convention credential, or the vote or support of any delegate or delegates to any political convention, in exchange for any money or thing of value, or in exchange for any credential or for the support or vote of any delegate, for any person or candidate for any political office or nomination.

2395. Violation of this chapter a misdemeanor. Any person or persons who shall aid, abet, or advise a violation of this chapter shall be guilty of a misdemeanor, and upon conviction thereof shall be punished as provided in this chapter.

2396. Place of prosecutions. Violations of this chapter may be prosecuted in the county where such payment or contribution is made, or services rendered, or in any county wherein such money has been paid or distributed.

2397. Proceeding by electors for violation of chapter. 1. If any elector of the state shall have within his possession information that any provision of this chapter has been violated by any candidate for whom such elector had the right to vote, or by any personal campaign committee of such candidate, or any member thereof, he may, by verified petition, apply to the district judge of the district in which such violation has occurred, to the attorney-general of the state, or to the governor of the state, for leave to bring a special proceeding to investigate and determine whether or not there has been such violation by such candidate or by such committee or member thereof, and for appointment of special counsel to conduct such proceeding in behalf of the state.

2. If it shall appear from such petition or otherwise that such candidate, committee, or member thereof has violated any provision of this chapter, and that sufficient evidence is obtainable to show that there is probable cause to believe that such proceeding may be successfully maintained, then such judge, attorney-general, or governor, as the case may be, shall grant leave to bring such proceeding, and shall appoint special counsel to conduct such proceeding.

3. If such leave be granted and such counsel appointed, such elector may, by a special proceeding brought in the district court in the name of the state upon the relation of such elector, investigate and determine whether or not such candidate, committee, or member thereof has violated any provision of this chapter; but nothing contained in this chapter shall be considered as in any way limiting the effect or preventing the operation of remedies now in existence in such cases.

2398. Procedure. 1. In such proceeding the complaint shall be served with the summons, and shall set forth the name of the person whose election

is contested, and the grounds of the contest in detail, and shall not thereafter be amended except by leave of the court. The summons and complaint in the proceeding shall be filed within five days after service thereof.

2. The answer to the complaint shall be served and filed within ten days after the service of the summons and complaint. Any allegation of new matter in the answer shall be deemed controverted by the adverse party without reply, and thereupon said proceeding shall be at issue and stand ready for trial upon five days' notice of trial.

3. All such proceedings shall have precedence over any civil cause of a different nature pending in such court, and the court shall always be deemed open for the trial thereof, in or out of term, and the same shall be tried and determined the same as are civil actions, but the court shall, without a jury, determine all issues of fact as well as issues of law.

4. If more than one proceeding is pending, or the election of more than one person is investigated and contested, the court may, in its discretion, order the proceedings consolidated and heard together, and may equitably apportion costs and disbursements.

5. In all such proceedings either party shall have the right of change of venue, as provided by law in civil actions, but application for such change must be made within five days after service of summons and complaint, and the order for such change shall be made within three days after the making of such application and the papers transmitted forthwith, and any neglect of the moving party to procure such transmission within such time shall be a waiver of his right to such change of venue.

6. If judgment is in favor of the plaintiff, the relator may recover his taxable costs and disbursements against the person whose right to the office is contested, but no judgment for costs shall be awarded against the relator, unless it shall appear that such proceeding has been instituted otherwise than in good faith. All costs and disbursements in such cases shall be in the discretion of the court.

2399. Id. Void elections. Vacancies. Findings in legislative elections. Appeals. 1. If the court shall find that the candidate whose right to any office is being investigated, or his personal campaign committee or any member thereof, has violated any provision of this chapter, in the conduct of the campaign for nomination or election, and if such candidate is not one mentioned in subsection 2 hereof, judgment shall be entered declaring void the election of such candidate to the office for which he was a candidate, and ousting and excluding him from office and declaring the office vacant. The vacancy thus created shall be filled in the manner provided by law, but no person found to have violated any provision of this chapter shall be eligible to fill any office or to become a candidate for any office, candidates for which have been voted for at the primary or election in connection with which such violation occurred.

2. If such proceeding has been brought to investigate the right of a candidate for member of either house of the state legislature or for senator or representative in congress, and the court shall find that such candidate or any member of his personal campaign committee has violated any provision of this chapter, in the conduct of the campaign for nomination or election, the court shall draw its findings to such effect and shall forthwith, without final adjudication, certify its findings to the secretary of state, to be by him transmitted to the presiding officer of the legislative body as a member of which such person is a candidate.

3. Appeals may be taken from the determination of the court in such proceedings in the same manner as appeals may be taken as provided by law in civil actions, but the party appealing shall in no case be entitled to or obtain a stay of proceedings. No injunction shall issue in any such proceeding suspending or staying any procedure therein or connected therewith, except upon application to the court or the presiding judge thereof upon notice to all parties and after hearing.

4. No judgment entered as provided for herein shall be any bar to or affect in any way any criminal prosecution of any candidate or other person.

2400. Special counsel. Compensation. 1. If the judgment of the trial court is appealed from in such proceeding, the district judge, the attorney-general, or the governor who made the appointment of special counsel for the trial court, shall authorize such counsel so appointed, or some other person, to appear as special counsel in the supreme court in such matter.

2. The special counsel provided for by this chapter, shall receive a reasonable compensation for his services, not to exceed, however, $25 per day for the time actually spent in conducting the proceedings in the trial court or upon appeal, and not to exceed $10 per day for the time necessarily expended in preparation therefor. Such compensation shall be audited by the secretary of state, and paid out of the state treasury upon a voucher and upon the certificate of the officer appointing such counsel to the effect that such appointment has been duly made, that the person so appointed has faithfully performed the duties imposed upon him, and that the number of days stated in such voucher have been consumed in conducting such litigation and in preparation therefor. Such compensation shall be audited and paid in the same manner as other claims against the state are audited and paid.

2401. Witnesses must testify. Exemptions from prosecution. No person shall be excused from testifying in such proceeding, or in any proceeding for violation of or growing out of the provisions of this chapter, on the ground that his testimony may expose him to prosecution for any crime, misdemeanor, or forfeiture. But no person shall be prosecuted, or subjected to any penalty or forfeiture, except forfeiture of nomination or election to office, for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in such proceeding or examination, except a prosecution for perjury committed in giving such testimony.

2402. Conviction of candidates or committeemen. Punishment. Supplemental judgments. 1. If any person shall, in a criminal action, be judged to have been guilty of any violation of this chapter, while a candidate for any office under the constitution or laws of this state, or under any ordinance of any town or municipality herein, other than the office of state senator or state representative, the court shall, after entering the adjudication of guilty, enter a supplemental judgment declaring such person to have forfeited the office in the conduct of the campaign for the nomination or election to which he was guilty of such violation, and shall transmit to the filing officer of such candidate a transcript of such supplemental judgment, and thereupon such office shall be deemed vacant and shall be filled as provided by law.

2. If any person shall, in a similar action, be found guilty of any violation of this chapter, committed while he was a member of the personal campaign committee of any candidate for any such office, the court before which such action is tried shall, immediately after entering such adjudication of guilty, enter a supplemental judgment declaring such candidate to have forfeited the office in the conduct of the campaign for nomination or election to which such member of his personal campaign committee was guilty of such violation, and shall transmit to the filing officer of such candidate a transcript of such supplemental judgment, and thereupon such office shall be deemed vacant and shall be filled as provided by law.

3. If any person shall, in a criminal action, be adjudicated guilty of any violation of this chapter, committed while he was a candidate for the office of state senator, state representative, United States senator, or representative in congress, or while he was a member of the personal campaign committee of any such candidate, the court, after entering such adjudication of guilty, shall forthwith transmit to the presiding officer of the legislative body as a member of which such officer was a candidate when such violation occurred, a certificate setting forth such adjudication of guilt.

4. Any court having jurisdiction to enter judgment of guilty in any such criminal action is hereby vested with jurisdiction to enter such supplemental judgment, transmit a transcript thereof, and issue a certificate as provided in this section.

2403. Employment of counsel by defense. Costs. Nothing contained in this chapter shall prevent any candidate from employing counsel to represent him in any action or proceedig affecting his rights as a candidate, nor from paying all costs and disbursements necessarily incident thereto. No sum so paid or incurred shall be deemed a part of the campaign expenses of any such candidate.

2404. Punishment other than herein provided. Any person violating any provision of this chapter shall, upon conviction thereof, be punished, unless otherwise herein provided, by imprisonment in the county jail for a period of not less than one month nor more than one year, or by imprisonment in the state prison for a period of not less than one year nor more than three years, or by a fine of not less than $25 nor more than $1000, or by both such fine and imprisonment; and no person so convicted shall be permitted to take or hold the office to which he was elected, if any, or receive the emoluments thereof.

2405. Repeal. Section 897, Compiled Laws of Utah, 1907, and all other chapters or parts of chapters in conflict with any provisions of this chapter are hereby repealed.

2406. Validity of chapter. In the event that any provision or paragraph or part of this chapter shall be questioned in any court and shall be held to be invalid the remainder of the chapter shall not be invalidated, but shall remain in full force and effect.

CHAPTER 16.

ELECTION CONTESTS.

2410. (914.) Grounds for contest of election, location of county seat, etc. The election of any person to any public office, the location or relocation of a county seat, or any proposition submitted to a vote of the people, may be contested:

1. For malconduct, fraud, or corruption on the part of the judges of election at any polling place, or of any board of canvassers, or any member of either board, sufficient to change the result;

2. When the incumbent was not eligible to the office at the time of the election;

3. When the incumbent has given or offered to any elector or any judge or canvasser of the election, any bribe or reward in money, property, or anything of value, for the purpose of procuring his election, or has committed any other offense against the elective franchise defined by law;

4. When illegal votes have been received, or legal votes have been rejected at the polls sufficient to change the result;

5. For any error of any board of canvassers or of the judges of election in counting the votes or declaring the result of the election, if the error would change the result;

6. For any other cause which shows that another person was legally elected.

The term incumbent in this section means the person whom the canvassers declare elected.

Each house of the legislature is the judge of the election and qualifications of its members, Con. art. 6, sec. 10.

Burden is on defendant to show title.

People v. Clayton, 4 U. 421; 11 P. 206.

If defendant shows no title, he cannot dispute claimant's title; court may proceed ex parte.

Id.

Defendant must show title de jure.

State, ex rel. Weber v. Beardsley, 13 U. 502; 45 P. 569.

Where the court is able to purge the vote at a particular poll of the illegal votes cast, and it does not appear that the officers at the poll or the contestee of the election participated in the fraud or knew of it, the vote of the whole poll

should not be rejected, but effect should be given to the unimpeached votes.

Ferguson v. Allen, 7 U. 263; 26 P. 570.

Where the registration officer, under § 246, C. L. 1888, after a hearing, has found that certain persons are not qualified voters, and certified such names to the election judges, who have stricken such names from the registration list, even though the judgment of such registration officer was erroneous and illegal, and the persons whose names are so stricken off on election day have offered their ballots, which were rejected by the judges of election because their names were not on the voting lists; held, that such votes so offered could not be counted because they were not cast.

Id.

Ballots not cast cannot be counted, whatever the reason of the rejection, but, if cast, and by mistake placed in the wrong box, they should be counted in the result.

Young v. Deming, 9 U. 204; 33 P. 818.

Where ballots that should have been counted were rejected in such numbers that, if cast for the contestant, they would have changed the result, but the evidence is uncertain as to which candidate received the ballots, the return of the judges of election will not be disturbed.

Id.

In a proper proceeding a court may determine matters pertaining to the election of a legislator who has received a majority of legal votes but through fraud has been deprived of the certificate showing his prima facie right to the office. In this case, however, a judicial action would be fruitless, since another trial by the state senate would be necessary.

Ellison v. Barnes, 23 U. 183; 63 P. 899.

The provisions of this chapter do not warrant contests for seats in the legislature, as each house is the judge of the election and qualification of its members.

Id.

A contestant may not question the irregularity or validity of the proceedings of a convention or committee in making or filing nominations, nor question the action of the officer whose duty it is to make up the party ticket and prepare the official ballot by review. This may be done only by special proceedings before the election so that errors, when found, may be corrected.

Payne v. Hodgson, 34 U. 269; 97 P. 132.

An election to determine whether the sale of intoxicating liquor shall be authorized or denied in a city is an election hereunder.

Hardy v. Beaver City, 41 U. 80; 125 P. 679.

A resident and taxpayer of an alleged high school district may contest an election to determine the question of the organization of the district, but the remedy hereunder is not exclusive, but cumulative with the remedy by quo warranto.

Murdock v. Ryan et al., 41 U. 327; 125 P. 666.

2411. (915.) Irregularity not a basis of contest. Exception. No irregularity or improper conduct in the proceedings of the judges, or any of them, is such malconduct as avoids an election, unless the irregularity or improper conduct is such as to procure the person whose right to the office is contested to be declared elected when he had not received the highest number of legal votes.

Provisions liberally construed, § 2113. Highest number of votes elects, §§ 2106, 2243.

2412. (916.) Election set aside for malconduct only when result changed. When any election held for an office exercised in and for a county is contested on account of any malconduct on the part of a judge or the judges of any election district, the election cannot be annulled and set aside upon any proof thereof, unless the rejection of the vote of such district or districts would change the result as to such office in the remaining vote of the county.

Immaterial defects in returns, § 2249.

Where it does not appear whether the rejection of the vote of such precinct would change the result, the election will not be annulled.

Ferguson v. Allen, 7 U. 263; 26 P. 570.

Young v. Deming, 9 U. 204; 33 P. 818.

2413. (917.) Contest to be filed within forty days. Statement. When an elector contests the right of any person declared elected to such office, he must, within forty days after the return day of the election, file with the clerk of the district court of the county within or for which such office is to be exercised a written statement, setting forth specifically:

1. The name of the party contesting such election, and that he is an elector of the county, precinct, city, school district, or of any subdivision of either, as the case may be, in which the election was held;
2. The name of the person whose right to the office is contested;
3. The office;
4. The particular grounds of such contest;

Which statement must be verified by the affidavit of the contesting party, that the matters and things therein contained are true, except as to those matters therein stated upon his information or belief, and that as to those matters he believes it to be true.

The provisions of this section require a written statement of election contest to be filed within forty days after the board of canvassers meets to canvass the returns on the Monday next after the election, as required by § 2238, and not from the time the result is declared and recorded, as required by § 2242.

Carbis v. Dale, 23 U. 463; 65 P. 204.

2414. (918.) Id. Sufficiency of statement. Names of witnesses to be given, when. When the reception of illegal votes or the rejection of legal votes is alleged as a cause of contest, it is sufficient to state generally, that in one or more specified districts or polls illegal votes were given to the person whose election is contested, which, if taken from him, would reduce the num-

ber of his legal votes below the number of legal votes given to some other person for the same office; or that legal votes for another person were rejected, which, if counted, would raise the number of legal votes for such person above the number of legal votes cast for the person whose election is contested; but no testimony can be received of any such votes, unless the party contesting such election deliver to the opposite party, at least three days before such trial, a written list of the number thereof, and by whom given or offered, which he intends to prove on such trial; and no testimony can be received of any such votes except such as are specified in such list.

2415. (919.) Statement not rejected nor proceeding dismissed for want of form. No statement of the grounds of contest will be rejected, nor the proceedings dismissed by any court for want of form, if the grounds of contest are alleged with such certainty as will advise the defendant of the particular proceeding or cause for which such election is contested.

Provisions liberally construed, § 2113.

In contested election cases, the evidence must be confined to the issues raised by the pleadings, and the judgment must also conform therewith, the same as in other civil cases.

Hamer v. Howell, 31 U. 144; 86 P. 1073.

Allegations of petition held insufficient to permit evidence as to paper of ballots and as to marking of same.

Id.

2416. (920.) Court to fix time for hearing contest. Upon the statement being filed, the clerk must inform the judge of the district court thereof; the judge of said court must then, by an order to be entered by the clerk, name some day, not less than ten nor more than thirty days from the date of the filing of such statement, to hear and determine such contested election.

2417. (921.) Citation to defendant. Service. The clerk must thereupon issue a citation for the person whose right to the office is contested to appear at the time and place specified in the order, which citation must be delivered to the sheriff, and be served either upon the party in person, or, if he cannot be found, by leaving a copy thereof at the house where he last resided, at least five days before the time so specified.

2418. (922.) Hearing contest. Continuance on terms. The court must meet at the time and place designated to determine such contested election, and shall have all the powers necessary to the determination thereof. It may adjourn the hearing and trial from day to day until such trial is ended, and may also continue the trial, before its commencement, for any time not exceeding twenty days, for good cause shown by either party upon affidavit, at the cost of the party applying for such continuance.

2419. (923.) Judgment confirming or annulling election. After hearing the proofs and allegations of the parties, the court must pronounce judgment in the premises, either confirming or annulling and setting aside such election.

2420. (924.) Order for production of ballots. Inspection in open court. If an inspection of the ballots of any election district or polling place in this state shall be necessary for the determination of any election contest before any court, the judge thereof may, by order, naming the district or polling place, require the proper officer to procure the same from the person in whose possession or custody the same may be, and such custodian shall deliver the same to said officer, who shall deliver them unopened to such judge. The judge shall open and inspect the same in open court in the presence of the parties or their attorneys, and immediately after such inspection shall seal them in an envelope and return them, by mail or otherwise, to the office of the legal custodian.

2421. (925.) Person having highest vote declared elected. If in any such case it appears that a person other than the one returned has the highest number of legal votes, the court must declare such person elected.

2422. (926.) Judgment for costs. If the proceedings are dismissed for insufficiency, or want of prosecution, or the election is by the court confirmed, judgment for costs must be rendered against the party contesting such election, and in favor of the party whose election was contested; but if the elec-

tion is annulled and set aside, judgment for costs must be rendered against the party whose election was contested, and in favor of the party contesting the same. Primarily, each party is liable for the costs created by himself, to the officers and witnesses entitled thereto, which may be collected in the same manner as similar costs are collected in other cases.

2423. (927.) Appeals. Execution not stayed except for costs. Either party aggrieved by the judgment may appeal therefrom to the supreme court, as in other cases of appeal thereto from the district court, but such appeal must not stay execution or proceedings, except execution for costs.

2424. (928.) Effect of not appealing within ten days. Whenever an election is annulled or set aside by the judgment of the district court, and no appeal has been taken within ten days thereafter, the commission, if any has been issued, is void, and the office vacant.

TITLE 28.

EMPLOYMENT OFFICES.

('09, p. 17.)

2440. Must obtain license. Employment agent defined. It shall be unlawful for any person, persons, firm, corporation, or association to open and establish in any city, town, or elsewhere within the limits of the state of Utah, any intelligence or employment office, for the purpose of procuring or obtaining for money or other valuable consideration, either directly or indirectly, any work, employment, or occupation for persons seeking the same, or to otherwise engage in the business, or in any way to act as a broker or go-between between employers and persons seeking work, without first having obtained a license so to do from the city, town, or, if not within any city or town, from the county where such intelligence or employment office is to be opened or such business is to be carried on. Any person, persons, firm, corporation, or association performing any of the foregoing enumerated services as aforesaid, shall be deemed to be an employment agent within the meaning of this chapter.

Industrial commission may supervise (sub. 6), § 3076.

Industrial commission may establish and supervise free employment offices, (sub. 6), § 3076.

2441. Cities, towns, and counties must provide licenses. Every city, town, or county in this state shall, by ordinance, provide for the issuing of licenses as contemplated by this chapter, and shall establish such rules and regulations as are not herein provided for the carrying on of the business or occupation for which such license may be issued.

2442. To whom application is made. Any person, persons, firm, corporation, or association applying for a license under the provisions of this chapter shall make application to the city council, or board of trustees, or board of county commissioners for the same, and shall deposit with the city, town, or county treasurer, in advance, the annual fee for such license, to be evidenced by the receipt of the city, town, or county treasurer endorsed on said application. If the city council, board of trustees, or board of county commissioners refuses to order the issuance of such license to the party or parties applying for the same, the sum so deposited with the city, town, or county treasurer shall be refunded to the applicant or applicants for license without any further action of the city council, board of trustees, or board of county commissioners.

2443. Annual license and bond. Any person, persons, firm, corporation, or association licensed under the provisions of this chapter shall pay an annual license fee in such amount as may be determined by the city council, board of trustees, or board of county commissioners, and before such license shall be issued shall deposit with the city, town, or county treas-

urer a bond in the penal sum of $1000, with two or more sureties, to be approved by the officers designated by ordinance; such bonds shall be made payable to the city, town, or county where such business is to be carried on, and shall be conditioned that the person, persons, firm, corporation, or association applying for the license will comply with this chapter, and shall pay all damages occasioned to any person by reason of any misstatement, or misrepresentation, or fraud, or deceit of any person or persons, their agents or employes, or from any other violation of this chapter, in carrying on the business for which license is granted. If at any time, in the opinion of the officers designated by ordinance to approve said bond as provided herein, the sureties, or any of them, shall become irresponsible, the person, firm, corporation, or association holding such license shall, upon notice from the city or town treasurer, give a new bond, to be approved as hereinafter provided. Failure to give a new bond within ten days after such notice shall operate as a revocation of such license, and the license shall be immediately returned to the city, town, or county treasurer, who shall destroy the same. Licenses granted under this chapter may be transferred by order of the city council, board of trustees, or board of county commissioners, but before such transfer shall be authorized, the applicant or applicants for the same shall deposit with the city, town, or county treasurer the sum of $5, which shall be endorsed upon the application, and the person, persons, firm, corporation, or association to whom such license is transferred shall also deposit such bond as is required by the applicant or applicants for an original license, as hereinbefore prescribed, and to be approved in the same manner.

2444. License to be publicly exposed. Upon the granting of a license by the city council, board of trustees, or board of county commissioners, under this chapter, the city, town, or county treasurer shall, within one week after payment of the license fee, issue to the applicant or applicants entitled to the same a certificate of license, setting forth the fact that such license has been granted, and it shall be the duty of all persons, firms, corporations, or associations, who may obtain such certificate of license, to keep the same publicly exposed to view in a conspicuous place in their office or place of business.

2445. Penalties for sending female help to certain places. Any employment agent who shall knowingly send out any female help to any place of bad repute, house of ill fame, or assignation house, or to any house or place of amusement kept for immoral purposes, shall be liable to pay a fine of not less than $100, and shall be imprisoned not less than ninety days and, on conviction thereof in any court, shall have his, or their licenses rescinded.

2446. Must obtain bona fide order before sending out help. Any employment agent who shall send out any help, male or female, without having previously obtained a bona fide order, shall, upon conviction thereof, for each and every offense be subject to the penalties provided in § 2455.

2447. Unlawful to receive money or consideration until information or assistance is furnished. It shall be unlawful for any employment agent in the state of Utah to receive, directly or indirectly, any money or other valuable consideration from any person seeking employment, for any information or assistance furnished or to be furnished by said agent to such person, enabling or tending to enable said person to secure such employment, prior to the time at which said information or assistance is actually thus furnished.

2448. Id. If applicant fails to obtain information or assistance. It shall be unlawful for an employment agent in the state of Utah to retain, directly or indirectly, any money or other valuable consideration received for any information or assistance such as is described in § 2440, if the person for whom such information or assistance is furnished fails, through no neglect or laches of his own, to secure the employment regarding which such information or assistance is furnished; and said money or consideration

shall be by said agent forthwith returned to the payer of the same, upon demand therefor by the latter or his agent.

2449. Commission limited. It shall be unlawful for any employment agent in the state of Utah to receive as commission, directly or indirectly, for information or assistance such as is described in § 2440, any money or other consideration which is in value in excess of 8 per cent of the amount earned, or prospectively to be earned, by the person to whom such information is furnished, through the medium of the employment regarding which such information or assistance is given, during the first month of such employment; *provided,* that said value of said commission shall not be in excess of 8 per cent of the amount actually prospectively to be earned in such employment when it is mutually understood by the agent and person in this section mentioned, at the time when said information or assistance is furnished, that said employment is to be for a period of less than one month.

2450. Employers' register to be kept. Each employment agent duly licensed under this chapter shall enter upon a register to be kept for that purpose, and to be known as an "employers' register," every order received from any corporation, company, or individual desiring the service of any persons seeking work or employment, the name and address of the corporation, company, or individual for whom such order was received, the number of persons wanted, the nature of the work or employment, the town or city, street and number, if any, where such work or employment is to be furnished, and the wages to be paid.

2451. Labor applicants' register to be kept. Each employment agent in the state of Utah shall keep a register, to be known as "labor applicants' register," which shall show the name of each person to whom information or assistance is furnished, and as is described in § 2440; and the amount of the commission received in each such case therefor; the name of each person who, having received and paid for, as herein contemplated, information or assistance such as is described in § 2440, fails to secure the employment regarding which such information or assistance is furnished, together with the reason why said employment was not by said person secured, and the name of each person to whom return is made, in accordance with the provisions of § 2448, of any money or other consideration such as is in said section named, together with the amount of said money, or the value of said consideration, thus returned. The registers required by § 2450 and by this section shall be open at all reasonable hours to the inspection of any peace official of any municipality or county in this state.

2452. Written copy to be furnished. Every person securing information or intelligence from an employment agent in reference to hiring or engagement to work for others, as provided in § 2440, shall be furnished a written copy in duplicate of the terms of such hire or engagement by said employment agent, showing amount of commissions or fees paid such employment agent, kind of service to be performed, rate of wages or compensation, length of time, if definite, and if indefinite it should be so stated, of such service, with full name and address of the person or persons, firm or corporation authorizing the hire of such person; one of the aforesaid copies to be delivered to the person or persons, firm or corporation for whom the labor is to be performed, and the other to be retained by the person furnished with information or intelligence, as aforesaid; and the agent issuing the above described written copy of the conditions of service or employment shall make and keep, in a book provided for the purpose, a third copy of the same; and any person engaged in the business of keeping an employment office, such as is contemplated by this chapter, who shall fail to observe the provisions of this section shall be subject to the penalties provided in § 2455; *provided,* that it shall be lawful to keep the register required by § 2451, and the receipt required by this section, in the same book and on one and the same form, if desired.

2453. Penalty for dividing fees. Any employment agent sending out help to contractors or other employers of help, and dividing the fees herein allowed with subcontractors and employers of help, or their foreman or any one in their employ, shall be subject to the penalties provided in § 2455.

2454. Employment or intelligence office not to be kept in any place where intoxicating liquors are sold. It shall be unlawful for any employment agent in the state of Utah to conduct the business of an employment or intelligence office in, or in connection with, any place where intoxicating liquors are sold or dispensed.

2455. False information. Penalties. If any person, persons, firm, corporation, or association, or his, its, or their agent or employes engage in the business of employment or intelligence agent or broker, duly licensed, as provided in this chapter, shall give any false information, or shall make any misstatement, or shall make any false promises concerning any work or employment or occupation, or shall fail to keep the registers as are prescribed in §§ 2450, 2451, or shall wilfully make any false entries in such register, or shall violate any other provisions of this chapter, for which violation penalties are not hereinbefore provided, he shall, upon conviction thereof, for each and every offense, be fined in any sum not exceeding $100, and, in the discretion of the trial judge, the license under which such person, persons, firm, corporation or association has or have been permitted to conduct the business of any employment or intelligence office, shall be forfeited.

2456. Suits, how brought. All claims or suits brought in any court against any employment or intelligence agent may be brought in the name of the party injured upon the bond deposited with the city, town, or county treasurer by said employment or intelligence agent, as provided in § 2443, and may be transferred as other claims for damage in civil suits. The amount of damages claimed by the plaintiff, not the penalty named in the bond, shall be the test of the jurisdiction of the court in which the action is brought.

2457. Not applicable to religious or charitable associations. Nothing herein shall be construed so as to require any religious or charitable association which may assist in procuring situations or employment for persons seeking the same to obtain a license so to do under the provisions of this chapter.

2458. Certain parts of this chapter to be conspicuously posted. The keeper of an employment or intelligence office shall cause two copies of §§ 2446-2449 inclusive and §§ 2452-2455 inclusive, printed in type of sufficient size to be legible and easily read, to be conspicuously posted in each room used or occupied for the purpose of such employment or intelligence office.

TITLE 29.

EXAMINERS, STATE BOARD OF.

2465. (929.) How constituted. Powers. The governor, the secretary of state, and the attorney-general constitute a board of examiners, with power to examine all claims against the state, except salaries or compensation of officers fixed by law, and the board shall perform such other duties as may be prescribed by law. No claim against the state, except salaries and compensation of officers fixed by law, shall be passed upon by the legislature without having been considered and acted upon by the board of examiners.

Mont. Pol. C., § 680.
Duties as to capitol grounds, §§ 464, 465.
Authority of board, Con. art. 7, sec. 13.
Wilkinson v. State, 42 U. 483; 134 P. 626.

2466. (930.) Meetings. Officers. The meetings of the board shall be held at the seat of government, or at such other place in the state as the

board may determine, on the third Monday in each month, and at such other times as the president may call it together. The governor shall be the president, and the secretary of state shall be the secretary of the board, and, in the absence of either, an officer pro tempore may be elected from among the members of the board.

Mont. Pol. C., § 681.

2467. (931.) Records. The board must keep a record of all its proceedings, and any member may cause his dissent to the action of a majority upon any matter to be entered upon such record. An abstract of all claims must be entered upon the minutes of the board before the same are acted upon.

Cal. Pol. C., § 656. Mont. Pol. C., § 682.

2468. (932.) Rules. The board may, in writing, establish rules and regulations not inconsistent with law, for its government.

Cal. Pol. C., § 656. Mont. Pol. C., § 683.

2469. (933.) Witnesses. The president of the board may issue subpœnas and compel the attendance of witnesses and the production of books and papers before the board or any member thereof; and any member of the board may administer oaths and may examine witnesses. In case of the disobedience of any witness, the board may invoke the aid of the district court to compel obedience. Whenever a witness is subpœnaed before the board to testify against any claim pending before it, the board may allow a reasonable fee to such witness for attendance, which fee must not exceed the fees allowed by law to witnesses in civil cases, and must be paid out of the appropriation for the contingent expenses of the board; *provided*, that in no instance shall a fee be allowed to a witness who has appeared in behalf of a claimant.

Cal. Pol. C., § 658*. Mont. Pol. C., § 684*. Contempt, how punished, § 6955.

2470. (934.) Depositions. Each member of the board may take depositions to be used before it.

Cal. Pol. C., § 659. Mont. Pol. C., § 685.

2471. (935.) Action on claims. Any person having a claim against the state, for which an appropriation has been made, may present the same to the board, in the form of an account or petition, and the secretary of the board must date, number, and file such claim, and the board must allow or reject the same in the order of its presentation. The board may, for cause, postpone action upon a claim for not exceeding one month.

Cal. Pol. C., § 660. Mont. Pol. § 686.

2472. (936.) Id. Approval. If the board approves such claim, the members thereof must indorse thereon, over their signatures, "approved for the sum of ..... dollars," and transmit the same to the office of the state auditor; and the auditor must draw his warrant for the amount so approved in favor of the claimant or his assigns, in the order in which the same was approved.

Cal. Pol. C., § 661. Mont. Pol. C., § 687.

2473. (937.) Id. Disapproval. If the board disapproves such claim, it must cause the same to be filed with the records of the board, with a statement showing such disapproval and the reasons therefor.

Cal. Pol. C., § 662. Mont. Pol. C., § 688.

2474. (938.) Where there is no appropriation. If no appropriation has been made for the payment of any claim presented to the board, the settlement of which is provided for by law, or, if an appropriation made has been exhausted, the board must audit the claim, and if it is approved must transmit it to the legislature with a statement of the approval.

Cal. Pol. C., § 663. Mont. Pol. C., 689.

2475. (939.) Claims not otherwise provided for. Any person having a claim against the state, the settlment of which is not otherwise provided for by law, must present the same to the board of examiners, accompanied by a

statement showing the facts constituting the claim, verified in the same manner as complaints in civil actions.

Cal. Pol. C., § 664*. Mont. Pol. C., § 690*.

2476. (940.) Id. Meeting to consider. On the first Monday in November preceding the meeting of each legislature, the board must hold a session for the purpose of examining the class of claims referred to in the preceding section, and may adjourn from time to time until the work is completed. The board must cause a list and brief abstract of all claims filed with it up to that date, to be made and published in some newspaper at the seat of government for such time as the board may prescribe. The list must be accompanied by a general notice of the order in which and of the time when the board will proceed to examine the claims.

Cal. Pol. C., § 665*. Mont. Pol. C., § 691.

2477. (941.) Id. Hearing report. The board must, at the time designated, proceed to examine and adjust all such claims, and may hear evidence in support of or against them, and shall report to the legislature such facts and recommendations concerning them as it may think proper. In making its recommendations the board may state and use any official or personal knowledge which any member of the board may have touching such claims.

Cal. Pol. C., § 666. Mont. Pol. C., § 692.

2478. (942.) Id. The board must make up its report and recommendations at least thirty days before the meeting of the legislature; and a brief abstract of the report, showing the claims rejected, and those allowed and the amounts thereof, must be published in a newspaper published at the seat of government, for such time as the board may prescribe, before the meeting of the legislature.

Cal. Pol. C., § 667. Mont. Pol. C., § 693.

2479. (943.) Member not to be interested in claim. No member of the board shall act upon any claim in which he is interested, or upon any claim for expenditures incurred in his office, nor shall he be present when the decision thereon is made.

Cal. Pol. C., § 668. Mont. Pol. C., § 694.

2480. (944.) Claims submitted third time. The board shall not entertain for a third time, a demand against the state once rejected by it or by the legislature, unless such facts or reasons are presented to the board as in suits between individuals would furnish sufficient ground for granting a new trial.

Cal. Pol. C., § 670*. Mont. Pol. C., § 695*. Motion for new trial, § 6980.

2481. (945.) Appeal to legislature. Any person interested, who is aggrieved by the disapproval of a claim by said board, may appeal from its decision to the legislature by filing with the board a notice thereof, and, upon the receipt of such notice, the board must transmit the demand and all the papers accompanying the same, with a statement of the evidence taken before it, to the legislature.

Cal. Pol. C., § 671. Mont. Pol. C., § 696.

2482. (946.) Auditor's duty respecting claims. The state auditor shall not draw his warrant for any claim, unless it has been approved by the board, except for salaries or compensation of officers fixed by law, or for moneys expressly appropriated by law.

Cal. Pol. C., § 672*. Mont. Pol. C., § 697*. A claim by a court stenographer for mileage was a claim for compensation fixed by contract, not by law, and the state auditor could not be required to draw a warrant for the same until it had been first approved by the state board of examiners. Davis v. Edwards, 33 U. 243; 93 P. 720.

2483. (947.) Illegal warrant. Whenever the board has reason to believe that the state auditor has drawn, or is about to draw, his warrant without authority of law, or for a larger amount than the state actually owes, the board must notify the state treasurer not to pay the warrant so drawn or to be drawn; and thereupon the treasurer is prohibited from paying the war-

rant, whether actually drawn or not, until he is otherwise directed by the legislature or by the board.

Cal. Pol. C., § 674. Mont. Pol. C., § 698.

2484. (948.) Board to audit books and accounts. As often as it may deem proper, the board shall audit the books and accounts of any or all state officers and state institutions, and count the money in the state treasury; and it may, at any time, direct the bank examiner to audit and examine the books and accounts of any such officers or institutions. The state auditor and other state officials and the officers of state institutions must permit the examination and auditing of the books and accounts in their respective offices at such times as the board of examiners shall deem proper, and shall furnish without delay any required information touching the books, papers, vouchers, or other matters pertaining to their respective offices; and the state treasurer must permit the money in the treasury, without delay on any pretense whatever, to be counted whenever the board wishes to make an examination or count.

Cal. Pol. C., § 675*. Mont. Pol. C., § 699*.

2485. (949.) Public statement of money in treasury. The board must, at least twice in each year, make and file in the office of the secretary of state, and publish in some newspaper published at the seat of government, a statement showing the amount of money in the state treasury.

Cal. Pol. C., § 677*. Mont. Pol. C., § 700*. Approval of official bonds, § 4267. Examination of treasurer's books, etc., §§ 5733, 5734.

2486. (949x.) Uniform system of accounting in state offices, etc. It is hereby made the duty of the state board of examiners to devise and place in operation in the several state offices, departments, commissions, boards, and institutions a uniform system of accounting. For the purpose of carrying out the foregoing provision, an appropriation of $1000, or so much thereof as may be necessary, is hereby made. '07, p. 188.

2487. (949x1.) No appropriation nor any surplus of any appropriation shall be diverted from any account to any other account, and the money appropriated, or so much as may be necessary, shall be applied to the payment of each item for which the appropriation is respectively made and nothing else. '07, p. 187.

BOARD OF SUPPLIES.

2488. (950.) Who constitute. The board of examiners is also a board of supplies and furnishing board.

Cal. Pol. C., p. 183*. Mont. Pol C., § 703.

2489. (951.) Duties. It is the duty of such board:

1. To contract for the furnishing of all stationery, printing, binding, paper, fuel, lights, and other necessary supplies to be used by the legislature and all other departments of the government, and for the printing, binding, and distributing of the laws, codes, journals, department reports, reports of decisions of the supreme court, and all other state printing, and for the binding and repairing of any books used by any state officer or department;

2. To hire all offices for the state officers, to furnish the same, and to keep the furniture in repair; and to hire and furnish halls and rooms for the use of the legislature, to provide furniture therefor, and to keep the same in repair;

3. To cause to be deposited in the office of the secretary of state all stationery, books, and other articles and supplies furnished and on hand, and to issue to any officer a requisition on the secretary of state, for any books, stationery, or other supplies needed by such officer;

4. At the end of each fiscal year, and at such other times as the board thinks proper, to cause an inventory to be taken of all articles and supplies on hand and contracted for, and to make an examination of all accounts and vouchers for such supplies;

5. To establish rules for the government of the board in relation to all contracts, not inconsistent with law.

Cal. Pol. C., p. 183*. Mont. Pol. C., § 704.

2490. (952.) Must advertise for bids. Before any contract is let, the board must advertise for twenty days, in two daily newspapers printed in the state, one of which must be published at the seat of government, for sealed proposals to furnish any or all the supplies mentioned in the next preceding section; *provided,* that such advertisement need not be made where the amount to be expended for such supplies shall be less than $200.

Cal. Pol. C., p. 183*. Mont. Pol. C., § 705*.

2491. (953.) Id. The board must specify in the advertisement the amount and kind of each article required.

Cal. Pol. C., p. 183*. Mont. Pol. C., § 706.

2492. (954.) Bids. Opening. A sample and a minute description of each article must accompany and be deposited with each proposal, and proposals received must be directed to the board, and opened and compared by it at its office at twelve o'clock noon of the day specified in the advertisement; and the board must award the contract for furnishing such supplies, or any of them, to the lowest responsible bidder.

Cal. Pol. C., p. 183*. Mont. Pol. C., §§ 706, 707.

2493. (955.) Id. Check to accompany bid. Bond. Each bid must be accompanied by a certified check equal to 10 per cent of the amount of the bid, to be held upon the condition that upon the award of said contract to him, the bidder will faithfully and promptly execute a good and sufficient bond, payable to the state, with two sureties to be approved by said board, conditioned for the faithful performance of the contract, and for the delivery of the supplies for which he has contracted, under such rules and regulations as the board may prescribe.

Cal. Pol. C., p. 183*. Mont. Pol. C., § 708.

2494. (956.) Classified bids. Rejection. The board may, in the advertisement, classify the supplies and articles to be furnished, and may receive bids, and award contracts for such separate class of supplies, or such separate article, as it considers the lowest and best bid. The board may require any class of supplies or separate articles thereof to be delivered in instalments. Any and all bids may be rejected, and the board may advertise again.

Cal. Pol. C., p. 183*. Mont. Pol. C., § 709.

2495. (957.) Legislative supplies. Publishing proposed amendments to constitution. The board must, at least one month before the meeting of the legislature, advertise, as provided in the preceding sections, for repairing and furnishing the halls and rooms, and for stationery, fuel, light, and such other supplies as are necessary for the members of the legislature at the ensuing session; and at the commencement of each session thereof the board must report to the legislature an account of the supplies, of the expenditures for the same, and of the stock on hand, and may contract for the publication of proposed amendments to the constitution. Am'd '11, p. 138.

Cal. Pol. C., p. 184*. Mont. Pol. C., § 711.

2496. (958.) Selling unnecessary material. When deemed advisable by the board, it may sell any old furniture or other material belonging to the state and not required for state purposes and pay the proceeds thereof into the state treasury to the credit of the general fund.

Sup. Cal. C. (1893) p. 32.

2497. (959.) Hiring rooms for state purposes. The board may hire the necessary rooms for the state officers, and the halls and rooms for the legislature and its committees, without advertising as provided in this chapter, if the board so decides.

Mont. Pol. C., § 712.

2498. (960.) State officers not to be interested in contract. No mem-

ber or officer of any department of the government shall be in any way interested in any contract made under the provisions of this chapter.

2499. (961.) Clerical help. The board of examiners may, when necessary, employ clerical help for any state officer or board, but no clerk or clerks shall be employed by any such officer or board without the authority of the board of examiners; nor shall the board of examiners authorize the employment of such clerical assistance, except when the duties of the office or of the board cannot be performed by the officer or the members of such board.

2500. (962.) State board of examiners to publish reports of state officers. The state board of examiners is authorized to procure the publication of as many copies as in their judgment may be necessary, not exceeding 1000, of the biennial reports of state officers and state institutions immediately after their submission to the governor, and before the meeting of the legislature; *provided,* that any state institution having the facilities for so doing may print and publish the necessary copies of its biennial report, not to exceed 1000 copies. The state board of examiners shall also procure the publication of 1000 copies, in pamphlet form, of the attorney-general's official opinions at the end of each year for distribution by the attorney-general to state officers, county attorneys, district attorneys, and other officers throughout the state. Am'd '07, p. 203.

2501. (963.) Repayment of money collected for lease of school lands. The state board of examiners is hereby directed to receive, audit, and allow all just claims of persons who have paid moneys in pursuance of chap. 76 of the session laws of the territory of Utah, of 1892, in relation to the leasing of school lands, and the state auditor is hereby directed to draw his warrant therefor, on the state district school tax fund.

Money paid by lessee of lands under chap. 76, laws of 1892, is a just claim within meaning of this section, provisions of which are mandatory.
Thoreson v. State Bd. Ex., 19 U. 18; 57 P. 175.

When claim is just and admitted to belong to class mentioned in this section, it became imperative duty of the board to allow it, and upon failure to do so, mandamus will lie to compel performance. (On rehearing, 21 U. 187; 60 P. 982.)
Id.

The provisions of Con. art. 7, sec. 13, do not prohibit the passage of a law such as § 2501, creating a legal obligation on the part of the state, out of what was a mere moral obligation, without such obligation having been first considered and acted upon by the state board of examiners. (On rehearing of 19 U. 18; 57 P. 175.)
Id.

The provisions of this section are not in conflict with Con. art. 7, sec. 13, providing that claims shall be examined and acted upon by the state board of examiners.
Id.

TITLE 30.

FEDERAL JURISDICTION.

2505. (963x1.) Jurisdiction ceded U. S. over federal buildings. Jurisdiction is hereby ceded to the United States in, to, and over any and all lands or territory within this state which has been or may be hereafter acquired by the United States for the purpose of sites for public buildings, of every kind whatever, authorized by act of congress; the state, however, reserving the authority to execute its process, both criminal and civil, within such territory. '99, p. 82; '03, p. 9.

Congress to have jurisdiction over places purchased for public buildings by consent of state legislatures, U. S. Con. art. 1, sec. 8.

2506. (963x2.) Governor to execute cession. The governor is hereby authorized and empowered to execute all proper conveyances in the cession herein granted upon request of the said United States, or proper officers thereof, whenever any land shall have been acquired for such purpose.
'99, p. 82; '03, p. 9.

2507. (963x3.) Jurisdiction ceded over Fort Douglas and Fort Duchesne. Jurisdiction is ceded to the United Staes in and over all lands com-

prised within the limits of the military reservations of Fort Douglas and Fort Duchesne, in the State of Utah, to continue so long as the United States shall hold and own the same for military purposes or in connection therewith, and no longer, saving, however, to the said state the right to serve all civil process and such criminal process as may lawfully issue under the authority of this state against persons charged with crimes against the laws of the state, committed within or without said reservations.

'05, p. 18; '11, p. 58.

TITLE 31.

FEES.

CHAPTER 1.

FEES OF STATE OFFICERS.

2510. (964.) Collected in advance. Payment into treasury. For services performed in their respective offices, the secretary of state, the state auditor, the clerk of the supreme court, the board of land commissioners, the state inspector of mines, and the bank examiner shall collect in advance for the use and benefit of the state the fees hereinafter enumerated under their respective official titles, and shall pay the same to the state treasurer quarterly.

Penalty for refusal to perform service on payment of fee, § 2576.
Fees to be collected in advance and paid over quarterly, Con. art. 7, sec. 20; art. 21, sec. 2.
Shall keep fee book, etc., §§ 2583-2587.
Statement to accompany fees on payment to treasurer, § 2565.
Fees to be paid over before salary paid, § 2570.
Officers responsible for fees, § 2575.

2511. (965.) Fees of secretary of state. For a copy of any law, resolution, record, or other document, or paper on file in his office, 15 cents per folio.

For affixing certificate and seal of state, $1.

For receiving and filing each original or certified copy of articles of incorporation, 25 cents on each $1000 of the authorized capital stock of the company or corporation; *provided,* that the same shall be charged and collected for receiving and filing certified copies of articles of incorporation or of amendments to said articles, or certificates of increase, increasing the capital stock of foreign corporations complying with the provisions of § 945. No fee shall be charged for filing certified copies of articles of incorporation organized not for pecuniary profit, nor for canal or irrigation corporations engaged exclusively in furnishing water for lands owned by the members thereof; nor for filing certified copies of articles of incorporation of any water users' association which is organized in conformity with the resuirements of the United States under the reclamation act of June 17, 1902, and which, under its articles of incorporation, is authorized to furnish water only to its stockholders.

For filing each certified copy of an amendment to articles of incorporation increasing the capital stock of any corporation not exempt under the provisions of this chapter, and issuing certificate thereof, 25 cents for each $1000 of increase of such capital stock.

For filing each certified copy of other amendments to articles of incorporation, and issuing certificate thereof, $5.

For receiving and filing articles of incorporation and by-laws of foreign corporations not included in the proviso to the third subdivision above, $25.

For issuing each certificate of incorporation, $5.

For issuing certificate of compliance on the part of a foreign corporation, $5.

For issuing each certificate of incorporation not organized for pecuniary profit, $1.

For issuing certificate of amendment to articles of incorporation not for pecuniary profit, $1.

For each commission signed by the governor, $5; *provided,* that no charge shall be made for commissions for public officers serving without compensation.

For filing each trade mark, $3.

For filing appointment of resident process attorney by foreign corporations, $1.

For filing annual statement of each building and loan association, $5.

For issuing certified copy of annual statement of building and loan association, $2.

For issuing certificate of authority to building and loan association, $3.

For filing and certifying private banker's preliminary statement, $25.

For filing each quarterly statement of each bank, and issuing a certified copy thereof, $5.

For receiving and filing an acceptance of the provisions of the constitution on the part of an incorporated company and issuing certificate thereof, $3.

For each warrant of arrest issued by the governor and attested by the secretary of state upon the requisition of any other state or territory, $5.

For recording miscellaneous records, papers, or other documents, 20 cents per folio.

For filing any paper or document not otherwise provided for, $5.

For searching records and archives of the state, $1; *provided,* that no member of the legislature or other state or county officer shall be charged for any search relative to matters appertaining to the duties of his office or for a certified copy of any law or resolution passed by the legislature and relative to his official duties. '01, p. 58; '05, p. 242; '09, p. 170; '11, p. 66.

Fee for issuing license to peddlers, § 4397. Fee for registration motor vehicles, § 3963. Fee for filing marks and brands of cans, bottles, etc., § 6150. Fee for filing initiative election petition, § 2302.

2512. (966.) Fees of state auditor. For a copy of any paper filed or recorded in his office, 20 cents per folio.

For affixing certificate, with or without seal, $1.

For recording a pedigree of not to exceed one hundred words, $1; for each additional 100 words or fraction thereof, 25 cents.

For filing any paper not otherwise provided for, $1.

For recording a brand for one position on the animal, $1.50, and $1 for each additional position; *provided,* that the fee for recording a brand to one person for the entire side of an animal shall be $4.

For recording any mark, $1.50. Am'd '13, p. 23.

2513. (967.) Fees of clerk of supreme court. For filing transcript on appeal in each civil case appealed to the supreme court, $12, payable by the appellant, in full for all services rendered in each case up to the remittitur to the court below.

For filing petition for any writ, $10, in full for all services rendered in each cause.

For certificate of admission as attorney and counselor, $25, $15 of which shall be retained by the state treasurer as a special fund for the benefit of the state library, and to be expended by the board of control.

For making transcripts, copies of papers or records, 10c per folio.

For comparing any document requiring a certificate, 5c per folio.

For each certificate under seal, $1.

2514. (968.) Fees of board of land commissioners. For making each lease of agricultural lands, $1.

For making each lease of all other lands, including grazing lands, $5.

For each certificate of purchase, $2; for additional certificate issued on the same purchase to the same party, $1.

For copy of any resolution, record, or other document or paper on file in office, 15 cents per folio; for making certified copies of papers or records, the same fees as are charged by the secretary of state for like services.

2515. (970.) Fees of coal mine inspector. For each inspection of any mine, $10.

2516. (970x.) Fees of state engineer. The state engineer shall collect the following fees, which shall be paid by him into the state treasury on the first Monday in January, April, July, and October of each year.

For examining and approving plans and specifications for any dam, $1 for each and every foot in height of the dam to be built; and, if necessary to inspect the site where the dam is to be built, an additional charge of $10 per day and expenses shall be made.

For inspecting any diverting works, by request, $10 per day and expenses.

For examining and filing applications to appropriate any quantity of water up to and including ten cubic feet per second, for each such application, $2.50.

Applications for water that specify quantities greater than ten cubic feet per second, a fee of $1 for each cubic foot above the ten cubic feet hereinbefore mentioned.

For applications which contemplate the storage of water, a minimum fee of $2.50 for each such application.

Applications for water that specify quantities greater than five hundred acre-feet, a fee of 2 cents for each acre-foot of water to be stored, in excess of five hundred acre-feet; *provided, however,* that when the filing fee for any application for water shall exceed $1000, the balance of the fee in excess of $1000, may, at the option of the applicant, be paid at the time when proof of the completion of the works is submitted.

For examining map, profile, and drawings that are part of the proof of appropriation, $5.

For approving and recording completed applications, $2.50.

For issuing certificates of appropriation, each, $1.

For examining and filing notices of protest, each, $2.50.

For filing any other paper, $1.

Affidavits, decrees, and other instruments attached to a protest shall be considered other papers within the meaning of this section, and for each such, a fee of $1 shall be charged.

For certified copy of any paper, per folio, 20 cents.

For blue print copy of any map, profile, or drawing, per square foot, 10 cents.

For each certificate to copy of paper, drawing or map, 50 cents; *provided,* that the provisions of this section shall not apply to works prosecuted under the supervision of the United States reclamation service. R. S. 98, § 2459; '01, p. 143; '03, p. 105; '05, p. 164; '07, p. 249; '09, p. 91; '11, p. 5.

CHAPTER 2.

FEES OF COUNTY OFFICERS.

2520. (971.) Collected in advance. Payment into treasury. For services performed in their respective offices, the county clerk, the county recorder, the sheriff, the county treasurer, the county auditor, and the county

surveyor shall collect in advance for the use and benefit of the county the fees hereinafter enumerated under their respective official titles, and shall pay the same to the county treasurer monthly.

Penalty for refusal to perform services on payment of fee, § 2576.
Shall keep account of and pay over fees, Con. art. 21, sec. 2.
Statement to accompany fees on payment to treasurer, § 2566.
Shall keep fee book, §§ 2583-2587.
Fees to be paid over before salary paid, § 2571.
Officers responsible for fees, § 2575.

Under § 4, chap. 58, laws 1896, the failure by the county clerk to pay into the state treasury certain fees collected, after an account had been stated with him, entitled the state to charge said clerk 25 per cent damages on amount delinquent and interest from time of failure to pay.
State ex rel. v. Stanton, 14 U. 180; 46 P. 1109.

2521. (972.) Fees of clerk of the district court. For all services performed by him in any action or proceeding (except a probate or guardianship proceeding), $7, to be collected in advance from the party commencing the action; *provided,* that in cases where an injunction or an attachment or a receiver is asked for, an additional advance fee of $2.50 shall be collected.

For all services in an action for divorce in which judgment is entered upon default, $5.

For filing cross complaint, counterclaim, or complaint in intervention, $2.50.

For entering judgment by confession, $3.

For services performed in an action appealed from a justice's court, $5.

For filing and indexing papers on transfer of a cause from the district court of another county, $2.50.

For transmission of files and papers on the granting of change of venue to the district court of another county or to the United States court, exclusive of express charges or postage, $2.50.

For issuing a commission to take testimony, 75 cents.

For filing notice and undertaking and all services, including indexing on appeal to the supreme court, $3.50.

For all services after judgment, pending appeal to the supreme court (not including the making of copies), $2.50, to be paid by the party moving for a new trial or to set aside judgment.

For services performed in proceedings to perpetuate testimony, $1.00.

For services performed in an adoption case, $5.

For certificates of dismissal of appeal, when prepared by the clerk, $2.50; and when prepared and furnished by the attorney, $1.

For certifying transcript on appeal and exemplification of record, 2 cents per folio.

For filing remittitur from supreme court, $1, and for recording judgment entered thereon, 10 cents per folio.

For filing abstract of judgment from justice's court, including docketing the same, $1.

For issuing execution or order of sale, $1, and for copying decree and return, 10 cents per folio.

For filing any papers in any cause after judgment, not otherwise provided for, 25 cents.

For issuing transcript of judgment and certifying thereto, $1.

For taking and certifying depositions, for each folio, 20 cents, besides $4 for each day's attendance.

For declaration of intention to become a citzen of the United States, $2.

For final citzenship certificates, $3.

For services in probate and guardianship proceedings up to and including the final settlement of the case, in which the value of the estate does not exceed $2,500, $10.

For services in probate and guardianship proceedings up to and including the final settlement of the case in which the value of the estate exceeds $2,500, and does not exceed $5,000, except as hereinafter provided, $20.

For filing petition for letters testamentary, or of administration of guardianship, in any one case, $2, to be paid upon the filing of such petition.

For services in probate and guardianship proceedings up to and including the final settlement of the case in which the value of the estate exceeds $5,000 and does not exceed $10,000, except as hereinafter provided, $35.

For services in probate and guardianship proceedings up to and including the final settlement of the case in which the value of the estate exceeds $10,000 and does not exceed $20,000, except as hereinafter provided, $50.

For services in probate and guardianship proceedings up to and including the final settlement of the case in which the value of the estate exceeds $20,000 and does not exceed $50,000, except as hereinafter provided, $75; and in cases where the value of the estate exceeds $50,000, the clerk shall receive $2 additional fees for each $1000 valuation.

For making copies in all probate and guardianship proceedings, 10 cents per folio, and each certificate thereto, 25 cents.

The valuation herein mentioned shall be ascertained from the inventory filed, and the fees herein provided shall be collected at the time of filing such inventory.

For filing objections or cross-petitions to the appointment of an executor, administrator, or guardian, or objections to settlement of accounts or any other proceedings in an estate or guardianship matter, $5, to be paid by moving party.

For any assignment for the benefit of creditors, the fees to be collected shall be the same in amount as fees collected in probate actions; that is to say, $2 upon the filing of the deed of assignment, and such sum upon the filing of the inventory as would have been required to be paid in probate action for filing such inventory.

For all services not herein enumerated, a reasonable compensation, to be fixed by the judge of the district court.

Fees of clerk of the district court and county clerk. For administering and certifying oaths, except oaths administered at the trial of any cause, 25 cents.

For making copies of papers, records, and files in his office, 10 cents per folio, and for each certificate thereto, 25 cents.

For recording papers or documents other than those provided for, per folio, 10 cents.

For taking justification of sureties, each surety, 25 cents; and for taking and filing testimony thereon, 20 cents per folio.

For searching the files and records, $1 per hour.

For taking and certifying acknowledgment, 50 cents for one name; for each additional name, 25 cents.

For certifying to the official character of any official person, $1.

For certifying to the official character of a notary public or justice of the peace, 50 cents.

Fees of county clerk. For receiving and forwarding to the state recorder of marks and brands any application for a recorded mark or brand, 50 cents.

For filing and indexing articles of incorporation, $2.50.

For filing and indexing amendments to articles of incorporation, $1.50.

For filing and indexing articles of incorporation of corporations not formed for pecuniary profit, $1.

For furnishing certified copy of articles of incorporation of corporations not formed for pecuniary profit, $2.

For filing and approving bonds or oath of officers of corporations, 50 cents.

For recording articles of incorporation, 20 cents per folio.

For filing and registering dental certificates, $1.

For filing and indexing certificate of copartnership, $1.

For issuing and recording marriage license, $2.50.

For filing any bond or other instrument required by law to be filed in his office, other than the bond of a public officer or one pertaining to a case in court, 50 cents.

For sealing weights and measures, as follows: For each examination, testing, sealing, and certifying as required from the owner of the same, to wit: For any steelyards, beam, ground, floor, platform, counter, or other scales, by which may be weighed not exceeding 100 pounds, 75 cents.

For any such instrument by which may be weighed over 100 pounds, and less than 600 pounds, $1; over 600 pounds, $1.50.

For any nests or sets of measures, 75 cents.

For any yardstick, dry or liquid measure, 25 cents.

And the weights attached to any scales shall, as to the compensation of the sealer of weights and measures, be considered as part of the scales; *provided,* that where any such weight, measures, or instruments, upon subsequent examination, be found correct and shall not require to be stamped a second time, the aforesaid sealer of weights and measures shall not receive more than one-half the compensation provided for.

The county clerk in counties of the first and second class shall examine and test the before-mentioned instruments for weighing or measuring; *provided,* that in all other counties he shall, on application by any person who shall tender him the fee which he is hereinbefore authorized to receive; and he shall, in every case where he may employ labor or material in making accurate weights or measures, be entitled to extra compensation therefor, and to retain the article upon which such labor or material has been employed, until such compensation be paid. Am'd '05, p. 79.

Weights and measures, §§ 6277-6304.

An intruder into a public office, the reasonable value of whose services has equaled the fees received, has no right to retain any part of such fees from the rightful claimant.

Wenner v. Smith, 4 U. 238; 9 P. 293.

The federal fee bill is not applicable to cases in the territorial courts in which the United States is not a party.

U. S. v. McMillan, 10 U. 184; 37 P. 263; (reversed, 165 U. S. 504.)

Under chap. 16 of the laws of 1896, it was the duty of the county clerk to pay into the state treasury all fees collected by him in civil and criminal cases, except probate fees, from and after January 4, 1896, and his failure to pay the same after an account stated and demand made entitles the state to collect twenty-five per cent damages and interest at the rate of ten per cent. Payment into the county treasury is not a sufficient release.

State, ex rel. Richards v. Stanton, 14 U. 180; 46 P. 1109.

The $2.50 fee allowed for filing motion for new trial covers all affidavits to be filed, in connection therewith, and the clerk cannot charge 25 cents each for filing such affidavits.

Beck v. Lee, 51 U. —; 172 P. 686.

2522. (973.) Fees of county recorders. For recording any instrument, paper, or notice, other than bonds of public officers, not otherwise provided for, for the first folio 50 cents, to include necessary filing, indexing and abstracting, and for each additional folio, 20 cents; *provided, however,* that where any instrument, paper, or notice contains more than one description, an additional fee of 10 cents for each of such additional descriptions shall be collected.

In any instrument in which a right of way is described, which is connected with or is appurtenant to any tract of land described in such instrument, the description of such right of way shall not constitute a separate description; *provided,* that where such instrument contains a description of more than one such right of way, an additional fee of 10 cents for each such right of way shall be collected; *provided, further,* that where any instrument contains more than two names each for either first or second party, or plaintiffs, or defendants, or locators of a mining claim, for each additional name, 10 cents; and *provided further,* that where any affidavit or proof of labor contains the name of more than one mining claim, an additional fee of 10 cents for each additional mining claim metioned therein shall be collected.

For copies of any record or paper, 10 cents per folio, and when said record or paper has a plat or map attached thereto and made a part thereof, the fee for copying said map or plat shall be one-half the regular fee, as provided in this section, for recording the original map or plat.

For each certificate under seal, 50 cents.

For each entry of certificate of discharge of mortgage, deed, or trust,

or other instrument in the book kept for that purpose, and making the necessary reference on the record of the original instrument, 50 cents.

For releasing any instrument on the margin of the record, 25 cents; *provided,* that where more than one description is contained within said instrument to be released, 10 cents additional shall be collected for each extra description; and, *provided, further,* that where more than two names each for either first or second party appear in said instrument to be released, an additional fee of 10 cents shall be collected for each additional name.

For searching files or records in his office, $1 per hour.

For recording any plat of a subdivision into lots and blocks, 15 cents for each lot, and 25 cents for each folio of figures, letters, and characters.

For recording any other plat or map, 10 cents for each course or line, and 25 cents for each folio of figures, letters, and characters.

For taking and certifying acknowledgments, including seal, 50 cents for one name; each additional name, 25 cents.

For certificate attached to abstract of title, $1.

For each entry in an abstract of title, not including entries on margin of record, 75 cents.

For entry on abstract of title of satisfaction or release of mortgage, trust deed, or other lien, made on margin of record, 25 cents.

For recording medical certificates, $1.

For all other services not herein enumerated, a reasonable compensation.

Am'd '05, p. 57; '07, p. 57; '09, p. 200.

Fees for photographic copies, § 1577.
Fees for recording mining locations and proofs of labor, § 3901.
Fees for recording live stock leases, § 133.
Fees for recording fire insurance premium note, § 1180.

2523. (974.) Fees of sheriff. For serving a summons, or summons and complaint, or writ of garnishment, or any other process by which action or proceeding of garnishment, or any other process by which action or proceeding is commenced, on each defendant, including copies when furnished by plaintiff, $1.

For taking bond or undertaking in any case in which he is authorized to take the same, including justification, 75 cents.

For copy of any writ, process, or other paper, when demanded or required by law, for each folio, 20 cents.

For each service of any notice, rule, or order, 50 cents.

For serving a subpœna, for each witness summoned, 50 cents.

For serving an attachment on property, or levying an execution, or executing an order of arrest, or an order for the delivery of personal property, including copies when furnished by plaintiff, $2; but no traveling fees shall be allowed on such attachment, order of arrest, or order for the delivery of personal property, when the same accompanies the summons in the suit, and may be executed at the time of the service of the summons, except for the distance actually traveled beyond that required to serve the summons. He shall collect such further amount for his trouble and expense, in taking and keeping possession of and preserving property under attachment or execution or other process, as the court shall order; *provided,* that no more than $4 per diem shall be allowed to a keeper.

For advertising property for sale on execution, or any judgment, or order of sale, exclusive of the cost of publication, $1.

The fees herein allowed for the levy of an execution and for advertising shall be collected from the judgment debtor by virtue of such execution in the same manner as the sum herein directed to be made.

For drawing and executing a sheriff's deed, inclusive of acknowledgment, $2, to be paid by the grantee.

For serving a writ of possession or restitution, or putting any person entitled in possession of premises, and removing occupant, $5.

For holding each trial of right of property, to include all services in the matter, except mileage, $10.

For traveling (to be computed from the courthouse; *provided,* that when

transmitted by mail, from the postoffice where received) to serve any summons, or summons and complaint, or writ of garnishment, or any other process by which action or proceeding is commenced, or to serve any notice, rule, order, subpœna, venire, or attachment on property, or to levy an execution, or execute an order of sale or of arrest, or order for the delivery of personal property, or writ of possession or restitution, or to hold trial of rights of property, for each mile necessarily traveled, in going only, 20 cents.

For taking a prisoner in civil cases from prison before a court or magistrate, for each mile necessarily traveled, in going only, 20 cents.

For taking a prisoner from the place of arrest to prison, in civil cases, or before a court or magistrate, for each mile necessarily traveled, in going only, 20 cents; for each additional prisoner taken at the same time, 5 cents per mile; *provided,* that if any two or more papers be required to be served in the same suit or proceeding, at the same time and in the same direction, one mileage only shall be charged; and, *provided also,* that in serving a subpœna, when two or more witnesses live in the same direction, traveling fees shall be charged only for the most distant; and, *provided, further,* that only one mileage per day shall be charged for taking a prisoner from prison before a court or magistrate.

For delivering an insane person at the state mental hospital, when payable by private individuals, 20 cents per mile, one way, for the distance from the county seat of his county to the state mental hospital; and for every additional insane person taken at the same time, 5 cents per mile. If the sheriff shall require assistance, the actual and necessary cost thereof shall be added.

For receiving and paying over money on execution or other process, as follows: If the amount collected does not exceed $100, three per cent thereon; if the amount exceeds $100, and is less than $200, three per cent on the first $100 and two per cent on the balance; if the amount exceeds $300 and is less than $1000, three per cent on the first $100, two per cent on the second $100, and one and one-half per cent on the balance; if the amount collected exceeds $1000, three per cent on the first $100, two per cent on the second $100, one and one-half per cent on the next $700 and three-fourths of one per cent on the balance.

For executing in duplicate a certificate of sale, exclusive of filing the same, $1. Am'd '99, p. 31; '05, p. 71.

County to be paid for services under live stock board, § 228.

Under statute fixing the sheriff's commission for "receiving and paying over money on execution," where the plaintiff bid in the property and directed amount of his bid to be credited on the execution, and no money in fact passed, the sheriff is not entitled to commission.

Peery v. Wright, 13 U. 480; 45 P. 46.

2524. (975.) Fees of county treasurer. For each certificate of tax sale, in full for all services in the matter, $2.

For publishing the same and the amount of taxes due from each delinquent, 25 cents.

For issuing certificate of redemption from tax sale, 50 cents.

For seizing or selling personal property for taxes, $3 and reasonable expenses for necessary travel, seizing, handling, keeping, or caring for any property so seized or sold.

2525. (976.) Fees of county auditor. For each tax deed issued, including acknowledgment, $2. Am'd '03, p. 26.

2526. (977.) Fees of county surveyor. For making any survey, per day, $7.

For copies and certificates, per folio, 20 cents.

For each chainman or marker, if furnished by the surveyor, $3.

CHAPTER 3.

FEES OF PRECINCT OFFICERS.

2527. (978.) Fees of justice of the peace. Every justice of the peace may for his own use collect the following fees, and no other:

For taking charge of the body of any person supposed to have died by unlawful means, and making an investigation of the means whereby the person came to his death where no inquest is held, $3.

For holding inquest, per day, $3.

For each mile necessarily traveled in going to place of inquest, one way only, 15 cents.

For docketing each case, 25 cents.

For issuing summons, for one person, 50 cents; for each additional person named therein, 25 cents.

For each copy of any writ or process, including certificate, 25 cents.

For issuing writ of attachment or arrest, or for the delivery of property, or any other writ, 50 cents.

For issuing subpœna, including all witnesses required, 25 cents.

For each venire, 50 cents.

For each execution or order of sale, 50 cents.

For hearing any motion or demurrer, for each hour or fraction thereof, 50 cents.

For entering final judgment, 50 cents.

For each dismissal or continuance, 25 cents.

For each certificate, 25 cents.

For copy of any judgment, order, docket entry, or paper on file, for each folio, 10 cents.

For swearing the jury, 25 cents.

For taking depositions, per folio, 10 cents.

For filing each paper, 10 cents.

For taking and approving any bond or undertaking, including justification of sureties, 50 cents.

For administering oath or affirmation to other than witnesses, 25 cents.

For swearing each witness, 10 cents.

For entering satisfaction of judgment, 25 cents.

For issuing commission to take testimony, 50 cents.

For preparing and certifying transcript on appeal and transmitting papers, $1.

For all charges for making up and transmitting papers on change of venue, $1.

For entering cause without process, 50 cents.

For entering judgment by confession, $1.

For each warrant of arrest or search warrant, 50 cents.

For each commitment to jail, 50 cents.

For each recognizance or bail, 50 cents.

For entering judgment for fine or other punishment, 50 cents.

For order of discharge to jailer, 25 cents.

For solemnizing marriage, $2.50.

In actions for damages caused by trespassing animals, the fees shall be but one-half the amounts collected in other civil cases.

For hearing testimony or argument on the trial of a civil or criminal case or proceeding, per day $3; *provided,* that in default cases, the fee shall be $2 for all services up to and including the entry of judgment; and, *provided further,* that where proceedings in any case occupy portions of more than one day, not more than one per diem compensation shall be charged unless the total number of hours occupied in the trial or hearing shall exceed six hours, in which case six hours shall be reckoned as a day for the purpose of fixing per diem compensation.

For issuing warrant of appraisement, under lien law, 50 cents.

For recording appraisement, or sale bill, under lien law, per folio, 20 cents. Am'd '05, p. 66.

Fees to be in full compensation, Con. art. 21, sec. 2.
Justice must demand fees in advance, § 2593.
Under § 4465, a suit by a city to collect a poll tax is an action of debt over which justices of the peace have jurisdiction, and a city justice of the peace is entitled to receive the fees prescribed by this section.
Timmony v. Salt Lak City, 28 U. 302; 78 P. 799.

2528. (979.) Justices' fees in criminal cases, etc. Certification by attorney. Accounts against the county for fees of justices of the peace for services in criminal cases and for holding inquests shall be certified as correct by the county attorney and shall be presented to the auditor; *provided,* that the board of county commissioners may reject bills in all cases or proceedings in which the county attorney has not in writing authorized the issuance of a warrant of arrest or the holding of an inquest.

2529. (980.) Justices of the peace cannot take acknowledgments. Justices of the peace are prohibited from taking acknowledgments of deeds or other instruments required by law to be recorded.

2530. (981.) Fees of constable. Constables may for their own use collect the following fees, and no other:

For serving summons, for first party served, $1; for each additional defendant served, 50 cents.

For each copy of summons for service, when made by him, 25 cents.

For levying writ of attachment or of execution, or for executing order of arrest or order for the delivery of personal property, $2.

For keeping personal property, such sum as the court may order; but not more than $3 per day shall be allowed for a keeper when necessarily employed.

For taking bond or undertaking, including justification, 50 cents.

For copies of writs and other papers, except summons, complaints, or subpœnas, per folio, 10 cents; *provided,* that when correct copies are furnished to him for use, no charge shall be made for such copies.

For serving any writ, notice, or order, except a subpœna, for the first person, $1; for each subsequent person, 50 cents.

For writing and posting notices of sale of property, $1.

For furnishing notice for publication, 25 cents.

For serving subpœnas, each witness, 25 cents.

For collecting money on execution, three per cent.

For executing and delivering certificate of sale, 50 cents.

For executing and delivering constable's deed, $2.

For each mile necessarily traveled in the service of any writ, order, or paper, except a warrant of arrest, in going only, 15 cents.

For each mile traveled in executing a warrant of arrest, both in going to and returning from place of arrest, 15 cents; *provided,* that in serving any process in any criminal case the constable shall not be entitled to mileage for distance traveled outside of his own precinct except such service be authorized in writing by the county attorney; and, *provided further,* that when traveling in the performance of two or more services at the same time, including the service of civil process or criminal warrants, or transportation of persons charged or convicted of a criminal offense, but one mileage shall be charged.

For arresting prisoner and bringing him into court, $2.

For summoning a jury, $1.

When, in the cases prescribed by law, he shall perform the duties of sheriff, he shall be entitled to collect the same fees that the sheriff would have been entitled to collect for such services.

Fees to be in full compensation, Con. art. 21, sec. 2.
When constable performs sheriff's duty, § 1523, 1524.

2531. (982.) Id. As poundkeeper. The constable may collect for his own use as poundkeeper the following fees:

For taking into his possession any animal, or animals if found together, 50 cents.

For driving such animal or animals, each mile, 10 cents.

For traveling in delivering copy of certificate of appraisement, 10 cents a mile, one way, for ten miles, and 5 cents for each mile thereafter.

For advertising including posting and mailing notices, $1.

For each bill of sale, including filing copy with the clerk, 50 cents; *provided,* that all animlas sold to one person shall be included in one bill of sale.

For branding, 25 cents for the first, and 10 cents for each additional animal.

For selling animals, 5 per cent of the amount of the sale.

For keeping animals, a reasonable sum, to be determined by the market price of forage and pasturage at the time and place where the animals are kept.

2532. (983.) Constables' fees in criminal cases. Certification by county attorney. Accounts against the county filed by constables for services in criminal cases shall be certified as correct by the county attorney, and shall be presented to the auditor; *provided,* that the board of county commissioners may reject such bills in all cases or proceedings in which the county attorney has not in writing authorized the issuance of the warrant of arrest.

CHAPTER 4.

FEES OF NOTARY PUBLIC, ETC.

2535. (984.) Fees of notary public. Every notary public may collect for his own use the following fees:

For protesting the non-payment of a promissory note or non-payment or non-acceptance of a bill of exchange, draft, or check, $1.

For drawing and serving each notice of non-payment of a promissory note, or the non-payment or non-acceptance of a bill of exchange, order, draft, or check, 35 cents.

For recording every protest, 50 cents.

For drawing an affidavit, deposition, or other paper, for which provision is not herein made, for first folio, 50 cents; for each subsequent folio, 15 cents.

For taking an acknowledgment or proof of a deed or other instrument, to include the seal and writing of the certificate, for the first signature, 50 cents; for each additional signature, 25 cents.

For administering an oath or affirmation, 25 cents.

For every certificate, to include writing the same and the seal, 50 cents.

Fees to be in full compensation, Con. art. 21, sec. 2.

2536. (985.) Fees of commissioner of deeds. Every commissioner of deeds may collect for his own use the same fees as those provided for a notary public.

2537. (986.) Fees of court stenographer. For services performed by him, every court stenographer may collect for his own use such sums, not to exceed the fees herein provided, as the district judge shall stipulate by contract.

For reporting proceedings in court, $8 per day.

For transcribing at length, 8 cents per folio.

For transcribing in narrative form, 10 cents per folio.

For additional copies, not exceeding two, to the same party, 2 cents per folio.

Court stenographers, duties and compensa tion, §§ 1901-1906.

2538. (987.) Fees of crier. Every crier appointed by virtue of the provisions of the lien law may collect for his own use the following fee:

For crying sale, per day, $2.

2539. (988.) Fees of appraiser of damage by animals. Every appraiser of damages done by estrays or trespassing animals may collect for his own use the following fees:

For each mile necessarily traveled to place of trespass, one way, 10 cents.

For time employed in making appraisement, per hour, 20 cents. There shall be no charge for making certificate of appraisement.

Fees of appraiser, § 70.

2540. (989.) Fees of persons distraining animals. A person distraining animals for trespass may collect for his own use for delivering certificate of appraisement to the owner of the animals:

For first ten miles necessarily traveled, 10 cents; each additional mile, 5 cents. Mileage shall be charged in going only.

2541. (990.) Fees of mining recorder. Every mining recorder shall be allowed the same fees for recording and making copies of any record in his custody as are allowed by law to county recorders for similar services; *provided,* that fees for recording location notices may equal but shall not exceed $1 for each notice. Am'd '99, p. 29.

Fees of mining recorders, § 3901.

Where the by-laws of a mining district fix the fees to be allowed mining recorders different from those allowed by territorial statute, the latter must govern.
People v. Monk, 8 U. 35; 28 P. 1115.

CHAPTER 5.

FEES OF JURORS AND WITNESSES.

2542. (991.) Jurors fees. Grand jurors and trial jurors in the district court shall receive $3 per day for each day's attendance, and 20 cents per mile, one way, for the distance necessarily traveled in attending court. A juror who is excused upon his own motion on the first day of his attendance in obedience to notice shall not receive per diem or mileage. Am'd '13, p. 11.

A law of the territory, approved March 8, 1888, fixing the fees for jurors and witnesses, should be given a prospective and not a retrospective effect, and the fees allowed should be those fixed by law at the time the service was rendered.
People, ex rel. Haller v. Clayton, 5 U. 598; 18 P. 628.
People, ex rel. Kelsey v. Pyper, 6 U. 160; 21 P. 722.

2543. (992.) Jurors and witnesses to report daily. Every witness in a criminal case subpœnaed for the state, or for a defendant by order of the court at the expense of the state, and every juror, whether grand or petit, shall, unless temporarily excused, in person report daily to the clerk his attendance at court from the time of his appearance to the date of his discharge, and no per diem shall be allowed for any day upon which attendance is not so reported.

2544. (993.) Statement of foreman of grand jury. Whenever a grand juror or a witness for the state before the grand jury is finally discharged, the foreman of the grand jury shall furnish to the clerk of the district court a statement containing information necessary for the clerk to make the juror's or witness' certificate.

2545. (994.) Witness' fees and mileage. Every witness legally required or in good faith requested to attend upon the district court or a grand jury is entitled to $2 per day for each day's attendance, and 20 cents for each mile actually and necessarily traveled, in going only; *provided,* that in case of a witness attending from without the state, mileage for such witness shall be allowed and taxed for the distance actually and necessarily traveled within the state, in going only. Am'd '11, p. 11.

Witnesses' fees in city and municipal courts the same as in district courts, § 1723.

Witnesses subpoenaed and in actual attendance in several cases at instance of same plaintiff are entitled to their fees in each case.
Smith v. Nelson, 23 U. 512; 65 P. 485.

A wife who is not a party to an action against her husband may be allowed witness' fees when called as a witness by him, and such fees are taxable.

I. X. L. Stores Company v. Moon, 49 U. 262; 162 P. 622.

Where a witness leaves his home pursuant to a subpoena or is served while away from home and returns to his home in due course of business before going to testify, he may claim mileage fees; and witnesses who were notified at their homes by telephone by the sheriff that he had subpoenas for them, and pursuant thereto came to the place of trial, were entitled to mileage fees from their homes to such place.

Holt v. Nielson, 37 U. 566; 109 P. 470.

A witness may waive the manner of service and be entitled to his mileage fees.

Id.

2546. (995.) Clerk's attendance roll. It shall be the duty of the clerk of the district court to keep an attendance roll, in which shall be entered the name of each witness subpœnaed for the prosecution in criminal cases, the name of each witness subpœnaed for the defendant at the expense of the state under order of the court, the name of each juror, where each witness or juror was subpœnaed or summoned, the date of appearance, the date of discharge, the number of days' attendance with the dates thereof the place of residence of the witness or juror, and the number of miles necessarily traveled by said witness or juror from the place of his residence to the place of holding court; and if a juror, the number of days of service in the trial of civil actions and the number of days' of service in the trial of criminal actions, or the number of days' service as a grand juror, as the case may be.

2547. (996.) Jurors' and witnesses' certificates. Whenever a grand juror or a juror engaged in the trial of criminal cases in the district court, or a witness subpœnaed on behalf of the state, or on behalf of the defendant at the expense of the state, in a criminal case, shall be discharged, the clerk of the district court shall issue to him under seal a numbered certificate, taken from a book containing a stub with like designations, stating the name of such juror or witness, when and where he was summoned or subpœnaed, the date of his discharge, the number of miles necessarily traveled from his place of residence to the place of holding court, the number of days of service, and the amount due for mileage and for service, and whether the same was as a grand juror or as a juror or witness in a criminal case. Whenever a juror who has been engaged in the trial of civil cases in the district court is discharged, the clerk shall issue to him a like certificate. Where the same juror has served in the trial of both civil and criminal cases, one certificate shall be issued to him for service in civil cases, and one for service in criminal cases. In apportioning mileage and per diem of jurors serving in the trial of both civil and criminal cases, the mileage and the whole number of days shall be divided between the two classes of service proportionately to the time occupied in each.

2548. (997.) Certification by county attorney. Warrant. Payment. The certificates of jurors in civil and criminal cases, and of witnesses in criminal cases, must be certified as correct by the county attorney, but no certificate of jurors or witnesses shall be so certified unless presented to the county attorney within twelve months after the date of issue. On presentation to the county auditor of any duly certified witness' or juror's certificate in a criminal case, the auditor shall draw his warrant to the county treasurer for the payment of the same out of the fund created for the redemption of such certificates. On presentation to the county auditor of the certificate of any juror in a civil case, duly certified, the auditor shall draw his warrant upon the county treasurer for the payment of the same out of the general fund of the county. Any such certificate shall be paid out of the fund upon which it is drawn; or, if there is no money in such fund with which to pay the same, it shall be registered and paid in its regular order.

Certificates must be presented within one year, § 2592.

Purchase of certificate by public officer a crime, § 2591.

The state is not required to pay mileage and attendance of jurors in civil cases.

Salt Lake County v. Richards, 14 U. 142; 46 P. 659.

2549. (998.) Witness fees in civil actions. The fees and compensation of witnesses in all civil actions must be paid by the party who causes such witnesses to be subpœnaed, and no witness shall be obliged to attend court in a civil action when subpœnaed unless his mileage and fees for one day's

attendance are tendered or paid to him on demand, nor unless his fees for attendance for each day are tendered or paid to him on demand. The fees of witnesses paid in civil cases may be taxed as costs against the losing party.

2550. (999.) Jurors in justices' courts. Mileage and per diem. Every juror in a justice's court who attends such court upon a subpœna properly issued, and every juror serving at an inquest, is entitled to $1.50 per day for actual attendance, and 20 cents for each mile necessarily traveled in attending said court or inquest in going only. Am'd '09, p. 46.

2551. (1000.) Id. Fees and mileage. Every witness legally required or in good faith requested to attend upon a justice's court or inquest is entitled to $1.50 per day for each day's attendance, and 20 cents for each mile actually and necessarily traveled, in going only; *provided,* that in case of a witness attending from without the state, mileage for such witness shall be allowed and taxed for the distance actually and necessarily traveled within the state, in going only. Am'd '11, p. 12.

2552. (1001.) Jurors' and witnesses' certificates. Every justice of the peace shall give to each person who has served before him as a juror at an inquest or in a criminal case, or as a witness at an inquest, or as a witness in a criminal case when summoned for the prosecution by the county attorney, or for the defense by order of the court, a numbered certificate, in which must be stated the name of the juror or witness, the title of the proceeding, the number of days' attendance, the number of miles traveled, and the amount due. Such certificate shall be presented to the county attorney, and, when certified by him as being correct, shall be presented to the county auditor, and, when allowed by the board of county commissioners, the auditor shall draw his warrant therefor on the county treasurer. Every justice of the peace shall keep a record of all certificates issued by him, which record shall show all of the facts stated in each certificate, and on the first Monday of each month he shall file with the county treasurer a detailed statement of all certificates issued.

Certificate must be presented within one year, § 2592.

2553. (1002.) Jury trial in district court. Deposit. If either party to any civil action pending in the district court shall desire a jury trial of the same, or of any issue or issues thereof, he shall, at the time of giving notice, deposit with the clerk the sum of $5. The clerk shall keep a separate account of all moneys deposited with him under the provisions of this section, and shall deposit the same in the county treasury at the same time as other fees of his office.

Jury waived unless demanded, Con. art. 1, sec. 10.

2554. (1003.) Id. In justice's court. Deposit. Either party may demand a trial by jury in a civil case in a justice's court on depositing with the justice a sum sufficient to pay the jurors their mileage and fees for one day's attendance.

If a justice of the peace refuses to try case, because plaintiff refuses to deposit the fees of jurors summoned at instance of defendant, a writ of mandate will issue to compel him to try it, though he may have entered a judgment of dismissal.
People v. Van Tassel, 13 U. 9; 43 P. 625.

2555. (1004.) Witnesses for defendant in criminal case. Expense. No witness for a defendant in a criminal case shall be subpœnaed at the expense of the state or of a county, except upon an order of the court. Such order shall be made only upon affidavit of the defendant, showing:

1. That said defendant is impecunious and unable to pay the per diem and mileage of said witness;

2. That the evidence of said witness is material for defendant's defense as he is advised by his counsel, if he have counsel;

3. That said defendant cannot safely proceed to trial without said witness.

2556. (1005.) Certain officers not entitled to witness fees. No officer of the United States, or the state of Utah, or of any county, incorporated city

or town, within the state of Utah, who is drawing a regular salary, in excess of $500 per annum, shall receive any per diem when testifying in a criminal proceeding. Am'd '03, p. 5.

2557. (1006.) Double fees forbidden. No witness shall receive fees in more than one criminal case on the same day.

2558. (1007.) Interpreters' fees. Interpreters and translators shall be allowed such compensation for their services as the court may allow, to be taxed and collected as other costs; but the same shall not exceed $3 per day.

CHAPTER 6.

STATEMENTS.

2565. (1008.) State officers to account for fees quarterly. The fees chargeable and collected by state officers for the use and benefit of the state shall be paid to the state treasurer at the end of each quarter, and must be accompanied by a statement thereof as shown by the fee book, duly verified by the officer making such statement. The statement shall be fully itemized, showing from whom and on what account such fees were collected, and it shall be made in duplicate, one copy of which shall be filed with the state auditor and the other with the state treasurer.

Fees to be paid over quarterly, § 2510.

2566. (1009.) County officers to account for fees monthly. The fees chargeable and collected by the officers of the several counties of this state for the use and benefit of the county shall be paid to the county treasurer on the first Monday in the following month, and must be accompanied by a statement thereof as shown by the fee book, duly verified by the officer making the statement. Such statement shall be fully itemized, showing the persons from whom and on what account, or the cases in which such fees were collected or earned; and it shall be made in duplicate, one copy of which shall be filed with the county auditor and the other with the county treasurer. Whenever any county officer shall pay to the state treasurer any fees or money collected by him, he shall prepare a statement as above provided, and shall file one copy with the state auditor and the other with the state treasurer.

Fees to be paid over monthly, § 2520.

2567. (1010.) Verification of statement. The verification attached to such statements shall be substantially in the following form:

State of Utah, county of .....

I, A B, county clerk (or other officer, as the case may be), do swear the fee book in my office contains a true statement in detail of all fees and compensation of every kind and nature, for official services rendered by me, my deputies, and assistants, for the (month or quarter) ending ....., 19.....; that said fee book shows the full amount received or chargeable in said (month or quarter) and since my last regular payment; that neither myself, nor, to my knowledge or belief, any of my deputies or assistants, have rendered any official service, except for the county or the state, which is not fully set out in said fee book; and that the foregoing statement thereof is full and correct.

.....

Subscribed and sworn to before me this ..... day of ....., 19.....

.....

2568. (1011.) Clerk's statement of jurors and witnesses' certificates. On the first Monday of every month the clerk of the district court must make a detailed statement of certificates issued to all jurors and to witnesses in criminal cases during the preceding month, showing the amount of fees and mileage earned by each, and shall file one copy thereof with the county auditor and the other with the county treasurer.

2569. (1012.) State to pay witnesses and jurors in criminal cases. At the end of each quarter it shall be the duty of the county treasurer and the county auditor of each county to prepare in duplicate and verify under oath a full and complete itemized statement of all certificates issued by the clerk of the district court since the date of the last statement for mileage and attendance of grand jurors, for mileage and attendance of petit jurors engaged in the trial of criminal cases in the district court, and for mileage and attendance of witnesses summoned by or on behalf of the state in criminal cases in the district court. Such statement shall set forth in detail the number of each certificate, the date of same, the name of the person or persons in whose favor issued, the nature of the service rendered, and such other information as may be necessary and required by the state auditor. One of said statements shall be transmitted to the state auditor and the other shall be filed in the office of the county clerk. Upon the receipt of said statement by the state auditor he shall, unless he find the same to be incorrect, draw his warrant in favor of the county treasurer upon the state treasurer for the whole amount of said jurors and witnesses' certificates, as shown by said statement, and shall transmit the same to the county treasurer. The county treasurer shall hold the funds drawn from the state treasury, upon the certificates aforesaid, for mileage and attendance of jurors and witnesses, as a separate fund for the redemption of jurors and witnesses' certificates. Am'd '03, pp. 30, 182.

2570. (1013.) State officer to account before receiving salary. The state auditor shall not draw his warrant for the salary for any quarter of any state officer by whom fees for the state are collected, until such officer shall have first presented him with the certificate of the state treasurer showing that he has made the statement and settlement for that quarter required in this title.

2571. (1014.) County officer to account before receiving salary. The county auditor shall not draw his warrant for the salary of any county officer for any month until the latter shall have first presented him with the certificate of the county treasurer showing that he has made the statement and settlement for that month required in this title; *provided,* that this section shall not be construed to prevent the payment of the salary of any employe or deputy of any officer.

CHAPTER 7.

GENERAL PROVISIONS.

2575. (1015.) Officers to keep account of fees. Payment into treasury. All state, district, county, city, town, and school officers, excepting notaries public, boards of arbitration, justices of the peace, and constables, shall keep a correct account of all fees collected by them, and shall pay the same into the proper treasury, and the officer whose duty it is to collect such fees shall be held responsible under his bond for the same.

Fees of state officers, payment, § 2510. Fees of county officers, payment, § 2520.

2576. (1016.) Fees payable in advance. Exceptions. Impecunious suitors. The state and county officers mentioned in this title shall not in any case perform any official service unless the fees prescribed for such service are paid in advance, and on such payment the officer must perform the services required; and for every failure or refusal to perform official duty, when the fees are tendered, any officer shall be liable upon his official bond; *provided,* that no fees shall be charged the state, or any county or subdivision thereof, or any public officer acting therefor, or in cases of habeas corpus, or in criminal cases, before final judgment, or for administering and certifying the oath of office, or for swearing pensioners and their witnesses,

or for filing and recording bonds of public officers; *provided, further,* that if any person shall make an affidavit before the judge of the district court, setting forth that he has a good cause of action or a good defense, and that he is unable to pay the fees in advance, the judge of the district court may, in his discretion, make an order that the clerk or the sheriff, or both, shall perform the necessary services in such case without any fee in advance, or he may require such person to give security for the costs, and then require such officers to perform the services, and it shall be the duty of such officers to obey the order of the district court.

Subpoena of witnesses for impecunious defendant in criminal case, § 2555.

In a case on appeal, the filing of an affidavit of impecuniosity relieves the necessity of advancing officers' fees which belong to the state, but not the filing of an undertaking under § 6996.

Hoagland v. Hoagland, 18 U. 304; 54 P. 978.

It is not error to grant a trial by jury on filing affidavit of impecuniosity under §§ 2576-2579, 6782.

Toltec Ranch Co. v. Babcock, 24 U. 183; 66 P. 876.

Whether the failure of a sheriff to charge legal fees and to include them in a statement filed by him hereunder is wilful or otherwise is a question of fact which should be submitted to the jury under proper instructions, in proceedings for removal of an officer for a wilful disregard of the statutes.

Law v. Smith, 34 U. 394; 98 P. 300.

2577. (1017.) Legal proceedings by poor person without cost. Oath. Any person may institute, prosecute, defend, and appeal any case in any court in this state by taking and subscribing, before any officer authorized to administer an oath, the following:

I, A B, do solemnly swear (or affirm) that owing to my poverty I am unable to bear the expenses of the action or legal proceedings which I am about to commence or the appeal which I am about to take, and that I verily believe I am justly entitled to the relief sought by such action, legal proceedings, or appeal.

See provisions of next preceding section.

In case of appeal to supreme court, § 6996.

Eddington v. Union Portland Cement Co., 42 U. 274; 130 P. 243.

2578. (1018.) Id. Officer to perform duties without fees. On such oath or affirmation being presented to any justice of the peace, or clerk of any court, such justice of the peace or clerk, as the case may be, shall at once file any complaint or papers on appeal and do any and all things necessary or proper to be done as promptly as though such litigant had fully paid all the regular fees; and the constable, or sheriff or his deputies, shall at once promptly serve any and all summons, writs, process, subpœnas, and all papers necessary or proper in the prosecution or defense of such cause for such poor person as though all the necessary fees and costs had been fully paid.

Stenographer's fees, when paid by state in criminal case, § 1906.

2579. (1019.) Id. If poor person successful costs collected from him. Nothing herein contained shall prevent such justice of the peace, clerk, constable, or sheriff from collecting their regular fees for all services so rendered for such poor person, in the event such poor person should be successful in his litigation, and all such fees and costs shall be regularly taxed and included in such judgment as may be recovered by such poor person, and the said fees and costs shall be paid to such justice of the peace, clerk, constable, sheriff, or deputy sheriff; *provided,* that in the event that said poor person fails in his action or appeal, then the costs of said action and appeal shall not be adjudged against him.

See Dunn v. Salt Lake & O. Ry. Co., 47 U. 137; 151 P. 979.

2580. (1020.) Id. If affidavit untrue, etc., fees to be paid or bond given. If it should be made to appear to the court by affidavit that the affidavit or affirmation is untrue or that the suit or appeal is frivolous or malicious or without merit, the court may make a rule on such poor person, fixing a day not less than five days from the date of service of such notice, requiring such poor person to appear at a fixed time and place, to show cause if any he have why he should not give bond and security for the costs of his action or appeal or pay the legal fees therefor, and, on failure so to do, why his suit, action, or appeal should not be dismissed. Should the court be of the opinion that the said poor person's affidavit or affirmation is frivolous or said action or appeal is malicious or without merit, the court in which such action is pending may dismiss it.

2581. (1021.) Id. Officer refusing to perform services guilty of misdemeanor. Any justice of the peace, clerk, or officer refusing to file or serve such papers shall be guilty of a misdemeanor and be punished as such.

2582. (1022.) Folio defined. The term "folio" when used as a measure for computing fees, shall be construed to mean one hundred words, counting every number expressed in numerals as a word; *provided,* that in computing the fees to be charged by the county recorder for recording any plat or map the word "folio" shall be construed to mean one hundred numbers, letters or characters. Any portion of a folio, when in the whole draft or paper there shall not be a complete folio, or when there shall be an excess over the last folio exceeding one-half, shall be computed as a folio.

Am'd '05, p. 58.

2583. (1023.) All officers must keep fee books. It shall be the duty of every officer in this title named, who is authorized to receive any fees for official services of himself or deputies, to keep a fee book, in which he shall enter an exact and full account, in detail, of all fees, commissions, or compensations, of whatever nature or kind, by him or his deputies earned, collected, or chargeable, with date, the name of the payer, and the nature of the service in each case. If any person shall hold more than one office, he may keep a separate fee book for each office, and may make separate statements for each, or he may keep a joint fee book and make joint statements, at his discretion.

2584. (1024.) All officers to post fee bill. It shall be the duty of every officer herein specified to prepare and keep posted in a conspicuous place in his office, a plain and legible statement of the fees allowed by law, upon pain of forfeiting, for failure to do so, $50, to be recovered, with costs, by any person, before any justice of the peace of the county.

2585. (1025.) Publication by officer, prepayment of cost. When, by law, a publication is required to be made by an officer, of any suit, process, notice, order, or other paper the cost of the same must be tendered by the party for whom such order of publication was granted before the officer shall be compelled to make such publication.

2586. (1026.) Receipt for fees paid. Every officer, upon receiving any fees for official duties or services, may be required by the person paying the same to make out in writing and deliver to such person an itemized account of such fees, and shall receipt the same; and if he refuses or neglects to do so when required, he shall be liable to the party paying the same for three times the amount so paid.

2587. (1027.) Not keeping fee book, etc. Penalties. If any officer shall refuse or wilfully neglect to keep a fee book, or to file a sworn statement, or to make returns, as herein required, he shall be deemed guilty of a misdemeanor.

2588. (1028.) Office vacated by receiving illegal fees. The board of county commissioners, upon receiving a certified copy of the record of conviction of any county, precinct, or district officer for receiving illegal fees, must declare his office vacant.

2589. (1029.) Id. Other penalties. Any public officer who shall charge and receive for any service rendered by him any other or greater amount than is prescribed by law for such service shall be deemed guilty of a misdemeanor, and shall forfeit to the person aggrieved the amount thereof and $25 as damages, and shall pay costs of suit.

2590. (1030.) False certification as to fees a felony. Every clerk of the district court, county attorney, justice of the peace, or other officer who shall certify as a fact any matter which he knows to be untrue, whereby any witness or juror shall be allowed a greater sum than he would otherwise be entitled to under the provisions of this title, shall be deemed guilty of a felony.

2591. (1031.) Officers forbidden to purchase certificates. No person connected officially with any of the district courts of this state, and no state, district, county, or precinct officer shall purchase or cause to be purchased any certificate issued to any juror or witness under the provisions of this title. Any person violating the provisions of this section shall be deemed guilty of a misdemeanor.

2592. (1032.) Certificates invalid after one year. Any holder of a witness or juror's certificate specified in this title shall be required to present it to the county treasurer or to the county auditor, as the case may be, of the county where such certificate was issued, within one year from the date of its issuance. If the same shall not be presented for payment within that time, it shall be invalid and shall not be paid.

2593. (1033.) Allowing suit without fees. Penalty. Every justice of the peace who files in his office any complaint, or allows a civil action to be commenced in his court, without the fees being paid therefor in advance, except in cases permitted by the statutes, is guilty of a misdemeanor.

TITLE 32.

FIREARMS.

('17, p. 278.)

2600. Prohibitions as to foreigners. Exceptions. Penalty. It shall be unlawful for any unnaturalized foreign born person to hunt, capture, or kill any wild bird or animal, either game or otherwise, of any description, excepting in the defense of the person, and it shall be unlawful for any such unnaturalized foreign born resident within this state to own or have in his possession, or under his control, a shotgun, rifle, pistol, or any firearm of any make; *provided,* that where such person may be employed or engaged in the destruction of predatory animals, or in caring for stock on the range, the provisions of this section shall not apply. Whoever violates any provision of this section shall be punished by a fine of not less than $25 for each offense, or by imprisonment for not less than fifteen days, or by both such fine and imprisonment; and any shotgun, rifle, pistol, or firearm owned by him or found in his possession, or under his control, shall be forfeited to the state of Utah.

2601. Disposition of firearms on forfeiture. Notice of the seizure of any firearm owned by, or found in the possession or under the control of, any person, violating any provision of this title shall be sent to the fish and game commissioner by the officer making the seizure immediately after the guilt of such person shall be established by a final adjudication in any prosecution brought against him for such violation; and the firearm so seized shall be sold at the discretion of the commissioner, the proceeds of such sale to go to the fish and game fund of the state of Utah.

Fish and game fund, § 2643.

2602. Duties of officers. Search and seizure. Exception. The commissioner and his deputies, members of the police force, sheriffs and their deputies, and all other officers qualified to serve criminal process shall have the right, and it is hereby made their duty, to arrest, without warrant, any person found with a shotgun or rifle, pistol, or other firearm or other deadly weapon in his possession if they have reason to believe that such person is an unnaturalized foreign born person. If any officer of the law above mentioned has reason to believe that a shotgun, rifle, or other firearm, or other deadly weapon, is being concealed by an unnaturalized foreign born person, he shall apply to any magistrate, justice of the peace, or court having jurisdiction of the offense, and such magistrate, justice of the peace or court, upon receipt of proof made by affidavit of the probable cause for believing that there is such

concealment by such person, shall issue a search warrant and cause a search to be made in any place where such shotgun, rifle, pistol, or other firearm or other deadly weapon may be concealed, and to that end the said officers shall have power, after demand and refusal, to cause any building, room, inclosure, or car to be broken open and entered, and any closet, chest, locker, box, trunk, crate, basket, box, package, or other receptacle to be opened and its contents examined by said officer; *provided,* that the provisions of this title shall not apply to persons who have filed upon homesteads. All acts and parts of acts inconsistent herewith are hereby repealed.

TITLE 33.

FIREMEN'S FUND.

('11, p. 293.)

2603. Fire insurance companies to make returns to insurance commissioner. Every fire insurance company, corporation, or association doing business in any incorporated city or town in the state that has, or may hereafter have, a regularly organized fire department under the control of the mayor and city council, or other governing body of said city or town, and which has, in serviceable condition for fire duty, apparatus and equipment amounting in value to the sum of $500 or more, shall return to the insurance commissioner of this state a just and true account of all premiums collected and received from all fire insurance business done by it within the corporate limits of each of said cities or towns during the year ending December 31 of each year, or such portion of the year as they may have transacted such business in said cities and towns. Said returns shall be made by the said companies, corporations, or associations within sixty days from and after the 31st day of December of each year.

2604. Premium statement. Every such fire insurance company, corporation, or association as designated in § 2603 shall, at the time of submitting its annual statement to the state commissioner of insurance, submit to him an additional premium statement, showing the premiums collected within the corporate limits of each of the cities or towns designated in the preceding section and deliver up to the said insurance commissioner 1 per cent of the amount of all premiums on fire and lightning insurance within the limits of each of such incorporated cities or towns, during the year ending December 31 of each year or for such portion of said year as such company, corporation, or association shall have done business in said city or town.

2605. Accounts of business transacted. Every such fire insurance company, corporation, or association shall keep accurate books of account of all business done by it, both on fire and lightning insurance, covering property situated within the limits of such incorporated cities or towns; and in case any fraud, misrepresentation, or mistake be apparent in said returns made by such company, as provided for in this title, it shall be the duty of the insurance commissioner to investigate such returns and collect the amount which he shall find to be due.

2606. Id. Penalty for failure to report, or making false reports. Every fire insurance company, corporation, or association in this state which shall neglect to keep such books of account as aforesaid, or shall fail or neglect to report, or pay over any of the money due on premiums received as aforesaid, at the times and in the manner specified in this title, or shall be found, upon examination, to have made a false return of the business done by it, shall for each offense forfeit, for the use and benefit of the fund hereinafter created, the sum of $100 for each day said statement or payment is delayed. Such forfeiture may be collected by a civil action to be instituted by the attorney-general in the name of the state.

2607. Revocation of certificate of authority for failure to pay funds. The insurance commissioner may revoke the certificate of authority of any fire insurance company, corporation, or association failing or refusing to pay such money or moneys within the times limited; and it shall be unlawful, in case such certificate of authority is revoked, for such company or any agent or solicitor thereof to solicit or receive application for insurance until the insurance commissioner has issued to the company, corporation, or association a new certificate of authority.

2608. Disposition of funds. All moneys collected under this title shall be turned over by the insurance commissioner to the state treasurer, to be kept by him in a fund out of which to pay to the heirs of deceased fireman, or to disabled firemen, the benefits provided by this title.

2609. Who entitled to benefits. Every member of every regularly organized fire department or company under the control of the mayor and city council, or other governing body of any city or town in this state having in serviceable condition for fire duty apparatus and equipment equal in value to the sum of $500, shall be entitled to the benefits of this title.

2610. Id. If any member of any of the above described fire departments or companies shall lose his life while in the performance of any of the duties devolving upon him as such, there shall be paid to his heirs out of the funds provided for by this title the sum of $2500. If any member of any of the above described fire departments or companies shall be injured while in the performance of the duties devolving upon him as such, he shall be paid out of said fund created by this title, for dismemberment by actual separation at or above the wrist joints or ankle joints on both hands or feet, $2500; one hand and one foot, $2500; one hand or one foot, $1250; one hand and irrecoverable loss of the sight of one eye, $2500; irrecoverable loss of both eyes, $2500; one eye, $1250; or if any member of any of the above described fire departments or companies shall contract sickness or receive injuries while in the performance of his duties as such, which shall result in his total disability, he shall be paid from said fund the sum of $2500.

2611. "Line of duty" construed. The line of duty specified in § 2610 required of a member of such fire department or company shall not be so construed as to mean any other duty except actual fire duty, which shall consist of service in the fire department from the time of the fire alarm until the members are dismissed by the officers at roll call; also any actual fire duty connected with the fire department when directed to perform the same by the officer in charge.

2612. Claims. All claims for death or injury accruing under the provisions of this title shall be filed with the state board of examiners within six months from the accrual thereof, and must receive the approval of said board before being paid. Any claim not filed with the state board of examiners within the time specified in this section shall not be allowed, unless reasons for the delay satisfactory to the board shall be submitted.

2613. Procedure where funds are insufficient to meet claims. In case there is not sufficient funds in said fund created by this title for the payment of any indemnity herein provided, when the claim therefor is presented, the portion that may be on hand may be paid and the balance when on hand; *provided,* that should there be more than one claimant for any indemnity herein provided, when there is not sufficient funds to pay all, they shall be paid pro rata in the proportion of the amount to which they may be entitled from said fund, and await the receipt of sufficient funds to be received into the fund created by this title for the balance; *provided, further,* that should it occur that when any member or members apply for an indemnity to which they may be entitled under the provisions of this title, and there are others who have made application prior thereto whose claims have not been fully paid, and there is not sufficient funds to pay all of the claims, the person or persons making such claims shall be paid pro rata with all prior claimants of the total

amount of the claims of each, and await the recovery of funds for the payment of the balance of their indemnity as herein provided, and this rule shall be followed with claims that may thereafter be presented.

TITLE 34.

FISH AND GAME.

('17, p. 228.)

2615. (1034.) Fish and game commissioner. Qualifications. Term. Vacancy. The governor of the state of Utah, by and with the consent of the senate, shall appoint a state fish and game commissioner, hereinafter called the state commissioner, who shall be a resident citizen of the state of Utah, shall have a knowledge of state conditions necessary to an intelligent interpretation and enforcement of all fish and game laws, who shall not be a member of any hunting, shooting, or fishing club, and whose term of office shall be four years and until his successor is appointed and qualified; *provided,* that when a vacancy occurs in the office of the state commissioner and the legislature is not in session, the governor shall have the power to fill such vacancy, until the next regular session of the legislature, and he shall have the power to remove the state commissioner for cause.

Am'd '99, p. 38; '05, p. 188; '07, p. 150.

2616. (1036.) Powers of commissioner. The state commissioner shall have the control and supervision of the waters, forests, and lands of the state for the collection, propagation, culture, and distribution of fish and game in the state, and shall receive and distribute all game, fish, fish-fry, and spawn coming into his hands, fairly and equitably among the several counties of the state. He shall have full control of all property of the state obtained and held for the purposes contemplated by this title.

Am'd '99, p. 38; '01, p. 155; '05, p. 188; '07, p. 150.

Arrest foreigners with firearms and take firearms from them, §§ 2600, 2602.
Issue and distribute licenses, §§ 2641, 2642.
Report licenses to state auditor and deposit funds with the state treasurer, § 2642.

2617. (1037.) Authority to take fish and game for scientific purposes. Reports. It shall be lawful for the state commissioner, or any person appointed by him in writing so to do, to take fish and game of any kind, dead or alive, or in any manner, for the purpose of inspection, cultivation, propagation, or for scientific or other purposes deemed by him to be in the interest of the fish and game industry of the state. He shall make a detailed report of his official transactions, including the number and kinds of fish and game distributed, and the locality, and the names of the streams, ponds, and lakes where the same have been placed, and submit such report, together with such recommendations as are deemed necessary by him for the future benefit of the fish and game, to the governor and the legislature not later than December 31 preceding each regular legislative session.

Am'd '99, p. 39; '05, p. 188; '07, p. 151.

2618. (1038.) Assistants and deputies. The commissioner may appoint, by and with the approval of the governor, and keep in service one chief deputy, and such additional deputies and other assistants as may be necessary. The state commissioner may also appoint, by and with the approval of the governor, special deputies, who shall constitute what shall be hereafter known as an advisory board, who shall serve without pay, receiving only necessary expenses. These deputies shall be taken from the various sections of the state; *provided,* that no more than one shall be selected from any one county of the state. Am'd '99, p. 39; '05, p. 189; '07, p. 151.

2619. (1035.) Salaries and expenses. The state commissioner shall receive a salary of $2400 per annum. and actual and necessary traveling and

contingent expenses, and his chief deputy shall receive a salary of $1500 per annum and actual necessary traveling expenses.
Am'd '99, p. 38; '01, p. 154; '05, 188; '07, p. 150.

2620. Bonds of commissioner and deputies. The state commissioner, before entering upon the duties of his office, shall give a bond in the penal sum of $10,000 for the faithful performance of his duties, which bond shall be approved by the state board of examiners and filed with the secretary of state. The chief deputy shall give bonds in the sum of $5000. All other deputies receiving pay from the state shall give bonds in the sum of $1000 each for the faithful performance of their duties and the prompt accounting for and the payment of any moneys coming into their hands by virtue of their office. Such bond shall run to the people of the state and be approved by the state commissioner. Am'd '99, p. 39; '05, p. 189; '07, p. 151.

2621. (1039.) Official duties. Make arrests. Examine and search. Procedure. It shall be the duty of the state commissioner, chief deputy, and their deputies to see that all of the laws of the state for the protection of fish and game are faithfully enforced throughout the state, and for this purpose they are collectively and severally given the same power and authority granted by the law to, and exercised by, sheriffs and constables. The commissioner and deputies are authorized and required to enforce this title, and to seize any fish or game taken or held in violation of this title, and shall have full power and authority so to do, and it shall be the duty of any such officer, with or without a warrant, to arrest any person whom he has reason to believe guilty of a violation thereof, and if without a warrant to hold him until a warrant can be procured; to open, enter, and examine all cars, stages, packs, warehouses, stores, vehicles, outhouses, boxes, barrels, and packages where he has reason to believe any game or fish taken or held in violation of this title may be found, and to seize the same; *provided,* that if such search and seizure be without a warrant, such warrant shall be secured as soon as possible during the search or seizure, if demanded; and, *provided, further,* that a dwelling house actually occupied can be entered for examination only in pursuance of a warrant. Am'd '99, p. 39; '01, p. 155; '05, p. 189; '07, p. 151.

2622. (1040.) Removal of fish. Drainage of canals. Notice. It shall be the duty of the chief commissioner to take, or cause to be taken, in the best practical manner, any game fish found in pools or other places where receding waters from rivers, streams, canals, or other water ways have left them, and which are likely to become dry, and to make the best disposition of the dead fish in the interest of the state fish and game fund, and carefully to put back the live fish into state waters. Any person, corporation, or company owning or controlling any irrigation canal, ditch, or mill race leading through any of the waters of the state known to contain game fish, who shall desire to drain any such canal, ditch, or mill race for any purpose, shall give a written notice to the state commissioner, or one of his deputies, and on the same date mail a duplicate of the said notice to the commissioner, at least five days prior to such draining. Failure to comply with the provision of this section shall be deemed a misdemeanor, and shall be punishable by a fine of not less than $100. R. S. '98, § 1041; '99, p. 39; '05, p. 190; '07, p. 152.

2623. (1041.) Fishways. Refuse matter. Offenses and penalties. The owners of any dam across any of the public streams in this state, either now in use or hereafter built, shall, if so required by the state commissioner or his deputies, and under his or their supervision, erect suitable fishways to allow the free, uninterrupted passage of fish up and down the streams, said fishways to be built and maintained by the owner of said dam. It shall be a misdemeanor for any person or persons, corporation or corporations, company or companies, to build or maintain any dam that will be the means of killing or destroying fish passing up and down the streams. And it shall be a misdemeanor for any person, corporation, or company owning any mill, factory, or reduction works in this state to cause or permit any refuse matter from said

mill, factory, or reduction works to be washed, dumped, or placed in any of the streams or waters of this state, or to place such refuse matter from said mill, factory, or reduction works in such close proximity to any of the streams that the same might be washed into said streams by rain. Any person or persons violating the provisions of this section shall be guilty of a misdemeanor and fined not less than $100 for such violation, and each day during which such violation continues shall constitute a separate offense.

R. S. '98, § 1042; '99, p. 40; '03, p. 152; '05, p. 190; '07, p. 152.

2624. (1042.) Screens. It shall be unlawful for any person or persons, corporation or company, to take any water from state streams, lakes, or reservoirs for power plant purposes or waterworks, without first furnishing and maintaining suitable screens or other devices to prevent fish from entering said power plant, mill race or waterworks system, said screens or other devices to be built and maintained under the direction of the state commissioner or his deputy. and at the expense of the said owner or operator; *provided,* that said screen shall not interfere with the operation of any power plant by materially obstructing the flow of water used for power or other purposes. The violation of this provision shall be a misdemeanor.

R. S. '98, § 1043; '99, p. 40; '05, p. 190; '07, p. 152.

2625. (1049.) Safety devices in irrigation canals. It is hereby made the duty of the fish and game commissioner to see that all irrigation canals, when deemed necessary by the state commissioner, are properly protected by some device (which shall not be the means of materially obstructing the flow of water into such canals) so that no fish may enter said ditches between April 1 and October 15 of each year; said device to be provided and maintained out of the fish and game fund.

R. S. '98, § 1050; '99, p. 41; '05, p. 194; '07, p. 158.

2626. (1043.) Angling season. Hooks and poles. Dates and places. It shall be unlawful for any person at any time to fish for, or to take any fish from any of the waters of this state by any device or means whatever, except as hereinafter provided. It shall be lawful to angle between the 15th day of June and the 30th day of November following, both dates included; *provided,* that it shall be lawful to angle fish from Fish lake between June 15 and October 1, and Strawberry reservoir between July 1 and September 30, both dates included. It shall be lawful to fish in Panguitch lake at all times of the year; *provided,* it shall be unlawful for any person to fish or take any fish from the waters of this state at any time between 9 o'clock p. m. and 4 o'clock a. m., or to take or have in his possession at any time any bass less than eight inches long or any trout or mountain herring less than six inches long.

The word angling, as used in this title, is defined to be fishing with a rod or pole held in the hand or hands, such rod or pole to have attached thereto artificial fly hook or hooks, not exceeding two in number, or not exceeding two baited hooks, or one baited hook with not more than one gang of not more than three hooks, or one trolling-spoon with not more than one gang of not more than three hooks. Any person violating any of the provisions of this section shall be guilty of a misdemeanor.

R. S. '98, § 1044; '99, p. 40; '01, p. 155; '03, p. 152; '05, p. 191; '07, p. 153.

2627. (1044-5.) Sales prohibited. Exceptions. Limit of catch. It shall be unlawful for any person to sell, offer to sell, expose for sale, or have in his possession with intent to sell, at any time, any eastern brook trout, rainbow trout, grayling trout, native trout, black-spotted mountain trout, or any other species of trout, or any land-locked salmon, herring, or black bass taken from any of the public waters of this state; *provided,* that it shall be lawful to sell black bass between June 15 and September 30, both dates included. In prosecutions under this section it will be sufficient to allege generally that such fish were unlawfully sold, offered, exposed, or held for sale, and proof of sale or offering or exposing to sell shall be prima facie evidence of guilt. It shall be unlawful for any person to catch more than ten pounds and one fish of any

or all of said varieties or species of fish on any one day, excepting black bass, which limit shall be fifteen founds and one fish, or to have in his possession at any time more than twenty-five pounds of any or all of the said varieties or species of fish.

R. S. '98, § 1046; '99, p. 40; '01, p. 156; '03, p. 153; '05, p. 191; '07, p. 154.

2628. Private ponds. Protection. Permit to sell and ship. Seasons. The owner or owners of private fish ponds shall, before selling or shipping any fish from the same, make application to the state commissioner, by affidavit, describing accurately such pond, where located, when such pond was completed and stocked with fish, from whence the fish were procured, the kind of fish to be sold or shipped, the railroad station from which he desires to ship such fish; and upon satisfactory showing being made to the state commissioner that such private pond is in fact a private pond, and that the fish desired to be shipped have been reared in said pond, and upon payment of $1, the state commissioner shall issue to the owner or owners of such private pond a permit to sell or ship such fish. Said permit must contain the date when issued, to whom issued, the number, the name, and location of the pond from which such fish are to be shipped, and also the station from which the shipments are to be made. All permits shall continue in force from the date of issuance until the 31st day of December following their issue. Such permit shall be issued in triplicate, one copy to be given to the shipper, one to the railroad or express agent at the station from which the shipments are to be made, and the third copy to be placed on file in the office of the state commissioner. A copy of the bill of lading for each and every shipment must be delivered or mailed by the shipper to the state commissioner on the day shipment is made. It shall be unlawful for any person to operate or maintain any private fish pond within this state without erecting and maintaining a sufficient screen, approved by the state fish and game commissioner, at the point where the waters enter such pond from any state waters, and also at the point where the waters leave such pond, so as effectually to prevent any fish from entering or leaving such pond. Every person violating any of the provisions of this section shall be guilty of a misdemeanor. It shall be unlawful for any owner or owners of any private ponds knowingly to deliver to any company, corporation, or individual any game fish to be carried or shipped outside of the state, without furnishing and mailing a copy of the invoices to the fish and game commissioner on the date the delivery is made.

R. S. '98, § 1046; '99, p. 40; '01, p. 156; '03, p. 153; '05, p. 191; '07, p. 154.

2629. Transporting fish. Rules governing. Violations punished. It shall be a misdemeanor for any express company, railroad company, other transportation company, or other common carrier of any kind to receive any fish of any kind whatever for shipment, unless they have in their possession a duplicate permit issued by the fish and game commissioner for such shipping as above described. And it shall be a misdemeanor to take fish or spawn from any of the lakes or streams of this state and place them in private ponds at any time, except as provided in § 2617; and it shall be a misdemeanor for any person or persons to sell or offer for sale any fish not propagated or grown in a private pond; *provided,* that carp, suckers, chubs, mullets, and catfish may be sold at any time; *provided, further,* that nothing in this title shall apply to fish raised outside of this state, except trout. It shall be unlawful for any individual, company, or corporation to ship or cause to be shipped or carried outside of this state, any fish, without first securing from the state commissioner a permit covering the period during which such shipments are to be made. This permit must be issued in triplicate, one copy to be delivered by the shipper to the express company, one to be retained by the shipper, and one to be mailed to the state fish and game commissioner.

2630. (1047.) Use of seines, spears, and hooks. Classification of fish and waters. For the purpose of catching carp, chubs, catfish, mullets, or suckers, and these fish only, seines, not more than two hundred yards long and twelve feet wide, with meshes not less than one and one-half inches

square for fifty yards in the center, and with meshes not less than two inches square in the wings thereof, may be used at any time in the following named waters only: Bear lake, Sevier river, from Sevier lake to the mouth of the Sevier bridge reservoir; the Colorado, Green, Grand, and San Juan rivers; the Gunnison reservoir; Sanpitch river; Redmond lake; Burrville reservoir; Sevier river, from the Black Knolle creamery north to the county line between Sanpete and Sevier counties; the Otter Creek reservoir, including Otter creek as far north as the old reservoir in the narrows, about six miles between Greenwich and the mouth of the canal that empties into Otter Creek reservoir from the east fork of the Sevier river; the east fork of the Sevier river from its junction with the waters of Otter creek, one-fourth of a mile below the said Otter Creek reservoir; Price river from Spring glen to Green river, Carbon county; San Rafael river from Orangeville to Green river, Emery county; Bear river, below the Idaho line; and in Utah lake and Jordan river; *provided,* that in Bear lake it shall be lawful to use seines or nets for catching herring, trout, and white-fish, between July 1 and May 1 following; *provided, further,* that it shall be unlawful to take fish from the waters of Bear lake with gill nets within four hundred yards of the mouth of any stream flowing into said lake. In Utah lake it shall be unlawful to use seines from June 1 to September 1, or at any time, without the presence of a deputy, who shall be paid not to exceed $2 per day by the party drawing the seine, and such deputy shall give a bond of $250 for the faithful performance of his duties, payable to the state of Utah, and to be filed with the state commissioner; *provided,* that before any person shall use a seine in any waters named in this section, such person shall procure a seiner's license from the state commissioner, on payment of $1.50, except to seine in Utah lake and Bear lake, where the fee shall be $5; *provided, further,* that before any person shall use a seine in any of the waters of this state, except Utah lake and Bear lake, he shall give a bond with two sufficient sureties to the state in the penal sum of $500, conditioned that no fish protected by the laws of this state from seining will be taken, and that diligence will be used by him to prevent the death of any of said fish, which bond shall be approved by and filed with the state commissioner. The state commissioner shall furnish blanks for said bonds, and shall furnish blanks to the county clerk of each county of the state, to be given to persons desiring to give bonds as herein provided. When a bond is prepared, it shall be delivered to the state commissioner, or to a deputy, or a county clerk, who shall forward it at once to the state commissioner. Upon approval by the state commissioner he shall file the same in his office and issue to the person giving such bond, upon payment of the license fee herein provided, a seiner's license. It shall be lawful to use spears, with or without a torch or lamplight, for the taking and killing of carp and suckers only, at any time, and it shall be lawful to take carp, suckers, chubs, mullets, and catfish, at any time, with hook and line, commonly known as angling, from the above waters, and from the waters of Sevier river between the mouth of Clear Creek canyon in Sevier county and the Otter Creek reservoir in Piute county, and in Weber river; *provided, further,* that suckers may be taken by grappling hooks between April 1 and May 20, both dates inclusive, in Provo river, between Utah lake and state road bridge northwest of Provo; in Spanish Fork river, between the San Pedro, Los Angeles & Salt Lake railroad bridges across said rivers and Utah lake; and in Hobble creek, between Main street, Springville City, and Utah lake. Any person violating any of the provisions of this section shall be guilty of a misdemeanor.

R. S. '98, § 1048; '99, p. 41; '01, p. 156; '05, p. 193; '07, p. 155.

2631. (1048.) Seines in Spring creek and Utah lakes prohibited. It shall be unlawful to use seines in Spring Creek lake, which runs into Utah lake, or within one-half mile from the mouth of any stream flowing into said Utah lake. R. S. '98, § 1049; '99, p. 41; '05, p. 194; '07, p. 158.

2632. Fishing from horseback or by fire light, and trespassing prohibited. It shall be a misdemeanor to fish from the back of a horse, or to travel up

or down any stream on horseback while fishing for trout or mountain herring; or to fish by fire or lamp light at night; *provided, however,* that nothing in this section shall be construed to prohibit a person from wading up or down any stream while so fishing. It shall be a misdemeanor for any person while engaged in fishing to damage private property, to take down or remove fences, to open and permit or cause to remain open, gates or bars or to do or commit any act of trespass, while engaged in fishing or hunting, and the commissioner or his deputy is authorized to arrest any person violating any of the provisions of this section, and all fines collected, upon conviction of any person so arrested after payment of the costs of prosecution, shall be turned over by the court to the owner of the property damaged.

2633. (1051.) Seizure and sale of unlawful devices. All seines, guns, nets, tackle, powder, explosives, lime, poison, drugs, and other means and devices for the unlawful taking of fish or game of any kind, found in the possession of any person who may be detected in unlawfully taking fish from any of the waters of the state or killing any kind of game, shall be seized by the officer making the arrest, and if it appears from evidence before the magistrate trying the case that the guns, seines, nets, tackle, powder, lime, poison, drugs, or other means and devices for the taking and killing of game were used for the unlawful taking of fish or game, the same shall be confiscated and sold at public auction by the state commissioner, and the proceeds therefrom turned into the fish and game fund.

R. S. '98, § 1052; '99, p. 41; '05, p. 194; '07, p. 159.

2634. (1052.) Unlawful to hunt or kill certain animals. It shall be unlawful for any person to shoot at, kill, or hunt for any deer, elk, antelope, mountain sheep, otter, beaver, or any other game animal in this state, or to capture or hold in confinement any such animal or its young. Possession of any such animals when the party in possession fails to make satisfactory explanation shall be deemed prima facie evidence of guilt; *provided,* that it shall be lawful for any citizen of the United States who is an actual and bona fide resident of the state of Utah, to hunt or kill one deer after 1920, between October 15 and October 31, both dates inclusive; *provided, further,* that it shall be unlawful to kill a fawn of either sex; *provided, further,* that when, in the judgment of the state fish and game commissioner, property is being damaged by beaver, he shall have authority to grant to residents of the state permission to trap or catch beaver under such restrictions as the case may in his judgment warrant. Hides of such animals must be delivered to the state fish and game commissioner to be disposed of by him, and the proceeds turned to the credit of the fish and game fund. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine in a sum not more than $500 and not less than $200, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment.

2635. (1053.) Pursuit by dogs prohibited. It shall be a misdemeanor for any person or persons to pursue with a dog or dogs any of the animals mentioned in § 2634. R. S. '98, § 1054; '99, p. 42; '05, p. 195; '07, p. 159.

2636. (1054.) Shooting of grouse, quail, sagehens, etc., and destruction of nests prohibited. It shall be unlawful for any person to shoot at, kill, or hunt for an partridge, penated grouse (commonly called prairie chicken), blue grouse, willow grouse, sagehen, pheasant, or quail, or to rob or destroy any nest, egg, or young of any such bird. It shall be a misdemeanor for any person to sell, offer for sale, or have in his possession with intent to sell, any part or parts of any of the birds mentioned in this section; *provided,* that the state fish and game commissioner may, in his discretion, permit the shooting of sagehens, pheasants, and quail in any county or counties which he may designate, when it is shown that in such county or counties these birds are increasing and are not in danger of being exterminated. Any person violating any of the provisions of this section shall be guilty of a misdemeanor.

R. S. '98, §§ 1055, 1056; '99, p. 42; '03, p. 154; '05, p. 195; '07, p. 159.

2637. (1055.) Destruction of insectivorous birds prohibited. It shall be unlawful for any person to kill, take, ensnare, net, trap, or shoot at any swan, mourning dove, pelican, gull, owl, lark, whippoorwill, hawk, blackbird, thrush, snowbird, swallow, robin, shore bird or other insectivorous or omnivorous (seed eating) bird in this state, or to destroy any egg or nest of the above mentioned birds. This section shall not be construed to protect the English sparrow, blue heron, squawk, magpie, blue cooper hawk or ratted hawk; *provided,* that pelicans or hood mergansers may be killed by the permission of the state commissioner. Any person violating any of the provisions of this section shall be guilty of a misdemeanor.

R. S. '98, § 1057; '99, p. 42; '01, p. 157; '05, p. 195; '07, p. 160.

2638. (1056.) Hunting season for wild ducks and geese. It shall be unlawful for any person to take, kill, wound, shoot at, or have in his possession any wild ducks or geese, or to rob or destroy any nest, egg, or young of any wild duck, goose, or snipe. This provision shall not prohibit the killing of not more than six geese, or twenty-five of all the girds mentioned in this section, in any one day, during the season allowed therefor, which shall commence on the 1st day of October and close on the 31st day of December of each year; *provided,* that it shall be unlawful to use sneak boats or sink boxes or other similar devices for the pursuit of such game, or to take, kill, wound, or shoot at any of the said birds between sunset and sunrise. Every person who shall violate any of the provisions of this section shall be guilty of a misdemeanor, and failure by the party in possession of such birds to give satisfactory explanation shall be deemed prima facie evidence of guilt.

R. S. '98, § 1058; '99, p. 42; '01, p. 157; '03, p. 155; '05, p. 195; '07, p. 160.

2639. (1058.) Unlawful possession of fish and game. Any person who shall have in his possession any game, fish, or birds unlawfully taken is guilty of a misdemeanor. All fish and game unlawfully taken, held unlawfully, shipped, or consigned for shipment out of this state shall be seized by the state commissioner or deputies, and disposed of to the best interest of the fish and game fund; *provided,* that any person, after procuring a non-resident license, may take out of the state the amount of one day's limit, by permission of the state commissioner, after the same has been inspected and marked by the said state commissioner or his deputies; *provided, further,* that nothing in this section shall apply to fish shipped from private ponds. The possession of any animal, fish, bird, or any part of the remains thereof, within the time or period within which taking and killing or possession of the same is prohibited, shall be prima facie evidence of such unlawful taking, killing, or possession. It shall be unlawful to kill, catch, or otherwise to take, destroy, or leave to waste, or in any manner to cause or suffer to be wasted, any bird, animal, or fish in this title mentioned, or any useful part or parts thereof except mullets, suckers, and carp. Any person or persons violating any of the provisions of this section shall be guilty of a misdemeanor and shall be punishable by a fine of not less than $100 for each offense.

R. S. '98, § 1060; '99, p. 43; '05, p. 196; '07, p. 160.

2640. (1061.) Reservation of waters for propagation of fish. For the better advancement of the fish interests of the state, the state commissioner may select and reserve any stream, lake, or pond, or a part thereof, in the state, for the purpose of planting, breeding, and propagating fish. And it shall be a misdemeanor for any person or persons to fish in any stream, lake, or pond while so reserved. When any stream, lake, or pond is selected for such purpose, the state commissioner shall forthwith post, or cause to be posted and maintained, conspicuous notices thereof along the banks or shores of such stream, lake, or pond, at points not over one mile apart, and shall advertise the same in the newspaper issued and published nearest to the lake, stream, or pond, for two weeks prior to the closing of such stream, pond, or lake to public fishing. Any person found violating any of the provisions

of this section shall be deemed guilty of a misdemeanor, and shall be punishable by a fine of not less than $25 for each offense.

R. S. '98, pg. 1063; '99, p. 43; '05, p. 196; '07, p. 161.

2641. (1047.) License to hunt and fish. It shall be unlawful for any male person to hunt for, kill, or shoot at any kind of game, or to take or fish for any kind of fish, except in Panguitch lake, whether protected or not, without first having procured a license so to do. It shall be unlawful for any person to refuse to produce his license for inspection at the time when requested so to do by the state commissioner or his deputy. Such license shall entitle the holder thereof to pursue, hunt, and kill such game animal and game birds and to fish for and catch such numbers and varieties of fish as are permitted by law, subject to the restrictions and regulations imposed by law.

The prices of such license shall be as follows:

To any male person over fourteen years of age, who is a citizen of the United States and an actual bona fide resident of the state of Utah, $1.25.

To any male person over fourteen years of age who is a citizen of the United States and not an actual bona fide resident of the state of Utah, $6; *provided,* that no alien shall be permitted to hunt or fish for game within the state of Utah; *provided, furthcr,* that persons under the age of fourteen years shall not be required to procure any license; and *provided, further,* that any person excepting an alien may hunt for and kill rabbits without a license.

Every license shall state the place of residence of the holder thereof, and shall not be transferable to any other person. All licenses, except as otherwise provided, shall be substantially in the following form:

License .....

The holder hereof, ..., whose residence is ....., county of ....., state of ....., is hereby permitted to hunt and fish within the state of Utah, subject to the limitations and restrictions of the game laws of the state of Utah.

Receipt of $..... for this license is hereby acknowledged. The holder is ..... years of age, is ..... feet ..... inches tall, weighs ..... pounds, is ..... complexioned and has ..... hair and ..... eyes.

Dated at ....., this ..... day of ....., 19.....

Officer's signature.

Officer's address.

Owner's signature.

Provided, that each resident license and duplicate thereof shall have plainly printed thereon the words "resident license, price $1.25"; each non-resident license and duplicate thereof the words "non-resident license, price $6."

It is further provided that every applicant for any of the above described licenses shall, immediately upon receipt of said license, sign his name in the place in said license provided, and at the request of the state commissioner or any of his deputies shall sign his name in the presence of said officer for comparison.

Such licenses may be issued by the state commissioner, his deputy, the county clerk or his deputies of any county within the state, or any person authorized so to do by the state commissioner. The state commissioner shall be responsible to the state for all moneys collected for game licenses issued by persons authorized by him to sell such licenses, and for the faithful performance of their duties, as required by law. Every person authorized under this section to issue any license, who shall knowingly issue the same for any less amount of money than required by this section shall be guilty of a misdemeanor.

Such license shall be printed as directed by the state commissioner in duplicate, which shall contain the name, the residence of the person to whom issued, the number and date, and the amount paid therefor, one copy to be retained by the county clerk or his deputies, or the commissioner or his deputies or other authorized persons issuing the license, and one duplicate, with

all mutilated licenses and all moneys collected, shall be remitted to the state commissioner on the first day of each month. Every license shall have printed on the back a short synopsis of this title. All licenses issued under the provisions of this title shall commence on the date of June 1 of each year, and expire May 31, the following year. Any person violating any of the provisions of this section shall be guilty of a misdemeanor.

2642. Licenses issued. Fees. Reports. It is hereby made the duty of the state commissioner, immediately after the passage of this title, to prepare and cause to be printed suitable forms of licenses as provided in this title, and to send by registered mail, or to deliver in person, taking receipt therefor, to each deputy commissioner of the state, such blanks as he may deem necessary, and to send by registered mail or deliver in person, taking receipt therefor, to the various county clerks such blanks as he may deem necessary; and it shall be the duty of the several deputy commissioners and county clerks to issue such licenses as applied for. And the state commissioner shall supervise the selling of licenses throughout the state. Each person authorized under this title to issue fishing and hunting licenses shall make a report to the state commissioner in such form and at such time as he shall prescribe, stating the number of resident licenses issued at $1.25, the number of seiner's licenses at $1.50, $5, and $10, respectively, the number of nonresident licenses sold at $6, and he shall deposit with the state commissioner all moneys from the sale of licenses, fines, or other moneys belonging to the state fish and game fund. On the first day of each month, the state commissioner shall make a report to the state auditor showing the number of licenses issued, and shall deposit with the state treasurer all moneys received by him belonging to the fish and game fund. Any officer who shall refuse or neglect to turn over any moneys collected for the licenses issued as herein provided shall be guilty of felony, and upon conviction thereof shall immediately be removed from office and be liable to criminal prosecution.

2643. Fish and game fund. A fish and game fund is hereby created, and all moneys collected for fish and game licenses, and the net moneys collected from the fines and forfeitures for violation of the fish and game laws, shall be paid to the state commissioner. All moneys so paid to the state commissioner shall be and are hereby constituted a state fish and game fund, said fund to be drawn upon only for payment of expenses of the state fish and game department.

Proceeds from sale of fish, fry and eggs, § 2648.
Sale of licenses, § 2642.
Proceeds sale of foreigners' firearms, etc., § 2601.

2644. Use of money now in fund. There is hereby appropriated all money now standing to the credit of the state fish and game fund and all moneys which may be received under the provisions of this title, for the purpose of paying the salaries of the various officers provided by this title; for paying the traveling expenses of the office of the state fish and game commissioner; for building and maintaining of hatcheries; and for importing, propagating, and protecting fish and game.

2645. Improvements on hatcheries and spawning grounds. The state commissioner is hereby authorized and directed to maintain and make needed improvements on the state hatcheries and spawning ponds and grounds connected therewith, and to construct and maintain such other hatcheries and spawning ponds as may be provided for.

2646. (1062.) Shipment of fish and game out of state. It shall be unlawful for any person or persons at any time to ship or cause to be shipped, carried, or transported out of this state, birds, fish, or game, or any part or parts thereof, dead or alive, mentioned in this title; *provided,* that carp, suckers, mullets, catfish, and chubs may be shipped after being first inspected by a fish and game commissioner or his deputy; and such fish and game commissioner or his deputy shall attach to each parcel or package of such shipment a statement that the same has been inspected and giving the kind of

fish and the weight thereof, which statement must be signed by the fish and game commissioner or his deputy making such inspection. And it is further provided that it is a misdemeanor for any railroad company, express company, or other transportation company, or common carrier of any kind to receive any common fish without such inspection certificate attached thereto; *provided,* that nothing in this section shall apply to fish shipped from private ponds. R. S. '98, § 1064; '99, p. 43; '03, p. 155; '05, p. 197; '07, p. 161.

2647. Public hunting grounds. Game sanctuaries. The state commissioner, with the concurrence and under the direction of the state board of examiners, is hereby authorized and empowered to procure, set aside, and maintain, or cause to be set aside and maintained, as public hunting grounds, such lands in the state as may be suitable for that purpose, and he is hereby authorized to use such amount of funds available for that purpose as may be necessary. Said commissioner and the state board of examiners may prescribe reasonable rules and regulations governing hunting within such hunting grounds, and may require reasonable fees for such privileges; *provided,* that the state commissioner is hereby authorized and empowered to procure, set aside, and protect, or cause to be set aside and protected, certain districts throughout the state as game sanctuaries; *provided, further,* that in like manner bird and game sanctuaries may be established.

2648. Sale of fish fry and eggs. The state commissioner, by and with the approval of the governor, may at any time sell fish fry and eggs, the proceeds to go to the state fish and game fund.

TITLE 35.

FLAG, DESCRIPTION OF THE STATE.

2664. Utah state flag. The state flag of Utah is declared to be a flag of blue field fringed with gold borders with the following device worked in natural colors on the center of the blue field:

The center a shield; above the shield and thereon an American eagle with outstretched wings; the top of the shield pierced with six arrows crosswise; upon the shield under the arrows the word "industry," and below the word "industry" on the center of the shield a beehive; on each side of the beehive, growing sego lilies; below the beehive and near the bottom of the shield the word "Utah," and below the word "Utah" and on the bottom of the shield the figures "1847," with the appearance of being back of the shield. There shall be two American flags on flagstaffs placed crosswise with the flags so draped that they will project beyond each side of the shield, the heads of the flagstaffs appearing in front of the eagle's wings and the bottom of each staff appearing over the face of the draped flag below the shield; below the shields and flags and upon the blue field the figures "1896." Around the entire design a narrow circle in gold.

Adopted by joint resolution number 17, laws '11, p. 353; amended by joint resolution number 1, laws '13, p. 252, and approved March 11, 1913.

TITLE 36.

FLOATING DEBT ON ADMISSION OF STATE.

2665. (1067.) Floating indebtedness at statehood may be refunded. All counties, cities, towns, school boards, and school districts that had a floating indebtedness at the time Utah was admitted as a state are hereby authorized to borrow an amount of money equal to the amount of such floating indebtedness; *provided,* that such floating indebtedness is not in excess of that authorized by law; and, *provided further,* that all money borrowed under the

provisions of this title shall not bear a greater rate of interest than the original obligation to be thereby liquidated.

Refunding county indebtedness, § 1410 et seq.
A warrant void as being in excess of the debt limit of a county and containing stipulation to pay interest, void because of lacking legislative authority for its insertion, was, under § 14, p. 524 laws 1896, and §§ 1, 2, laws 1897, validated as to principal only.
Daggett v. Lynch, 18 U. 49; 54 P. 1095.

The indebtedness of Salt Lake county for 1895, which exceeded its debt limit for that year, was validated, and county board authorized to issue bonds for its payment under laws of 1896, pp. 179, 524, and §§ 1, 2 laws 1897.
Darke v. Commissioners, 15 U. 467; 49 P. 257.

2666. (1068.) Money applied to such indebtedness. All money so borrowed shall be applied in the payment of the indebtedness designated in § 2665; and no bond or note issued by any county, city, town, school board, or school district, upon which such money shall be borrowed, shall be sold for less than its face value.

TITLE 37.

STATE FLOWER.

2667. Utah state flower. The sego lily is hereby selected as and declared to be the Utah state flower. '11, p. 137.

TITLE 38.

FOREST RESERVE FUND.

2668. (1068x.) Acceptance by the state. All moneys which shall come into the hands of the state treasurer from the United States, pursuant to act of congress, approved June 30, 1906, and any and all acts supplementary thereto, are hereby fully and completely ratified; and the state of Utah hereby accepts said apportionment upon the terms and conditions set forth in the said act of congress for the benefit of the public schools and public roads of the county or counties in which the forest reserve is situated. '07, p. 221.

2669. (1068x1.) Fund created. There is hereby created a fund to be known as the county road and school fund from forest reserves. '07, p. 221.

2670. (1068x2.) State treasurer to receive and hold money. Report. The state treasurer shall receive and hold all moneys which shall hereafter come into his hands by virtue of the said act of congress hereinbefore mentioned, as the county road and school fund from forest reserves, and shall immediately, on the first Monday in January in each year, or thereafter if requested to do so by the state board of examiners, report to said board the amount of money on hand in such fund, which the state board of examiners is hereby directed, forthwith, to apportion to the several counties of the state, which by the said act of congress are entitled to participate therein. '07, p. 223.

2671. (1068x3.) Duty of county commissioners. The board of county commissioners of each county participating herein shall, immediately upon receipt of the apportionment, proceed to apportion the said fund in the manner following, to wit: One-half to the several school districts of the county entitled thereto, according to the number of school children residing in each of said districts over six and under eighteen years of age; and one-half for the improvement of the public roads in said county. '07, p. 223.

TITLE 39.

HABEAS CORPUS.

2672. (1069.) Petition. Contents. The petition for the writ of habeas corpus must state:

1. That the person in whose behalf it is sought is restrained of his liberty, and the person by whom, and the place where he is so restrained, men-

tioning the names of the parties, if known, and if unknown, describing them with as much particularity as practicable;

2. The cause or pretense of such restraint, according to the best information of the applicant; and if by virtue of any legal process, a copy thereof must be annexed, or a satisfactory reason given for its absence;

3. That the restraint is illegal, and wherein;

4. That the legality of the imprisonment has not already been adjudged upon a prior proceeding of the same character, to the best knowledge and belief of the applicant;

5. Whether application for the writ has been before made to, and refused by, any court or judge, and if so, a copy of the petition in that case must be attached, with the reasons for the refusal, or satisfactory reasons given for the failure to do so.

Iowa, McClain's An. C. (1888) § 4698.

Privilege of writ not to be suspended, except, Con. art. 1, sec. 5.

No right of appeal from an order discharging a person upon habeas corpus.

In re Clasby, 3 U. 183; 1 P. 852.

Mead v. Metcalf, 7 U. 103; 25 P. 729.

Relief may be had by habeas corpus from restraint under void judgment.

Ex parte Dixon, 1 U. 192.

Ex parte Nielson, 131 U. S. 176.

Ex parte Lewis, 10 U. 47; 41 P. 1077.

A soldier of the national army can be demanded by and surrendered to the civil authorities, to be tried and punished by them, only when he is charged with an offense such as is punishable by the "known laws of the land"; that is, by the laws of the United States or of a state or territory.

Ex parte Bright, 1 U. 145.

A jugment which either remands or discharges the petitioner is a final judgment; notwithstanding petitioner may commence another similar proceeding.

Winnovich v. Emery, 33 U. 345; 93 P. 988.

A father of an illegitimate child who marries the mother may maintain habeas corpus for himself and the mother for the custody of the child, and the strangers cannot be compensated for their services and expense in caring for the child.

Harrison v. Harker, 44 U. 541; 142 P. 716.

Unless the complaint fails to state some jurisdictional fact of some essential ingredient constituting the offense whereby the court is left without jurisdiction, a judgment of conviction will not be reviewed on habeas corpus, but the error, if reviewed at all, must be done on appeal.

Bruce v. East, 43 U. 327, 134 P. 1175.

The evidence in habeas corpus proceedings by a mother to obtain the custody of her child held sufficient to support the finding of the trial court that the mother had abandoned the custody of the child to others without intention of reclaiming it, and that it was for the the best interests of the child that it should remain with its adoptive parents.

Hummel v. Parrish et al., 43 U. 373; 134 P. 898.

Though the presumption is that it is for the best interests of the child and of society that it shall remain with its natural parents during minority, where a parent has surrendered her child to others in infancy and it has been allowed to remain with others until new ties of mutual affection are formed, the child's welfare will control the parent's rights in habeas corpus proceedings for its return.

Id.

What will be considered on hearing:

Upon an application for a writ of habeas corpus only the facts appearing in the record will be considered.

In re Maughan, 6 U. 167; 21 P. 1088.

Four judges held, on habeas corpus, that the judgment should be affirmed where the commitment was on an indictment regular in form for a crime of which the court has jurisdiction; the other judges, that the judge could look behind the indictment for irregularities in the summons of grand jurors, etc.

Stout v. People, 20 Law, Ed. U. S. S. C. Rep. 512.

An objection may be taken on habeas corpus where it appears on the face of the judgment that three separate indictments for a continuous offense were found by same grand jury, at same time and on same testimony, covering a continuous period of thirty-five months.

In re Lorenzo Snow, 120 U. S. 274.

Court will not consider upon habeas corpus question as to the legality of grand jury.

Ex parte Springer, 1 U. 214.

Nor correctness of order changing venue in civil case.

Ex parte Whitmore, 9 U. 441; 35 P. 524.

A court on habeas corpus proceedings may not review the evidence adduced before a magistrate in support of a criminal charge, but if it is alleged that there was no preliminary hearing and no findings offered and that the record is false, the court should hear evidence on those questions.

Winnovich v. Emery, 33 U. 345; 93 P. 988.

What may be considered on appeal.

In a habeas corpus by a father for the custody of a child, the proceeding will be considered on appeal as one in equity, so far as the conclusiveness of the findings of the trial court are concerned.

Harrison v. Harker, 44 U. 541; 142 P. 716.

Relief refused in following cases:

Order will not issue for discharge of witness committed for refusal to answer proper question before grand jury.

In re Whetstone, 9 U. 156; 36 P. 633.

In re Belle Harris, 4 U. 5; 5 P. 129.

Nor where defendant fails to plead former conviction.

Ex parte Maughan, 6 U. 167; 21 P. 1088.

In re Barton, 6 U. 264; 21 P. 998.

Nor where court irregularly pronounces sentence within six hours after conviction.

In re Barton, 6. U. 264; 21 P. 998.

Nor from the judgment, regular upon its face, or a court of competent jurisdiction.

Ex parte Douglass, 1 U. 108.

Ex parte Hays, 15 U. 77; 47 P. 612.

Nor to determine an abstract question of law.

Ex parte Meears, 3 U. 50; 5 P. 552.

2673. (1070.) Id. Verification. The petition must be sworn to by the person confined, or by some one in his behalf, and presented to some court or judge authorized to allow the writ.

Iowa, McClain's An. C. (1888) § 4699.

2674. (1071.) Writ awarded, when. Upon the presentation of the foregoing petition to any court having jurisdiction, the writ of habeas corpus shall be awarded, unless it shall appear from the petition itself, or the doc-

uments annexed, or the showing of the petitioner, that the party so applying would not be entitled to any relief.

Privilege of writ not to be suspended, exception, Con. art. 1, sec. 5. When writ refused, note under § 2672.

2675. (1072.) By whom granted. Where served. The writ of habeas corpus may be granted by the supreme or district courts, or any judge thereof, and may be served in any part of the state.

Jurisdiction, Con. art. 8, secs. 4, 7.

2676. (1073.) To whom returnable. When granted by a justice of the supreme court, the writ may be made returnable before himself or the supreme court, or before any district court or judge thereof in the state.

2677. (1074.) Application to nearest court. Application for the writ must be made to the court or judge most convenient in point of distance to the applicant, and the more remote court or judge, if applied to for the writ, may refuse the same, unless a sufficient reason shall be adduced in the petition for not making application to the more convenient court or judge.

2678. (1075.) Form of writ. When the writ shall be awarded, it shall appear under the seal of the court issuing the same, or if it shall be issued by any judge, it shall be signed by him, and shall be substantially in the following form:

State of Utah, county of .....

To the sheriff of ..... (or A B, as the case may be):

You are hereby commanded to have the body of C D, by you unlawfully detained as alleged, before the court, (or before me, or before E F, judge, etc., as the case may be) at ....., on ....., (or forthwith after being served with this writ) to be dealt with according to law, and have you then and there this writ with a return of your doings in the premises.

Such writ must be indorsed: "By the habeas corpus act."

2679. (1076.) To whom directed. The writ must be directed to the person having custody of, or restraining the person on whose behalf the application is made, and must command him to have the body of such person before the court or judge before whom the writ is returnable, at a time and place therein specified.

Cal. Pen. C., § 1477. Mont. Pen. C., § 2744.

2680. (1077.) Disallowance. When the writ is disallowed, the court or judge shall cause a statement of the reasons for the disallowance to be appended to the petition and the same returned to the person applying for the writ.

2681. (1078.) Issuance without application. Whenever a court or judge authorized to grant this writ shall have evidence that any person within the jurisdiction of such court or judge is unjustly imprisoned or restrained of his liberty, it shall be the duty of such court or judge to issue or cause to be issued the writ as aforesaid, though no application is made therefor.

2682. (1079.) By whom served. The writ may be served by the officer or by any other person appointed in writing for that purpose by the court or judge by whom it is issued or allowed. If served by any other person than the officer, he possesses the same power and is liable to the same penalty for a non-performance of his duty as though he were the officer.

2683. (1080.) How served. Service of the writ shall be made by leaving the original with the defendant, preserving a copy on which to make the return of service.

2684. (1081.) Id. Upon person having plaintiff in custody. If the defendant cannot be found, or if he has not the plaintiff in custody, the service shall be made upon any person having the plaintiff in custody, in the manner and with the same effect as though he had been made defendant therein.

2685. (1082.) Defendant arrested, when. If the defendant conceals

himself, or refuses admittance to the person attempting to serve the writ, or if he attempts wrongfully to carry the person out of the county or state after service of the writ, the officer, or the person who shall be attempting to serve, or who shall have served the writ as above contemplated, is authorized to arrest the defendant, or other persons so resisting, and bring him or them, together with the plaintiff, forthwith before the judge or court before whom the writ is made returnable. In order to make such arrest, the officer or other person having the writ possesses the same power to execute the same as is given to a sheriff for the arrest of a person charged with felony.

2686. (1083.) Defect of form. Appearance. Producing plaintiff. The writ of habeas corpus must not be disobeyed for any defect of form or misdescription of the plaintiff or defendant; *provided,* that enough shall be stated to show the meaning and intent of the writ. Service being made, the defendant must appear at the proper time and place and answer the petition. He must also bring the body of the plaintiff, or show good cause for not doing so. To get possession of a plaintiff's person, when there is no person appearing to have him in charge or custody, the same power is given to the officer or person having the writ as is given to the sheriff for the arrest of a person charged with felony.

2687. (1084.) Defendant's answer. The defendant in his answer must state plainly and unequivocally whether he then has, or at any time has had the plaintiff under his control and restraint, and, if so, the cause thereof. If he shall have transferred him, he must state that fact, and to whom, and the time thereof, as well as the reason or authority therefor.

2688. (1085.) Wrongful refusal to award writ. Any judge, whether acting individually or as a member of a court, who shall wrongfully and wilfully refuse to award such writ, whenever proper application for the same shall have been made, shall forfeit and pay a sum not exceeding $5,000 to the party thereby aggreived.

2689. (1086.) Disposal of plaintiff pending judgment. Until judgment is given on the return, the court or judge before whom any party may be brought on such writ may commit him to the sheriff of the county, or place him in such custody as may be deemed proper.

N. Dak. (1895) § 8668*.

2690. (1087.) Plaintiff's presence at trial. Waiver. Discharge. The plaintiff, in writing, or by his attorney, may waive his right to be present at the trial, in which case the proceedings may be had in his absence. The writ in such case shall be modified accordingly. If no sufficient, just, legal cause of detention is shown, the plaintiff must be discharged.

2691. (1088.) Hearing to be summary. Upon the return of any writ of habeas corpus, the court or judge shall, after having given sufficient notice, proceed in a summary manner to hear the matter, and shall dispose of the prisoner as justice may require.

Where petitioner for habeas corpus admitted the legality of his commitment to the state prison under a ten-year sentence for burglary, but asserted that his commitment under a life sentence for murder was invalid, the court would determine the legality of the life sentence, and dispose of the petition as justice might require under this section, thereby enabling petitioner, upon the life sentence being adjudged invalid, to apply for a reduction of the ten-year sentence, as authorized by § 4330, and thereby enabling the state to prosecute the petitioner on the charge of murder.
Conners v. Pratt, 38 U. 258; 112 P. 399.

2692. (1089.) Recommitment or bail. Witnesses. In all cases where the imprisonment is for a criminal offense and there is not sufficient cause for discharge, and, although the commitment may have been informally made or without due authority, or the process may have been executed by a person not duly authorized, the court or judge may make a new commitment, or admit the party to bail, if the case is bailable. And all material witnesses shall also be required to enter recognizance to appear at the same time and place and not depart therefrom without leave. All such papers must be filed in the clerk's office where the same is made returnable.

2693. (1090.) Shall not be again imprisoned for same cause. No person who shall have been discharged by order of the court or judge upon habeas corpus shall be again imprisoned, restrained, or kept in custody for the same cause, except in the following cases:

1. If he shall have been discharged from custody on a criminal charge, and shall be afterward committed for the same offense, by legal order or process;

2. If, after discharge for defect of proof, or for any defect of the process, warrant, or commitment in a criminal case, the prisoner shall be again arrested on sufficient proof and committed by legal process for the same offense.

Cal. Pen. C., § 1496. Mont. Pen. C., § 2763.

2694. (1091.) Warrant when irreparable injury probable. When it appears to any court or judge, authorized by law to issue the writ of habeas corpus, that anyone is illegally held in custody, confinement, or restraint, and that there is reason to believe that such person will be carried out of the jurisdiction of the court or judge before whom the application is made, or will suffer some irreparable injury before compliance with the writ of habeas corpus can be enforced, such court or judge may cause a warrant to be issued, reciting the facts, and directed to the sheriff or any constable of the county, commanding the officer to take such person thus held in custody, confinement, or restraint, and forthwith bring him before such court or judge, to be dealt with according to law.

Cal. Pen. C., § 1497. Mont. Pen. C., § 2764.

2695. (1092.) Id. The court or judge may also insert in such warrant a command for the apprehension of the person charged with such illegal detention and restraint.

Cal. Pen. C., § 1498. Mont. Pen. C., § 2765.

2696. (1093.) Refusal to deliver copy of process. A person refusing to deliver a copy of the legal process by which he detains the plaintiff in custody to anyone who demands such copy for the purpose of taking out a writ of habeas corpus, shall forfeit not exceeding $200 to the plaintiff.

2697. (1094.) Penalties. If the defendant attempts to elude the service of the writ of habeas corpus, or if the defendant or any officer wilfully fails to comply with the requirements of this title, or if he shall disobey the order of discharge, he shall, upon conviction, be imprisoned in the state prison or county jail for a period of not more than one year and fined not exceeding $1000, and shall also forfeit to the person aggrieved not more than $5000. Any person knowingly aiding or abetting in any such act shall be subject to a like punishment and forfeiture.

2698. (1095.) Costs. Costs shall be taxed as the court may direct.

TITLE 40.

HEALTH.

CHAPTER 1.

STATE BOARD OF HEALTH.

2705. (1096.) Appointment. How constituted. The governor, by and with the consent of the senate, shall appoint seven persons, a majority of whom shall be physicians in good standing and graduates of regularly chartered and legally constituted medical colleges, and one of whom shall be a civil engineer, who shall constitute the state board of health and vital statistics.

2706. (1097.) Terms of office. The persons so appointed shall hold their offices for seven years; *provided,* that the terms of office of the seven first appointed shall be so arranged that the term of one shall expire on the 31st day of December of each year, and the vacancies so created, as well as all vacancies occuring otherwise, shall be filled by the governor.

2707. (1098.) Duties and powers. The board shall have the general supervision of the interests of the health of the citizens of the state, and shall especially study its vital statistics. It shall have general supervision of all matters pertaining to quarantine, shall have co-ordinate powers as a board of health with every local board, and shall have authority to make such rules and regulations not contrary to law as may be deemed necessary for the preservation of public health. It shall make sanitary investigations and inquiries respecting the causes of diseases, especially of epidemic diseases, including those of domestic animals, the sanitary conditions and effects of localities, employments, and circumstances on the public health, and it shall gather such information in respect to these matters as it may deem proper for diffusion among the people.

For further duties, see §§ 2722, 2723.
May abate nuisances, § 2737.
Duty as to health conventions, §§ 2758 et seq.
Local boards of health, §§ 2720, 2725.
Custodian official register of trained nurses, § 4289.
Formulate rules for protection of employes, §§ 3071-3072.
Formulate rules for testing sight, hearing, etc., of school children, § 4537.
Following diseases must be reported: Venereal, § 2753; inflamed eyes, § 2754; tuberculosis, § 2764; contagious diseases, §§ 2726-2728, 2746.
Duty respecting rabies and hydrophobia, §§ 150-156.
Quarantine regulations, §§ 2747, 2748.

2708. (1099.) Reports. The board shall, on or before the 1st day of December preceding each regular session of the legislature, make to the governor a report of its official acts and investigations.

2709. (1100.) Id. Meetings. The board shall recommend such forms and amendments of laws as shall be deemed to be necessary. The secretary of the board shall be superintendent of registration of vital statistics. The board shall hold meetings at least once every three months, one of which meetings shall be held at the capital during the session of the legislature. Its first meeting shall be within ten days after the appointment of the members of the board shall have been made, and four members shall always constitute a quorum for business.

2710. (1101.) Officers. Compensation. The board shall elect from its members a president, whose term of office shall be one year, and a secretary. The latter shall be the executive officer of the board, and shall hold his appointment until removed by the appointment of his successor or otherwise. No member except the secreary shall receive any compensation, but the actual and necessary expenses of any and all members, while engaged in the duties of the board, shall be paid out of the state treasury on the warrant of the state auditor.

2711. (1102.) Secretary to be state health commissioner. Duties. Qualifications. Salary and expenses. The secretary of the state board of health shall be state health commissioner, and shall perform and superintend the work prescribed in this title, and shall perform such other duties as the board may require. He shall keep the minutes of all meetings, make quarterly reports to the board, and employ, subject to the confirmation of the board, all necessary employes. The secretary shall be a licensed physician in good standing, of temperate habits and good moral character, and shall be thoroughly informed and experienced in all matters pertaining to hygiene and sanitation and skilled in the management and treatment of infectious and contagious diseases. The secretary shall give his entire time to the duties of his office and shall receive from the state treasury in quarterly payments an annual salary of $4000 and such actual and necessary traveling expenses as shall be allowed by the state board of examiners on presentation of an itemized account certified by the state board of health. All other ex-

penses of the board of health shall be paid out of the appropriations made for that purpose. Am'd '03, p. 108; '15, p. 67.

Duty in relation to transit of infected person or goods, § 2745.

A member school house construction commission, § 4527.

2712. (1103.) Office. Stationery. The state board of examiners shall provide such apartments, stationery, and clerical assistance as the board may require in the discharge of its duties.

2713. (1104.) County clerk's duties. The county clerk of each county shall send to the secretary of the state board of health, at such times as the state board shall direct, a copy of the records in his office, showing the marriages, births, and deaths reported during a prescribed time.

CHAPTER 2.

SANITATION OF PUBLIC BUILDINGS, ETC.

2714. (1104x.) Duty of board of health. It shall be the duty of the state board of health, and it is hereby authorized and empowered, to prepare rules and regulations governing the proper disinfection and sanitation of public buildings and all railway coaches and sleeping cars operated in the state of Utah. '07, p. 202.

2715. (1104x1.) Id. Sanitary code. It shall be the duty of the state board of health, and it is hereby authorized and empowered, to prescribe a sanitary code, which shall contain and provide rules and regulations of a general nature for the improvement and amelioration of the hygienic and sanitary condition of said public buildings, railway coaches, and sleeping cars. '07, p. 202.

2716. (1104x2.) To whom applicable. Must put rules into effect. Every person having control of any public building, railway company, sleeping car company, or other corporation, company, or individual, or the receiver thereof, engaged in the carrying of passengers in this state, shall, at their own expense, within a prescribed time after receiving notice from the state board of health of the promulgation of the rules and regulations in the above sections mentioned, carry the same into effect. '07, p. 202.

2717. (1104x3.) Penalty. If any person having control of any public building, or any agent, manager, operator, employe, or receiver of any railway company, sleeping car company, or any individual shall fail to comply with the provisions of this chapter, and the rules and regulations promulgated by the state board of health under the provisions thereof, he shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than $50 nor more than $200. '07, p. 203.

CHAPTER 3.

LOCAL BOARDS OF HEALTH.

2720. (1105.) Municipal boards. It shall be the duty of the board of trustees or city council of every incorporated town or city of the state to establish by ordinance a board of health for such town or city, to consist of three or more persons, one of whom, when practicable, shall be a physician, a graduate of a regularly chartered medical college, who shall be the executive officer of the board and be known as the health officer.

Power of city to establish, § 570x64.

2721. (1106.) District health officers. County board. Each board of county commissioners shall divide the county, outside of the limits of incorporated cities and towns, into sanitary districts, and shall appoint a health

officer for each district, who shall be, when practicable, a physician. Such district health officers shall, together with the board of county commissioners, constitute the county board of health.

Power of county commissioners, § 1400x39.

2722. (1107.) Duties and powers. Every local board of health, whether county or municipal, shall supervise all matters pertaining to the sanitary condition of its county, town, or city, and shall have power and authority to order nuisances or the cause of any special disease or mortality to be abated and removed.

It shall be the duty of the local boards of health and health officers to use diligence in the discovery of contagious and infectious diseases, to maintain strict quarantine, and to cause all infected persons and premises to be disinfected in accordance with the rules of the state board of health. Said disinfection shall be performed by the local health officer, or a competent agent, for whose actions the health officer shall be responsible in every way as though performed by himself. In no case shall any disinfection performed by members of a quarantined household be accepted as compliance with this section. If any local health officer shall fail or refuse to properly keep records, make reports, enforce quarantine, disinfect infected persons or premises, or to perform any of the duties provided by law, he shall be deemed guilty of a misdemeanor, and, upon a complaint made by the state board of health, it shall be the duty of the city council, town board, or board of county commissioners by whom he was appointed to give the said local health officer a hearing, and if the charges are sustained, they shall immediately remove him and appoint his successor. The term "local health officer," used in this chapter, shall apply to town, city, and county health officers. Am'd '03, p. 108.

Must enforce rules concerning contagious diseases, § 2743.

Has jurisdiction pertaining to health in schools, §§ 2755, 2756.

2723. (1108.) Reports to state board of health. Every local board of health or health officer shall report to the secretary of the state board of health, at such times as the state board may require, the sanitary conditions of the locality, the number of births and deaths, and the causes of death as near as can be ascertained, within their jurisdiction, during the preceding month. It shall be the duty of the local health officer to make a monthly report to the state board of health, on or before the 5th day of each month, of all cases of scarlet fever, smallpox, diphtheria, membranous croup, typhoid fever, whooping cough, measles, chickenpox, pneumonia, and tuberculosis, which have occured within his jurisdiction during the previous month; and upon receipt of notification of the existence of any case of either of said diseases in any family, a member of which is in attendance upon any public or private school, he must at once report the existence of such disease to the principal of the school so attended, giving the name and address of the person so affected, and the nature of the disease. If no case of any of the diseases mentioned in this section has occured during the month, the fact shall be so reported to the state board of health in the same manner as hereinbefore provided. It shall be the duty of the local health officer to make an annual report of his actions and those of the local board of health to the state board of health. Am'd '03, p. 109; '05, p. 171.

2724. (1109.) Sanitary rules and ordinances. It shall be the duty of the board of trustees of every incorporated town, and of the city council of every incorporated city, and of the board of county commissioners of each county in the state, to establish by ordinance such sanitary rules and regulations as may be necessary to promote the general health, and to prevent the outbreak or spread of infectious or contagious diseases; and to provide penalties for the infraction of any of such ordinances.

2725. (1110.) Quarantine. Any local board of health may declare quarantine in its county, city, or town, or any part thereof, against a contagious or infectious disease prevailing there or elsewhere, and against all persons and things likely to spread contagion or infection. Each of such

boards shall have power and authority to enforce such quarantine until the same is raised by it, and may confine any person affected with or likely to spread contagion or infection to the house or premises in which he resides, or to a place to be provided by the board for the purpose.

Compulsory vaccination prohibited by law of 1901, p. 15, § 2763.

Prior to enactment of § 2763, it was held that the board of education was authorized to exclude a pupil from school who refuses to be vaccinated, where smallpox was epidemic in the community.

State v. Bd. of Ed., 21 U. 401; 60 P. 1013.

CHAPTER 4.

CONTAGIOUS DISEASES; REPORT; PENALTIES.

2726. (1111.) Contagious diseases to be reported. All physicians or other persons having knowledge of the existence of any contagious or infectious disease, or having reason to believe that any such disease exists, are hereby required to report the same forthwith to the local board of health.

Contagious diseases, § 2743.

Tuberculosis to be reported, § 2764.

2727. (1112.) Duties of persons exposed. All physicians or nurses, or other persons having been exposed to any contagious or infectious disease, are forbidden to mingle with other persons subject thereto, in the clothing worn by them while so exposed, unless the same has been thoroughly disinfected, or to otherwise expose any other person to such contagion or infection.

2728. (1113.) Penalties. Any person who shall wilfully or unlawfully or knowingly introduce any contagious or infectious disease into any county, city, town, or village, or who neglects or refuses to comply with any of the provisions of this title, shall be deemed guilty of a misdemeanor.

CHAPTER 5.

HEALTH AND QUARANTINE REGULATIONS.

2735. (1113x.) Nuisance defined. A misdemeanor. Whatever is dangerous to human life or health, and whatever renders soil, air, water, or food impure or unwholesome, are declared to be nuisances and to be illegal, and every person, either owner, agent, or occupant, having aided in creating or contributing to the same, or who may support, continue, or retain any of them, shall be guilty of a misdemeanor. '99, p. 66.

See Salt Lake City v. Young, 45 U. 349; 145 P. 1047.

In an action for damages to live stock and crops alleged to have been caused by the operation by defendant of a smelter emitting poisonous gases, evidence held insufficient to show that the death or sickness of the animals was caused by the alleged operation.

Sagers v. International Smelting Co., 50 U. —; 168 P. 105.

2736. (1113x1.) Id. No house refuse, offal, garbage, dead animals, decaying vegetable matter, or organic waste substance of any kind shall be thrown or allowed to remain upon or in any street, road, ditch, gutter, public place, private premises, vacant lot, water course, lake, pond, spring, or well. '99, p. 66.

2737. (1113x2.) Duty of board of health, when complaint made. Whenever a complaint is made in writing, or otherwise, to the board of health, the executive officer thereof, or a regularly appointed inspector, shall forthwith investigate the matter, and shall determine whether the alleged nuisance is detrimental to the public health, or the cause of any special disease or mortality; and in case he shall so find, then he shall notify the occupant, or, if unoccupied, the owner or agent of said premises, in writing, of such finding, and shall order and direct the abatement and removal of the same within two days; and in the event of the failure of the occupant, or, if unoccupied, the owner or agent of said property, to abate and remove the

nuisance, then the executive officer may proceed to abate and remove the same, and may employ all the forces necessary to do so; or the state board of health may cause an action to be brought in the name of the state, upon relation of said board, by the attorney-general, for the abatement of such nuisance, and by the judgment therein the nuisance may be enjoined or abated. '99, p. 66; '07, p. 52.

2738. (1113x3.) Nuisance. No privy vault, cesspool, or reservoir into which a privy, water closet, stable, or sink is drained, shall be established or permitted within fifty feet of any surface well, spring, or other source of water used for drinking or culinary purposes, without written permission from the board of health, based upon the advice of the medical health officer. Whenever, in the opinion of any board of health or health officer, any privy vault or cesspool has become the receptacle of infectious material from a contagious or infectious disease, or has become a menace to health, they shall have the power to order such privy or cesspool disinfected, or filled in and abandoned. '99, p. 66; '03, p. 61.

2739. (1113x4.) Id. No pig pen shall be built or maintained within 100 feet of any well or spring of water used for drinking purposes or within 50 feet of any street or any inhabited house. '99, p. 67.

2740. (1113x5.) Id. Hog yards and piggeries will not be permitted within 100 feet of any natural stream or water course used for culinary purposes, and the drainage of a piggery shall in no case be permitted to reach any natural stream until said drainage has been purified. '99, p. 67.

2741. (1113x6.) Id. The feeding of animals dead from natural causes, to pigs, will not be allowed. Offal shall not be fed to pigs for at least a month before they are killed. The animals to be killed shall be removed from the pen where offal is fed and shall be fed on grain or other wholesome food. Offal from hogs shall not be fed to hogs. Offal from hogs shall be burned or buried. '99, p. 67.

2742. (1113x7.) Id. No hog ranch or piggery for garbage or offal feeding, where more than fifty head of swine are kept, shall be established or maintained without a permit from a health authority. '99, p. 67.

CONTAGIOUS DISEASES.

2743. (1113x8.) Rules concerning contagious diseases to be enforced. The necessary rules and regulations concerning cholera, smallpox, yellow fever, diphtheria, scarlet fever, typhoid fever, whooping cough, measles, and other contagious and infectious diseases, shall be enforced by the local boards of health, under the supervision of the health officer; and all public officers of the town, city, or county, in their proper capacities, are hereby commanded and enjoined to assist the said board of health in the enforcement of said rules and regulations. '99, p. 67.

Disinfection in typhoid cases, §§ 2761, 2762. Tuberculosis to be reported, § 2764.

2744. (1113x9.) To provide against spread of contagious diseases. No person or thing liable to propagate any of the contagious diseases enumerated in the above section shall be brought within the limits of the state without the special permit and direction of the state board of health, and whenever it shall come to the knowledge of any person that such person or thing has been brought within such limits, he shall immediately give notice thereof to a member of the said board, together with the location thereof. No person shall, within the limits of the state, without a permit from the local board of health, carry or remove from one building to another any person afflicted with such contagious disease. Nor shall any person afflicted with such contagious disease, or liable to communicate or spread the contagion thereof, be shipped or removed from one town or place to any other town or place, except under the charge and direction of the board of health, and with proper precautions against the spread of the contagion. '99, p. 67.

2745. (1113x10.) Id. Upon satisfactory information of the approach

to, or transit through, the state of Utah, of infected persons or goods, from an infected locality, or persons or goods suspected of being infected, it shall be the duty of the secretary, as executive officer of the board, to cause the same to be stopped at the state line, or, if found within the limits of the state, to cause such persons or goods to be removed from cars, stages, or other conveyances, and securely isolated and disinfected. In cases coming under the jurisdiction of national or municipal quarantine authorities, he shall co-operate with said authorities in all such action. '99, p. 67; '03, p. 61.

QUARANTINE RULES.

2746. (1113x11.) Physicians to report contagious diseases. Penalty. It shall be the duty of every physician or other person caring for the sick in the state of Utah to make a report to the local board of healh immediately after such person becomes aware of the existence of any case of scarlet fever, diphtheria, membranous croup, whooping cough, smallpox, typhoid fever, measles, tuberculosis, Asiatic cholera, rubella (rotheln), chicken pox, typhus fever, plague, cerebro-spinal meningitis, infantile paralysis, leprosy, or pneumonia in his or her charge, and it shall be the duty of every person, owner, agent, manager, principal, or superintendent of any public or private institution, or dispensary, hotel, boarding house, or lodging house to make a report in like manner of any inmate, occupant, or boarder suffering from any of the said infectious or contagious diseases; and in case such physician or other person shall fail to report in twenty-four hours, said person shall be deemed guilty of a misdemeanor. '99, p. 68; '11, p. 105.

Disinfection in typhoid cases, § 2761.

2747. (1113x13.) Rules for quarantine. The state board of health is hereby authorized and empowered to make all needful rules for quarantining any person who has a contagious disease or who has been exposed to a contagious disease, or any premises which have been infected by any contagious disease, and to prescribe the period of quarantining for the various diseases. Any person who violates any of the rules of the state board of health made in pursuance of this section shall be guilty of a misdemeanor.
'99, p. 68; '01, p. 131; '11, p. 105.

2748. (1113x14.) Quarantine regulations. It shall be the duty of the local board of health, without delay, upon receiving such notice as is provided for in § 2746, to proceed immediately to carry out such rules and regulations as the state board of health may prescribe, having for their object the prevention and restriction of the disease or diseases aforementioned in § 2746. It shall be the duty of the local health authorities, upon the receipt of said notice of existing or suspected disease aforesaid, to inspect or cause the house or locality to be inspected by its sanitary officers, and, on discovering that such disease exists, the local health officer or local board of health may isolate and quarantine said diseased person or persons, and may also quarantine any other person or persons exposed to said disease, and restrain them within their home or locality from intercourse with other persons, and prohibit ingress or egress to or from such premises whenever it is necessary for the prevention or restriction of such diseases, and any person or persons isolated or quarantined that shall wilfully escape from said isolation or quarantine before they have fully recovered, or before the time provided for by the rules of the state board of health, or before their clothes have been disinfected by the authorities in charge, or wilfully permit clothes or other articles to be carried from the infected premises prior to disinfection, shall be guilty of a misdemeanor. '99, p. 68; '01, p. 132; '11, p. 105.

2749. (1113x15.) Id. Any person who gives, lends, sells, transmits, or exposes, without previous disinfection according to the rules of the board of health, any bedding, clothing, rags, or other objects which have been exposed to infection from any of the above diseases, shall, upon conviction, be deemed guilty of a misdemeanor. '99, p. 68.

2750. (1113x16.) Id. Any person who knowingly has conveyed a person affected with a contagious disease shall be deemed guilty of a misdemeanor unless he shall have immediately disinfected his conveyance in a thorough manner. '99, p. 69.

2751. (1113x17.) Id. The owner or agent of any house in which a person has been suffering from any contagious disease who shall knowingly let it or part of it for hire without having previously disinfected it and all articles therein liable to disinfection according to the rules of the board of health, shall be deemed guilty of a misdemeanor. '99, p. 69.

VENEREAL DISEASES.

2752. Physicians and superintendents of hospitals to report. It shall be the duty of every physician in this state, every superintendent or manager of a hospital or public institution in this state, to immediately report to the local board of health every case of venereal disease which he is called upon to treat or which is in such hospital or public institution, and each and every physician, superintendent, or manager of such hospital or institution shall make such reports as may be called for by the rules and regulations of the state board of health, and must comply with all the rules and regulations made by said board to prevent the spread of venereal diseases; *provided,* that the report of such venereal disease shall not include the name of the person affected. It shall be the duty of all boards of health to enact and enforce rules and regulations necessary to prevent the spread of venereal diseases.

2753. Penalty. Any person violating any of the provisions of the foregoing section shall be guilty of a misdemeanor. '11, p. 128.

INFLAMMATION OF THE EYES.

2754. Physicians and midwives to report. Treatment. Penalty. It shall be the duty of every physician and every midwife attending a case of child-birth to report to the local board of health every case where the newly born child has inflammation of the eyes attended by a discharge therefrom, such report to be made within six hours after the appearance of such disease. It shall be the duty of such physician or midwife to treat the eyes of the child so afflicted in accordance with the rules of the state board of health. Every physician and midwife failing to comply with the provisions of this section shall be guilty of a misdemeanor. '11, p. 84.

SCHOOLS.

2755. (1113x18.) Board of health has jurisdiction in matters pertaining to health in schools. The local boards of health shall have jurisdiction in all matters pertaining to the preservation of the health of those in attendance upon the public and private schools in the state, to which end it is hereby made the duty of each of the local boards of health:

1. To exclude from said schools any person, including teachers, suffering with any contagious or infectious disease, whether acute or chronic, or liable to convey such disease to those in attendance;

2. To make regular inspections of all school buildings and premises, as to their hygienic condition, and to report on forms that shall be furnished by the state board of health, the result of such inspection to those having charge and control of such schools, with instructions as to the remedy of such conditions (if any such be found) whereby the health of those in attendance may be impaired or life endangered. A copy of said report shall also at the same time be sent to the state board of health. '99, p. 70.

May not require vaccination as condition for admission to school, § 2763.

2756. (1113x19.) Board to enforce regulations. In the event of failure or refusal of those having such charge and control to carry out the instructions so given, then the board of health shall cause such faulty conditions to be remedied at the proper cost and expense of those having charge and control of the school or schools. '99, p. 70.

2757. (1113x20.) Penalty for violation of statute or of regulations. Any person who violates, disobeys, omits, neglects, or refuses to comply with, resists any of the provisions of this chapter, or who refuses or neglects to obey any of the rules, orders, proclamations, or sanitary regulations of the board of health, health officer, or mayor, or who omits, neglects, or refuses to comply with, or who resists any officers or orders or special regulations of said board of health, health officer, or mayor, shall, upon conviction, be deemed guilty of a misdemeanor. '99, p. 70.

CHAPTER 6.

ANNUAL CONVENTION OF HEALTH OFFICERS.

2758. (1113x21.) Convention to be held at state capital. There shall be held annually at the state capital, at such time as may be designated by the state board of health, a convention of health officers of the state. '07, p. 52

2759. (1113x22.) Membership. Expenses. The health officer of each city, incorporated town, and county of the state shall be a member of such convention, and his actual and necessary traveling expenses shall be paid by the city, incorporated town, or county from which he holds his appointment. '07, p. 52; am'd '09, p. 33.

2760. (1113x23.) Purposes of convention. Said convention shall be held for the purpose of disseminating knowledge as to the cause and prevention of disease, and the best method of enforcing the sanitary laws of the state, and the rules and regulations of the state board of health, and shall be under the general direction of the state board of health. '07, p. 52.

CHAPTER 7.

DISINFECTION IN TYPHOID FEVER CASES.

2761. (1113x24.) Disinfection. It shall be the duty of any person having charge of a person affected with typhoid fever to disinfect all excreta excreted by the said person during the course of the disease, in accordance with the rules of the state board of health, and upon failure to do so shall be deemed guilty of a misdemeanor. '03, p. 68.

Prevention of spread of contagious diseases, §§ 2743-2748.

2762. (1113x25.) Duty of physician. It shall be the duty of the physician in attendance upon all persons affected with typhoid fever to personally instruct those having charge of same to perform the disinfection described in this chapter and to satisfy himself that the same is properly carried out, and for failure to do so he shall be deemed guilty of a misdemeanor. '03, p. 68.

CHAPTER 8.

MISCELLANEOUS.

2763. (1113x26.) Unlawful to compel vaccination. Hereafter it shall be unlawful for any board of health, board of education, or any other public board, acting in this state under police regulations or otherwise, to compel by resolution, order, or proceedings of any kind, the vaccination of any child, or person of any age; or making vaccination a condition precedent

to the attendance at any public or private school in the state of Utah, either as pupil or teacher. '01, p. 15.

Health of school children, §§ 2755, 2756.
Sight and hearing of school children to be tested, § 4537.
Prior to adoption of this section, board of health might, during epidemic of smallpox, make vaccination a condition for admission to schools.
State v. Bd. of Education, 21 U. 401; 60 P. 1013.

2764. (1113x27.) Tuberculosis to be reported. Precaution. Penalty. It shall be the duty of every physician, owner, agent, manager, principal, superintendent, or other officer of each and every public or private institution or dispensary, hotel, boarding or lodging house, in any town, city, or county to report to the board of health or health officer thereof, in writing, or to cause such report to be made by some proper and competent person, the name, age, sex, occupation, and latest address, and such other facts as may be required by the rules of the state board of health, of every person afflicted with tuberculosis, within one week of the discovery of such affliction. It shall be the duty of every person afflicted with this disease and of every person in attendance upon any one sick with this disease, and of the authorities of public or private institutions or dispensaries, to observe and enforce all the sanitary rules and regulations of the state board of health for preventing the spread of pulmonary tuberculosis. Any person afflicted with tuberculosis of the lungs or larynx, or any other disease whose virus or infecting agent is contained in the sputum or other infectious secretion, shall not deposit his sputum, saliva, or other infectious secretion in such place as to cause offense or danger of contracting the disease to any person or persons. It shall be the duty of every person afflicted with tuberculosis of the lungs or larynx, or any other disease whose virus or infecting agent is contained in the sputum, saliva, or other infectious secretion, to provide himself with a sputum flask, or receptacle in which to deposit his sputum, saliva, or other infectious secretion, while traveling in any public conveyance or attending any public place, and the contents of said flask or receptacle shall be burned or otherwise thoroughly disinfected. Upon the compliant of any responsible person, the local board of health or health officer shall at once investigate the conditions complained of, and, if found dangerous or detrimental to the public health, such board of health or health officer shall make and enforce such orders as may be necessary to abate the offense or dangers caused thereby. In case of the vacation of any apartment or premises by death from tuberculosis, or by the removal therefrom of a person or persons afflicted with tuberculosis, it shall be the duty of the person or physician in charge to notify the board of health or health officer having jurisdiction thereof of said removal within twenty-four hours thereafter, and such apartments or premises so vacated shall not again be occupied until duly disinfected as provided by law and the rules of the state board of health. Any person who shall violate any of the provisions of this section, and any person who, without written authority from the board of health or health officer, shall remove or cause to be removed any placard placed upon premises or apartments which are or have been occupied by a person or persons afflicted with any of the diseases mentioned in this section, shall be guilty of a misdemeanor, and upon conviction thereof, shall be fined not less than $5 nor more than $100, or punished by imprisonment in the county jail for not less than five days nor more than ninety days.
'05, p. 64; '13, p. 109.

2765. (1113x28.) Location of pesthouses. Penalty. No city, county, or municipal corporation, or public or private corporation, or person or association, or persons, shall, after the first day of April, 1911, use, operate, maintain, or cause to be used, operated, and maintained, any house, building, or premises for any pesthouse, asylum, or hospital used as a place of detention in which to keep or confine persons having, or suspected of having, smallpox, within twenty rods of any public road, or within one-fourth mile of any canal, ditch, aqueduct, or flume conveying a stream of running water, only, and uncovered along the surface of the ground where the waters

of such canal, ditch, aqueduct, or flume are conveyed into or used by the inhabitants of any city, town, or village for culinary, household, or other domestic purposes. Any person, association of persons, or corporation violating any of the provisions of this section shall be deemed guilty of a misdemeanor. '03, p. 31; am'd '11, p. 182.

CHAPTER 9.

ESTABLISHMENT AND MAINTENANCE OF COUNTY HOSPITALS.

('17, p. 371.)

2775. Petition. Duty of commissioners. Any county may establish a hospital in the following manner: Whenever the board of county commissioners of any county shall be presented with a petition signed by 20 per cent of the resident taxpayers of said county, one-half of whom shall not be residents of the town in which said hospital is to be located, asking for the annual levy of a tax for the establishment and maintenance of a public hospital at a place in the county therein named, and shall specify in their petition the maximum amount of money to be spent in the establishment, building, or buying of such structure as shall be used for said hospital, such board of county commissioners shall submit the question to the qualified electors of the county at the next general election to be held in the county, or at a special election to be held for that purpose, giving ninety days' notice thereof in one or more newspapers published in said county, if any be published therein, and by posting such notices, written or printed, in each voting precinct in said county, which notice shall include the text of the petition and state the amount of tax to be levied upon the assessed property of said county, which tax shall not exceed 2 mills on the dollar for a period of time not exceeding twenty years, and to be for the issue of county bonds, and provide funds for the purchase of a site or sites, and the erection thereon of a public hospital building or buildings, and for the support of the same; which said election shall be held at the usual places in said county for electing county officers, the vote to be canvassed in the same manner as that for county officers.

2776. Submission to electors. Tax levy. The board of county commissioners of such county shall submit to the qualified voters thereof, at a regular or special election, the question whether there shall be levied on the assessed property of such county a tax of ..... mills on the dollar for the purchase of real estate for hospital purposes, for the construction of hospital buildings, and for the maintaining of the same, or for either or all such purposes. The ballot to be used at any election at which the hospital question is submitted shall be printed with a statement substantially as follows:

For a ..... mill tax for a bond issue for a public hospital and the maintenance of the same: Yes, no.

If a majority of the votes cast at such an election on a proposition so submitted shall be in favor of a ..... mill tax for a bond issue for a public hospital and for the maintenance of the same, the board of county commissioners shall levy the tax so authorized, which shall be collected in the same manner as other taxes are collected, and credited to the hospital fund, and shall be paid out on the order of the hospital trustees for the purpose authorized by this chapter, and for no other purpose whatsoever.

2777. Five trustees. Selection. Should a majority of all votes cast upon the question be in favor of establishing said county hospital, the board of county commissioners shall proceed to appoint five trustees as follows: One trustee for each school precinct where county constitutes but one school district, such trustee to hold office until the next school election, when his successor shall be elected; one for each school precinct, who shall hold office

for the same period of time as the school trustees of their respective precincts. At each subsequent school election the offices of such trustees whose term of office is about to expire shall be filled by the nomination and election of hospital trustees in the same manner as provided for the nomination and election of school trustees in such county; *provided,* that in counties containing more than one school district the county commissioners shall divide said county into five representative precincts, and shall appoint one trustee for each of such precincts, said trustees to hold office until the next school election, when their successors shall be elected, one from each hospital precinct, in the same manner as provided for election of trustees in school precincts. No physician shall serve as a member of the hospital board.

2778. Organization. Compensation; powers, and duties of board. The said trustees shall, within ten days after their election or appointment, qualify by taking the oath of civil officers and organize as a board of hospital trustees by the election of such other officers as they may deem necessary, but no bond shall be required of them. The county treasurer of the county in which the hospital is located shall be treasurer of the board of hospital trustees. The treasurer shall receive and pay out all moneys under the control of the board as ordered by it, but shall receive no compensation from such board. No trustee shall receive compensation for his service performed, but may receive a reimbursement for expenditure actually made for personal expenses or incurred as a trustee, and an itemized account of all such expenses and money paid out shall be made under oath by each of such trustees and filed with the secretary and allowed only by the affirmative vote of all the trustees at a board meeting. The board of trustees shall make and adopt such rules and regulations for their own guidance and for the government of the hospital as they deem expedient for the economical and equitable conduct thereof and not inconsistent with this chapter and the ordinances of such town or city wherein such hospital is located. They shall have control of all money collected for the hospital fund, for the purchase of sites, the purchase or construction of a hospital building or buildings, and of the supervision, care, and cusody of the grounds, rooms, or buildings purchased; *provided,* that all money received from such hospital shall be deposited in the treasury of the county to the credit of the hospital fund and paid out only by warrant drawn by the auditor of said county on properly authenticated vouchers of the hospital board. Said hospital board shall have the power to appoint a suitable matron or superintendent, or both, and necessary assistants, and fix their compensation, and shall have power to remove such appointees; and shall in general carry out the spirit and intent of this chapter in establishing and maintaining a public hospital. Such board shall hold meetings as least once a month; they shall keep a complete record of all proceedings; and four members of such board shall constitute a quorum for the transaction of business. One of said trustees shall visit and examine said hospital at least twice a month, and the board shall within the first week of January of each year, compile and publish in one or more newspapers in the county in which said hospital is located, if such newspaper there be, and also file with the county commissioners in said county, a report of their proceedings with reference to such hospital, and a statement of all receipts and expenditures of the year, and shall certify the amount necessary to maintain and improve the hospital for the ensuing year. No trustee shall have pecuniary interest in the purchase of any supplies for the hospital unless such supplies be purchased by competitive bidding.

2779. Filling vacancies. Vacancies in the board of trustees, occasioned by removals or resignations, or otherwise, shall be reported to the board of county commissioners, and be filled in like manner as the original appointments, appointees to hold office until the next following school election, when such vacancies shall be filled in the regular manner.

2780. Issuance of bonds. Whenever any county in the state shall pro-

vide for the appointment and election of hospital trustees, and shall have voted a tax to provide for the payment of bonds, said bonds may be issued for a term not exceeding twenty years for hospital purposes as provided by law. The said county may issue bonds in anticipation of the collection of such tax in such sums as the board of hospital trustees shall certify to the board of county commissioners of said county to be necessary for the purpose contemplated by such tax; but such bonds in the aggregate shall not exceed the amount which might be levied on the property valuation of the year in which the tax is voted, and such bond shall mature in twenty years from the date, and shall be in sums of not less than $100 nor more than $1000, and draw interest at the rate of not to exceed 5 per cent per annum, payable annually or semi-annually. Said bond shall be payable at the pleasure of the county after five years, and each of said bonds shall provide that it is subject to this provision, and shall not be sold for less than par, and shall be substantially in the form provided for county bonds, but subject to changes that will conform them to the provisions of this chapter, and be numbered consecutively and redeemable in the order of their issuance. For the providing of the levy to pay interest, principal, and redemption of said bonds, the existing statutes shall apply.

2781. Sites. Condemnations. If the board of hospital trustees and the owner of any property desired for them for hospital purposes can not agree as to the price to be paid therefor, the board shall report the same to the board of county commissioners, and condemnation proceedings shall be instituted by the board of county commissioners and prosecuted in the name of the county wherein such hospital is located, by the county attorney for such county under the provisions of the existing statutes.

2782. Erection of buildings. No hospital building shall be erected or constructed until the plans and specifications therefor have been made and adopted by the board of hospital trustees and bids advertised for according to law as for other county buildings.

2783. Jurisdiction of towns. The jurisdiction of the city, town, or village in or near which such hospital is located shall extend over all lands used for hospital purposes outside the corporate limits, if so located, and all ordinances of such cities or towns shall be in full force and effect in and over the territory occupied by such public hospital.

2784. Improvement appropriations. In counties exercising the rights conferred by this chapter, the board of county commissioners may appropriate each year, in addition to a tax for hospital funds hereinbefore provided for, not exceeding 5 per cent of the general fund for the improvement and maintenance of any hospital so established.

2785. Beneficial use. Privileges extended. Conditions. Every hospital established under this chapter shall be for the benefit of the inhabitants of such county and of any person falling sick or being maimed or injured within its limits; but every inhabitant or person who is not a pauper shall pay to such board of hospital trustees, or such officers as it shall designate, a reasonable compensation for occupancy, nursing, care, medicine, or attendance according to the rules and regulations of such board as may be adopted in order to render the use of said hospital of the greatest benefit to the greatest number; and said board may exclude from the use of such hospital any and all persons or individuals who wilfully violate such rules and regulations. Such board may extend the privileges and use of such hospital to persons residing outside of such county upon such terms and conditions as said board may from time to time by its rules and regulations prescribe.

2786. Subject to rules. When such hospital is established, the physicians, nurses, and attendants, the person sick therein, and all persons approaching or coming in the limits of the same, and all furniture and other

articles used or bought there, shall be subject to such rules and regulations as the board may prescribe.

2787. Donations. Any person or persons, firm or corporation, organization or society desiring to make donations of money, personal property, or real estate for the benefit of such hospital shall have the right to vest title to the money or real estate so donated to said county hospital, to be controlled when accepted by the board of hospital trustees, according to the terms of the deed, gift, or devise of such property.

2788. Physicians. In the management of such public hospital no discrimination shall be made against practitioners of any school of medicine recognized by the laws of the state of Utah, and all such legal practitioners shall have equal privileges in the treating of patients in said hospital. The patient shall have the absolute right to employ at his or her own expense, physicians, and when acting for any patient in such hospital the physician employed by such patient shall have exclusive care and treatment of such patient, and nurses therein and patients shall be subject to the directions of such physicians, subject always to such general rules and regulations as shall be established by the board of trustees under the provisions of this chapter.

2789. Apartments for insane. The said board of trustees shall at all times provide a suitable room for the examination and detention of all persons brought before the commissioners of insanity for such county, provided that such hospital is located at the county seat. Such person having been adjudged insane shall be sent to the state mental hospital at the discretion of the commissioners of insanity

2790. Tubercular and infected patients. The board of hospital trustees are hereby authorized to provide suitable apartments in said hospital for the care and treatment of all medical and surgical cases, including tuberculosis, infectious diseases, and maternity cases, to formulate rules and regulations for the government of such persons, and for the protection from infection of other patients, persons, nurses, and attendants in such public hospital as may be deemed necessary. It shall be the duty of such person in charge of, or employed at such hospital, or resident thereof, to faithfully obey all such rules and regulations.

2791. Rates for treatment. The board of hospital trustees shall have the power to determine whether or not patients presented at such public hospital for treatment are subjects for charity, and shall fix such rate for treatment of patients, other than those unable to assist themselves, as may be deemed right and equitable by the board of trustees.

2792. Care of indigent. The board of county commissioners of any county where no suitable provisions have been made for the care of its indigent residents may contract with the board of trustees of any public hospital for the care of such persons in the hospital upon such terms as may be agreed upon.

TITLE 41.

HIGHWAYS.

CHAPTER 1.

GENERAL PROVISIONS.

2800. (1114.) Defined. In all counties of this state, all roads, streets, alleys, lanes, courts, places, trails, and bridges laid out or erected as such

by the public, or dedicated or abandoned to the public, or made such in actions for the partition of real property, are public highways.

Cal. Pol. C., § 2618*. Mont. Pol. C., § 2600*.
Dedication of streets, etc., § 5024.
Penalty for injuring, § 8384.
Right of motor vehicles in, § 3975.
Liable for drainage assessment, § 2068.
Standard highways, §§ 2875-2883.
Use of wide-tired wagons, §§ 2894, 2895.
Highways defined, § 5848.

2801. (1115.) When deemed dedicated. A highway shall be deemed to have been dedicated and abandoned to the use of the public when it has been continuously used as a public thoroughfare for a period of ten years.

The extent of the dedication is determined by all the circumstances, not only by the part actually used, but also the width of the highways in the vicinity and of the system of which the particular highway is a part.

Burrows v. Guest, 5 U. 91; 12 P. 847.
Wilson v. Hull, 7 U. 90; 24 P. 799.
Whitesides v. Green, 13 U. 341; 44 P. 1032.

Where the public assumes to appropriate land for public use, and the owner interposes no objection, but acquiesces in its continual use by the public, an intention to dedicate will be presumed.

Whittaker v. Ferguson, 16 U. 240; 51 P. 980.

Where land has been set apart by the owner for public use as a highway and accepted by the public, the right of the public does not depend upon a ten or twenty years' user or possession; the dedication may be inferred from long continued use by the public with the knowledge of the owner and without objection by him.

Schettler v. Lynch, 23 U. 305; 64 P. 955.

Land having been once dedicated by the owner of the soil as a highway and having been accepted by the public, all subsequent grantees of abutting lands are bound by such dedication and have no right to obstruct any portion of the street.

Id.

A dedication of land for a public highway may be either express, as where the owner manifests his purpose by a grant evidenced by writing, or implied, when the acts and conduct of the owner clearly manifest the intention on his part to devote the land to the public use; but in either case it is always a question of intention, and no particular formality or form of words is necessary.

Id.

To make a dedication complete, there must not only be an intention on the part of the owner to set apart the land for the use and benefit of the public, but there must be an acceptance of the dedication by the public.

Culmer v. S. L. City, 27 U. 252; 75 P. 620.
Lemp v. Moran, 50 U. —; 169 P. 459.

Acceptance may be inferred.

Wilson v. Hull, 7 U. 90; 24 P. 799.

Facts tending to show dedication.

Davis v. O. S. L. R. R. Co., 31 U. 307; 88 P. 2.

If not accepted within a reasonable time the grantor may revoke the offer

Lemp v. Moran, 50 U. —; 169 P. 459.

A grantor owning a piece of ground, who deeds to several grantees an easement over a strip of ground, does not dedicate the strip to the public as a public highway.

Brown v. O. S. L. R. R. Co., 36 U. 257; 102 P. 740

A use under private right is insufficient to show dedication, however long; it does not make the way public, and the mere fact that the public also used it without objection from the owner will not make the way public

Morris v. Blunt, 49 U. 243; 161 P. 1127.

2802. (1116.) Continue until abandoned. All highways once established must continue to be highways until abandoned by order of the board of county commissioners of the county in which they are situated, or by judgment of a court of competent jurisdiction. Am'd '11, p. 287.

Cal. Pol. C., § 2619*. Mont. Pol. C., § 2601*.
Title to streets, § 2866x.

This section applies to a road dedicated by the public as well as other roads, and the abandonment by the public authorities does not affect any rights of individuals to the road acquired by purchase of lots according to the plat which dedicated it.

Sowadzki v. Salt Lake County, 36 U. 127; 104 P. 117.

Dedication of a public highway by the filing of a plat takes effect when the plat is filed, and a highway so dedicated ceases to be such five years from the filing of the plat, unless it has been used or worked in the meantime, in which case it will not cease to be a highway until five years after such use or work.

Tuttle v. Sowadzki, 41 U. 501; 126 P. 959.

2803. (1117.) Widths of public and private ways. The width of rights-of-way for state roads shall be such as will meet the approval of the state road commission, and the widths of rights-of-way to be used for county roads, alleys, lanes, trails, private highways, and by-roads shall be such as may be deemed necessary by the board of county commissioners; *provided,* that nothing in this section shall be so construed as to increase or diminish the width of either kind of highways already established or used as such; *provided, further,* that nothing in this section contained shall prevent cities from laying out, establishing, opening, or accepting the dedication of streets, avenues, boulevards, and alleys of any width the council of such cities shall deem proper. Am'd '09, p. 81; '17, p. 222.

Cal. Pol. C., § 2620*. Mont. Pol. C., § 2602*.

2804. (1118.) Forfeiture of franchise. Whenever the franchise of any toll bridge, trail, turnpike, or of any plank or common wagon road has expired by limitation, forfeiture, or non-user, the same becomes a free public highway, and no claim shall be valid against the public for right of way or for land or material comprising such bridge, trail, turnpike, or plank or wagon road.

Cal. Pol. C., § 2619*.

2805. (1119.) Limited highways. Where roads or streets are laid out through improved lands, and such lands are not protected by fences along the lines of the roads or streets passing through them, such roads or streets may, by the board of county commissioners of the county, be declared to be limited highways. A notice to that effect shall be posted at each end of such limited highways, and any person who shall wilfully drive any bands or herds of cattle, horses, sheep, or hogs over such roads or streets other than during the time that the abutting lands are thrown open to the public by the owners thereof for grazing purposes, shall be deemed guilty of a misdemeanor.

2806. (1120.) Public and private rights in highways. By taking or accepting land for a highway, the public acquires only the right of way and incidents necessary to enjoying and maintaining it. A transfer of land bounded by a highway passes the title of the person whose estate is transferred to the center of the highway.

Cal. Pol. C., § 2631*. Mont. Pol. C., § 2620*.

The easement acquired by the public in a public highway vests in it the mere right of passage, and does not divest the owner of the fee, and he may continue to make any use thereof not incompatible with the public easement.

Whitesides v. Green, 13 U. 341; 44 P. 1032.

While the public may abandon a street, so far as its rights therein are concerned, such abandonment does not affect the rights of abutting owners to an easement therein for ingress and egress.

Hague v. Juab County M. & E. Co., 37 U. 290; 107 P. 249.

This section is not applicable where the recitals in the findings respecting a strip of land are such as to create a private, as distinguished from a public, easement.

Brown v. O. S. L. R. R. Co., 36 U. 257; 102 P. 740

2807. (1121.) Highways in cities and towns. Where public highways extend through any incorporated town or city they shall conform to the direction and grade and be subject to all regulations of other streets in such town or city.

2808. (1122.) Plats of highways. It shall be the duty of the board of county commissioners in each county immediately to determine all public highways existing in its county and to prepare plats and specific descriptions of the same and of such other highways as such board may from time to time locate upon public lands, which shall be kept on file in the office of the county clerk. Am'd '99, p. 117.

2809. (1123.) Patent subject to easement. Whenever the state shall issue its patent for any lands the same shall be made subject to the easement or right of the public to use all such highways as may have been established according to law, across the land therein described. Am'd '99, p. 118.

2810. (1124.) U. S. patents. Highways. Claim for damages. Whenever any person shall acquire title from the United States to any land in this state over which there shall at such time extend any public highway that shall not theretofore have been duly platted, and that shall not have been continuously used as such for a period of ten years, theretofore, he shall, within three months after receipt of his patent, assert his claim in writing for damages to the board of county commissioners of the county in which the land is situated; and said board shall have an additional period of three months in which to begin proceedings to condemn the land according to law. Such highway shall continue open as a public highway during said periods; but in case no action is begun within the period above stated by the board of county commissioners, said highway shall be deemed to be abandoned by the public. In case of a failure by such person so acquiring title to public lands to assert his claim for damages as aforesaid, for three months from the time he shall have received a patent to such lands, he shall thereafter be barred from asserting or recovering any damages by reason of such public highway, and the same shall remain open.

N. Dak. (1895) § 1078*. See R. S. of U. S., § 2477.

2811. (1125.) Sidewalks on highways. Any owner or occupant of land may construct a sidewalk on the highway along the line of his land, subject, however, to such regulations as may be prescribed by the board of county commissioners. Any person driving or riding on such sidewalk with horse

or team, without permission of the owner of such sidewalk, is liable to such owner for all damage he may suffer thereby.

Cal. Pol. C., § 2632*. Mont. Pol. C., § 2621*.

2812. (1126.) Trees along highways. Damages. Any owner or occupant of land adjoining a public highway may plant trees on the side of such highway contiguous to his land. Such trees must be set in regular lines at such distances from the center line of the highway as may be determined by an order of the board of county commissioners. Whoever shall wilfully or maliciously injure any of such trees shall be liable to the owner for treble the amount of damages sustained.

Cal. Pol. C., § 2633*. Bonus for planting trees on highway, § 1400x17.

2813. (1127.) Ditches crossing highways. Owners or users of canals or ditches which now are or hereafter may be constructed across any public highway are required to restore such highway to as good and safe condition as it was before such canal or ditch was constructed, by building a bridge or such other suitable crossing as may be determined by the board of county commissioners or the road supervisor. A failure to construct and keep in repair such bridge or crossing as and when required by the board of county commissioners shall be deemed a misdemeanor; *provided,* that nothing in this chapter shall prevent the county from keeping bridges and crossings in repair after they have been accepted by the board of county commissioners.

2814. (1128.) Encroachments. If any public highway is encroached upon by a fence or building or otherwise, the road supervisor of the district may, orally or in writing, require the encroachment to be removed.

Cal. Pol. C., § 2731. Mont. Pol. C., § 2721.

2815. (1129.) Id. Notice to remove. Notice must be given to the occupant or owner of the land, or person causing or owning the encroachment, or left at his place of residence, if he be known to the person giving such notice and reside in the county; if not, it must be posted on the encroachment, specifying the breadth of the highway, the place and extent of the encroachment, and requiring him to remove the same within ten days thereafter.

Cal. Pol. C., § 2732 Mont. Pol. C., 2722.

2816. (1130.) Id. Refusal. Penalty. If the encroachment is not removed or commenced to be removed, and the removal not diligently prosecuted, prior to the expiration of the ten days from the service or posting the notice, the one who caused, owns, or controls the encroachment forfeits $10 for each day the same continues unremoved. If the encroachment is such as to effectually obstruct and prevent the use of the highway for vehicles, the road supervisor must forthwith remove the same.

Cal. Pol. C., § 2733. Mont. Pol. C., § 2723.

2817. (1131.) Id. Action. If the encroachment is denied, and the owner, occupant, or person controlling the matter or thing charged with being an encroachment refuses either to remove or permit the removal thereof, the board of county commissioners must direct the county attorney to commence in the proper court an action to abate the same as a nuisance; if judgment be recovered for the plaintiff, in addition to having the same abated, there shall also be recovered $10 for every day such nuisance remained after notice given for its removal, and also the costs of the action.

Cal. Pol. C., § 2734. Mont. Pol. C., § 2724*.

2818. (1132.) Removal without action. The board of county commissioners may at any time order the supervisor to forthwith remove any such encroachment without commencing action.

Mont. Pol. C., § 2724

2819. (1133.) Id. Penalty. If the encroachment is not denied, but is not removed for five days after the notice is complete, the road supervisor may remove the same at the expense of the owner, occupant, or person controlling the same, and recover his costs and expenses, and also for each day

the same remained after notice was complete, the sum of $10, in an action for that purpose.

Cal. Pol. C., § 2735. Mont. Pol. C., § 2725.

CHAPTER 2.

POWERS OF COUNTY COMMISSIONERS AS TO ROADS.

('09, p. 279.)

2820. (1134.) Powers. Each board of county commissioners shall, by proper regulations:

1. Appoint a county road commissioner biennially, fixing his compensation, and shall have the power to remove him for cause;

2. Cause to be surveyed, viewed, laid out, recorded, opened, maintained, and worked, such public roads as are necessary for public convenience;

3. Abolish or abandon such public roads as are unnecessary for the use of the public;

4. Contract for, purchase, or otherwise acquire, when necessary, rights-of-way for public roads over private property, and may institute proceedings for the acquirement of said rights-of-way as provided by law;

5. Cause to be erected and maintained on such roads as they may designate, milestones or posts, and guide posts properly inscribed;

6. Designate the public roads to be maintained by the county within or extending through each incorporated city or town, which in no case shall be more than three in the same direction.

Cal. Pol. C., § 2643*. Mont. Pol. C., § 2631*.
County board to create road district, § 1400x1; and control highways, § 1400x24.
Create indebtedness for, § 1364.
Create special road districts and levy taxes, §§ 2830, 2835.
See Salt Lake City v. Wilson, 46 U. 60; 148 P. 1104.

2821. (1135.) County clerk to keep record. The county clerk must keep a book in which must be recorded all orders of the board of county commissioners relative to all county roads, including orders for laying out, opening and altering roads, all contracts, and all other matters pertaining thereto.

2822. (1136.) County road commissioner. Oath. Bond. The county road commissioner shall receive notice of his appointment from the county clerk, and within twenty days thereafter must qualify as such by taking and subscribing the oath of office and giving a bond to the county in such sum as may be determined by the board of county commissioners, and approved by them, and filed with the county clerk. A certificate of the county clerk under his seal that the appointment has been made, the required bond filed, and the oath of office taken shall constitute a commission, and shall authorize the person named therein to discharge the duties of county road commissioner until superseded.

2823. (1137.) Id. Powers and duties. The county road commissioner, under the direction and supervision of the board of county commissioners, shall:

1. Take charge of the public roads within the county, and employ and direct such competent help as may be necessary to properly perform his duties;

2. Prepare, and submit to the county commissioners for their approval, plans, specifications, and estimates for any road construction to be made in the county on county roads. After the approval by the county commissioners of the plans, specifications, and estimates provided therein, the work of construction growing out of such approved plans, specifications, and estimates shall be wholly within the authority of the county road commissioner;

3. May assist in the supervising and constructing of state roads under the direction and control of the state road commission;

4. Keep the roads clear of obstructions, and in good repair;

5. Cause the roads to be graded, and bridges and causeways to be built wherever necessary, and keep the same in repair and renew them when necessary;

6. Give notice to all persons in the several precincts liable to the payment of road poll tax, stating when due and where to be paid;

7. Collect, personally, or by authorized agent, the annual road poll tax;

8. Make to the board of county commissioners, on or before the first Monday in December of each year, a written report showing:

(a) Name of each person assessed for road poll tax in each precinct;

(b) The amount of tax collected by suit or otherwise, and the names of all delinquents from whom collection has been enforced;

(c) The amount of uncollected tax, the name of each delinquent, and the cause why such tax remains uncollected in each instance;

(d) The amount of money expending in each precinct and a detailed description of improvements made;

(e) A general description of the condition of the public roads in each precinct;

(f) An accurate account of the time he himself and his agents have been employed, and the nature and items of the service rendered.

Poll tax, §§ 4465-4470.
To enforce motor vehicle act, § 3974.
Duties respecting poll tax, §§ 2873, 4465-4468.
Supervise labor of delinquent husband or father, § 8115.

CHAPTER 3.

SPECIAL ROAD DISTRICT TAX.

('09, p. 287.)

2830. Special road districts. County commissioners shall have the power to divide the county into special road districts as occasion may require, for the purpose of permanently constructing the roadway space on any state road or any county road, by graveling, macadamizing, or paving the same.

2831. Cost. How assessed. The cost of graveling, macadamizing, or paving the roads within any special road district as provided in § 2830, except the intersection of roads within such districts, shall be assessed upon the lots and lands abutting upon the roads in such district, at so much per acre or fraction thereof; *provided,* that not more than 25 per cent of the cost of such graveling, macadamizing, or paving shall be assessed against such property owners; and, *provided further,* that no property shall be included in such special road district that is distant from the road to be improved more than one-half the distance from said road to a parallel state or county road; *provided further,* that the tax for road construction as provided in this section shall be as follows: Fifty per cent of said tax shall be levied upon the property taxable for such purpose that lies adjacent to said road and within one-third of the distance from said road to the farther boundary of property taxable for said road construction; 30 per cent of said tax shall be levied upon property within the middle third of the distance from said road to the farther boundary of the property taxable for said road construction and 20 per cent of said tax upon property lying in the outer third of the distance from said road to the farther boundary of the property taxable for said purpose.

2832. County commissioners shall give notice. In all cases, before the levy of any tax as provided in this chapter, the county commissioners shall give notice of intention to levy said tax, naming the purpose for which the tax is to be levied, dividing the improvements proposed, the boundaries of the district to be affected or benefited, the estimated cost of such improve-

ments, and designating a time when the county commissioners shall consider the proposed levy, which notice will be published at least twenty days in a newspaper published within said county and having general circulation within said county; *provided,* that in counties where there is no newspaper for publication of said notice, the county commissioners shall have at least five such notices posted in conspicuous places within the boundaries of said special road district. If, at or before the time so fixed, written objection to such improvement, signed by owners of property upon which two-thirds of the proposed tax is to be levied for such improvement, be not filed with the county clerk, the county commissioners will be deemed to have acquired jurisdiction to proceed to levy and collect such tax.

2833. Notice of tax to be mailed. Equalization. Whenever the county commissioners shall levy any tax under the provisions of this chapter, and after the completion of the lists of the property in such district so taxed, the county commissioners shall mail notice of said tax to each person liable therefor, which tax shall be based on the assessed valuation of the land in said district, which notice shall state the time and place of meeting of said board during the usual business hours and for not less than three consecutive days that county commissioners shall sit as a board of equalization and review, and any person feeling aggrieved shall have a hearing, and the board of county commissioners shall have authority to make corrections of any tax deemed unequal or unjust.

2834. Special assessments constitute a lien. Special assessments made and levied under the provisions of this chapter, and the cost of collecting the same, shall constitute a lien upon and against the property upon which such assessment is made from and after the date thereof, and such assessment shall be collected in the manner prescribed by ordinance.

2835. Time and manner of collecting tax. The board of county commissioners shall by ordinance prescribe the time and manner of collecting the said special road tax as provided in this chapter, together with rules and regulations governing delinquencies.

CHAPTER 4.

PENALTIES.

2840. (1139.) Obstructions and injuries to highways. Any person who wilfully or carelessly obstructs or injures any public or other highway by causing or permitting flow or seepage of water; or who wilfully or carelessly permits water under his control to escape in any manner, so as to injure any public or other highway; or any person who shall wilfully or carelessly place or leave, or cause to be placed or left, any log, timber, stone, wood, or other material, or any machinery, wagon, or other vehicle upon any public or other highway, in such a way as to obstruct the travel or to endanger property or persons passing upon such highway, shall be deemed guilty of a misdemeanor.

Encroachments on highways, §§ 2814-2819.

Railroads must maintain good and sufficient crossings, § 1237.

Ringing bell and blowing whistle at crossings, § 1239, and note.

When a train and vehicle approach a highway crossing at the same time, the latter should stop, but the train should not, by stopping on the crossing or moving backward and forward, subject the vehicle to unreasonable delay.

Wilson v. Sou. Pac. Co., 13 U. 352; 44 P. 1040.

Public highways may not only be used for public travel in the usual and ordinary mode, but may be used for other purposes, if thereby the ordinary uses are not unreasonably interfered with.

City of Eureka v. Wilson, 15 U. 53; 48 P. 41.

2841. (1140.) Driving animals on hillside highway. Any person who drives a herd of horses, mules, asses, cattle, sheep, goats, or swine over a public highway, where such highway is constructed on a hillside, shall be liable for any damage done by such animals in destroying the banks or roll-

ing rocks into or upon such highway; and the action for such damage shall be brought in the name of the county wherein such damage is done, and the amount received shall be paid into the county treasury, and it shall be the duty of the county attorney of such county to prosecute the action.

Am'd '99, p. 24.

The highway act making owners of sheep, cattle, etc., liable for damages to roads, is due process of law.

Brimm v. Jones, 11 U. 200; 39 P. 825; affirmed 165 U. S. 180.

2842. (1141.) Use of bridges. Notice. The board of county commissioners may cause to be put up on bridges a notice that there is a "fine of $5 for riding or driving on this bridge faster than a walk"; and that "not more than (stating the number) horses, mules, asses, or cattle, or (stating the number) sheep, goats, or swine will be allowed upon this bridge at any one time, under a penalty of $10 for each offense." Whoever thereafter rides or drives faster than a walk on such bridge is liable to a fine of $5 for each offense, and any person who drives or allows upon such bridge a greater number of animals than that designated upon the notice is liable to a fine of $10 for each offense.

2843. (1142.) Injuring trees on highways. Whoever digs up, cuts down, or otherwise injures or wilfully destroys any shade, ornamental, or other tree, planted and standing on any highway in conformity to the requirements of this title, shall be deemed guilty of a misdemeanor.

2844. (1143.) Teams passing each other. Whenever it is necessary for a fast traveling team to pass a slower one, it shall be the duty of the teamster of the slow traveling team to give the other a convenient opportunity so to do, if it can be done without endangering his own team; and whenever teams of any kind meet, each shall seasonably turn to the right, so as to give the other team half of the traveled road, whenever it can be done with safety. A failure so to do shall be deemed a misdemeanor.

Rule of road as to motor vehicles, § 3968.

Evidence held to sustain a finding that the automobile passed the plaintiff on the wrong side.

Fowkes v. Case Threshing Mch. Co., 46 U. 502; 151 P. 53.

Whether driving a team on the wrong side of the road in violation of an ordinance is negligence depends on the facts and circumstances, and generally is a question of fact and not of law.

White v. Shipley, 48 U. 496; 160 P. 441.

Where plaintiff was a passenger on the rear of the motorcycle, which the driver rode on the wrong side of the highway at a high speed without protest from the plaintiff, and in turning out for a team they were injured, plaintiff was contributorialy negligent, and could not recover from the owner of the automobile which they then struck.

Russell v. Watkins, 49 U. 598; 164 P. 867.

Driving to the left of the center line of the road should be submitted to the jury as an element of negligence.

Staton v. Western Macaroni Mfg. Co., 51 U. —; 173 P. —.

2845. (1144.) Damages. Any person violating any of the provisions of this title, in addition to the penalties herein provided, shall be liable for all damages that may accrue to the party damaged by reason of such violation.

CHAPTER 5

STATE ROAD COMMISSION.

('09, p. 282.)

2850. Commission created. There is hereby created a state road commission, consisting of the governor of the state, the state engineer, the attorney-general, the secretary of state, and the state auditor, all of whom, as members of such board, shall serve without compensation. Am'd '17, p. 128.

2851. Clerk. Salary. The state road commission is hereby authorized to appoint a competent clerk for said commission, whose salary shall be $1500 per annum, payable quarterly out of the state treasury, the same as other salaries are paid; and the sum of $3000 is hereby appropriated for said service for the years 1911 and 1912. '11, p. 63.

2852. Powers and duties of commission. The duties of the state road commission shall be as follows:

To designate the roads which shall comprise the system of state roads, as provided in this chapter.

To have charge of the expenditure of all moneys in the state road fund, and to make all necessary rules and regulations to properly safeguard the expenditure of said fund in the construction and maintenance of state roads and to carry out and effectuate the provisions of this chapter.

To furnish plans, specifications and estimates for culverts, bridges, and for road construction, together with such necessary information with respect thereto as may be desired by boards of county commissioners, for use on state or county roads.

To test road materials, and to conduct experiments and make investigations with reference to road construction whenever the commission shall deem it necessary, and to prepare and issue a comprehensive manual of road building and maintenance for the information and guidance of officials having supervision of such work.

To employ such competent assistants as may be necessary to properly carry into effect the provisions of this chapter.

To keep all records, maps, profiles, and papers in the office of the commission for public inspection and reference.

To submit a report biennially to the governor of all expenditures, containing a statement of the work accomplished; also, a statement of the general condition of the roads of the state, together with recommendations, at least twenty days prior to the regular session of the legislature.

Am'd '13, p. 70; '15, p. 111.

Contract with government about rural post roads, § 2890.
Select projects for aid, § 2891.
Supervise prisoners work on roads, §§ 5510, 5512, 5514.
Attorney-general and district attorney to advise, § 2860.
Appropriations by national government how disposed of, § 2858.
Survey, etc., pioneer route, §§ 2870-2872.

2853. County roads may be designated a part of state road system. Any of the existing county roads of this state may hereafter be designated by the state road commission in accordance with the provisions of this chapter, and after such designation shall become a part of the system of state roads; *provided,* that only such roads shall be designated as state roads as will connect with similar roads in adjoining counties to form a continuous system of state roads, and such other roads as will best subserve the interest of the people in marketing their products and developing the resources of the state. Where there is no county road in the location designated by the state road commission, the board of county commissioners of the several counties of the state are hereby authorized to secure the right-of-way for such state road in accordance with the laws of the state relating to procuring right-of-way for public roads.

Am'd '13, p. 70; '15, p. 111.

2854. County maps. Upon application of the state road commission, the county commissioners shall have prepared a map of the county, showing the location of all the county roads, and shall designate on said map the roads upon which there is the most traffic and travel, both locally and with adjoining counties. Said map shall be prepared according to the instructions of the state road commission, shall be certified to as to its correctness by the county surveyor, approved by the county commissioners, and filed with the state road commission within six months from the date of the request of said commission.

2855. Designation of roads to form part of system. From the maps furnished by the county commissioners, supplemented by such other information as the state road commission may have, said state road commission shall designate which roads shall form a part of a system of state roads. After having selected such roads, the state road commission shall have prepared a map of each county, designating thereon the roads so selected, approving the same, and shall file a copy of said map with the county recorder of each county. The roads so designated shall be known as "state roads,"

and all other roads designated on the map furnished by the county commissioners shall be known as "county roads."

2856. Appropriation. Apportionment to counties. Notice of construction. Right to fund. There is hereby set apart as a state road fund, from the proceeds of the sale of bonds authorized by §§ 2864-2870 the sum of $100,800 for the calendar year of 1917, and $100,800 for the calendar year of 1918, and there is hereby appropriated and set apart from the general revenues of the state for the year 1919 and for each succeeding year thereafter the sum of $100,800 annually, and such other revenues as may be by law provided. Such funds shall be available for the construction and maintenance of state roads in each county of the state in equal proportions, or as otherwise provided in this chapter; *provided,* that before any part of such fund shall be so available in any county in this state, counties of the eleventh, twelfth, thirteenth, fourteenth, and fifteenth classes are required to duplicate one-fourth of the amount of such fund so set apart for use in such counties; and counties of the ninth and tenth classes to duplicate one-half of the amount of such fund so set apart for use in such counties; and counties of the first, second, third, fourth, fifth, sixth, seventh, and eighth classes, to duplicate the full amount of such fund set apart for use in such counties. Notice of intention to engage in state road construction in any county to the whole amount of the state road fund that will be available, or any part thereof, for said county, shall be filed by the state road commission with the board of county commissioners not later than June 1st of each year. Such notice shall give the following information:

1. The amount of money that will be available in the state road fund for use in said county;

2. A general outline of the work to be undertaken on the state roads in said county;

3. The amount of funds to be appropriated and set aside in order to augment the state provision of funds as set forth in this section;

4. The amount of the special tax levy, in mills, to be placed on the property of the county to raise the funds provided for in § 2857.

Within thirty days from the date of said notice, the county commissioners shall notify the state road commission of the amount of money which the county will appropriate for the purposes specified in the notice to them from the state road commission. In case the board of county commissioners shall decide to accept and comply with the requirements of said notice, they shall, within thirty days from the date thereof, notify the state road commission of the amount of money which the county will appropriate for the purposes specified in said notice, and the acceptance by the county commissioners of the requirements therein set out shall constitute the state road commission the agent of such county for the purpose of carrying out the provisions of this chapter, with irrevocable authority in all matters relating to the construction and maintenance of roads as provided in this chapter. Should the board of county commissioners fail to comply with the requirements of said notice within the time specified, thereupon said county shall forfeit its right to its proportion of the state road fund for that year; *provided,* that the state road commission may grant an extension of time for compliance with the requirements of said notice, not exceeding thirty days additional; *provided, further,* that in case the board of county commissioners fails to comply with these requirements within the time specified, the amount of the state allotment available for such county shall remain a part of the state road fund to be apportioned as herein provided for the following year. The county shall be responsible for the amount of money which is specified in the reply of the county commissioners to the request of the state road commission as provided herein, which amount of money shall become part

of the state road fund, and shall be available for use only in the county where collected. Am'd 11, p. 59; '13, p. 71; '15, p. 111; '17, p. 109.

State road commission has discretion in expenditures, § 2870.

This is a special act providing for the expenditures only of the amount specified and is not in conflict with § 2870.

Hartley v. State Rd. Com., 51 U. —; 173 P. —.

2857. Special road tax. How levied and collected. Whenever the state road commission shall decide to construct or maintain a portion of the state road in any county, and the board of county commissioners shall accept the appropriation provided in § 2856, said county commissioners are authorized to levy a special road tax on all assessable property in the county in an amount sufficient to meet the requirements of subdivision 4 of the notice mentioned in § 2856 and to be used for the construction and maintenance of state roads in said county, said tax to be collected at the same time and in the same manner as other taxes; but this shall not be construed to mean that the board of county commissioners of any county shall not have authority to appropriate any additional amount of money that they may desire to be used in connection with said fund available for use in such county, such additional amount to be expended by the state road commission within such county; *provided,* that no county shall levy a special tax for the purposes of this chapter in excess of 5 mills in any year. Should a county default in the payment of said moneys after the acceptance of the requirements of the notice above mentioned, the state road commission is hereby authorized to collect the amount of such default from any moneys due said county in the hands of the state treasurer. Where the streets of any city are, or shall become a part of the system of state roads, such city may levy a special tax not to exceed 2 mills, to be used in connection with the state road fund on the portion or portions of the state road system within such city, and to be expended under the direction of the state road commission. The county auditor of each county shall, on or before the first day of October of each year, certify to the state road commission the following information relating to each county in which there is a state road: Assessed valuation of the county, the state road levy in mills, and the amount of taxes to be derived from said levy. On or before December 1 of each year, the county treasurer of each county shall certify to the state road commission the amount of money collected under the provisions of this section, together with all delinquencies in the collection of such taxes, and on or before July 1 of each year, the county treasurer shall certify to the state road commission the delinquent taxes collected.

Upon requisition from the secretary of the state road commission, the state road fund appropriated and collected, as provided in this chapter, shall, from time to time, as the state road commission directs, be remitted by the county auditor of each county, and by the recorder of any city levying a tax as in this chapter provided, to the state treasurer for disbursement by warrants of the state auditor, upon requisition of the state road commission, in payment for state road work in counties and cities where appropriated and collected. All moneys paid by the state road commission from the state road fund, as herein provided, shall be by warrant of the state auditor upon requisition issued by the state road commisssion. The necessary expenses for carrying into effect the provisions of this chapter shall be paid from the state road fund upon requisition to the state auditor on vouchers covering such expenses, approved by the state road commission. Am'd '11, p. 60; '13, p. 73; '15, p. 111.

2858. Appropriations by national government. If any appropriation of moneys by the national government shall become available to the state road building fund, it shall be distributed to the several counties conformable to the terms of this chapter.

2859. Gifts, bequests. Gifts, bequests, and donations by individuals, corporations, or societies to the state for road building purposes shall become part of the state road building fund, and shall be expended according to the

provisions of this chapter. Such gifts, bequests, or donations made to a county shall be expended under the direction of the county commissioners.

2860. Plans, specifications, and estimates. The state road commission shall make plans, specifications, and estimates preparatory to the improvement of any state road, and may provide that the construction work be done by contract, in which event the state road commission shall advertise for and receive sealed proposals for said work, which proposals shall be opened at a stated time and place, and then and there said state road commission shall open said proposals, and may award the work to the lowest responsible bidder, conditioned upon said bidder's signing a contract and giving a good and sufficient bond for the faithful performance of the work.

2861. Legal advisers of commission. In all matters requiring legal advice, in the performance of its duties and the prosecution or defense of any action growing out of the performance of its duties, the attorney-general of the state, and the district attorney of the district in which any legal question arises, shall be the legal advisers of the said state road commission, and they are hereby required to perform any and all legal services required of them by the state road commission, without other compensation than their salaries now or hereafter fixed by law. Am'd '13, p. 73; '15, p. 115.

2862. University and Agricultural College instructors and machinery available. It is hereby provided that the engineering machinery, apparatus, and the force of mechanics and instructors operating the same in the University of Utah and the Agricultural College of Utah shall be at the disposal of the state road commission and that any member of the faculties of said institutions shall furnish any information or assistance desired upon request of the state road commission, said service and information to be furnished without compensation.

2863. Road defined. The term "road" as used in this chapter, shall be any highway, street, avenue, road, lane, or alley over which the county commissioners have jurisdiction.

CHAPTER 6.

BOND ISSUE FOR CONSTRUCTION, REPAIR AND MAINTENANCE OF STATE ROADS.

('17, p. 74.)

2864 Bond issue. Interest rate. Term. The state board of loan commissioners is hereby authorized to provide for and negotiate, as needed for the purposes in this chapter provided, a loan for the state in the sum of two million dollars, by issuing negotiable coupon bonds of this state therefor under rules and regulations not in conflict herewith to be prescribed by said board; said bonds to bear interest at a rate to be fixed by said board, not exceeding four and one-half per centum per annum, interest payable semi-annually on the first day of January and July in each year; said bonds to be signed by the governor and the secretary of state; have the great seal of the state affixed, and be countersigned by the state treasurer and registered by the state auditor in a book to be kept by him for that purpose. Such bonds shall not be sold for less than their par value and accrued interest. Said bonds shall run not longer than twenty years, and the faith and credit of the state is hereby pledged for their payment and for the payment of the interest accruing thereon.

2865. Incidental expense. Additional bond of treasurer. The state board of loan commissioners is hereby authorized to provide the necessary engraved bonds to carry out the provisions of this chapter, and the expense

thereof, and all other necessary incidental expenses incurred by said board in the preparation and negotiation of said bonds shall be paid out of the funds derived from the registration of motor vehicles, upon the approval of the state board of examiners. Before the issuance of said bonds the state treasurer shall give to the state of Utah an additional bond with sureties as provided by law in the sum of one hundred thousand dollars, which bond shall be approved by the state board of examiners and deposited and filed with the secretary of state, and the said treasurer shall stand charged upon said bond and upon his official bond for the faithful performance of such duties as are required of him under the provisions of this chapter, or that may be prescribed by the said board of loan commissioners.

2866. Interest payments. The state auditor shall draw his warrant on the state treasurer for the amount of interest which shall fall due on the first day of January and July of each year which said interest warrant or warrants shall be drawn at least ten days prior to the maturing of the interest, and such sum as may be necessary is hereby appropriated and set aside from the motor vehicle registration fund, created by § 3977, or in case there is not sufficient money in said fund, that such sum as may be necessary is hereby appropriated and set aside from the general fund of the state, or from such other fund as may be provided by law for use from year to year to pay the interest upon said bonds.

2867. Annual appropriation. Redemption fund. There shall be and is hereby set apart and appropriated from the said motor vehicle registration fund, or in case there is not sufficient money in said fund, there shall be set apart from the general fund of the state, or from such other fund as may be provided by law for that purpose, annually, the sum of $100,000, to be drawn on the warrant of the state auditor to pay the principal of said bonds as the same fall due. Said amount shall be held and placed by the treasurer in a fund to be known as the redemption fund for the redemption of said bonds.

2868. Report of loan commissioners. It shall be the duty of the state board of loan commissioners to make a full report of their proceedings under the provisions of this chapter to the legislature during the first week of the next session and biennially thereafter.

2869. Bonds not taxable. Application of proceeds. The bonds issued under the provisions of this chapter shall not be taxed for any purpose within this state, and the proceeds of the sale thereof shall be covered into the state treasury, and the same shall be appropriated and used exclusively for the construction, maintenance and repair of state roads and the building of bridges thereon; and said treasurer shall pay out said moneys so received, in the manner now required by law, at the order of the state road commission, subject to the approval of the state board of examiners.

2870. Disbursement by road commission. Said money received from the sale of said bonds shall be apportioned and spent by the said state road commission upon such roads and bridges as by it deemed best.

Funds must be apportioned to counties, pro rata, § 2856.

Section 2856 is not in conflict with this section and the State Road Commission may expend the entire amount of the bonds in its discretion except the amount provided for by § 2856.

Hartley v. State Rd. Com., 51 U. —; 173 P. —.

CHAPTER 7.

PERPETUATION OF THE UTAH PIONEER ROUTE INTO SALT LAKE VALLEY.

('13, p. 56.)

2871. Road commission to locate and mark route. The state road commission is hereby authorized to engage a competent engineer or engineers to locate, survey, and mark with stone pillars appropriately inscribed, the route of the pioneers into the Salt Lake valley as follows: Commencing at the point on the Utah-Wyoming line where it enters the state; thence down Echo canyon to the Weber; thence down the Weber to the village of Henefer; thence southwesterly up Little East canyon to East Canyon creek; thence southward to the mouth of Little Emigration canyon, ascending Big mountain; thence down Big mountain to Parley's canyon creek to the point where the route leads over Little mountain to Emigration creek, following the same through the mouth of Emigration canyon into Salt Lake valley; thence to the place of the pioneer encampment within the limits of Salt Lake City.

2872. Part designated as state road; commission to improve. The state road commission is hereby authorized and directed to lay out, construct, and repair a highway for wagons and automobiles from the village of Henefer over said route to the limits of Salt Lake City. The said highway, when so laid out and established, is hereby declared to be a state road.

2873. Appropriation. The sum of $5,000, or so much thereof as may be necessary, is hereby appropriated out of the moneys in the treasury not otherwise appropriated for the survey and marking of said pioneer route, and for the survey, construction, and repair of the part thereof hereinbefore declared to be a state road, to be designated "the Utah pioneer route into Salt Lake valley." All acts in conflict with this chapter are hereby repealed.

CHAPTER 8.

ESTABLISHING A STANDARD SYSTEM OF CONSTRUCTION OF PUBLIC HIGHWAYS.

('09, p. 213.)

2875. Public highways systematized. For the furtherance of good roads in the state and the several counties thereof, the public highways, roads, streets, avenues, and lanes in this state outside of incorporated cities and towns are hereby systematized into sidewalk, roadway, tree space, ditch space, curb lines, and fence lines as follows:

1. The curb line shall be a line on either side of the center of such highways, roads, streets, avenues, and lanes, distant from the center thereof forty-nine feet on eight-rod highways; forty-four feet on seven rod highways; thirty-nine feet on six-rod highways; thirty-one and a half feet on five-rod highways; twenty-four feet on four-rod highways, and twelve and one-half feet on two-rod lanes.

2. The fence line shall be along the outside of said highways, measuring the full width thereof, the initial point of measurement being the center of the highway.

3. That portion of the highway outside of the line herein designated on either side as the curb line and inside of the fence line is designated and set apart as sidewalk, under the specifications herein set forth, and as may be further provided by law.

4. The width of the sidewalks, outside of the curb line and inside of the fence line, is specified as follows: On eight-rod highways, seventeen feet; on seven-rod highways, thirteen and seventy-five hundredths feet; on six-rod higways, ten and five-tenths feet; on five-rod highways, nine and seventy-five hundredths feet; on four-rod highways, nine feet, and on two rod lanes, four feet.

5. On highways four rods and more in width, there is hereby designated as tree space a strip of the sidewalk two feet in width, running parallel with and adjacent to the curb line, in the center of which trees may be planted under regulations by the board of county commissioners, or such other use thereof be made as provided by law.

6. That space on either side of highways four rods wide and over, indicated by the curb line on one side and on the other by a line three and one-half feet nearer the center of the highway than the curb line, is hereby designated as ditch space, along which ditches and waterways may be constructed.

7. That space between the curb lines on either side of the center of the highways is hereby designated as roadway.

8. The hitching post line is hereby designated as a line four feet nearer the center of the highway than the curb line.

2876. Profile of cross-sections. In pursuance of a plan of systematic road construction there is hereby adopted and designated a profile of cross-sections for two-rod lanes, and for four-rod, five-rod, six-rod, seven-rod, and eight-rod highways, which profile of cross-sections shall be the standard for road construction, to be observed and conformed to in all work upon public roads; *provided,* that where any eight-rod highway has been in part designated by the board of county commissioners for park purposes, the profile cross-section shall be the width of the roadway, which will, in the judgment of the county commissioners, best conform to such reduced width of roadways. The slopes, grades, curves, and dimensions of said cross-section on highways are specified and defined as follows:

1. Standard cross-section of two-rod lanes: Width, thirty-three feet between fence lines, the center line being the initial point of measurements. The four feet lying outside of the curb line, twelve and five-tenths feet from the center on either side, is classed as sidewalk, which shall have a fall of three hundredths per foot from fence line to curb. The twenty-five feet within the curb shall be classed as roadway. The center twenty-one feet shall be graded to a curve with the following elevations in said curve: The elevation of the center shall be four inches higher than the elevation of the fence line. The elevation at a point seven and one-half feet on either side of the center shall be the same as at the fence line. The elevation at a point eleven feet on either side of the center shall be seven inches lower than at the fence line. The remaining one and five-tenths feet of the twelve and five-tenths feet on either side of the center, and next to the curb, to be allowed for a ditch one and one-half feet wide and nine inches deep, and one foot wide in the bottom as measured from the eleven foot grade point.

2. Standard cross-section of four-rod street: Width, sixty-six feet between fence lines, the center line being the initial point of measurements. The nine feet lying outside of a curb line twenty-four feet from the center of the street on either side to be classed as sidewalk, the grade of which shall have a fall of three hundredths per foot from fence line to curb. The forty-eight feet within the curb lines shall be classed as roadway, the center forty-four feet of which shall be graded to a curve with the following elevation in said curve: The elevation at the center shall be nine inches higher than the elevation at the fence line. The elevation at a point fifteen and seventy-five hundredths feet on either side of the center shall be the same as the elevation at the fence line. The remaining two feet of the twenty-four on either side of the center, and next to the curb line to be allowed for a ditch two feet wide and one foot deep and one foot wide in the bottom as

measured from the twenty-two foot grade point. This ditch is a variable quantity as to depth and width, according to necessity, but in no case to be wider than a ditch space of three feet and six inches, or from the curb line to a point six inches from the hitching post line. The elevation at a point twenty-three feet on either side of the center of the roadway, or at the bottom of the one foot ditch here indicated, and which is variable under necessity, shall not be more than two feet lower than the elevation at the fence line.

3. Standard cross-section of five-rod street: Width, eighty-two and five-tenths feet between fence lines, the center line being the initial point of measurements. The nine and sevnty-five hundredths feet lying outside of the curb line thirty-one and five-tenths feet from the center of the street on either side to be classed as sidewalk, which shall have a fall of three hundredths per foot from fence line to curb. The sixty-three feet within the curb lines to be classed as roadway, the center thirty-three feet of which shall be graded to a curve with the following elevations in said curve: The thirteen feet between the curve and the ditch line on either side shall be an inclined plane and shall have a fall of seventy-seven thousandths per foot from intersection of arc to ditch line. The elevation of the center shall be ten and one-half niches higher than the elevation at the fence line. The elevation at a point sixteen and fifty-hundredths feet on either side of the center shall be the same as the elevation at the fence line. The elevation at a point twenty-nine and five-tenths feet on either side of the center shall be one foot lower than the elevation at the fence line, the remaining two feet of the thirty-one and five-tenths feet on either side of the center, and next to the curb line, to be allowed for a ditch two feet wide and one foot deep, as measured from the twenty-nine and five-tenths foot grade point. This ditch is a variable quantity as to width and depth, according to necessity, but in no case to be wider than a ditch space of three feet six inches, or from the curb line to a point six inches from the hitching post line. The elevation at a point thirty and five-tenths feet on either side of the center of the roadway, or at the bottom of the ditch indicated, and which is variable under necessity, shall not be more than two feet lower than the elevation at the fence line.

4. Standard cross-section of six-rod street: Width, ninety-nine feet between fence lines, the center line being the initial point of measurements. The ten and five-tenths feet lying outside of a curb line thirty-nine feet from the center of the street on either side to be classed as sidewalk, which shall have a fall of three hundredths per foot from the fence line to curb. The seventy-eight feet within the curb lines to be classed as roadway, the center forty feet of which shall be graded to a curve with the following elevations in said curve: The seventeen feet between the curb and ditch line on either side shall be an incline plane, which shall have a fall of fifty-nine thousandths per foot from intersection of arc to ditch line. The elevation of the center shall be one foot higher than the elevation at the fence line. The elevation at a point twenty feet on either side of the center shall be the same as the elevation at the fence line. The elevation at a point thirty-seven feet on either side of the center shall be one foot lower than the elevation at the fence line, the remaining two feet of the thirty-nine feet on either side of the center, and next to the curb line, to be allowed for a ditch two feet wide and one foot deep, as measured from the twenty-seven foot grade point. This ditch is a variable quantity as to depth and width, according to necessity, but in no case to be wider than a ditch space of three feet six inches, or from the curb line to a point six inches from the hitching post line. The elevation at a point thirty-eight feet on either side of the center of the roadway, or at the bottom of the one foot ditch indicated, and which is variable under necessity, shall not be more than two feet lower than the elevation at the fence line.

5. Standard cross-section of seven-rod street: Width, one hundred

fifteen and five-tenths feet between fence lines, the center line being the initial point of measurements. The thirteen and seventy-five one hundredths feet lying outside of a curb line forty-four feet from the center of the street on either side to be classed as sidewalk, which shall have a fall of three hundredths per foot from fence line to curb. The eighty-eight feet within the curb lines to be classed as roadway, the center forty-five feet of which shall be graded to a curve with the following elevations in said curve: The nineteen and five-tenths feet between the arc and ditch line on either side shall be an incline plane, which shall have a fall of five hundred and twelve ten-thousandths per foot from intersection of curve to ditch line. The elevation of the center shall be fifteen inches higher than the elevation at the fence line. The elevation at a point twenty-two and five-tenths feet on either side of the center shall be the same as the elevation at the fence line. The elevation at a point forty-two feet on either side of the center shall be one foot lower than the the elevation at the fence line, the remaining two feet of the forty-four feet on either side of the center and next to the curb line to be allowed for a ditch two feet wide and one foot deep, as measured from the forty-two foot grade point. This ditch is a variable quantity as to depth and width, according to necessity, but in no case to be wider than a ditch space of three feet six inches, or from the curb line to a point six inches from the hitching post line. The elevation at a point forty-three feet on either side of the center of the roadway, or at the bottom of the one foot ditch indicated, and which is variable under necessity, shall not be more than two feet lower than the elevation at the fence line.

6. Standard cross-section of eight rod street: Width, one hundred thirty-two feet between fence lines, the center line being the initial point of measurements. The seventeen feet lying outside of a curb line forty-nine feet from the center of the street on either side to be classed as sidewalk, which shall have a fall of three hundredths per foot from fence line to curb. The ninety-eight feet within the curb lines to be classed as roadway, the center fifty feet of which shall be graded to a curve with the following elevation in said curve: The twenty-two feet between the arc and the ditch line on either side shall be an inclined plane, which shall have a fall of four hundred and fifty-four ten-thousandths per foot from intersection of curve to ditch line. The elevation of the center shall be one and five-tenths feet higher than the elevation at the fence line. The elevation at a point twenty-five feet on either side of the center shall be the same as the elevation at the fence line, the elevation at a point forty-seven feet on either side of the center shall be one foot lower than the elevation at the fence line, the remaining two feet of the forty-nine feet on either side of the center, and next to the curb line, to be allowed for a ditch two feet wide and one foot deep, as measured from the forty-seven foot grade point. This ditch is a variable quantity as to depth and width, according to necessity, but in no case to be wider than a ditch space of three feet six inches, or from the curb line to a point six inches from the hitching post line. The elevation at a point forty-eight feet on either side of the center of the roadway, or at the bottom of the one foot ditch indicated, and which is variable under necessity, shall not be more than [two feet lower than] the elevation at the fence line.

2877. State engineer to provide plans and specifications. Where physical conditions will not permit of construction as provided in § 2876, the state engineer shall provide plans and specifiacations for all permanent construction work. The longitudinal profile of the grade of any portion of a highway, upon which work is to be done, at the expense of the state, in whole or in part, shall be determined by the state engineer, and is to be made a matter of record in the office of the county surveyor of the county concerned, and of the state engineer.

2878. Ditches crossing sidewalks or roadway to be bridged or flumed. Change of grade. All ditches, canals, or waterways constructed across any sidewalk or roadway shall be securely bridged or flumed, and shall be con-

structed in conformity with the established grade thereof; *provided,* that when a change in the grade becomes necessary for the convenience of any ditch, canal, or waterway, the changed grade shall be reasonable for the uses of the roadway, and the work of making the highway across its full width conform to the changed grade shall be done by or at the expense of the person, persons, or corporation constructing the ditch, canal, or waterway, and shall be completed to the satisfaction of the board of county commissioners. Bridges over any ditch, waterway, or opening across any sidewalk shall be not less than the full width of such sidewalk exclusive of tree space thereon; and bridges over any ditch, waterway, or opening across any roadway section of any highway, except river bridges, shall not be narrower than the full width of the roadway section less a space of five feet from the curb line on either side on highways, four rods or more in width, and less a space of two and a half feet from the curb line on either side on two-rod lanes. Flumes shall be of the full extent as herein set forth for bridges. The board of county commissioners may grant permission for temporary bridges of narrower dimensions than those herein indicated for highways of four rods and more in width, or may order constructed, in case of necessity, such narrower bridges; but in no case shall any permission or order be given for a bridge less than sixteen feet in width, to be used as a public roadway; and river bridges shall be set square with the road or sidewalk, and not askew thereon, and their covering shall be made to conform to the grade of the road or sidewalk, if possible, as fixed in pursuance of § 2876. Bridges or culverts crossing a roadway upon which work is to be done at the expense of the state, in whole or in part, shall be built of iron, steel, stone, brick, cement, reinforced concrete, or other imperishable material. Headgates for the control of irrigating or other water shall be placed in either the ditch space or the tree space, as may be necessary. Railways crossing public highways, shall make their crossings conform to the widths herein required for bridges and flumes, and to the regulations herein fixed as to changing grades for ditches, canals, or waterways.

2879. Water mains, etc. Water mains, sewers, and sewer pipes may be laid by permission or upon the order of the board of county commissioners, and shall be located, in the roadway section of the highway, at a sufficient depth to keep the roadway secure, and to prevent a nuisance thereon; but no excavation for such purposes shall be made in any public highway without first obtaining the consent of the board of county commissioners. Water troughs for watering animals may be placed in the ditch space, the side of such troughs next to the center of the road to be lined upon the hitching post line. Water tanks and spills for supplying water for street sprinkling, etc., may be located in the ditch space as nearly as practicable, and where wider than the ditch space may utilize tree space and such additional space on the roadway as may be necessary. Artesian or other wells may be sunk on any highway, and, when located outside of the ditch space, shall not be allowed to remain open to the surface of the roadway or sidewalk, but shall be covered and piped either to the ditch space or beyond the fence line, and in all cases be made secure from being a menace to public safety; *provided,* that no such water tanks, spill, trough, or well shall be placed on any highway contrary to regulations made by the board of county commissioners or as provided herein. Waste water from such tanks, etc., shall be carried into the ditch space or off the highway.

2880. Hitching and other posts. Hitching posts and posts for carrying or holding mail boxes shall be set either in the tree space hereinbefore named or along the hitching-post line designated in § 2875. Sign posts may be set in the tree space, but no sign-board shall be permitted to extend across any sidewalk at a less height than twelve feet above the level of said sidewalk, or across any portion of the roadway at a less height than twenty feet above the level of said road. Telephone, telegraph, electric light, and railway trolley or other poles may be set along curb lines upon permission being obtained

therefor from the board of county commissioners; but for the setting of any such poles along any line in the roadway or any place therein, a specific grant of right-of-way therefor must be obtained from the board of county commissioners, and when such poles or pole line would obstruct or materially interefere with the proper public use of any road whereon state funds are expended, no such grant shall be given. Nothing in this chapter shall be construed as limiting the power of county commissioners in granting rights-of-way or otherwise controlling public roads, except as in this chapter specifically set forth.

2881. Extension of sidewalks. It shall be unlawful to extend or construct any sidewalk so as to encroach upon any highway nearer to the center thereof than the curb line herein designated, or to encroach upon any sidewalk with any building, fence, wall, or post, etc., nearer than the fence line, or so as to make the sidewalk narrower than the widths herein designated; and all platforms, porches, etc., on sidewalks shall be at the grade thereof, and flumes, pipes, etc., below the grade shall be covered to grade, and shall be kept in good repair by the person or company in whose interest constructed, so as not to be dangerous to pedestrians, or to impair the safe and ordinary use of highway.

2882. Unlawful to obstruct. It shall be unlawful to drive or place any wagon, car, buggy, carriage, team, horses, cows, mules, etc., up or along any sidewalk except in crossing such sidewalk to or from abutting property, or to permit the same to remain on or across any sidewalk in a way to impede or obstruct the ordinary use thereof; *provided,* that vehicles, building material, etc., may be placed temporarily in such manner on public highways as not to impede, endanger, or obstruct ordinary traffic, but no such vehicles, building material, or other obstruction shall be permitted to remain on any such highway contrary to instructions from the board of county commissioners.

2883. Penalty. The doing of anything in this chapter declared unlawful is hereby declared to be a misdemeanor.

CHAPTER 9.

AID IN CONSTRUCTION OF RURAL POST ROADS.

('17, p. 223.)

2890. Assent to act of congress. Authority of road commission. Funds pledged. The legislature of the state of Utah hereby assents to the provisions of the act of congress, approved July 11, 1916, entitled, "An act to provide that the United States shall aid the states in the construction of rural post roads, and for other purposes" (thirty-ninth United States statutes at large, page 355). The state road commission is hereby authorized to enter into all contracts and agreements with the United States government relating to the survey, construction, and maintenance of roads under the provisions of the said act of congress, to submit such scheme or program of construction and maintenance as may be required by the secretary of agriculture, and do all other things necessary fully to carry out the co-operation contemplated and provided for by the said act. For the construction of rural post roads, the good faith of the state is hereby pledged to make available funds sufficient to equal the sums apportioned to the state by or under the United States government during each and all of the five years for which federal funds are appropriated, and to make adequate provisions for carrying out such maintenance.

2891. Selection of road projects. Disposition of funds. The state road commission is hereby authorized and empowered to select the federal aid

road projects and to make such disposition of federal aid road funds in the construction of state roads as by it is deemed best.

2892. Use of county fund. Designation of project. Payment for construction. For the survey, construction, and improvement of state roads in any county, when such roads are within or partly within a national forest, the state road commission is hereby authorized and empowered to use any or all of the state road funds accruing to that county by virtue of the laws of this state, in co-operating with the secretary of agriculture, as contemplated in the federal aid road act and the rules and regulations thereunder. Immediately upon the execution of an agreement between the secretary of agriculture and the state road commission, as provided in § 8 of the federal aid road act, the state road commission shall designate the project mentioned in the agreement by a name and a number. The state road commission shall then certify to the state treasurer the total amount of state road funds to be expended upon the project under the said agreement and the county or counties in which the project is located, together with the amount to be expended from the state road funds of each county involved in the agreement; whereupon the state treasurer shall set aside from the state road fund standing to the credit of said county or counties the amount or amounts so mentioned. Upon presentation to the state auditor of an approved bill or claim for debts incurred in the construction of such project, accompanied by an order for payment signed by the secretary of agriculture or his duly authorized agent, the state auditor shall draw a warrant upon the state treasurer for the amount of said order, specifying the county against the funds of which the warrant is to be charged. The amount of this order, together with all previous payments from funds to the credit of any county, shall not exceed the sum set aside to the credit of such county for said project.

2893. Roads in national forests. Payments from road funds. Counties are hereby authorized and empowered, by their commissioners, to enter into agreements with the secretary of agriculture of the United States, as provided for in § 8 of the federal aid road act and all other acts of congress specifically authorizing the use of federal funds to construct, improve, or maintain roads, other than state roads, within or partly within national forests; *provided,* that the share of any county in the cost of such co-operative road project shall be paid from county road funds; *provided, further,* that donations may be accepted in lieu of appropriations from county road funds.

CHAPTER 10.

USE OF WIDE-TIRED WAGONS ON PUBLIC HIGHWAYS.

('15, p. 47.)

2894. Use of wagons with narrow tires prohibited. It shall be unlawful after the first day of January, 1920, for any person, persons, or corporation to use on the public highways of the state of Utah wagons having tires less than three inches wide; *provided,* that this chapter shall not apply to buggies, carriages, and other light vehicles used for driving purposes only.

2895. Penalty. Any person, persons, or corporation using wagons on the public highways of this state after January 1, 1920, having tires less than three inches wide, shall be guilty of a misdemeanor.

TITLE 42.

HOLIDAYS.

2896. (1145.) Legal holidays. The following named days are legal holidays in this state: Every Sunday; the 1st day of January, commonly called New Year's day; the 12th day of February, the anniversary of the birth of Abraham Lincoln; the 22d day of February, the anniversary of the birth of George Washington; the 15th day of April, commonly called Arbor day; the 30th day of May, commonly called decoration day; the 4th day of July, commonly called Independence day; the 24th day of July, commonly called Pioneer day; the first Monday in September, known as Labor day; the 25th day of December, commonly called Christmas; and all days which may be set apart by the president of the United States, or the governor of this state, by proclamation, as days of fast or thanksgiving; *provided,* that when any of said days, except the first mentioned, shall fall on Sunday, the following Monday shall be the holiday. Am'd '09, p. 2.

When last day to perform an act falls on a holiday, it may be performed on the following day, §§ 4233, 5843, 5844.

Negotiable instrument maturing on holiday, § 4233.

Under the provisions of this section, Feb. 23d becomes a legal holiday when Feb. 22d falls on Sunday. Contempt proceedings on holiday void.

Davidson v. Munsey, 27 U. 87; 74 P. 431.

2897. (1146.) Arbor day proclamation. The governor shall each year issue a proclamation, recommending the observance of Arbor day by the planting of trees, shrubs, and vines, in the promotion of forest growth and culture, and in the adornment of public and private grounds, places, and ways, and in such other efforts and undertakings as shall be in harmony with the general character of such holiday.

TITLE 43.

HOMESTEADS.

2898. (1147.) Value allowed. A homestead consisting of lands and appurtenances, which lands may be in one or more localities, not exceeding in value with the appurtenances and improvements thereon the sum of $1,500 for the head of the family, and the further sum of $500 for his wife, and $250 for each other member of his family, shall be exempt from judgment lien and from execution or forced sale, except as provided in this title.

Homestead exemption to be provided, Con. art. 22, sec. 1.

Neither husband nor wife can remove the other from homestead, § 2992.

Property exempt from execution, §§ 6923-6926.

Homestead exempt from payment of decedent's debts, exception, §§ 6409, 7644.

Homestead of decedent goes to whom, §§ 6410, 6411, 7644.

Land not being the residence of the plaintiff or his family, nor in any manner appurtenant to or used in connection with their residence, nor selected by the plaintiff for a homestead, is not within the exemption provided for in § 3429, C. L. 1888, and hence subject to sale by a judgment creditor.

Gammett v. Storrs, 15 U. 336; 49 P. 642.

In order to claim a homestead under the statute, it is not necessary that the debtor reside upon the land claimed as exempt, provided the land be used for the family support, and as the whole or part of the homestead.

Kimball v. Salisbury, 17 U. 381; 53 P. 1037.

Bunker v. Coons, 21 U. 164; 60 P. 549.

The homestead exemption given by the constitution and by law is an absolute right, intended to protect the home against creditors; and no waiver could affect the right of the wife and children.

Kimball v. Salisbury, 17 U. 381; 53 P. 1037.

Bunker v. Coons, 21 U. 164; 60 P. 549.

The homestead right, when vested in the head of a family, cannot be waived by contract in advance of the occasion of asserting such right; such a contract of waiver being against public policy.

Bunker v. Coons, 21 U. 164; 60 P. 549.

When the homestead consists of one or more pieces of land, is within the value limited by statute, and is established by selection or occupancy, the constitution and the statute enacted under it are a positive prohibition against levy and sale thereof by creditors of the owner of the homestead.

Kimball v. Salisbury, 17 U. 381; 53 P. 1037.

Kimball v. Salisbury, 19 U. 161; 56 P. 973.

Bunker v. Coons, 21 U. 164; 60 P. 549.

Where plaintiffs only left their homestead temporarily, leaving in it personal effects and intending to return, it was not an abandonment.

Anderson v. Davis, 18 U. 200; 55 P. 363.

Temporary absence of the homestead claimant from his residence, while out of the state for a year or two at a time earning money to assist in providing for his family, does not constitute abandonment, when there is shown a bona fide intention to return, build a house and reside on the land.

Bunker v. Coons, 21 U. 164; 60 P. 549.

Homestead laws liberally construed.

Folsom v. Asper, 25 U. 299; 71 P. 315.

The constitution exempts homesteads from sale without exception.
Volker v. Vance, 32 U. 74; 88 P. 896.
If, after deducting the value of subsisting liens on a homestead from its gross value, the net value does not exceed the exemption allowed, a creditor may not interfere with the homestead.
Crosby v. Anderson, 49 U. 167; 162 P. 75.
The purchase by an insolvent debtor of a homestead with non-exempt assets is not fraud, and the fact that the owner of the homestead has conveyed with intent to defraud his creditors does not affect his right to claim a homestead exemption.
Id.
If the owner selects as a homestead the lot on which improvements are made, and has no other real estate, the person furnishing materials is not entitled to a lien thereon.
Park City Meat Co. v. Comstock Sil. Mg. Co., 36 U. 145; 103 P. 254.
An owner's conveyance of his homestead to his wife, with intent to defraud his creditors, does not affect his right to claim a homestead exemption in the property conveyed.
Daniels v. Smith et al., 51 U. —; 169 P. 267.
Where one or two lots had a dwelling erected thereon, if the owner selected and claimed the lots as her homestead, and the value thereof with the improvements did not exceed the amount to which she was entitled as a homestead exemption, persons furnishing materials for the dwelling were not entitled to a lien on the lots, unless when the material was furnished the owner owned other lands separate from the lots which, independently of them, constituted her homestead, and equaled the value of her homestead exemption.
Volker-Scowcroft Lbr. Co. v. Vance, 36 U. 348; 103 P. 970.

2899. (1148.) Selected from property of husband or wife. If the homestead claimant is married, the homestead may be selected from the separate property of the husband, or, with the consent of the wife, from her separate property.

N. Dak. (1895) § 3606*.

2900. (1149.) Declaration, who may make. Any person who is the head of a family may make a declaration of homestead in the manner provided in the next two sections, but a failure to make such declaration shall not impair the homestead right.

N. Dak. (1895) § 3620.
Head of family defined, § 2869.
The failure to make the declaration is immaterial in a creditors' suit to set aside the homestead's fraudulent conveyance to the wife.
Daniels v. Smith et al., 51 U. —; 169 P. 267.

2901. (1150.) Id. Execution and filing. In order to record a homestead, the husband or other head of the family, or, in case the husband has not made such selection, the wife must execute and acknowledge a declaration of homestead, and file the same for record in the office of the recorder of the county or counties in which the land is situated.

N. Dak. (1895) § 3621*.

2902. (1151.) Id. Contents. The declaration of homestead must contain:

1. A statement showing the person making it to be the head of a family; or, when the declaration is made by the wife, showing that her husband has not made such declaration;
2. A description of the premises;
3. An estimate of their cash value.

N. Dak. (1895), § 3622.

2903. (1152.) Selection on issue of execution. It shall be the privilege of either the husband or the wife to claim and select a homestead to the full extent prescribed in this title, on the failure of the other, being the judgment debtor, to make such claim or selection.

Occupation and use constitute a sufficient selection.
Kimball v. Salisbury, 17 U. 381; 53 P. 1037.
Kimball v. Salisbury, 19 U. 161; 56 P. 973.

Unless a party has actual notice of levy and sale of his homestead, his failure to assert the right is not a waiver.
Kimball v. Salisbury, 19 U. 161; 56 P. 973.

Under § 3429, C. L. U. 1888, the selection of lands claimed as exempt by a judgment debtor need not be made until after the levy, but may be made at any time before sale under execution; and it is not necessary that the selection made should include the home place of the family.
Folsom v. Asper, 25 U. 299; 71 P. 315.
Sec. 2907, providing that a homestead shall be subject to execution to satisfy judgments on debts secured by mechanics' liens for labor done for the improvement of the same, is in conflict with Con. art. 22, sec. 1, requiring the legislature to provide for the selection and exemption of a homestead; the constitution exempting a homestead from execution sale with out exception; though lien may be created by contract.
Volker Lumber Co. v. Vance, 32 U. 74; 88 P. 896.

2904. (1153.) Sale of homestead. Effect. A sale and disposition of one homestead shall not be held to prevent the selection or purchase of another.

N. Dak. (1895) § 3624.

2905. (1154.) "Head of a family" defined. The phrase "head of a family" as used in this title includes within its meaning:

1. The husband or wife, when the claimant is a married person; but in no case are both husband and wife entitled each to a homestead under the provisions of this title, except to the extent hereinbefore provided;

2. Every person who is residing on the premises with him or her and under his or her care and maintenance, either: (a) his or her child, or the child of his or her deceased wife or husband, whether by birth or adoption; (b) a minor brother or sister, or the minor child of a deceased brother or sister; (c) a father, mother, grandfather, or grandmother; (d) the father, mother, grandfather, or grandmother of a deceased husband or wife; (e) an unmarried sister, or any other of the relatives mentioned in this section, who have attained the age of majority and are unable to take care of or support themselves.

N. Dak. (1895) § 3625*.
Under § 2898, and sub. 2 of this section, which apply to unmarried men the same as to a married man, a person is the head of a family if his mother resides with him and is under his care and maintenance, and, being the head of a family, his actual residence on the land claimed as a homestead is not necessary to render it exempt from execution.
Bunker v. Coons, 21 U. 164; 60 P. 549.
Under this section, the husband is no more the head of the family than the wife, and she may answer setting up homestead rights.
Volker Lumber Co. v. Vance, 32 U. 74; 88 P. 896.

2906. (1155.) Conveyance of recorded homestead. If the owner is married, no conveyance or incumbrance of, or contract to convey or incumber, the premises selected and recorded as a homestead prior to the time of such conveyance, incumbrance, or contract, is valid unless both the husband and wife join in the execution of the same.

N. Dak. (1895) § 3608*.
Iowa, McClain's An. C. (1888) § 3165*.
Colorado, Mills' An. S. (1891) § 2137*.
Effect of conveyance; exemption of proceeds, § 2909.
Wife must join in assignment of wages, § 4385.
Husband can convey homestead without wife's consent, subject to her dower right.
Cook v. Higley, 10 U. 228; 37 P. 366.
Where no declaration of homestead was made by either the husband or wife, a mortgage given by the husband alone was valid, and foreclosure and sale thereunder transferred the title to the mortgagee, subject to the right of redemption and to the wife's one-third interest should she survive the husband.
Nielson v. Peterson, 30 U. 391; 85 P. 429.
Bunker v. Coons, 21 U. 164; 60 P. 549.
Cook v. Higley, 10 U. 228; 37 P. 336.
Where the owner of a homestead voluntarily incumbers it in the manner prescribed by this section, by giving a material-man furnishing materials for an improvement thereon, a lien therefor, the material-man acquires a lien not by virtue of the statute creating a lien, but by virtue of the contract.
Volker Lumber Co. v. Vance, 32 U. 74; 88 P. 896.

2907. (1156.) When subject to execution. The homestead is subject to execution in satisfaction of judgments obtained:

1. On debts secured by mechanic's or laborers' liens for work or labor done or material furnished exclusively for the improvement of the same;

2. On debts secured by lawful mortgage on the premises;

3. On debts created for the purchase thereof and for taxes accruing and levied thereon.

N. Dak. (1895) § 3607.
All property liable to execution for purchase price, taxes, etc., § 6927.
Exemption of proceeds of sale, § 2873, and note.
Where a purchaser of realty gave a bill of sale of certain hogs as part payment of purchase price, a judgment in an action for failure to deliver the hogs was for a "debt created for the purchase price of land" under § 6927, making the land subject to execution for such debts though a homestead.
Harris v. Larsen, 24 U. 139; 66 P. 782.
Sec. 2871, providing that a homestead shall be subject to execution to satisfy judgments on debts secured by mechanics' liens for labor done for the improvement of the same, is in conflict with Con. art. 22, sec. 1, requiring the legislature to provide for the selection and exemption of a homestead; the constitution exempting a homestead from execution sale without exception. Though lien may be created by contract.
Volker Lumber Co. v. Vance, 32 U. 74; 88 P. 896.

2908. (1157.) When husband or wife deserts. In case the husband or wife desert his or her family, the exemption shall continue in favor of the one residing upon the premises.

2909. (1158.) Effect of conveyance. Exemption of proceeds. When a homestead is conveyed by the owner thereof, such conveyance shall not subject the premises to any lien or incumbrance to which it would not be subject in the hands of the owner; and the proceeds of the sale thereof, to the amount of the exemption existing at the time of sale, shall be exempt from execution or other process for one year after the receipt thereof by the person entitled to the exemption.

Conveyance of recorded homestead, § 2906.
The acceptance of an oral promise to deliver brick in consideration of the conveyance of land constituting a homestead is not a re-

ceipt of the proceeds of a sale thereof within provisions of this section, exempting the proceeds of a sale of a homestead for one year after the receipt thereof, and the year of the exemption does not run from that time, but from the time of the delivery of the brick.

Christensen v. Beebe, 32 U. 406; 91 P. 129.

The term "proceeds," used in this section, exempting the proceeds of a sale of a homestead for one year after the receipt thereof, means some tangible thing which is the subject of manual delivery and receipt.

Id.

The proceeds of sale of a homestead, so far as they may be exempt, stand in lieu of the homestead for a period of one year from the time that the homestead owner has received such proceeds, and a partial payment constitutes a part of the proceeds of the sale of the homestead the same as the remainder due and unpaid in excess of the amount constituting part of such proceeds, and the burden is on the person claiming the exemption to establish it, and the claimant has the right to elect which payments of the proceeds of the sale he will claim as exempt until he has received and held for one year the amount of proceeds allowed him by statute.

Giesy-Walker Co. v. Briggs, 49 U. 205; 162 P. 876.

Notice to levying officer and garnishee as soon as claimant learned that the proceeds of sale were garnished, sufficient.

Hansen v. Mauss et al., 40 U. 361; 121 P. 605.

2910. (1159.) Insurance money, when exempt. Whenever the homestead improvements are insured in favor of the owner, and a loss occurs entitling such person to the insurance, the money thus derived shall be exempt to the same extent as the improvements would have been had not such loss occurred.

2911. (1160.) Water rights exempt from execution. Water rights and interests either in the form of corporate stock or otherwise, owned by the judgment debtor, shall be exempt from execution to the extent that such rights and interests are necessarily employed in supplying water to the homestead for domestic and irrigating purposes; but such rights and interests shall not be exempt from assessment and sale by corporations or companies owning the water, nor from levy and sale on a judgment against such corporations or companies.

General exemption law, § 6925.

2912. (1161.) When homestead exceeds exemption in value. If the homestead selected is of greater value than is exempted under this title, and if it consists of two or more separate pieces of land, neither of which is of the value allowed, the person entitled to the exemption may select which he will retain in full and which shall be partitioned or sold. If so selected, the homestead may be sold, and, after paying the judgment debtor the value of the homestead, the balance of the money shall be applied on the judgment.

If the selection of a homestead be made before execution, levy, and sale, of more than the amount in value, as limited by statute, or, if it thereafter becomes enhanced in value, such homestead is still liable for the debt of the execution creditor to the amount in value in excess of the limit exempt by statute.

Kimball v. Salisbury, 17 U. 381; 53 P. 1037.

2913. (1162.) Id. Sale of homestead. The homestead shall not be sold if the bid do not exceed the value of the exemption if the homestead be in one piece; but if the homestead be in more than one piece, then the officer and the judgment debtor shall proceed as hereinafter provided to determine the value of each piece of property exempted, and any such property shall not be sold unless the bid for each piece be greater than the appraised value thereof.

2914. (1163.) Id. When situate in more than one county. If the homestead be situated in more than one county, then the officer serving the execution shall have that part of the homestead situated in the county wherein the writ is served, appraised, and he shall prepare a certificate in duplicate, signed by the appraisers, if any, and himself, stating the value of such property, of which one copy shall be given to the judgment debtor and the other shall be forwarded to the sheriff or other proper officer of the county wherein another piece of the homestead property is situated; and such property shall be appraised as before. In case such property does not equal in value the remainder of such exemption, the officer shall, before levy and sale, if the judgment debtor have unappraised property in some other county, cause the same to be appraised and like proceedings had as hereinbefore prescribed.

2915. (1164.) Id. Proceeds of sale exempt. If sold on the judgment, the money paid the judgment debtor shall be exempt from that or any other execution as hereinbefore provided.

2916. (1165.) Id. Interval between sales in different counties. When

sales of property are made in more than one county on the same execution, there shall be at least five days intervening between the first and each succeeding sale.

2917. (1166.) Id. Disagreement as to value of homestead. Procedure. If the officer having the execution and the person claiming the exemption cannot agree as to the value of the homestead, or the partition thereof, or as to the quantity and value of any of the articles of personal property exempted by law, the officer shall select one appraiser and the person claiming the exemption another appraiser, both being householders of the vicinity, to whom the officer shall administer an oath to fairly and justly appraise and set apart the exempt property concerning which there is a disagreement. In case of the disagreement of the appraisers, they shall choose a third person, who shall also be sworn, and the decision of any two such appraisers, when made, shall be final. The appraisers shall report to the officer their appraisal of the property selected for the homestead. If the person entitled elect to have the property partitioned, it shall be the duty of the appraisers to set apart such homestead as the person entitled shall select and be entitled to.

In an action in the nature of a creditor's bill to reach the equity in a homestead, it is not necessary to ascertain the value of the homestead by appraiser, and the homestead cannot be sold unless the amount of the bid exceeds the statutory exemption; before the court can proceed to appraise the homestead, it must be made to appear by proper evidence that its value is in excess of the exemption allowed by law.
Crosby v. Anderson, 49 U. 167; 162 P. 75.

2918. (1167.) Id. Excess to be sold. The property not set apart as a homestead shall be subject to sale, under execution, the proceeds to be applied on the judgment.

TITLE 44.

HORSE COMMISSIONERS.

(Re-enacted '11, p. 317.)

2919. (1167x.) Board created. Duties. A state board of horse commissioners is hereby created. The following persons shall constitute said board, viz: The director of the experiment station, the veterinarian and animal husbandman of the agricultural college and experiment station. The animal husbandman shall be secretary and executive officer of said board. The work of this board shall be done under the direction of the board of trustees of the Agricultural College of Utah. The duties of said officers shall be as follows:

1. The examination and passing upon all stallions and jacks provided for in this title, and the passing upon all documents as provided for in § 2921;
2. The examination as to the merits of pedigrees;
3. The recording of, and issuing of certificates as specified in §§ 2925-2927;
4. All fees collected as provided for in this title shall be paid to the secretary of the college, who shall pay all expenses of the commission, taking vouchers therefor;
5. The employing of one or more competent graduated veterinarians, or other accredited inspectors, to make examinations of such stallions and jacks as are referred to herein;
6. To make all necessary rules and regulations, and to perform such other duties as may be necessary to carry out and enforce the provisions of this title.

2920. (1167x1.) Owners of stallions and jacks must have license certificate. Every person, firm, or company standing, traveling, or offering for sale for breeding purposes any stallion or jack in this state shall cause

the name, description, and pedigree of such animal to be enrolled by the said board, and procure a license certificate of such enrollment from such board.

2921. (1167x2.) How to obtain certificate. In order to obtain a license certificate herein provided for, the owner of such stallion or jack shall have the same examined by a duly qualified veterinarian named by said board, or by some other inspector who shall be appointed by the board, and procure, from such veterinarian or inspector, a certificate of examination of such animal, and shall forward such certificate to said board; and in case of pure breeds, with said certificate so forwarded shall be transmitted the stud book certificate of registry of the pedigree of said animal, and in all cases such other necessary papers relating to the breeding and ownership of said animal.

2922. Certificates for animals affected with certain diseases. No certificate shall be issued by any veterinarian or inspector, and no certificate of enrollment or license shall be issued by said board, for any animal referred to in § 2920 that has any of the following diseases, or is unsound in any of the following respects: Cataract; amaurosis; periodic ophthalmia (moon blindness); laryngeal hemiplegia (roaring or whistling); pulmonary emphysema; chorea (St. Vitus's dance, crampiness, shivering, stringhalt); bone spavin; ringbone; enlarged sidebone; navicular disease; bog spavin; curby formation of hock; glanders; farcy; maladie du coit; urethral gleet; mange; melanosis; or any marked faulty or weak conformation which is likely to be transmitted.

2923. May withhold license. In all cases of doubt or suspicion as to the genuineness of the certificate of registration of any stallion or jack, the board of horse commissioners shall withhold the license of enrollment of such stallion or jack as a pure bred until they have investigated and have been furnished proof that said stallion or jack is the animal described in said certificate of registration.

2924. (1167x3.) Standards to be used. The officers of the board of horse commissioners, whose duty it shall be to examine and pass upon the merits of each pedigree submitted, shall use as their standard of action stud books and signatures of the duly authorized officers of the various American horse or jack pedigree associations, societies, or companies recognized by the department of agriculture, Washington, D. C., and shall accept as pure bred and entitled to a license certificate as such, each stallion or jack for which a pedigree registry certificate is furnished, bearing the signature of the fully authorized officers of a government-recognized and approved American stud book.

2925. (1167x4.) Certificate to be recorded. The owner of any stallion or jack standing for public service shall cause the certificate of enrollment to be recorded with the recorder of deeds of the county in which said stallion or jack is used for public service in this state, and shall post and keep affixed, during the entire breeding season, copies of the license certificate of said stallion or jack issued under the provisions of the next preceding section, in a conspicuous place where said stallion or jack stands for public service.

2926. (1167x5.) Form of license certificate, for pure-bred animals. The license certificate issued for a stallion or jack whose sire and dam are of pure breeding, and the pedigree of which is registered in a stud book recognized by the government department of agriculture, shall be in the following form:

STATE BOARD OF HORSE COMMISSIONERS.

Certificate of pure-bred stallion or jack No. ..... The pedigree of the stallion or jack ..... Name ..... Owned by ..... Described as follows: Color ..... Breed ..... Foaled in the year ..... has been examined by the state board of of horse commissioners of the state of Utah, and it is hereby certified that the said stallion or jack is of pure breeding,

and is registered in a stud book recognized by the department of agriculture, Washington, D. C.

(Signature).....
Secretary state board of horse commissioners.

2927. The license certificate for a "no-standard" bred stallion shall be in the following form:

CERTIFICATE OF NON-STANDARD BRED STALLION.

No. ..... The pedigree of the stallion ..... Name ..... Described as follows: Color ..... Foaled in the year ..... has been examined by the state board of horse commissioners, and it is found that the said stallion is not eligible to registration as standard bred, and for the purpose of this license is not pure-bred, although recorded in the non-standard department of the American trotting register.

(Signature).....
Secretary state board of horse commissioners.

2928. (1167x6.) Id. For grade or mongrel. A certificate for a mongrel stallion or jack shall be in the following form:

BOARD OF HORSE COMMISSIONERS.

Certificate of grade or mongrel. No. ..... The pedigree of the stallion or jack ..... Name ..... Owned by ..... Described as follows: Color ..... Foaled in the year ..... has been examined by the board of horse commissioners in the state of Utah, and it is found that the stallion or jack is not of pure breeding, and is therefore not eligible for registration in any stud book recognized by the department of agriculture, Washington, D. C.

(Signature).....
Secretary state board of horse commissioners.

2929. (1167x7.) Advertising must contain copy of certificate. Every bill, poster, or advertisement issued by the owner of any stallion or jack under this title, or used by him for advertising such stallion or jack, shall contain a copy of its certificate of enrollment.

2930. (1167x8.) Fees. A fee of $10 shall be paid the inspector for making an examination, which he shall forward to the state board of horse commissioners within five days, to be placed in the horse commissioner's fund, and the certificate which he issues shall be made in triplicate, describing the animal fully, and containing a receipt for the fee. One of the triplicates shall be given the owner, one forwarded at once to the state board of horse commissioners, and one retained in the book. A fee of $2 shall be paid annually to the secretary of the board of horse commissioners for the renewal of this license, on or before the 1st day of March of each year, following the issuance of the certificate, and a failure to pay this fee forfeits the license. All owners of stallions and jacks registered under this title, on the death of such stallion or jack, must report such death to the secretary of the state board of horse commissioners, and forward the license certificate of said animal.

2931. (1167x9.) Transfer of ownership. Upon transfer of the ownership of any animal licensed under the provisions of this title, the license certificate shall be transferred by the secretary of the board to the buyer, upon submittal of proof of such transfer of ownership and upon payment of a fee of $2. In case a license certificate is lost or destroyed, and satisfactory proof of same is furnished, a new one shall be issued by the secretary on payment of a fee of $1.

2932. (1167x11.) Disposition of fees. The funds accruing from the above named fees shall be used by the state board of horse commissioners to defray the expenses of inspector's examination, or enrollment of pedigrees, and issuance of licenses. Any funds not so used shall be used to publish reports or bulletins containing lists of stallions and jacks examined; to encourage the horse and mule breeding interests of this state; to dissem-

inate information pertaining to horse breeding, and for any other such purposes as may be necessary to carry out the purposes and enforce the provisions of this title.

2933. (1167x10.) Lien for service. Every person in the state of Utah complying with the provisions of this title, and having obtained the license certificate for a pure-bred stallion or jack, registered in a government-approved stud book, shall have a lien on the mare and a first lien upon the offspring of such service, to the amount of the agreed service, for a period of eighteen months after service, and it shall not be necessary, in order to secure and fix said lien, to secure, file, or register any contract or statement thereof with any officer; nor shall it be necessary that the owner of such mare or foal execute any contract whatever; the said lien may be foreclosed in the same manner that a mortgage upon personal property is foreclosed.

2934. (1167x12.) Penalty. Any person violating any of the provisions of this title in any manner shall be guilty of a misdemeanor. '07, p. 191.

2935. Renewal of certificates. All owners of stallions licensed under chap. 126 [Tit. 33; C. L. 1907] of Revised Statutes of Utah, at the time of approval of this title, may secure a certificate for same by paying the annual renewal fee of $2 and by turning in to the board of horse commissioners the old license certificate.

TITLE 45.

HOTELS AND LODGING HOUSES.

CHAPTER 1.

LIABILITY OF HOTEL KEEPERS.

('17, p. 22.)

2940. Keeping of safe or fireproof vault. Notice to guests. Liability limited. If an inn keeper, hotel keeper, boarding house or lodging house keeper, keeps on his premises a fireproof safe or vault, and gives notice to a guest, boarder, or lodger, by posting a copy of this chapter in a prominent or conspicuous place in the office of said inn, hotel, boarding house or lodging house, and in the room occupied by the guest, boarder, or lodger, that he keeps for the use of such guest, boarder, or lodger a fireproof safe or vault, and will not be liable for money, jewelry, documents, or other articles of unusual value and small compass, unless placed therein, he is not liable, except so far as his acts or the acts of his employes shall contribute thereto for any loss of or injury to such articles, if not deposited with him to be placed in such safe or vault, nor in any case more than the sum of $250 for any such property of any individual, guest, boarder, or lodger, unless he shall have given a receipt in writing therefor to such guest, boarder, or lodger, and the value of such article placed with him for safe keeping shall have been declared by such guest, boarder, or lodger.

CHAPTER 2.

INSPECTION OF HOTELS AND LODGING HOUSES.

('13, p. 145.)

2941. Hotel defined. Every building or other structure, and all buildings, in connection, kept, used, maintained as, or advertised as, or held out to

the public to be a place where sleeping accommodations are furnished for pay to transient or permanent guests, in which five or more rooms are used for the accommodations thereof, shall for the purpose of this chapter be deemed hotels.

2942. Inspection certificate. No hotel shall be kept, maintained, or conducted in this state after this chapter takes effect without first procuring an inspection certificate therefor, and no such certificate license shall be transferable; *provided,* that no holder of a certificate under this chapter shall be relieved thereby from compliance with the ordinance of any town, city, or county in which the building is located or which such certificate is issued. Am'd '15, p. 55.

State food and dairy commissioner may employ inspectors, § 2954.

2943. Id. Fees. The annual fee for an inspection certificate to conduct a hotel shall be $2 for hotels with less than twenty rooms; $5 for hotels with more than twenty rooms and less than fifty rooms; $10 for hotels with more than fifty rooms and less than one hundred rooms; $15 for hotels with more than one hundred rooms, which shall be paid to the state dairy and food commissioner before the inspection certificate is issued, who shall on the first day of each month pay into the state treasury all fees collected for inspection certificates issued during the preceding month.

2944. Id. Application blank. The state dairy and food commissioner shall, upon request therefor, furnish to any person, firm, or corporation desiring to conduct a hotel the necessary application blank for inspection certificate, which the applicant shall fill in, stating the full name and address of the owner or agent of the building or the lessee or manager of such hotel, together with a full description of the building and property used, or to be used for such business, together with the location of the same, which application upon its return to the state dairy and food commissioner shall be accompanied by the inspection certificate fee provided for in § 2943.

2945. Dairy and food commissioner to inspect premises; to revoke license and prosecute. It is hereby made the duty of the state dairy and food commissioner to inspect or cause to be inspected, at least once each year, every hotel in this state, and for that purpose he shall have the right of entry and access thereto, at any reasonable time; and whenever, upon such inspection of any hotel, it shall be found that such business and property so inspected is not being conducted in the manner and condition provided by the provisions of this chapter, it shall thereupon be the duty of the state dairy and food commissioner to revoke the license provided in § 2943 and cause a criminal prosecution to be instituted against the person, firm, or corporation violating the provisions of this chapter.

2946. Sanitation. Every hotel in this state shall be properly lighted and ventilated, with strict regard for the health, comfort, and safety of the guests. Such proper lighting shall be construed to mean both daylight and illumination, and such proper plumbing shall be construed to mean that all plumbing and drainage shall be constructed and plumbed according to approved sanitary principles, and such proper ventilation shall be construed to mean at least one door and one window in each sleeping room. All sleeping room doors must be provided with sliding bolts.

2947. Id. Ventilation. No room shall be used for a sleeping room which does not open to the outside of the building or light wells, air shafts, or courts, and all sleeping rooms shall have at least one window and one door each.

2948. Sanitation. Closets. Lavatories. In all cities, towns, and villages where a system of waterworks is maintained for public use, every hotel therein operated shall, within six months after the passage of this chapter, be equipped with suitable water closets for the accommodation of its guests, which water closet or closets shall be connected by proper plumbing with sewerage system, if there be one, otherwise with a cesspool, and the means

of flushing such water closets with the water of said system so as to prevent sewer gas or effluvia from arising therefrom. All lavatories, bath tubs, sinks, drains, and urinals in such hotels must be connected and equipped in a similar manner, both as to methods and times. In all cities, towns, and villages not having a system of waterworks, every hotel shall have properly constructed privies or over-vaults, which shall have tightly built backs, and which shall be kept clean and free from filth, and which shall have separate apartments for the sexes, each being properly designated. Am'd '15, p. 55.

2950. Public wash room. Each hotel in this state shall be provided with a main public wash room, convenient and easy of access to guests.

2951. Fire escapes. Within six months after the passage of this chapter, every hotel in this state which is more than two stories high, or any part of which hotel is more than two stories high, shall be equipped with an iron stairway or fire escape on the outside of the building, connecting on each floor above the ground floor and to the cornice of the building, with openings from each floor, which shall be well fastened and secured, with landings not less than six feet in length and three feet in width, guarded by an iron railing not less than thirty inches in height. Such landing shall be connected by iron stairs not less than two feet wide with steps not less than six inch treads and placed at an angle of not more than forty-five degrees. The way of egress to each fire escape shall be at all times kept free and clear of any and all obstructions of any and every nature. At every opening to every fire escape a red light shall be kept burning at night. There shall be one fire escape for each fifteen sleeping rooms on each floor. There shall be posted and maintained in conspicuous places in each hall and guest room, except in the hall and rooms on the ground floor of such hotel, plainly printed notices reading: "Fire escapes are indicated by red lights," *provided,* that hotels which, at the time this chapter takes effect, have complied with the ordinances of the cities or towns wherein they are situated relating to fire escapes and fire regulations shall be deemed to have complied with the regulations of this section. Cities and towns may, after this chapter takes effect, pass ordinances in relation to fire escapes on hotels, in addition to, but not to conflict with, the provisions of this section.

2952. Individual towels. In each bedroom or in each public washroom of every hotel of this state, between the hours of 6:30 a. m. and 9 p. m., there shall be furnished at least two clean individual towels for each guest, so that no guest will be required to use any except an individual towel, and such towels shall be at least ten inches wide and fifteen inches long after being washed.

2953. Clean bedding. Fumigation. All hotels shall provide each bed, bunk, cot, or other sleeping place for the use of guests with pillow slips and under and top sheets. Each over-sheet shall be not less than ninety-nine inches long after being washed, and of sufficient width to completely cover the mattress and springs. Said sheets and pillow slips shall be made of white cotton or linen, and after being used by one guest they shall be washed and ironed before they are furnished to another guest, a clean set being furnished to each guest. All bedding, including mattresses, quilts, blankets, pillows, sheets, and comforts used in any hotel in this state must be thoroughly aired and kept clean; *provided,* that no bedding, including mattresses, quilts, blankets, pillows, sheets, or comforts shall be used which are worn out or unfit for further use. Any room in any hotel in this state infested with vermin or bedbugs shall be fumigated, disinfected, and renovated until said vermin or bedbugs are exterminated. Also the floors, walls, and ceilings of all rooms in all hotels shall be kept clean and free from dirt and filth. Am'd '15, p. 55.

2954. Commissioner to employ assistants. The state dairy and food commissioner is hereby empowered to hire and appoint such office help and traveling inspectors as are necessary to carry out the terms of this chapter.

2955. Penalty. Any person, firm, association, or corporation violating any of the provisions of this chapter shall be guilty of a misdemeanor.

2956. Appropriation. For the purpose of carrying into effect the provisions of this chapter there is hereby appropriated the sum of $2000 annually, or so much thereof as may be necessary, out of any moneys in the state treasury not otherwise appropriated.

TITLE 46.

HUSBAND AND WIFE.

CHAPTER 1.

MARRIAGE.

2966. (1183.) Incestuous marriages. Marriages between parents and children, ancestors and descendants of every degree, brothers and sisters of the half as well as the whole blood, uncles and nieces, aunts and nephews, first cousins, or between any persons related to each other within and not including the fifth degree of consanguinity, computed according to the rules of civil law, are incestuous and void from the beginning, whether the relationship is legitimate or illegitimate. Am'd '07, p. 31.

2967. (1184.) Other void marriages. Marriages prohibited and declared void:

1. With an idiot, lunatic, or person afflicted with syphilis, or gonorrhea, that is uncured, or a person subject to chronic epileptic fits; *provided,* that the last qualification shall not apply to a female over the age of forty-five years;
2. When there is a husband or wife living from whom the person marrying has not been divorced;
3. When not solemnized by an authorized person, except as provided in § 2970;
4. When, at the time of marriage, the male is under sixteen or the female is under fourteen years of age;
5. Between a negro and a white person;
6. Between a Mongolian and a white person;
7. Between a divorced person and any person other than the husband or wife from whom the divorce was secured, within the period allowed for an appeal, and, if an appeal is taken, until after the affirmation of the decree of divorce. Am'd '07, p. 32; '09, p. 232.

Rohwer v. District Court, 41 U. 279; 125 P. 671. Custer v. Custer, 41 U. 575; 126 P. 880.

2968. (1185.) Children of bigamous marriages contracted in good faith. When a marriage is contracted in good faith and with the belief of the parties that a former husband or wife, then living and not legally divorced, was dead or legally divorced, the issue of such marriage, born or begotten before notice of the mistake, shall be the legitimate issue of both parents.

Rohwer v. District Court, 41 U. 279; 125 P.671.

2969. (1186.) Foreign marriages. Marriages solemnized in any other country, state, or territory, if valid where solemnized, are valid here.

2970. (1187.) Marriage in good faith before unauthorized person. No marriage solemnized before any person professing to have authority therefor shall be invalid for want of such authority, if it is consummated with the belief of the parties, or either of them, that he had authority and that they have been lawfully married.

2971. (1188.) Who may solemnize. Marriages shall be solemnized by the following persons only:

1. Ministers of the gospel or priests of any denomination, in regular communion with any religious society;

2. Justices of the peace, mayors of cities, and judges of the district and supreme courts.

2972. (1189.) Marriage license, when issued. No marriage shall be solemnized without a license therefor, issued by the county clerk of the county in which the female resides at the time; *provided,* that when she is of full age or a widow, and it is issued on her application in person, or by writing signed by her, it may be issued by the clerk of any county; and, *provided, further,* that any marriage consummated by virtue of any license issued by any district court, or clerk thereof, within this state, prior to the approval of this section, shall be, and is hereby declared valid and legal.

Am'd '03, p. 32.

A sealing ceremony in accordance with the usages of the Mormon church constituted the parties husband and wife, so as to entitle the woman to dower, though the ceremony was performed in contemplation of her immediate decease and solely for her celestial advantage.

Hilton v. Roylance, 25 U. 129; 69 P. 660.
Stewart v. Hilton, 25 U. 160; 69 P. 1134.

A marriage solemnized by a justice of the peace between a man and a plural wife, his legal wife being dead, for the purpose of disqualifying her as a witness, was invalid.

Riddle v. Riddle, 26 U. 268; 72 P. 1081.

In the absence of statutory requirement, a ceremony is not essential to the validity of a marriage. Cohabitation is not essential to the creation of the marriage status.

Hilton v. Roylance, 25 U. 129; 69 P. 660.

Prior to the enactment by congress of the Edmunds-Tucker law (Act March 3, 1887), the common law on the subject of marriage was in force in the territory of Utah.

Riddle v. Riddle, 26 U. 268; 72 P. 1081.

Marriage at common law does not arise unless the parties mutually agree to live together as husband and wife for life, to the exclusion of all others.

Id.

There can be no common law marriage between a man and a plural wife.

Id.

Prior to the act regulating marriages, the relation could be contracted by the mutual consent of parties capable of contracting, without ceremony or formality.

U. S. v. Simpson, 4 U. 227; 7 P. 257.

In a habeas corpus proceeding to obtain release of a juvenile delinquent from the state industrial school, evidence held insufficient to establish a legal marriage between the delinquent and the plaintiff.

Stoker v. Gowans, 45 U. 556; 147 P. 911.

2973. (1190.) Id. Minors. Consent of parent or guardian. If at the time of applying for license the male shall be under twenty-one or the female under eighteen years of age, and not before married, no license shall issue without the consent of his or her father, mother, or guardian, personally given or certified in writing to the clerk over his or her signature, attested by two or more subscribing witnesses, and proved by the oath of one of them, administered by any officer authorized by law to administer oaths; *provided,* that whenever such oath shall be administered and certified by a justice of the peace or other officer having no seal and residing outside of the county within which the license is to be issued, such oath and consent shall not be received nor filed, unless the signature and official capacity of the officer so administering and certifying such oath shall be certified by the county clerk of the county in which the officer so certifying resides, and attested by his seal.

2974. (1191.) Id. Parties unknown to clerk. When the parties are personally unknown to the clerk, a license shall not issue until an affidavit is made before the clerk, which shall be filed and preserved by him, by the party applying for such license, showing that there is no lawful reason in the way of such marriage. The party making such affidavit, or any subscribing witness, if he falsely swear therein, is guilty of perjury.

2975. (1192.) Return of license with certificate. The person solemnizing the marriage shall, within thirty days thereafter, return the license to the clerk of the county whence it issued, with a certificate of the marriage over his signature, giving the date and place of celebration and the names of two or more witnesses present at the marriage. For failing to make such return, he is guilty of a misdemeanor.

2976. (1193.) Id. Recording same. The license, together with the certificate of the person officiating at the marriage, shall be filed and preserved by the said clerk, and shall be recorded by him in a book kept for that purpose, which shall be properly indexed in the names of the parties so married.

2977. (1194.) Solemnizing marriage without license. Penalty. If any person shall solemnize a marriage without such license, he shall be imprisoned not less than one nor more than twelve months in the county jail, or fined not more than $1000, or be both so fined and imprisoned.

2978. (1195.) Id. Without authority. False personations. Penalty. If any person not authorized shall solemnize a marriage under pretense of having authority, or shall falsely personate the father, mother, or guardian in obtaining a license, or forge the name of any father, mother, or guardian to any writing purporting to give consent to such marriage, he shall be punished by imprisonment in the state prison not exceeding three years.

2979. (1196.) Id. Forbidden marriages. Penalty. If any authorized person shall knowingly, with or without license, solemnize a marriage such as is herein prohibited, he shall be imprisoned in the state prison not exceeding three years, or fined not exceeding $1000, or be both so fined and imprisoned.

2980. (1197.) Issuing license for prohibited marriage. Penalty. Every clerk or deputy clerk who shall knownigly issue a license for any prohibited marriage shall be punished by confinement in the state prison for a term not exceeding two years, or fined in any sum not exceeding $1000, or by both such fine and imprisonment, and in case of conviction shall be expelled from his office by the judgment of the court before which his conviction is had; and if he wilfully issues a license contrary to his duty as herein prescribed he shall be fined not exceeding $1000.

CHAPTER 2.

PROPERTY RIGHTS.

2983. (1198.) Separate property of wife, control of. Real and personal estate of every female, acquired before marriage, and all property to which she may afterwards become entitled by purchase, gift, grant, inheritance, or devise, shall be and remain the estate and property of such female, and shall not be liable for the debts, obligations, or engagements of her husband, and may be conveyed, devised, or bequeathed by her as if she were unmarried.

Husband may not mortgage exempt chattels without consent of wife, § 486.
Property rights of married woman, Con. art. 22, sec. 2.
Homestead rights of married women, §§ 2862-2882, and notes.
Assignment of wages void unless wife joins, § 4385.
Husband's duty to support wife, § 8112.
Succession of married woman, §§ 6311, 6406-6412.
Decisions on dower right, etc., note to § 6406.
Married woman may sue and be sued as if unmarried, § 6497.
When married woman may defend for her husband, §§ 6498, 6499.
Judgment for or against a married woman rendered and enforced as if she were single, § 6858.
Where the husband and wife gave their joint note secured by mortgage upon two parcels of ground belonging to the husband and a third parcel belonging to the wife, for a debt of the husband; held, under the evidence, that the wife was a principal.
Kelly v. Kershaw, 5 U. 295; 14 P. 804.

While the statutes do not in express words repeal the common law rule that the husband is liable for the torts of the wife, it has made such modifications in the husband's rights and her disabilities as to wholly remove the reason for his liability.
Culmer v. Wilson, 13 U. 129; 44 P. 833.
Where a husband alone contracts to sell land, the wife cannot be compelled to convey her dower interest.
Kelsey v. Crowther, 7 U. 519; 27 P. 695.
Under C. L. 1888, § 2528, an abandoned wife could hold land adversely to her husband.
Warr v. Honeck, 8 U. 61; 29 P. 1117.
Whittemore v. Cope, 11 U. 344; 40 P. 256.
In this state, women are relieved from common law disability and are given independent power to manage, control, transfer, and dispose of their separate property without restriction or limitation by reason of marriage, and to contract with reference thereto in the same manner as if sole.
Morrison, Merrill Co. v. Clark, 20 U. 432; 59 P. 235.
Culmer v. Wilson, 13 U. 129; 44 P. 833.
Farr v. Swigart, 13 U. 150; 44 P. 711.

2984. (1199.) Wife's contracts. Contracts may be made by a wife and liabilities incurred, and the same enforced by or against her, to the same extent and in the same manner as if she were unmarried.

Ill., Starr & Curtis' An. S. (1885) p. 1272*.
Iowa, McClain's An. C. (1888) § 3404.
N. Y. R. S., vol. IV, p. 2606.
Wash. C. (1896) § 2164.

2985. (1200.) Conveyance by husband or wife to the other. A conveyance, transfer, or lien executed by either husband or wife, to or in favor of the other, shall be valid to the same extent as between other persons.

Iowa, McClain's An. C. (1888) § 3397.
Under § 2528, C. L. 1888, a married woman could take real property by deed from her husband without the intervention of a trustee.
Cereghino v. Wagener, 4 U. 514; 11 P. 568.

2986. (1201.) Wife's wages. Her right to sue or defend. A wife may receive the wages for her personal labor, and maintain an action therefor in her own name, and hold the same in her own right, and may prosecute and defend all actions for the preservation and protection of her rights and property as if unmarried. There shall be no right of recovery by the husband on account of personal injury or wrong to his wife, or for expenses connected therewith, but the wife may recover against a third person for such injury or wrong as if unmarried, and such recovery shall include medical treatment and other expenses paid or assumed by the husband.

Iowa, McClain's An. C. (1888) § 3408*.

2987. (1202.) Liability of husband or wife for debts of the other. Neither husband nor wife is liable for the debts or liabilities of the other incurred before marriage, and, except as herein otherwise declared, they are not liable for the debts of each other contracted after marriage, nor are the wages, earnings, or property of either, nor is the rent or income of the property of either, liable for the separate debts of the other.

Ill., Starr & Curtis' An. S. (1885) p. 1270.
Iowa, McClain's An. C. (1888) § 3403.
Wash. C. (1896) § 2167*.

2988. (1203.) Husband or wife may sue the other. Should the husband or wife obtain possession or control of property belonging to the other before or after marriage, the owner of the property may maintain an action therefor, or for any right growing out of the same, in the same manner and to the extent as if they were unmarried.

Iowa, McClain's An. C. (1888) § 3395.
Ill., Starr & Curtis' An. S. (1885) p. 1278.

2989. (1204.) Husband not liable for wife's torts. For civil injuries committed by a married woman, damages may be recovered from her alone, and her husband shall not be liable therefor, except in cases where he would be jointly liable with her if the marriage did not exist.

Iowa, McClain's An. C. (1888) § 3396.
Ill., Starr & Curtis' An. S. (1885) P 1270.
A husband is not liable for the torts of his wife committed by her before marriage, while she was the wife of another man.
Culmer v. Wilson, 13 U. 129; 44 P. 833.

2990. (1205.) Acting as attorney in fact for the other. A husband or wife may constitute the other his or her attorney in fact, to control and dispose of his or her property for their mutual benefit or otherwise, and may revoke the appointment the same as other persons.

Iowa, McClain's An. C. (1888) § 3401.
Ill., Starr & Curtis' An. S. (1885) p. 1279.

2991. (1206.) Severally liable for family expenses. The expenses of the family and the education of the children are chargeable upon the property of both husband and wife, or of either of them, and in relation thereto they may be sued jointly or separately.

Iowa, McClain's An. C. (1888) § 3405.
Ill., Starr & Curtis' An. S. (1885) p. 1279.
It is the duty of a husband to provide his wife and children with a maintenance commensurate with his means and station.
Snow v. Snow, 13 U. 15; 43 P. 620.
The question whether the indebtedness was for necessaries is immaterial, if it was for legitimate and proper family expenses, but where a husband is permanently separated from his wife because of her excessive use of intoxicants, he is not liable for goods furnished during such separation
Berow v. Shields, 48 U. 270; 159 P. 538.

2992. (1207.) Right to occupy homestead. Neither the husband nor wife can remove the other or their children from their homestead without the consent of the other, unless the owner of the property shall, in good faith, provide another homestead suitable to the condition in life of the family; and if he abandons her, she is entitled to the custody of her minor children, unless a court of competent jurisdiction, upon application for that purpose, shall otherwise direct.

Iowa, McClains' An. C. (1888) § 3406*.
Ill., Starr & Curtis' An. S. (1885) p. 1279.
Homestead generally, §§ 2862-2882, and notes.
In case of separation, wife entitled to custody of minor children, § 3004.

CHAPTER 3.

DIVORCE, ETC.

2995. (1208.) Procedure. Residence. Causes. Proviso as to insane defendant. Proceedings in divorce shall be commenced and conducted in the manner provided by law for the proceedings in civil cases, except as hereinafter provided, and the court may decree a dissolution of the marriage contract between the plaintiff and defendant in all cases where the plaintiff, for one year next prior to the commencement of the action, shall have been an actual and bona fide resident of the county within the jurisdiction of the court, for any of the following causes, to wit:

1. Impotency of the defendant at the time of marriage;
2. Adultery committed by defendant subsequent to marriage;
3. Wilful desertion of plaintiff by defendant for more than one year;
4. Wilful neglect of defendant to provide for plaintiff the common necessaries of life;
5. Habitual drunkenness of defendant;
6. Conviction of defendant for felony;
7. Cruel treatment of plaintiff by the defendant to the extent of causing bodily injury or great mental distress to plaintiff;
8. Permanent insanity of defendant; *provided,* that no divorce shall be granted on the grounds of insanity unless, first, the defendant shall have been duly and regularly adjudged to be insane by the legally constituted authorities of this or some other state at least five years prior to the commencement of the action; second, unless it shall appear to the satisfaction of the court, by the testimony of competent witnesses, that the insanity of the defendant is incurable. In all such actions, the court shall appoint for the defendant a guardian *ad litem,* who shall take such measures as may be necessary and proper to protect the interests of the defendant; and a copy of the summons and complaint must be duly served on the defendant in person, or by publication, as provided for by the laws of this state in other actions for divorce, on his guardian *ad litem,* and on the county attorney for the county in which such action is prosecuted; it shall be the duty of such county attorney to make an investigation into the merits of the case, and, if defendant resides out of this state, have a commission issued to take such depositions as are necessary for that purpose, and to attend the court upon the trial of said cause, and make such defense therein as may be just and proper to protect the rights of the defendant and the interest of the state. In all such actions the court and judge thereof shall have all the powers relative to the payment of alimony, the distribution of property, and the custody and maintenance of minor children which such courts now have or may hereafter possess in other actions for divorce. Either the plaintiff or defendant, or legal representatives shall, if the defendant resides in this state, upon proper notice, be entitled to have the defendant brought into the court upon the trial or to have an examination of the defendant by two or more competent physicians, to determine the mental condition of the defendant, and for such purpose either party may, upon application, have process from the court to enter any asylum or institution within the state where such defendant may be confined. The costs of court in such action shall be assessed or apportioned by the court according to the equities of the case, as may be just and proper.

Separate maintenance, § 3010.

Divorce jurisdiction of the territorial district and probate courts.

Cast v. Cast, 1 U. 112.

Whitmore v. Hardin, 3 U. 121; 1 P. 465.

Kenyon v. Kenyon, U. 431; 24 P. 829.

A decree of divorce entered by a probate judge while lawfully exercising jurisdiction is a decree of a court of general jurisdiction importing absolute verity, and cannot be attacked in a collateral proceeding.

Amy v. Amy, 12 U. 279; 42 P. 1121.

The granting of a legislative divorce in Idaho was not a rightful subject of legislation under sec. 1851, U. S. Revised Status.

Higbee v. Higbee, 4 U. 19; 5 P. 693.

Statute of limitations does not apply to actions for divorce.

Tufts v. Tufts, 8 U. 142; 30 P. 309.

A decree granted without jurisdiction of the subject matter or of the person, or without cause of divorce stated and without proof, is absolutely void, and such decree cannot be

validated or confirmed by subsequent legislative enactment.

In re Christiansen, 17 U. 412; 53 P. 1003.

Where plaintiff resided in state for statutory period, and defendant, a non-resident, appeared and surrendered to the court's jurisdiction, the court had jurisdiction to decide the whole case on the merits, and, if necessary, grant a decree to her on her cross complaint, and proceed under §§ 2998, 3000 to make such order and award as to the children, property, alimony, etc., as is equitable.

Fisk v. Fisk, 24 U. 333; 67 P. 1064.

Where, in an action for divorce, the defendant appears and joins issue by answer, the nature of the proceeding is thereby changed from a proceeding in rem to one in personam.

Gibbs v. Gibbs, 26 U. 382; 73 P. 641.

The district court of a county in which plaintiff resided for statutory period had jurisdiction of the subject matter of an action for divorce for adultery committed in another county.

Id.

Where a husband and wife were married and resided in Utah, where the husband abandoned the wife, the matrimonial domicile was in that state, which was all that was essential to confer jurisdiction on its courts to decree a divorce, though the husband could not be personally served there.

State ex rel. v. Morse, 31 U. 213; 87 P. 705.

A decree of divorce obtained by collusion of the parties, or by the suppression of the facts, or false testimony, is a fraud upon the court and against public policy.

Karren v. Karren, 25 U. 87; 69 P. 465.

An instrument, whereby a wife released her one-third interest for a sum of money on an understanding that the husband should apply for a divorce and that the wife should make no defense thereto, was void as against public policy.

In re Bell's Estate, 29 U. 1; 80 P. 615.

Palmer v. Palmer, 26 U. 31; 72 P. 3.

A "church divorce" of the Mormon church, whereby parties who have been sealed as husband and wife under Mormon sealing ordinance, under the authority and with the consent of the church, attempt to dissolve their marital relations, is not a valid divorce, although the parties believe it to be valid and thereafter go through another marriage ceremony with other parties.

Hilton v. Roylance, 25 U. 129; 69 P. 660.

While a husband or wife, or both, may violate the terms and obligations of their marriage contract, yet neither one, nor both combined, can rescind or modify it except as provided by the law of the land.

Palmer v. Palmer, 26 U. 31; 72 P. 3.

Hilton v. Roylance, 25 U. 129; 69 P. 660.

Norton v. Tufts, 19 U. 470; 57 P. 409.

Adultery may be proved in divorce case by circumstantial evidence.

Griffin v. Griffin, 18 U. 98; 55 P. 84.

Where, in an action for divorce on the ground of cruelty, the evidence of defendant, not denied by plaintiff, showed that plaintiff had frequently struck defendant when intoxicated, the divorce was properly denied, though cruelty as alleged had been committed by defendant.

Hartwell v. Hartwell, 25 U. 41; 69 P. 265.

In a suit by the wife for divorce, findings that the husband wilfully and without excuse had deserted plaintiff, and failed to support her and their children, though he had the ability to do so, and that plaintiff was financially unable to maintain the children, are insufficient to warrant a decree granting a divorce but awarding the custody of the children to the husband.

Stover v. Stover, 24 U. 92; 66 P. 766.

The courts have jurisdiction of an action for divorce against a non-resident defendant by constructive service, although the marriage was not solemnized within the state and no matrimonial domicile had therein.

Schaffer v. Ritchie, Dist. Judge, 49 U. 111; 162 P. 618.

When a divorce is sought upon the ground of permanent insanity, to confer jurisdiction it is essential that the defendant be personally served within the state.

Id.

A complaint for cruelty causing great mental distress, alleging that the wife was unduly familiar with other men, and especially with N., and that she refused to live longer with the complainant, and left him, and moved to S., where she is constantly in company with N., and the complainant gave her no cause for her conduct, is insufficient.

Benson v. Benson, 45 U. 514; 146 P. 564.

Being occasionally drunk does not constitute habitual drunkenness as a ground for divorce; there must be a confirmed habit.

Holm v. Holm, 44 U. 242; 139 P. 937.

Cruelty by a wife, constituting a cause of divorce hereunder, is established by evidence that she has transferred her affections to another, has refused to discontinue her manifestations of friendship for him and her visits and associations with him.

Id.

Where a wife, without foundation, accused her husband of numerous acts of sexual immorality, demanded that his employers discharge him, characterized him as nō better than a convict, charged him with failure to support her, employed detectives to trail him, and sought his arrest on criminal charges, her acts constituted cruelty causing great mental distress.

Doe v. Doe, 48 U. 200; 158 P. 781.

2996. (1208x.) Decrees validated. All decrees of divorce heretofore made and entered by the courts of this state under § 2995 where constructive service of the summons on the defendant was had are hereby validated and confirmed, and shall have the same force and effect as though they had been granted after the enactment of this chapter. '17, p. 383.

2997. (1209.) Husband may obtain divorce. The husband may in all cases obtain a divorce from his wife for the like causes, and in the same manner as the wife obtains a divorce from her husband.

2998. (1210.) Temporary alimony. The court may order either party to pay to the clerk a sum of money for the separate support and maintenance of the adverse party and the children, and to enable such party to prosecute or defend the action.

Iowa, McClain's An. C. (1888) § 3417.

Alimony in suit for separate maintenance, § 3010.

On motion made in the supreme court in a proper case temporary alimony and counsel fees will be allowed.

Cast v. Cast, 1 U. 112.

2999. (1211.) Complaint. Testimony. Decrees. The complaint or petition shall be in writing and verified by the oath of plaintiff, and no decree in divorce shall be granted upon default or otherwise, except upon legal testimony taken in the cause; and all hearings and trials for divorce shall be had

before the court, and not before a master, referee, or any other delegated representative; and the court, in all cases in divorce, shall make and file its findings and decrees upon the testimony. '09, p. 82.

3000. (1212.) Disposal of children and property. When an interlocutory decree of divorce is made, the court may make such order in relation to the children, property, parties, and the maintenance of the parties and children as shall be equitable; *provided,* that if any of the children have attained the age of ten years and are of sound mind, such children shall have the privilege of selecting to which of the parents they will attach themselves. Subsequent changes, or new orders, may be made by the court in respect to the disposal of the children or the distribution of property, as shall be reasonable and proper. '09, p. 233.

In case of separation, mother entitled to children, § 3004.

Children of twelve years have right to select which parent to live with, § 3004.

Disposal of children and property in separate maintenance proceeding, § 3012.

The right to alimony follows as a matter of course, if the respondent is entitled to a decree of divorce.

Cast v. Cast, 1 U. 112.

Allowance for child is not a final judgment that may be appealed from.

Thompson v. Thompson, 5 U. 401; 16 P. 400.

Defendant properly adjudged guilty of contempt for refusal to pay alimony.

In re Kelsey, 12 U. 393; 43 P. 106.

Snow v. Snow, 13 U. 43 P. 620.

Whether a divorced wife and minor children are entitled to alimony, after husband's death, depends upon the terms of the decree.

Murphy v. Moyle, 17 U. 113; 53 P. 1010.

A provision in a decree that the father shall pay a certain monthly sum towards support of minor children during their minority is not discharged by his death, but performance may be enforced out of his estate for the time of minority.

Id.

Where there is danger that the husband will dispose of his property by conveyance or squander it, so that nothing will remain upon which decree can operate, the court may require him to furnish security for its performance.

Id.

A general rule for allowance of alimony is one-third of husband's property, or one-third of his income.

Griffin v. Griffin, 18 U. 98; 55 P. 84.

A husband is not entitled to alimony or an allowance except as provided by statute.

Hoagland v. Hoagland, 19 U. 103; 57 P. 20.

Court authorized to make such disposition of children and property as was equitable and just, even though defendant was a non-resident; she having appeared and submitted herself to the jurisdiction of the court.

Fisk v. Fisk, 24 U. 333; 67 P. 1064.

Custody of minor child; when party at fault should be allowed to see child.

Griffin v. Griffin, 18 U. 98; 55 P. 84.

Held, improper and inconsistent to grant wife a divorce for husband's fault and then award children to husband.

Stover v. Stover, 24 U. 92; 66 P. 766.

Subsequent changes in decree in respect to disposal of children, etc., can only be granted in the suit in which the divorce decree was granted.

Karren v. Karren, 25 U. 87; 69 P. 465.

After a decree of divorce and division of property the court may modify its order in relation to the distribution of the property.

Whitemore v. Hardin, 3 U. 121; 1 P. 465.

The provisions of this section authorize the court to make such changes in the amount of alimony awarded in the decree as will be just to both parties, in view of their changed condition.

Read v. Read, 28 U. 297; 78 P. 675.

The question of alimony and the fixing of the amount thereof rest in the discretion of the trial court, and, in the absence of abuse of discretion, its judgment will not be disturbed on appeal.

Id.

Though a divorce decree directed that plaintiff husband should pay to a third person for the use and benefit of the minor children a certain sum per month until each of the children should become of the age of eighteen years, yet such third person was without right to maintain an action to recover the same; the right of action therefor being in the defendant wife.

Hunt v. Monroe, 32 U. 428; 91 P. 269.

Under this section as amended, the amount of alimony to be awarded is within the discretion of the trial court, and will not be disturbed without a clear showing of abuse.

Blair v. Blair, 40 U. 306; 121 P. 19.

A wife who was granted no alimony when the interlocutory decree of divorce was entered will not thereafter be granted it on petition.

Cody v. Cody, 47 U. 456; 154 P. 952.

The court may modify the decree by reducing the alimony, though the husband admitted that the amount allowed would be reasonable.

Buzzo v. Buzzo, 45 U. 625; 148 P. 362.

A complaint for divorce alleging that complainant conveyed his property to his wife in trust for the children, and that he verily believes that she would transfer said land and dissipate the proceeds, is insufficient to authorize any relief, and where the complaint failed there can be no judgment awarding the cancellation of the conveyance.

Benson v. Benson, 45 U. 514; 146 P. 564.

Though divorce is granted to a husband, custody of the children may temporarily be given to the mother, and the husband required to contribute to their support.

Holm v. Holm, 44 U. 242; 139 P. 937.

This section is not conclusive on the question of the custody and control. If the parent the child selects is found to be an immoral, or an unfit person to have the care and custody of the child, and the court finds it for the best interest of the child to be placed elsewhere.

Dorsey v. Dorsey, 51 U. —; 172 P. 722.

Where the father who is found by the court to be of a good moral character, stipulates that the custody of the child may be with the mother, it requires very strong and positive evidence to justify the court in granting the custody of the child to another.

Id.

3001. Interlocutory decree. If, after the hearing of any divorce cause, the court shall be of the opinion that the divorce ought to be granted to either person, a decree shall be entered granting to such person a divorce; but the said decree shall specifically provide that it shall not become absolute until the expiration of six months from the date of its entry.

'09, p. 231; am'd '13, p. 76.

The interlocutory decree is a final decree determining the issues and the respective rights and interests of the parties, and there is a right of appeal therefrom which must be taken within six months from the entry thereof, and such proceedings are not reviewable on an apeal from the absolute or final decree.
Parsons v. Parsons, 40 U. 203; 122 P. 907.

3002. Id. Becomes absolute, when. The decree of divorce shall become absolute after the expiration of six months from the entry thereof, unless proceedings for a review are pending, or the court before the expiration of said period for sufficient cause, upon its own motion or upon the application of any party, whether interested or not, otherwise orders. '09, p. 231; am'd '13, p. 76.

Where the appeal is taken within six months after the final, and more than six months after the interlocutory, decree, and attacked the sufficiency of the evidence to support the findings, but not the sufficiency of the findings to support the decree, there was nothing for review.
Pike v. Pike, 41 U. 589; 128 P. 520.
Custer v. Custer, 41 U. 575; 126 P. 880.

3003. Unlawful for divorced persons to marry, when. It shall be unlawful for either party to a divorce proceeding, whose marriage is dissolved by the final decree provided for by § 3002, to marry any person other than the husband or wife from whom the divorce was granted, within the period allowed for an appeal from such final decree under the code of civil procedure, and if an appeal from such final decree be taken, until after the affirmance of such decree; and any marriage contracted in violation of the provisions of this section shall be null and void. '09, p. 232.

3004. (1212x.) Care of minor children. In the case of the separation of husband and wife having minor children, the mother of said children shall be entitled to the care, control, and custody of all such children; *provided,* that if any of said children have attained the age of twelve years and are of sound mind, such children shall have the privilege of electing to which of the parents they will attach themselves; *provided further,* that if it shall be made to appear to a court of competent jurisdiction that the mother is an immoral or otherwise incompetent or improper person, then the court may award the custody of said children to the father or make such other order as may be just. '03, p. 68.

Disposal of children and property, § 3000. Children of ten years have right to select parent to live with, § 3000.

3005. (1213.) Guilty party. When a divorce is decreed, the guilty party forfeits all rights acquired by marriage.

AVOIDANCE OR AFFIRMANCE OF MARRIAGE.

3006 (1214.) When validity uncertain. Procedure. When doubt is felt as to the validity of a marriage, either party may, in a court of equity, demand its avoidance or affirmance, but when one of the parties was within the age of consent at the time of the marriage, the other party, being of proper age, shall have no such proceeding for that cause against the party under age.

3007. (1215.) When obtained by force or fraud. Minors. Courts having general equity jurisdiction may declare void a marriage obtained by force, or fraud, or where the male was under sixteen or the female under fourteen years of age at the time of the marriage, and the marriage was without the consent of the father, mother, guardian, or other person having the proper charge of his or her person, and has not been ratified by cohabitation after that age.

CHAPTER 4.

SEPARATE MAINTENANCE.

3010. (1216.) Neglected or deserted wife. Alimony. Whenever a husband, being a resident of this state, shall have deserted his wife without good and sufficient cause, or, being of sufficient ability to support her, shall have neglected or refused to properly provide for and suitably maintain her,

or, having property within this state, and the wife being a resident of this state, shall have so deserted or neglected or refused to provide for her, or where a married woman, without her fault, now lives or may hereafter live separate and apart from her husband, the district court shall, on the application of the wife, allot, assign, set apart, and decree to her as alimony, the use of such part of her husband's real and personal estate or earnings as the court may determine in its discretion; and, during the pendency of the proceedings, the court may require the husband to pay such sums for costs, expenses, and attorney's fees, and for the support of the wife as it shall deem necessary and proper, in like manner as in actions for divorce.

Husband's duty to support wife, § 8112.
Divorce, grounds for, § 2995.

Though a husband is under a moral obligation to support his plural wives and their children, he is under no legal obligation to do so. Riddle v. Riddle, 26 U. 268; 72 P. 1081.

Where the husband neglects the wife, attends dances, ball games, picture shows, and insists that she was not sick, and should go with him, and came home drunk, and used abusive language toward her, and swore and raved, as a result of which she was in a nervous condition, and had convulsions, which was affecting her health, and he boasted when he came back from a trip up the canyon, that he slept with a woman, sufficiently justifies findings and judgment for separate maintenance. Willardson v. Willardson, 51 U. ——; 172 P. 719.

3011. (1217.) Procedure. In all cases commenced pursuant to the preceding section, the proceedings and practice therein shall be the same, as near as may be, as is now or hereafter may be provided by law in actions for divorce; but suit may be brought either in the county where the wife resides or in any county in which the husband may be found.

3012. (1218.) Disposal of children and property. Subsequent changes. In all actions brought pursuant to this chapter the court may order and decree concerning the care, custody, and maintenance of the minor children of the parties, and may determine with which of the parties, the children or any of them shall remain, and may assign and decree to the wife the possession of any of the real or personal estate of the husband, and may decree the payment of a fixed sum of money for the support of the wife and minor children, and provide that the payment of the same be secured upon real estate or otherwise, the payment to be made at such times and in such manner as may be proper, and may enforce the performance of such decree by the sale of the real estate of the husband, or by any proceedings in contempt or otherwise as may be necessary. And the court shall have the power to change the allowance from time to time, according to circumstances, or may revoke such allowance altogether upon satisfactory proof of a voluntary and permanent reconciliation; *provided,* that such allowance shall be only during the joint lives of such husband and wife.

Disposal of children and property on divorce, § 3000.

3013. (1219.) Restraining disposal of property. At the time of filing the complaint mentioned in § 3010, or at any time subsequent thereto, the plaintiff may procure from the court and file with the county recorder of any county in the state in which the defendant may own real estate, an order enjoining and restraining the defendant from disposing of or incumbering the same or any portion thereof, describing such real estate with reasonable certainty, and from the time of filing such order the property described therein shall be charged with a lien in favor of the plaintiff to the extent of any judgment which may be rendered in the action.

3014. (1220.) Dependent husband. Effect of imprisonment. Like rights and remedies shall be extended to a dependent husband in case he shall be deserted by, or with just cause live apart from, his wife; and, to either husband or wife, on the imprisonment of the other in the state prison under a sentence of one year or more, when suitable provision has not been made for the support of one not so imprisoned.

TITLE 47.

IMMIGRATION, LABOR, AND STATISTICS—BUREAU OF.

('11, p. 185.)

3024. (2427x.) Bureau created. A state bureau of immigration, labor, and statistics is hereby created and established, and said bureau shall be under the control of a commissioner. '11, p. 185.

Duty of bureau imposed on industrial commission, subs. 7 and 9, § 3076.

Originally it was bureau of statistics, and enlarged, '11, p. 185.

3025. Appointment of commissioner. Term. Salary and expenses. Deputies. It shall be the duty of the governor, by and with the consent of the senate, to appoint a competent person as commissioner of immigration, labor, and statistics, who shall have charge of said bureau, and who shall hold office for a term of two years, or until his successor shall have qualified. He shall receive a salary of $2400 per annum, and all necessary traveling expenses, not exceeding $600 per annum, while traveling in the discharge of his official duties. The commissioner shall have power to appoint two deputy commissioners, one of whom shall be a woman, and they shall receive a salary each of $1000 per annum; the commissioner shall appoint one of said deputies as the chief clerk of said bureau, who shall receive an additional salary of $800 per annum. The salaries of the commissioner and deputy commissioners shall be paid monthly. Before entering upon the duties of his office the commissioner shall take oath for faithful discharge of the duties thereof, the same as other state officers.

Am'd '11, p. 185; '13, p. 119; '15, p. 70.

3026. (2427x1.) Duties. It shall be, and is hereby made, the duty of said commissioner to collect and compile and present in annual reports to the governor all reliable data and information at his command, concerning the climate, soil, and various resources of the state, its agricultural, horticultural, mineral, timber, and grazing lands, and commercial industries and the development thereof; the water courses and lakes of the state in reference to irrigation, manufacturing, mechanical, and other uses, the various crop products and adaptibility of the different soils and localities for the production of different crops; the number, kinds, and value of domestic animals in the state, with useful information regarding the same, the number of public schools, educational institutions, churches, charitable and fraternal organizations, health and pleasure resorts, and vital health statistics of the state, the number and mileage of railroads and other transportation lines, the number and capacity of irrigation canals and the land covered by same, the number and location of newspapers and periodicals in the state, the amount of public and school lands, those belonging to various public institutions of the state, the wages and hours of labor, both skilled and common, and its relation to capital; and, generally, any information which, if disseminated abroad, would tend to the development of the state by inducing population and capital to come within its borders. Said commissioner shall also inform himself in regard to suitable locations for agricultural and horticultural colonies in the state, and use all facilities at his command for encouraging and promoting desirable enterprises of this kind. To this end he shall endeavor to secure low rates of transportation favorable to immigration by urging the co-operation of railroads and other corporations interested in the settlement of the state. He should also open correspondence with and answer any and all inquiries from those seeking information in regard to the resources of the state; he shall, whenever practicable, and when funds are available for such purpose, organize and encourage local exhibits at such points as would tend to advertise the resources of the state.

Am'd '11, p. 185.

Commissioner to enforce minimum wage act, § 3674.

3027. Id. Enforcement of labor laws. It shall be the duty of the com-

missioner and his deputies to investigate and report to the proper authorities all violations of law regarding the conditions surrounding the employment of children, minors, and women, and the laws established for the protection of all employes in factories, mines, mills, and other institutions where labor is employed, and to make such recommendation in relation thereto as they may deem proper for the protection of employes. In case any owner or occupant, or their agent, shall refuse to admit any officer of said bureau to their workshop or factory, mine or smelter, store or hotel, when open or in operation, or shall refuse to submit their payroll or register showing the number of hours each employe works, or shall wilfully give false information concerning the same, they shall be deemed guilty of a misdemeanor for each and every offense, and upon conviction thereof shall be subject to a fine of not more than $50 nor less than $10, or to imprisonment not to exceed fifteen days, or to both such fine and imprisonment.

'11, p. 185; am'd '13, p. 120.

3028. Id. May do all things necessary. With the approval of the state board of examiners, said commissioner is authorized and empowered to do any and all things necessary to make a full and complete investigation of the matters and things hereinbefore enumerated, and to that end to employ the necessary clerical assistance, and to provide the necessary office room, stationery, printing, blank forms, and other incidental matters required to carry into effect the provisions of this title. '11, p. 185.

3029. (2427x2.) Id. Witnesses. The commissioner of the bureau of statistics shall have power to issue subpœnas, administer oaths, and take testimony in all matters relating to the duties herein required by said bureau, said testimony to be taken in some suitable place in the vicinity to which testimony is applicable. Witnesses subpœnaed and testifying before the commissioner of the bureau shall be paid the same fees as witnesses before a justice's court, such payment to be made out of the contingent fund of the bureau in advance, but such expense for witnesses shall not exceed $100 annually. Any person duly subpœnaed under the provisions of this section, who shall wilfully neglect or refuse to attend or testify at the time and place named in the subpœna, shall be deemed guilty of a misdemeanor, and, upon conviction thereof before any court of competent jurisdiction, shall be punished by a fine not exceeding $50 and costs of prosecution, or by imprisonment in the county jail not exceeding thirty days; *provided, however,* that no witness shall be compelled to go outside the county in which he resides to testify. '01, p. 47.

3030. (2427x4.) Information confidential. In the reports of the commissioner no use shall be made of names of individuals, firms, or corporations supplying the information called for by this chapter, such information being deemed confidential and not for the purpose of disclosing personal affairs; and any officer or employe of the bureau of statistics violating this provision shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be fined in a sum not exceeding $500 and costs of prosecution, or by imprisonment in the county jail not exceeding one year. '01, p. 48.

3031. (2427x5.) Documents to be held two years. No report or return made to said bureau in accordance with the provisions of this chapter, and no schedule, record, or document gathered or returned by its officers or employes, shall be destroyed within two years of the collection or receipt thereof. At the expiration of two years all records, schedules, or papers accumulating in said bureau during said period, that may be considered of no value by the commissioner, may be destroyed; *provided,* the authority of the state senate be first obtained for such destruction. '01, p. 48.

3032. (2427x6.) Information, how obtained. Said bureau may collect the information called for by this chapter, or such information as the commissioner shall consider essential to perfect the work of the bureau, from the several state, county, city, town, precinct, and school district officers,

and from officers of prisons, penal and reformatory institutions; and it shall be the duty of all such officers to furnish, upon the written or printed request of the commissioner, such information as shall be considered necessary for the purposes of this chapter, upon blanks furnished by said bureau. Each owner, operator, or manager of industrial, mining, or agricultural business, or other person having information necessary to the work of the bureau of statistics, shall, upon the request of the commissioner, furnish the same, upon blanks to be provided by the said bureau. Each owner, operator, or manager of any industrial, mining, or agricultural business, or any person having information necessary to the work of the bureau, who fails or refuses to furnish the information so requested, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in a sum not less than $10 nor more than $100, and costs of prosecution. '01, p. 48; '03, p. 72.

3033. (2427x7.) County assessor to get statements. Blank form. Each county assessor, or his deputies, at the time of taking lists of property for taxation in each year, shall require each person, company, and corporation in his county or district to make a statistical statement of the previous year, as indicated on blanks furnished by the bureau, as follows:

Agriculture: Number of acres and production per acre of each kind of crop; number of acres of different kinds of pasture; number of fleeces of wool and average weight of the same; name of manager of farm; size of farm; quantity of land under fence; quantity of land not under fence; quantity of land under cultivation; assessed value of farm and farming implements; number of different kinds of livestock, poultry, stands of bees; amount of honey produced; number of acres of nurseries, orchards, and vineyards, with the production thereof and the amount of capital invested therein; number of mules, horses, cattle, sheep, and hogs, subdivided into the breeds or classes where they belong; number and value of slaughtered animals; canals, reservoirs, etc., constructed and the cost thereof; and such other agricultural information as shall be practicable in discharge of their duties. The county assessor shall return such statements to the state bureau of statistics on or before the 1st day of July of each year. '01, p. 48; '03, p. 73.

3034. (2427x8.) Industrial and mining. The commissioner of the bureau shall require each person, company, and corporation engaged in industrial or mining pursuits in the state to make statistical statements, as indicated on blanks furnished by the bureau, as follows:

Industries: Number of establishments; name and postoffice address of corporation, company, or individual producing; name of business; kind of motive power; average number and sex of hands employed; capital invested; raw material used; product; number of flouring mills, woolen mills, saw mills, and factories of different classes; number of pounds of cheese and butter produced in factories; number and kind of cows used; number of mercantile establishments and average number of employes in each; amount of capital invested; number of work shops and average number of employes; minimum wages; maximum wages; average wages; number of hours per day employes are required to work.

Mining: Quantity of precious or other metals or minerals produced or handled; capital employed; approximate area of property; area of undeveloped property.

In addition, each person, company, and corporation engaged in industrial or mining business shall furnish such other information as shall be requested on the blanks provided by the bureau therefor. '01, p. 49; '03, p. 73.

TITLE 48.

INDIAN WARS.

CHAPTER 1.

COMMISSIONER OF INDIAN WAR RECORDS .

('11, p. 101.)

3040. Office created. There is hereby created a commissioner, to be known as commissioner of Indian war records, to consist of the adjutant-general of the state, who shall be the custodian of the records thereof.

3041. Duties. The duties of said commissioner shall be to ascertain the names of persons who were members of any organization performing military duty during any of the Indian wars or expeditions against the Indians, or who performed the duties of home guard as members of any organization doing military duty during the time of any Indian wars or expeditions in this state, and to ascertain the character of the service rendered, the duration of same, with what organization and the name of the commanding officer under whom such service was rendered, and such other facts relating to such service as the commissioner shall deem proper.

3042. Oath. Testimony. Witnesses. The commissioner shall have power, by virtue of his office, to administer oaths, take testimony, and subpœna witnesses.

3043. Facts to be supported by two witnesses. The facts relating to service of any person, as hereinbefore set forth, shall be supported by at least two reputable witnesses made before said commissioner, or any officer having a seal authorized to administer oaths, and shall be by said commissioner reduced to writing, and attested by the seal of said commissioner, and filed in the office of said commissioner.

3044. Seal. Description. The seal of said commissioner shall be circular in form, one and three-eighths inches in diameter, a circle within a circle, and between which circles shall be impressed the words "commissioner of Indian war records. Seal," and within the inner circle shall be impressed the word "Utah."

3045. Rules and regulations. The commissioner shall have power to prescribe such rules, regulations, and forms as he may deem necessary and proper regarding the taking of testimony and the preservation of all Indian war records.

3046. Expenses. The expenses of said commissioner, including the publishing and binding of such records, shall be allowed by the state board of examiners and paid, upon verified vouchers, in the manner provided by law.

3047. Appropriation. The sum of $500, or as much thereof as may be necessary, is hereby appropriated out of any moneys in the state treasury not otherwise appropriated for the expenses of said commissioner.

Appropriation for Indian war veterans, §§ 3050-3053. Veterans fund, §§ 3055-3058.

CHAPTER 2.

APPROPRIATION FOR INDIAN WAR VETERANS.

('13, p. 200.)

3050. Compensation of veterans. Each veteran who performed actual service in any of the Indian wars of the territory of Utah, in the regular

militia of the territory, or if he be dead then his widow, shall receive from the state of Utah compensation as follows:

1. For expeditionary service while in the field away from home: (a) Cavalry, infantrymen, buglers, teamsters, and musicians at the rate of $40 per month. (b) For the use and risk of each horse at the rate of $15 per month.

2. Home guard service: Cavalrymen and infantrymen at the rate of $20 per month.

The foregoing schedule for services shall govern without regard to the rank in which the person served; *provided,* that no person shall be paid for any service for which he has heretofore received payment, and provided further that in no case shall payment be made to any one for a period exceeding one month; and *provided, further,* that the provisions of this chapter shall not apply to any person who has been granted a pension from the United States; and *provided, further,* that payments hereunder shall not be held to bar further payments in the future for services longer than one month as shown by the records hereinafter mentioned.

Commissioner of Indian war records, §§ 3040-3043.

3051. Affidavit of service. Adjutant-general to disburse funds. The affidavits of service in Indian wars in the territory of Utah on file in the office of the adjutant-general of the state of Utah shall be deemed conclusive proof of service therein respectively mentioned, such affidavits having been compiled by the commissioners of Indian war records as authorized heretofore by the governor and legislature of the state of Utah. The funds hereby provided for and appropriated shall be disbursed by the adjutant-general of the state of Utah. Upon the filing of proof of identity by any person rendering such service with the adjutant-general, he shall immediately list said person, showing the amount due hereunder; at the end of ninety days from the taking effect of this chapter the adjutant-general shall disburse said fund on a pro-rata basis, paying to each veteran his proportionate amount of the sum hereby appropriated.

3052. Manner of identification. Identification may be made as follows:

1. Of the person rendering the service: By certificate of such person attested by two responsible witnesses.

2. Of a widow of the person rendering the service when the proof was filed by the widow: The certificate of said widow attested by two responsible witnesses.

3. Of a widow of the person rendering services when such person has died since the filing of proof of service: By certificate of such widow attested by two responsible witnesses, or by certified copy of marriage record of the widow to the deceased.

The proof in all cases shall be filed within ninety days from the taking effect of this chapter.

3053. Appropriation. How drawn. There is hereby appropriated out of any moneys in the state treasury not otherwise appropriated the sum of $50,000 for the purpose of carrying into effect the provisions of this chapter. The state auditor shall draw his warrant on the state treasurer in favor of the adjutant-general for the sum hereby appropriated.

CHAPTER 3.

INDIAN WAR VETERANS' FUND.

('17, p. 72.)

3055. Fund created. There is hereby created a fund to be known as the indian war veterans' fund, said fund to consist of any moneys appropriated by the state for the purposes set out in this chapter, and any money appro-

priated or advanced by the government of the United States for disbursements among the Indian war veterans, or persons herein mentioned, and any other funds donated or acquired for said purposes.

Commissioner of Indian war records, §§ 3040-3043.

3056. Appropriation. There is hereby appropriated from the general funds of the state, not otherwise appropriated, the sum of $25,000, to be placed to the credit of the Indian war veterans' fund.

3057. Disbursement. The state board of examiners is hereby authorized and empowered to disburse the Indian war veterans' fund to veterans who have performed actual service in any of the Indian wars of the territory of Utah while such veterans were members of the regular militia of the territory, or to the wives or widows of such veterans, as compensation for the services of such veterans.

3058. State board of examiners to approve claims. The state board of examiners shall examine into and investigate the merits and claims of any person applying for a share of the Indian war veterans' fund. The findings of the said state board of examiners in regard to these matters shall be final. If, in the opinion of the state board of examiners, any person applying for a portion of the Indian war veterans' fund shall be entitled thereto, the state board of examiners shall determine the amount to be disbursed to such person, and upon such determination the state auditor shall draw his warrant upon the state treasurer for such amount in favor of the person so entitled; *provided, however,* that no disbursements in excess of the amount of money available in said fund shall be made.

TITLE 49.

INDUSTRIAL COMMISSION.

('17, p. 306.)

3061. Commission Created. Membership. Terms. There is hereby created the industrial commission of Utah, to be composed of three members, who shall be appointed by the governor within thirty days after this title goes into effect. Two of the members of such commission shall be appointed for the term of two years and one for four years, and thereafter each member shall be appointed, with the advice and consent of the senate, for the term of four years. Not more than two of the members of said commission shall belong to the same political party.

3062. Removals for cause. The governor at any time may remove any member of the commission for inefficiency, neglect of duty, malfeasance, misfeasance, or nonfeasance in office.

3063. Limitations, business and political. No commissioner shall hold any office of trust or profit, or engage in any occupation or business interfering or inconsistent with his duties as such commissioner, and no commissioner shall serve on any committee of any political party.

3064. Salary. Qualifications. Bonds of commissioners and employes. Each of said commissioners shall receive an annual salary of $4000, payable in the same manner as the salaries of other officers of the state are paid. Before entering upon the duties of his office, each commissioner shall take and subscribe to the constitutional oath of office, which oath shall be filed in the office of the secretary of state. Each member of the commission shall give a corporate surety bond in the sum of $10,000, which bond shall be approved by the governor and filed with the state treasurer. All employes or deputies of the commission receiving or disbursing funds of the state shall give corporate surety bonds to the state in amounts and with surety to be approved by the commission. The premiums of all bonds provided for in this section shall be paid out of the state treasury.

3065. Organization. Quorum. Vacancies. Within thirty days after this title goes into effect, the commission shall meet at the seat of government and organize by choosing one of its members as chairman. A majority of the commission shall constitute a quorum to transact business. No vacancy shall impair the rights of the remaining commissioners to exercise all the powers of the commission; and in case a vacancy exists, the remaining members of the commission shall exercise all of the powers and authorities of the commission until such vacancy is filled.

3066. Offices. Places of sessions. The commission shall keep and maintain its offices at the state capitol, in suitable room or rooms. Necessary office furniture shall be furnished to the commission in the state capitol. The commission may hold sessions in any place within the state of Utah.

3067. Official seal. Judicial notice. Certification of records. The commission shall have an official seal for the authentication of its orders and proceedings, upon which seal shall be engraved the words, "the industrial commission of Utah," and such other design as the commission may prescribe; and the courts in this state shall take judicial notice of the seal of the commission, and in all cases copies of orders, proceedings, or records in the office of the industrial commission of Utah, certified by the secretary of the said commission under its seal, shall be equal to the original as evidence.

3068. Business hours. Sessions. Records. Voting. The commission shall be open for the transaction of business during all business hours of each and every day except Sunday and legal holidays. The sessions of the commission shall be open to the public. All proceedings of the commission shall be shown on its records, which shall be a public record, and all voting shall be had by calling each member's name by the secretary, and each member's vote shall be recorded on the proceedings as cast.

3069. Adoption and change of rules of procedure. Subject to the provisions of this title, the commission may adopt its own rules of procedure, and may change the same from time to time in its discretion.

3070. Commission employes. Compensation, expenses. The commission may employ a secretary, deputies, actuaries, accountants, inspectors, examiners, experts, clerks, physicians, stenographers, and other assistants, and fix their compensation. Such employment and compensation shall be first approved by the governor, and shall be paid out of the state treasury. The members of the commission, deputies, secretary, actuaries, accountants, inspectors, examiners, experts, clerks, physicians, stenographers, and other assistants that may be employed shall be entitled to receive from the state treasury their salaries or compensation, and also their actual and necessary expenses while traveling on the business of the commission, and the members of the commission may confer and meet with officers of other states and officers of the United States on any matters pertaining to their official duties. Such expenses shall be itemized and sworn to by the person who incurred the expense and allowed by the commission.

3071. Places of employment. Safety devices. Obeying orders. Every employer shall furnish employment and a place of employment which shall be safe for the employes therein, and shall furnish and use safety devices and safeguards, adopt and use methods and processes, and follow and obey orders of the commission, reasonably adequate to render such employment and place of employment safe, and shall do every other thing reasonably necessary to protect the life, health, safety, and welfare of such employes.

3072. Duties of employers. No employer shall require or knowingly permit any employe to be in any employment or place of employment which is not safe, and no such employer shall fail to provide and use safety devices and safeguards, or fail to obey and follow orders of the commission, or to adopt and use methods and processes reasonably adequate to render such employment and place of employment safe, and no employer shall fail

or neglect to do every other thing reasonably necessary to protect the life, health, safety, and welfare of his employes; and no employer or other person shall hereafter construct or occupy or maintain any place of employment that is not safe.

3073. Duties of employes. No employe shall remove, displace, damage, destroy, or carry off any safety device or safeguard provided for use in any employment or place of employment, nor interfere in any way with the use thereof by any other person, nor shall any such employe interfere with the use of any method or process adopted for the protection of any employe in such employment or place of employment, nor fail or neglect to follow and obey orders and to do every other thing reasonably necessary to protect the life, health, safety, and welfare of employes.

3074. Right of examination. Any commissioner or deputy of the commission may enter any place of employment for the purpose of collecting facts and statistics, examining the provisions made for the health, safety, and welfare of the employes therein, and bring to the attention of every employer any law, or any order of the commission, and any failure on the part of such employer to comply therewith. No employer shall refuse to admit any commissioner or deputy of the commission to his place of employment.

3075. Supervision over places of employment. The commission is vested with the power and jurisdiction to have such supervision of every employment and place of employment and of every building and establishment in this state as may be necessary adequately to enforce and administer all laws and all lawful orders requiring every employment and place of employment to be safe, and requiring the protection of the life, health, safety, and welfare of every employe in such employment or place of employment.

3076. General powers of commission. It shall also be the duty of the commission, and it shall have full power, jurisdiction, and authority:

1. To administer and enforce all laws for the protection of life, health, safety, and welfare of employes;

2. To ascertain and fix such reasonable standards and prescribe, modify and enforce such reasonable orders for the adoption of safety devices, safeguards, and other means or methods of protection, to be as nearly uniform as possible, as may be necessary to carry out all laws and lawful orders relative to the protection of the life, health, safety, and welfare of employes in employment and places of employment;

3. To ascertain, fix, and order such reasonable standards for the construction, repair, and maintenance of places of employment as shall render them safe;

4. To investigate, ascertain, and determine such reasonable classifications of persons, employments, and places of employment as shall be necessary to carry out the purposes of this title;

5. To do all in its power to promote the voluntary arbitration, mediation, and conciliation of disputes between employers and employes;

6. To establish and conduct free employment agencies, and license and supervise the work of private employment offices, and to do all in its power to bring together employers seeking employes and working people seeking employment, and to make known the opportunities for employment in this state;

Employment offices, §§ 2440-2458.

7. To collect, collate, and publish all statistical and other information relating to employes, employers, employments, and places of employment and such other statistics as it may deem proper;

8. Upon petition by any person that any employment or place of employment is not safe or is injurious to the welfare of any employe, the commission shall proceed, with or without notice, to make such investigation as may be necessary to determine the matter complained of. After such investigation, the commission shall enter such order relative thereto as may

be necessary to render such employment or place of employment safe and not injurious to the welfare of the employes therein. Whenever the commission shall believe that any employment or place of employment is not safe or is injurious to the welfare of any employe, it may of its own motion summarily investigate the same, with or without notice, and issue such order as it may deem necessary to render such employment or place of employment safe;

9. All duties, liabilities, authority, powers, and privileges conferred and imposed by law upon the commissioner of immigration, labor, and statistics, state mine inspector of coal and hydro-carbon mines, and board of conciliation and arbitration are hereby imposed upon the commission. All laws relating to the commissioner of immigration, labor, and statistics, state mine inspector of coal and hydro-carbon mines, and board of conciliation and arbitration shall apply to, relate, and refer to the industrial commisson of Utah. The industrial commission of Utah shall be deemed the commissioner of immigration, labor, and statistics, state mine inspector of coal and hydro-carbon mines, and board of labor, conciliation and arbitration within the meaning of existing laws;

Commissioner immigration, labor and statistics, §§ 3024-3034.
State mine inspector coal, etc., §§ 3910-3934.
Board of labor, conciliation and arbitration, §§ 3634-3644.

10. All orders of the commission in conformity with law shall be valid and in force and prima facie reasonable and lawful until they are found otherwise in an action brought for that purpose pursuant to the provisions of this title or until altered or revoked by the commission;

11. All general orders of the commission shall take effect within thirty days after their publication. Special orders shall take effect as therein directed. The commission shall, upon application of any employer, grant such time as may be reasonably necessary for compliance with any order. Any person may petition the commission for an extension of time, which the commission shall grant if it finds such extension of time necessary.

3077. Hearings as to reasonableness of orders. 1. Any employer or other person interested either because of ownership in or occupation of any property affected by any such order, or otherwise, may petition for a hearing on the reasonableness and lawfulness of any order of the commission provided in this title.

2. Such petition for hearing shall be by verified petition filed with the commissioner, setting out specifically and in full detail the order upon which a hearing is desired, and every reason why such order is unreasonable or unlawful, and every issue to be considered by the commission on the hearing. The petitioner shall be deemed to have finally waived all objection to any irregularities and illegalities in the order upon which a hearing is sought other than those set forth in the petition.

3. Upon receipt of such petition, if the issues raised in such petition have theretofore been adequately considered, the commission shall determine the same by confirming, without hearing, its previous determination, or if such hearing is necessary to determine the issue raised, the commission shall order a hearing thereon and consider and determine the matter or matters in question at such time as shall be prescribed. Notice of the time and place of such hearing shall be given to the petitioner and to such other persons as the commission may find directly interested in such decision.

4. Upon such investigation, if it shall be found that the order complained of is unlawful or unreasonable, the commission shall substitute therefor such other order as shall be lawful and reasonable.

5. Whenever, at the time of final determination upon such hearing, it shall be found that further time is reasonably necessary for compliance with the order of the commission, the commission shall grant such time as may be reasonably necessary for such compliance.

3078. Limitations as to actions. Presumptions. No action, proceeding, or suit to set aside, vacate, or amend any order of the commission,

or to enjoin the enforcement thereof, shall be brought unless the plaintiff shall have applied to the commission for a hearing thereon at the time and as provided in § 3077, and in the petition therefor shall have raised every issue raised in such action. Every order of the commission shall, in every prosecution for violation thereof, be conclusively presumed to be just, reasonable, and lawful, unless prior to the institution of the prosecution for such violation an action shall have been brought to vacate and set aside such order, as provided in § 3087.

3079. Administer oaths, certify acts, issue process. Duties of district courts. Each of the commissioners and the secretary of the commission, for the purposes mentioned in this title shall have power to administer oaths, certify to official acts, issue subpœnas, compel attendance of witnesses and the production of papers, books, accounts, documents, and testimony. In case of the failure of any person to comply with any order of the commission or any subpœna lawfully issued, or upon the refusal of any witness to testify to any matter regarding which he may be lawfully interrogated, it shall be the duty of the district court of any county in this state, on the application of a commissioner, to compel obedience by attachment proceedings for contempt, as in the case of disobedience of the requirements of a subpœna issued from such court or a refusal to testify therein.

3080. Payment of witnesses. Each witness who shall appear before the commission by its order shall receive for his attendance the fees and mileage now provided for witnesses in civil cases in the district court, which shall be audited and paid by the state out of the state treasury in the same manner as other expenses are audited and paid, upon the presentation of properly verified vouchers approved by the chairman of the commission. But no witness subpœnaed at the instance of the parties other than the commission shall be entitled to compensation from the state for attendance or travel, unless the commission shall certify that his testimony was material to the matter investigated.

Witness fees, § 2545.

3081. Depositions. The commission or any party may in any investigation cause depositions of witnesses residing within or without the state to be taken as in civil actions.

Depositions, §§ 7163-7198.

3082. Record of proceedings. A full and complete record shall be kept of all proceedings had before the commission on any investigation, and all testimony shall be taken down by a stenographer appointed by the commission.

3083. Publication of rules. Publication of rules and orders of the commission shall be made by the commission in pamphlet form, to be furnished on demand at the office of the commission. The expenses of publication shall be audited and paid as are other expenses of the commission.

3084. Designation of agents. Duties and powers. 1. For the purpose of making any investigation with regard to any employment or place of employment, the commission shall have power to appoint, by an order in writing, any member of the commission, any deputy, or any other competent person who is a resident of the state as an agent, whose duty shall be prescribed in such order.

2. In the discharge of his duties such agent shall have every power whatsoever of an inquisitorial nature granted in this title to the commission, and the same powers as a referee appointed by a district court with regard to taking testimony.

3. The commission may conduct any number of such investigations contemporaneously through different agents, and may delegate to such agents the taking of all testimony bearing upon any investigation or hearing. The decision of the commission shall be based upon its examination of all testimony and records. The recommendations made by such agents shall

be advisory only and shall not preclude the taking of further testimony if the commission so orders, nor further investigation.

3085. Special and general attorneys. The commission shall have authority to direct any deputy to act as special prosecutor in any action, proceeding, investigation, hearing, or trial relating to matters within its jurisdiction. Upon the request of the commission, the attorney-general, district attorney, or the county attorney of the county in which any investigation, hearing, or trial had under the provision of this title is pending, shall aid therein and prosecute, under the supervision of the commission, all necessary actions or proceedings for the enforcement of this title and all other laws of this state relating to the protection of life, health, safety, and welfare, and for the punishment of all violations thereof.

3086. Orders not void for technical omission. A substantial compliance with the requirements of this title shall be sufficient to give effect to the orders of the commission, and they shall not be declared inoperative, illegal, or void for any omission of a technical nature in respect thereto.

3087. Action to vacate orders. Procedure. Any employer or other person in interest, being dissatisfied with any order of the commission, may commence an action in the district court of the county where the property, plant, or place of employment affected by such order may lie, against the commission as defendant, to set aside, vacate, or amend any such order, on the ground that the order is unreasonable or unlawful, and the district court is hereby authorized and vested with exclusive jurisdiction to hear and determine such action. The commission shall be served with summons as in other civil cases. The answer of the commission shall be filed within ten days after service of summons upon it, and with its answer it shall file a certified transcript of its record in said matter. Upon the filing of said answer, said action shall be at issue, and shall be advanced and assigned for trial by the court, upon the application of either party, at the earliest possible date.

3088. Stay of court proceedings when commission has not determined issues. 1. If, upon the trial of such action, it shall appear that all issues arising in such action have not theretofore been presented to the commission in the petition filed as provided in § 3077, or that the commission has not theretofore had ample opportunity to hear and determine any of the issues raised in said action, or for any reason has not in fact heard and determined the issues raised, the court shall, before proceeding to render judgment, unless the parties to such action stipulate to the contrary, transmit to the commission a full statement of such issue or issues not adequately considered, and shall stay further proceedings in such action for fifteen days from the date of such transmission, and may thereafter grant such further stay as may be necessary.

2. Upon the receipt of such statement, the commission shall consider the issues not theretofore considered, and may alter, modify, amend, or rescind its order complained of in said action, and shall report its order thereon to said court, within ten days from the receipt of the statement from the court, for further hearing and consideration.

3. The court shall thereupon order the pleading to be so amended as to raise the issues resulting from such alteration, modification, amendment, or rescision of the commission's order, and shall thereafter proceed with such action in the manner provided by law for other civil actions.

3089. Jurisdiction of courts. No court of this state, except the district court and the supreme court on appeal, shall have jurisdiction to review, vacate, set aside, reverse, revise, correct, amend, or annul any order of the commission, or to suspend or delay the execution or operation thereof, or to enjoin, restrain, or interfere with the commission in the performance of its official duties; *provided,* that the writ of mandamus shall lie from the said supreme court to the commission in all proper cases.

3090. Power of court to suspend orders. Bond. The pendency of an action to set aside, vacate, or amend an order of the commission shall not of itself stay or suspend the operation of an order of the commission; but, during the pendency of said action, the said district court in its discretion may stay or suspend, in whole or in part, the operation of the commission's order. But no order so staying or suspending an order of the commission shall be made by the said court otherwise than upon three days' notice and after hearing. In case the order is stayed or suspended, the order of the court shall not become effective until a suspending bond first shall have been executed and filed in the action and approved by the court or the clerk thereof, payable to the state of Utah, and sufficient in amount and security to insure the prompt payment by the party petitioning to set aside, vacate, or amend such order of all damages caused by the delay in the enforcement of the order of the commission.

3091. Proceedings have preference. Exceptions. All actions and proceedings under this title, and all actions or proceedings to which the commission or this state may be parties, and in which any question arises under this title or under or concerning any order of the commission, shall be preferred over all other civil cases, except election causes and causes involving or affecting the public utilities commission, irrespective of position on the calendar. The same preference shall be granted upon application of the attorney of the commission in any action or proceeding in which he may be allowed to intervene.

3092. Penalties. If any employer, employe, or other person shall violate any provisions of this title, or shall do any act prohibited by this title, or shall fail or refuse to perform any duty lawfully enjoined, within the time prescribed by the commission, for which no penalty has been specifically provided, or fail, neglect, or refuse to obey any lawful order given or made by the commission, or any judgment or decree made by any court in connection with provisions of this title, for each such violation, failure, or refusal such employer or other person shall be fined not less than $50 nor more than $1000 for the offense, and not less than $100 nor more than $5000 for each subsequent offense.

3093. Designation of violations. Every day during which any person, persons, or corporations, or any officer, agent, or employe thereof, shall fail to observe and comply with any order of the commission, or to perform any duty enjoined by this title, shall constitute a separate and distinct violation of such order, or said section, as the same may be.

3094. Statements by employers. Penalty for failure. Every employer shall furnish the commission, upon request, all information required by it to carry out the purpose of this title. In the month of January of each year, every employer shall prepare and mail to the commission at the state capitol, Salt Lake City, Utah, a statement containing the following information, viz: the number of employes employed during the preceding year from January 1 to December 31, inclusive; the number of such employes employed at each kind of employment; and the scale of wages paid to each class of employment, showing the minimum and maximum wage paid, and the aggregate amount of wages paid to all employes; which information shall be furnished on a blank or blanks to be prepared by the commission; and it shall be the duty of the commission to furnish such blanks to employers free of charge, upon request therefor. Every employer shall cause said blanks to be properly filled out so as to answer fully and correctly all questions therein propounded, and to give all the information therein sought, or if unable to do so, he shall give to the commission, in writing, good and sufficient reasons for such failure. The commission may require the information herein required to be furnished to be certified under oath and returned to the commission within the period fixed by it or by law. The commission, or any member thereof, or any person employed by the commission for that purpose,

shall have the right to examine, under oath, any employer or the officer, agent, or employe thereof, for the purpose of ascertaining any information which such employer is required by this title to furnish to the commission. Any employer who shall refuse to furnish to the commission the annual statement herein required, or who shall refuse to furnish such other information as may be required by the commission under authority of this section, or who shall wilfully furnish a false or untrue statement, shall be liable to a penalty of not to exceed $500 for each offense, to be collected in a civil action brought against said employer in the name of the state; all such penalties, when collected, shall be paid to the state insurance fund hereinafter provided for.

3095. State insurance fund. There is hereby created a fund, to be known as the state insurance fund, for the purpose of insuring employers against liability for compensation under this title, and of assuring to the persons entitled thereto the compensation provided by this title. Such fund shall consist of all premiums and penalties received and paid into the fund, of property and securities acquired by and through the use of moneys belonging to the fund, and of interest earned upon money belonging to the fund and deposited or invested as herein provided. Such fund shall be administered by the commission without liability on the part of the state beyond the amount of such fund. Such fund shall be applicable to the payment of losses sustained on account of insurance and to the payment of compensation and of expenses in the manner provided in this title.

3096. Administration of fund. It shall be the duty of the commission to conduct the business of the state insurance fund, and it is hereby vested with full authority over the said fund, and may do any and all things which are necessary or convenient in the administration thereof, or in connection with the insurance business to be carried on by it under the provisions of this title.

3097. Classification of employments. Employments insured in the state insurance fund shall be divided by the commission, for the purpose of the said fund, into classes. Separate accounts shall be kept of the amounts collected and expended in respect to each such class for convenience in determining equitable rates; but for the purpose of paying compensation the state insurance fund shall be deemed one and indivisible. The commission shall have power to rearrange any of the classes by withdrawing any employment embraced in it and transferring it wholly or in part to any other class. The commission shall determine the hazards of the different classes, and fix the rates of premium therefor, based upon the total payroll and number of employes in each of such classes of employment, at the lowest possible rate consistent with the maintenance of a solvent state insurance fund and the creation of a surplus and reserve; and for such purpose may adopt a system of schedule rating in such a manner as to take account of the peculiar hazard of such individual risk.

The rate established ipso facto becomes the established rate for all insurers doing business under this title. Scranton Leasing Co. v. Industrial Com. of Utah, 50 U. —; 170 P. 976.

3098. Commission may sue and be sued. The commission may, in its official name, sue and be sued in all the courts of the state, in all actions or proceedings arising out of anything done or suffered in connection with the state insurance fund or business relating thereto. Service of summons on any member of the commission or the secretary thereof shall be deemed service on the commission.

3099. Contracts as to insurance fund. The commission may, in its official name, make contracts of insurance as herein provided and such other contracts relating to the state insurance fund as are authorized or permitted under the provisions of this title.

3100. Deputies. Powers delegated. The commission may act through proper deputies and may delegate to such deputies such powers as it deems

necessary or convenient. Among the powers which may be so delegated shall be the power to enter into contracts of insurance, insuring employers against liability for compensation as herein provided and insuring to employes the compensation fixed by this title; also the power to make agreements for the settlement of claims against said fund for compensation for injuries in accordance with the provisions of this title; also the power to determine to whom and through whom payments of such compensation shall be made; and also the power to contract with physicians, surgeons, and hospitals for medical and surgical treatment and care and nursing of injured persons entitled to compensation from said fund.

3101. Policy of insurance. Payment of premiums. 1. Every employer insuring in the state insurance fund shall receive from the commission a contract or policy of insurance in a form to be approved by the state commission.

2. Except as otherwise provided in this title, all premiums shall be paid by every employer who elects to insure with the state insurance fund to the commission on or before July 1, 1917, and semi-annually thereafter, or at such other times as may be prescribed by the commission. Receipts shall be given for such payments and the money shall be paid over to the state treasurer to the credit of the state insurance fund.

3102. Withdrawal from fund. Any employer may, upon complying with subs. 2 or 3 of § 3114, withdraw from the fund by turning in his insurance contract or policy for cancellation; *provided,* he is not in arrears for premiums due to the fund and has given to the commission written notice of his intention to withdraw before the expiration of the period for which he has elected to insure in said fund.

3103. Reinsurance. The commission may reinsure any risk, or any part thereof, and may enter into agreements of reinsurance in the same way and to the same extent as other insurance carriers.

3104. Requirements in fixing rates. The commission shall observe the following requirements in classifying and fixing the rates of premiums for the risks of the same:

1. It shall keep an accurate account of the money paid in premiums by each of the several classes of occupations or industries, and the expenses of administering the state insurance fund, and the disbursements on account of injuries and death of employes in each of said classes, including the setting up of reserves adequate to meet anticipated and unexpected losses, and to carry the claims to maturity; and it shall also keep an account of the money received from each individual employer, and the amount disbursed from the state insurance fund for expenses and on account of injuries and death of the employes of such employer, including the reserves so set up.

2. Ten per cent of the money paid into the state insurance fund shall be set aside for the creation of a surplus until such fund shall amount to the sum of $100,000, and thereafter 5 per cent of all the money paid into the state insurance fund shall be credited to such surplus fund until, in the judgment of the commission, such surplus shall be sufficiently large to cover the catastrophe hazard and all other unanticipated losses. The commission shall also set up and maintain a reserve adequate to meet the anticipated losses and carry all claims and policies to maturity. The amount of such surplus and reserve shall be subject to the approval of the state commission.

3. At the end of every year, and at such other times as the commission in its discretion may determine, a readjustment of the rate shall be made for each of the several classes of employments or industries. If at any time there is an aggregate balance remaining to the credit of any class of employment or industry, which the commission deems may safely and properly be divided, it may, in its discretion, credit to each individual member of such class who shall have been a subscriber to the state insurance fund for a period of six months or more prior to the time of such readjustment, such

proportion of such balance as he is properly entitled to, having regard to his prior paid premiums since the last readjustment of rates.

4. Should any such accounting show a balance remaining to the credit of any class of occupation or industry, after the above-mentioned amounts have been credited to the surplus and reserve fund, and after the payment of expense of administering said fund and the payment of all awards for all injuries or deaths lawfully chargeable against the same, the premium rate for such class shall be reduced; and each individual of such class who has been a subscriber to the state insurance fund for a period of six months or longer prior to the time of such readjustment, and whose premium or premiums so paid to the fund exceeds the amount of the disbursements from the fund on account of injuries or deaths of his employes during such period, shall be entitled to a credit on the instalment or instalments of premium next due from him, the amount of which credit shall be such proportion of said balance as the amount of his prior paid premiums sustains to the whole amount of said premiums paid by the class to which he belongs since the last readjustment of rates.

3105. Rules and regulations as to insurance fund. Wage expenditures. The commission shall adopt rules and regulations with respect to the collection, maintenance, and disbursement of the state insurance fund, one of which rules shall provide that, in the event the amount of premiums collected from any employer at the beginning of any period of six months is ascertained and calculated by using the estimated expenditure of wages for the period of time covered by such premium payments as a basis, an adjustment of the amount of such premium shall be made at the end of such period, and the actual amount of such premium shall be determined in accordance with the amount of the actual expenditure of wages for said period; and, in the event such wage expenditure for said period is less than the amount on which such estimated premium was collected, then such employer shall be entitled to receive a refund from the state insurance fund of the difference between the amount so paid by him and the amount so found to be actually due, or have the amount of such difference credited on succeeding premium payments at his option, and should such actual premium, when ascertained as aforesaid, exceed in amount the premium so paid by such employer at the beginning of such period, such employer shall, upon being advised of the true amount of such premium due, forthwith pay to the state treasurer an amount equal to the difference between the amount actually found to be due and the amount paid by him at the beginning of said six months' period.

3106. State treasurer to be custodian of fund. The state treasurer shall be the custodian of the state insurance fund, and all disbursements therefrom shall be paid by him upon vouchers authorized by the industrial commission of Utah and signed by a member of the commission and the secretary thereof.

3107. Manner of deposit. Interest. The state treasurer shall deposit any portion of the fund not needed for immediate use in the same manner and subject to all the provisions of law with respect to the deposit of state funds by such treasurer; *provided,* that the best interest obtainable shall be collected upon such deposits, and all interest earned by such portion of the state insurance fund as may be deposited by the state treasurer in pursuance of the authority herein given shall be collected by him and placed to the credit of such fund.

3108. Surplus may be invested. The commission shall have power to invest any of the surplus or reserve belonging to the state insurance fund in bonds of the United States or federal land banks, of the state of Utah, or of any county, city, town, or school district of the state of Utah, at current market prices for such bonds; or in first mortgages on real estate at not to exceed 40 per cent of the cash value thereof; *provided,* that such purchase or investment be authorized by a resolution adopted by the commission and

approved by the state board of examiners; and it shall be the duty of the boards or officers of the several taxing districts of the state, in the issuance and sale of bonds of their respective taxing districts, to offer in writing to the commission, prior to advertising the same for sale, all such issues of the taxing districts so issuing such bonds; and said commission shall, within ten days after the receipt of such written offer, either accept the same and purchase such bonds or any portion thereof at par and accrued interest, or reject such offer in writing; and all such bonds so purchased forthwith shall be placed in the hands of the state treasurer, who is hereby designated as custodian thereof, and it shall be his duty to collect the interest thereon as the same becomes due and payable, and also the principal thereof, and to pay the same, when so collected, into the state insurance fund. The state treasurer shall honor and pay all vouchers drawn on the state insurance fund for the purchase of such bonds when signed by any two members of the commission upon delivery of said bonds to him when there is attached to such voucher a certified copy of such resolution of the commission authorizing the purchase of such bonds; and the commission may sell any of said bonds upon like resolution, and the proceeds thereof shall be paid by the purchaser to the state treasurer upon delivery to him of said bonds by the treasurer.

3109. Separate bond by treasurer. The state treasurer shall give a separate and additional corporate surety bond in such amount as may be fixed by the governor, conditioned upon the faithful performance of his duties as custodian of the state insurance fund. The premium of said bond shall be paid out of the state insurance fund.

3110. Employers subject to this title. The following shall constitute employers subject to the provisions of this title:

1. The state, and each county, city, town, and school district therein.
2. Every person, firm, and private corporation, including every public utility, that has in service four or more workmen or operatives regularly in the same business, or in or about the same establishment under any contract of hire, express or implied, oral or written, except agricultural laborers and domestic servants; *provided,* that employers who have in service less than four employes shall have the right to come under the terms of this title by complying with the provisions thereof, and all the rules and regulations of the commission. The term "regularly" as herein used shall include all employments, whether continuous throughout the year or for only a portion of the year. It means all employments in the usual course of the trade, business, profession, or occupation of an employer.

3111. Employe, workman, and operative. The term "employe," "workman," and "operative," as used in this title, shall be construed to mean:

1. Every person in the service of the state, or of any county, city, town, or school district therein, including regular members of lawfully constituted police and fire deparments of cities and towns under any appointment or contract of hire, express or implied, oral or written, except any elective official of the state, or of any county, city, town, or school district therein, or other official receiving more than $2400 per year salary.
2. Every person except agricultural laborers and domestic servants in the service of any person, firm, or corporation, employing four or more workmen or operatives regularly in the same business, or in or about the same establishment under any contract of hire, express or implied, oral or written, including aliens, and also including minors who are legally permitted to work for hire under the laws of the state, but not including any person whose employment is but casual, or not in the usual course of trade, business, profession, or occupation of his employer.

3112. Construction of terms. The following terms as used in this title shall be construed as follows:

1. The term "order" shall mean and include any decision, rule, regulation, direction, requirement, or standard of the commission, or any other determination arrived at or decision made by such commission.

2. The term "general order" shall mean and include such order as applies generally throughout the state to all persons, employments, or places of employment of a class under the jurisdiction of the commission. All other orders of the commission shall be considered special orders.

3. The term "welfare" shall mean and include comfort, decency, and moral well-being.

4. The terms "safe" and "safety," as applied to any employment or a place of employment, shall mean such freedom from danger to life, health, safety, or welfare of employes as the nature of the employment will reasonably permit.

5. The words "personal injury by accident arising out of and in the course of employment" shall include an injury caused by the wilful act of a third person directed against an employe because of his employment. They shall not include a disease except as it shall result from the injury.

6. The term "compensation" shall mean the compensation and benefits provided for in this title.

3113. Payments of compensation. If a workman receives personal injury by accident arising out of and in the course of his employment, his employer or the insurance carrier shall pay compensation in the amounts and to the person or persons hereinafter specified.

3114. Securement of compensation. Insurance associations subject to rules. Employers, but not including municipal bodies, shall secure compensation to their employes in one of the following ways:

1. By insuring and keeping insured the payment of such compensation with the state insurance fund; or

2. By insuring and keeping insured the payment of such compensation with any stock corporation or mutual association authorized to transact the business of workmen's compensation insurance in the state; or

3. By furnishing to the commission satisfactory proof of financial ability to pay direct the compensation in the amount and manner and when due as provided for in this title.

In the latter case the commission may in its discretion require the deposit of acceptable security, indemnity, or bond to secure the payment of compensation liabilities as they are incurred. All stock corporations or mutual associations transacting the business of workmen's compensation insurance in this state under the terms of sub. 2 of this section shall be subject to the rules and regulations of the commission with respect to rates to be charged, and methods of compensation to be used.

The language of the section is mandatory and not merely permissive, and all employers shall in advance secure the payment of the compensation to which any one of their employes may become entitled under this chapter; and the Industrial Commission may invoke the aid of the courts to compel companies to comply with the terms of the act.
The Industrial Com. v. Daly M. Co.; 51 U. —; 172 P. 301.

This title is constitutional so far as it authorizes the industrial commission to fix a minimum rate for all insurers under this act, and the commission is justified in not receiving a policy providing for a lower rate.
Scranton Leasing Co. v. the Industrial Com., 50 U. —; 170 P. 976.

3115. Notice to be filed. If the insurance so effected is not with the state insurance fund, the employer shall forthwith file with the commission in form prescribed by it a notice of his insurance, together with a copy of the contract or policy of insurance.

3116. Policy to cover entire liability. Every policy of insurance covering the liability of the employer for compensation, whether issued by the commission or by a stock company, or by a mutual association authorized to transact workmen's compensation insurance in this state, shall cover the entire liability of the employer to his employes covered by the policy or contract, and also shall contain a provision setting forth the right of the employes to enforce in their own names, either by, at any time, filing a separate claim or by, at any time, making the insurance carrier a party to the original claim, the liability of the insurance carrier in whole or in part for the payment of such compensation; *provided, however,* that payment in

whole or in part of such compensation, by either the employer or the insurance carrier, shall, to the extent thereof, be a bar to the recovery against the other of the amount so paid.

Secs. 3116-3118 are discussed in Scranton Leasing Co. v. Industrial Com., 50 U. —; 170 P. 976.

3117. Notice as to injury. Jurisdiction and effect of award. Every such policy and contract shall contain a provision that, as between the employe and the insurance carrier, the notice to or knowledge of the occurrence of the injury on the part of the employer shall be deemed notice or knowledge, as the case may be, on the part of the insurance carrier; that jurisdiction of the employer shall, for the purpose of this title, be jurisdiction of the insurance carrier, and that the insurance carrier shall in all things be bound by and subject to the orders, findings, decisions, and awards rendered against the employer for the payment of compensation under the provisions of this title.

3118. Insolvency of employer not to relieve insurance carrier. Every such policy and contract shall contain a provision to the effect that the insolvency or bankruptcy of the employer, and his discharge therein, shall not relieve the insurance carrier from the payment of compensation for injuries or death sustained by an employe during the life of such policy or contract.

3119. Insurance by county, city, town, or school district. Each county, city, town, or school district which is liable to its employes for compensation may insure in the state insurance fund or pay compensation direct.

3120. Proportion of contribution by state to fund. The state shall contribute to the state insurance fund in proportion to the annual expenditure of money by it for the service of persons in the employ of the state described in sub. 1 of § 3111, the amount of such payments and the method of making the same to be determined as hereinafter provided.

3121. Rate and manner of payments by state. Estimates submitted to governor. In the month of January in the year 1918, the state auditor shall draw his warrant on the state treasurer, in favor of said treasurer as custodian of the state insurance fund, and for deposit to the credit of said fund, for a sum equal to 1 per cent of the amount of money expended by the state during the last preceding fiscal year, for the service of persons in the employ of the state, which said sums are hereby appropriated and made available for such payments; and thereafter in the month of January of each year, such sums of money shall in like manner be paid into the state insurance fund as may be due according to the rate for and insurance as fixed by the commission; and it shall be the duty of the commission to communicate to the governor, three months before the convening of each regular session of the legislature, an estimate of the aggregate amount of money necessary to be contributed by the state during the ensuing biennium as its proper portion of the state insurance fund.

3122. Employes covered by state fund to be compensated. Every employe covered by insurance in the state incurance fund, who is injured, by accident arising out of and in the course of his employment, and the dependents of such as are killed, provided the same was not purposely self-inflicted, on or after July 1, 1917, shall be paid such compensation out of the state insurance fund for loss sustained on account of such injury or death as is provided in this title, and shall be entitled to receive such medical, nurse, and hospital services and medicines, and such amount of funeral expenses in case of death as are provided by this title.

3123. Payments into state fund regulated by class and rates. Except as hereinafter provided, every employer (except the state), who shall have insured in the state insurance fund, shall, in the month of July, 1917, and semi-annually thereafter, pay into the state insurance fund the amount of premium determined and fixed by the commission for the employment or occupation of such employer, the amount of which premium to be so paid

by each such employer to be determined by the classifications, rules, and rates made and published by the commission; and such employer shall semi-annually thereafter pay such further sum of money into the state insurance fund as may be ascertained to be due from him by applying the rules of the commission, and a receipt or certificate certifying that such payment has been made shall immediately be mailed to such employer by the commission, which receipt or certificate, attested by the seal of the commission, shall be prima facie evidence of the payment of such premium.

3124. Substitute systems of insurance. Requirements, termination, and benefits. Subject to the approval of the commission, any employer may enter into or continue any agreement with his employes to provide a system of compensation, benefit, or insurance in lieu of the compensation and insurance provided by this title. No such substitute system shall be approved unless it confers benefits upon injured employes and their dependents, at least equivalent to the benefits provided by this title, nor if it requires contributions from the employes unless it confers benefits in addition to those provided under this title at least commensurate with such contributions. Such substitute system may be terminated by the commission on reasonable notice and hearing to the interested parties if it shall appear that the same is not fairly administered or if its operation shall disclose defects threatening its solvency, or if for any substantial reason it fails to accomplish the purposes of this title; and in this case the commission shall determine upon the proper distribution of all remaining assets, if any, subject to the right of any party in interest to take an appeal as in other cases of appeal from the orders of the commission. Any employer who makes a deduction for such purposes from the wages or salary of any employe entitled to the benefits of this title shall be guilty of a misdemeanor; *provided,* that, subject to the supervision of the commission, nothing in this title shall be construed as preventing the employer and his employes entering, and it shall be lawful for them to enter, into mutual contracts and agreements respecting hospital benefits and accommodations and medical and surgical services, nursing, and medicines to be furnished the employes as in this title provided; but no profit, directly or indirectly, shall be made by any employer as a result of such contract or agreement, the purpose and intent of this title in such respect being that, where hospitals are maintained and medical and surgical services and medicines furnished by the employer from payments by or assessments of his employes, such payments or assessments shall be no more or greater than necessary to make such hospital benefits and accommodations, including surgical and medical services and medicines, self-supporting for the care and treatment of his employes, and all sums received or retained by the employer from the employes for such purpose shall be paid and applied thereto; and *provided, further,* that such hospitals so maintained in whole or in part by payments or assessments of employes shall be subject to the inspection and under the supervision of the commission as to services and treatment rendered such employes.

3125. Tax on employers not insuring in state fund. Employers who do not insure either in the state insurance fund or with any stock corporation or mutual association shall pay a tax of the same per cent as required by law to be paid by insurance companies upon their premiums, based upon an amount equivalent to premiums which would be paid by such employer if insured in the state insurance fund; said tax to be computed and collected by the state commission and paid into the state treasury.

3126. Compensation to workmen hired or injured in or out of state. If a workman who has been hired in this state receives personal injury by accident arising out of and in the course of such emplyoment, he shall be entitled to compensation according to the law of this state as provided for in this title, even though such injury was received outside of this state. If a workman who has been hired outside of this state is injured while engaged in his employer's business, and is entitled to compensation for such

injury under the law of the state where he was hired, he shall be entitled to enforce against his employer his rights in this state if his rights are such that they can reasonably be determined and dealt with by the commission and the court in this state.

3127. Conditional liability of employers. Rights of dependents. Election of remedy. Duties of commission and insurer. Deficiency payment. Employers who comply with the provisions of § 3114 shall not be liable to respond in damages for injuries sustained by their employes not resulting in death. For injuries, however, resulting in death, the dependents of the deceased employe are given the right, within such time as the commission by rule shall prescribe, to elect (a) between bringing suit at law against such employer to recover damages for such death and in the event of suit said dependents must prove negligence on the employer's part before they can recover, or (b) to accept the benefits allowed to dependents of deceased employes by this title in the event of death. If they elect (b) they shall not be entitled to sue such employer at law to recover damages. If they elect (a) they thereby forfeit any rights to compensation under this title, and in a suit at law shall not be entitled to recover damages from such employer if the deceased employe was himself guilty of contributory negligence, or if he assumed the risk, or if his death was due in whole or part to the negligence of a fellow servant. If the dependents of the deceased elect to sue as herein provided, and in such suit recover judgment against the employer, then the commission shall determine the amount to which the plaintiffs in such suit would be entitled by accepting the provisions of this title, and pay the same toward the satisfaction of the judgment so recovered, if the employer against whom the judgment is recovered was, at the time the injuries causing the death were received, insured in the state insurance fund; otherwise such judgment shall be paid by the employer or his insurance carrier. Any deficiency shall be paid by the employer against whom the judgment is recovered.

3128. Notice of authorization to be posted by employers electing to pay direct compensation. Each employer providing insurance or electing directly to pay compensation to his injured or the dependents of his killed employes as herein provided, other than the employers mentioned in sub. 1 of § 3110, shall post in conspicuous places about his place of business typewritten or printed notices stating the fact that he has complied with the provisions of this title and all of the rules and regulations of the commission made in pursuance thereof, and has been authorized by the commission directly to compensate such employes or dependents, and the same, when so posted, shall constitute sufficient notice to his employes of the fact that he has complied with the law as to securing compensation to his employes and their dependents.

3129. Employers not entitled to benefits during period of noncompliance. Certain defenses unavailable. Employers who shall fail to comply with the provisions of § 3114 shall not be entitled to the benefits of this title during the period of non-compliance, but shall be liable to their employes or the dependents of their employes in case of death or damage suffered by reason of personal injuries arising out of and in the course of employment caused by the wrongful act, neglect, or default of the employer or any of the employer's officers, agents, or employes, and also to the personal representatives of such employes where death results from such injuries. And in such action, the defendant shall not avail himself or itself of either of the following defenses: The defense of the fellow-servant rule, the defense of the assumption of risk, or the defense of contributory negligence. And in all such cases proof of the injury shall constitute prima facie evidence of negligence on the part of the employer and the burden shall be upon the employer to show freedom from negligence resulting in such injury. And such employers shall also be subject to the provisions of the two sections next succeeding.

3130. Rights of employe when employer fails to comply with title. Procedure. Prosecution or compromise of suit. Any employe whose employer has failed to comply with the provisions of § 3114, who has been injured by accident arising out of and in the course of his employment, wheresoever such injury has occurred, and which was not purposely self-inflicted, or his dependents in case death has ensued, may, in lieu of proceeding against his employer by civil action in the courts, as provided in the last preceding section, file his application with the commission for compensation in accordance with the terms of this title, and the commission shall hear and determine such application for compensation in like manner as in other claims before the commission; and the amount of the compensation which said commission may ascertain and determine to be due to such injured employe, or to his dependents in case death has ensued, shall be paid by such employer to the person entitled thereto within ten days after receiving notice of the amount thereof as fixed and determined by the commission; and in the event of the failure, neglect, or refusal of the employer to pay such compensation to the person entitled thereto, within said period of ten days, the same shall constitute a liquidated claim for damages against such employer in the amount so ascertained and fixed by the commission, which, with an added penalty of 50 per cent, may be recovered in an action in the name of the state for the benefit of the person or persons entitled to the same. The commission shall adopt and publish rules and regulations governing the procedure before the commission provided in this section, and shall prescribe forms of notices and the mode and manner of serving the same in all claims for compensation arising under this section. Any suit, action, or proceeding brought against any employer under the provisions of this section may be compromised by the commission, or such suit, action, or proceeding may be prosecuted to final judgment as in the discretion of the commission may best subserve the interests of the persons entitled to receive such compensation.

3131. Procedure in case of default by employers. Action by attorney-general. If any employer shall default in any payment required to be made by him to the state insurance fund, the amount due from him with interest thereon at the rate of 12 per cent per annum shall be collected by civil action against him in the name of the state as plaintiff; and it shall be the duty of the commission on the first Monday in August, 1917, and on the first Monday of each month thereafter, to certify to the attorney-general of the state the names and residences of all employers known to the commission to be in default for such payments for a longer period than five days, and the amount due from each such employer, and it shall then be the duty of the attorney-general forthwith to bring or cause to be brought against each such employer a civil action in the proper court for the collection of such amount so due, and the same when collected shall be paid into the state insurance fund, and each employer's compliance with the provisions of this title requiring payments to be made to the state insurance fund shall date from the time of the payment of said money so collected as aforesaid to the state treasurer for credit to the state insurance fund.

3132. Right to recovery under this title exclusive remedy. Exceptions. The right to recover compensation pursuant to the provisions of this title for injuries sustained by an employe shall be the exclusive remedy against the employer, except that where the injury is caused by the employer's wilful misconduct and such act causing such injury is the personal act of the employer himself, or if the employer be a partnership, on the part of one of the partners, or if a corporation, on the part of an elective officer or officers thereof, and such act indicates a wilful disregard of the life, limb, or bodily safety of employes, such injured employe may, at his option, either claim compensation under this title or maintain an action at law for damages. The term "wilful misconduct," as employed in this section shall be

construed to mean an act done knowingly and purposely with the direct object of injuring another.

3133. Election as to remedy. Assignment of cause. Compromise. If an employe entitled to compensation under this title be injured or killed by the negligence or wrong of another not in the same employ, such injured employe, or in case of death, his dependents, shall, before any suit or claim under this title, elect whether to take compensation under this title or to pursue his remedy against such other. Such election shall be evidenced in such manner as the commission may by rule or regulation prescribe. If he elect to take compensation under this title, the cause of action against such other shall be assigned to the state for the benefit of the state insurance fund, if compensation be payable therefrom, and otherwise to the person or association or corporation liable for the payment of such compensation, and if he elect to proceed against such other, the state insurance fund, person, or association, or corporation, as the case may be, shall contribute only the deficiency, if any, between the amount of the recovery against such other person actually collected, and the compensation provided or estimated by this title for such case. Such a cause of action assigned to the state may be prosecuted or compromised by the commission. A compromise of any such cause of action by the employe or his dependents at an amount less than the compensation provided for by this title shall be made only with the written approval of the commission, if the deficiency of compensation would be payable from the state insurance fund, and otherwise with the written approval of the person, association, or corporation liable to pay the same.

3134. Waiver of right to exercise option. Every employe, or his legal representative in case death results, who makes application for an award, or accepts compensation from an employer, waives his right to exercise his option to institute proceedings in any court. Every employe, or his legal representative in case death results, who exercises his option to institute proceedings in court, as provided in this title, waives his right to any award or direct payment of compensation from his employer.

3135. Judgments have same preference as taxes. All judgments obtained in any action prosecuted by the commission or by the state under the authority of this title shall have the same preference against the assets of the employer as claims for taxes now have.

3136. Compensation. Exceptions. No compensation shall be allowed for the first ten days after the inquiry is received, except the disbursement hereinafter authorized for medical, nurse, and hospital services and medicines, and for funeral expenses.

3137. Rate and limit for temporary disability. In case of temporary disability, the employe shall receive 55 per cent of his average weekly wages so long as such disability is total, not to exceed a maximum of $12 per week, and not less than a minimum of $7 per week; but in no case to continue for more than six years from the date of the injury, or to exceed $4500.

3138. Rate, time, and schedule for partial disability. Where the injury causes partial disability for work, the employe shall receive, during such disability and for a period of not to exceed six years beginning on the eleventh day of disability, a weekly compensation equal to 55 per cent of the difference between his average weekly wages before the accident and the weekly wages he is able to earn thereafter, but not more than $12 a week. In no case shall the weekly payments continue after the disability ends, and in case the partial disability begins after a period of total disability the period of total disability shall be deducted from such total period of compensation. In the case of the following injuries the compensation shall be 55 per cent of the average weekly wages, but not more than $12 to be paid weekly for the periods stated against such injuries respectively, to wit: For loss of:

One arm at or near shoulder	200 weeks
One arm at the elbow	180 weeks
One arm between the wrist and the elbow	160 weeks
One hand	150 weeks
One thumb and the metacarpal bone thereof	60 weeks
One thumb at the proximal joint	30 weeks
One thumb at the second distal joint	20 weeks
One first finger and the metacarpal bone thereof	30 weeks
One first finger at the proximal joint	20 weeks
One first finger at the second joint	15 weeks
One first finger at the distal joint	10 weeks
One second finger and the metacarpal bone thereof	30 weeks
One second finger at the proximal joint	15 weeks
One second finger at the second joint	10 weeks
One second finger at the distal joint	5 weeks
One third finger and the metacarpal bone thereof	20 weeks
One third finger at the proximal joint	12 weeks
One third finger at the second joint	8 weeks
One third finger at the distal joint	4 weeks
One fourth finger and the metacarpal bone thereof	12 weeks
One fourth finger at the proximal joint	9 weeks
One fourth finger at the second joint	6 weeks
One fourth finger at the distal joint	3 weeks
One leg at or so near the hip joint as to preclude the use of an artificial limb	180 weeks
One leg at or above the knee where stump remains sufficient to permit the use of an artificial limb	150 weeks
One leg between the knee and ankle	140 weeks
One foot at the ankle	125 weeks
One great toe with the metatarsal bone thereof	30 weeks
One great toe at the proximal joint	15 weeks
One great toe at the second joint	10 weeks
One toe other than the great toe with the metatarsal bone thereof	12 weeks
One toe other than the great toe at proximal joint	6 weeks
One toe other than the great toe at second or distal joint	3 weeks
One eye by enucleation	120 weeks
Total blindness of one eye	100 weeks

The amounts specified in this section are all subject to the limitation as to the maximum weekly amount payable as hereinbefore specified in this section, and in no event shall more than a total of $4500 be required to be paid.

Sections 3138-3144 are discussed in Scranton Leasing Co. v. the Industrial Com., 50 U. —; 170 P. 976.

3139. Permanent total disability. In cases of permanent total disability, the award shall be 55 per cent of the average weekly wages for five years from date of injury, and thereafter 40 per cent of such average weekly wages until the death of such person so totally disabled, but not to exceed a maximum of $15 per week and not less than a minimum of $5 per week. The loss of both hands or both arms, or both feet or both legs, or both eyes, or of any two thereof, shall constitute total and permanent disability, to be compensated according to the provisions of this section.

3140. Benefits in case of death. In case the injury causes death within the period of three years, the benefits shall be in the amounts and to the persons following:

1. If there be no dependents, the employer or insurance carrier shall pay the burial expenses of the deceased, as provided herein, and shall pay into the state insurance fund the sum of $750, unless the employer is insured in said state insurance fund.

2. If there are wholly dependent persons at the time of the death, the

payment shall be 55 per cent of the average weekly wages, but not to exceed a maximum of $15 per week, and to continue for the remainder of the period between the date of the death, and six years after the date of the injury, and not to amount to more than a maximum of $4500, nor less than a minimum of $2000.

3. If there are partly dependent persons at the time of the death, the payment shall be 55 per cent of the average weekly wages, but not to exceed the maximum of $15 per week, and to continue for all or such portion of the period of six years after the date of the injury, as the commission in each case may determine, and not to amount to more than a maximum of $4500.

4. The following persons shall be presumed to be wholly dependent for support upon a deceased employe:

(a) A wife upon a husband with whom she lives at the time of his death;

(b) A female child or female children under the age of eighteen years and a male child or male children under the age of sixteen years (or over such ages if physically or mentally incapacitated from earning) upon the parent with whom he is living at the time of the death of such parent.

In all other cases, the question of dependency, in whole or in part, shall be determined in accordance with the facts in each particular case existing at the time of the injury resulting in the death of such employe, but no person shall be considered as dependent unless a member of the family of the deceased employe, or bears to him the relation of husband or widow, lineal descendent, ancestor, or brother or sister. The word "child" as used in this title, shall include a posthumous child, and a child legally adopted prior to the injury.

3141. Apportionment and payment of benefits. The benefits in case of death shall be paid to such one or more of the dependents of the decedent, for the benefit of all the dependents, as may be determined by the commission, which may apportion the benefits among the dependents in such manner as it may deem just and equitable. Payment to a dependent subsequent in right may be made, if the commission deems it proper, and shall operate to discharge all other claims therefor. The dependents or persons to whom benefits are paid shall apply the same to the use of the several beneficiaries thereof according to their respective claims upon the decedent for support, in compliance with the finding and direction of the commission. In all cases of death where the dependents are a widow and one or more minor children, it shall be sufficient for the widow to make application to the commission on behalf of herself and minor children; and in cases where all of the dependents are minors, the application shall be made by the guardian or next friend of such minor dependents. Should any dependent of a deceased employe die or marry during the period covered by such weekly payments, the right of such dependent to compensation under this title shall cease.

3142. Basis of computation. The average weekly wage of the injured person at the time of the injury shall be taken as the basis upon which to compute the benefits.

3143. Expected increase of wage considered. If it is established that the injured employe was of such age and experience when injured as that under natural conditions his wages would be expected to increase, the fact may be considered in arriving at his average weekly wage.

3144. Powers and jurisdiction of commission continuing. The powers and jurisdiction of the commission over each case shall be continuing, and it may from time to time make such modification or change with respect to former findings or orders with respect thereto as in its opinion may be justified.

3145. Payments may be commuted or lumped. The commission, under special circumstances, and when the same is deemed advisable, may commute periodical benefits to one or more lump sum payments.

3146. Exemptions of compensation. Compensation before payment shall be exempt from all claims of creditors and from any attachment or execution, and shall be paid only to such employes or their dependents.

3147. Additional compensation. In addition to the compensation provided for herein, the employer, or insurance carrier, or state insurance fund shall pay such amounts for medical, nurse, and hospital services and medicines as it may deem proper, not, however, in any instance to exceed the sum of $200; and, in case death ensues from the injury, reasonable funeral expenses shall be disbursed and paid in an amount not to exceed the sum of $150, and the commission shall have full power to adopt rules and regulations with respect to the furnishing medical, nurse and hospital service and medicine to injured employes entitled thereto, and for the payment therefor.

3148. Claimant may appeal if denied compensation. The commission shall have full power and authority to hear and determine all questions within its jurisdiction, pertaining to the payment of compensation and benefits, and its decision thereon shall be final; *provided, however,* in case the final action of such commission denies the right of the claimant to participate at all in such fund on the ground that the injury was self-inflicted or on the ground that the accident did not arise out of and in the course of employment, or upon any other ground going to the basis of the claimant's right, then the claimant, within thirty days after the notice of the final action of such commission, may, by filing his appeal in the district court in any county of the district where the injury was inflicted, be entitled to a trial in the ordinary way, and be entitled to a jury if he demands it. In such a proceeding, the district attorney, without additional compensation, shall represent the commission, and he shall be notified by the clerk forthwith of the filing of such appeal. Within thirty days after filing his appeal, the appellant shall file a complaint in the ordinary form against such commission as defendant, and further pleadings shall be had in said cause, according to the rules of civil procedure, and the court, or the jury, under the instructions of the court, if a jury is demanded, shall determine the right of the claimant; and if they determine the right in his favor, shall fix his compensation within the limits and under the rules prescribed in this title; and any final judgment so obtained shall be paid by the commission out of the state insurance fund in the same manner as such awards are paid by such commission. The cost of such proceeding, including a reasonable attorney's fee to be fixed by the trial judge, shall be taxed against the unsuccessful party. Either party shall have the right to prosecute appeals to the supreme court as in civil cases.

An employer should be notified of the hearing to allow compensation, and it has sufficient interest in the fund to permit it to bring certiorari or prohibition proceedings where the commission acts without jurisdiction.

The Ind. Com of Utah v. Evans, Judge, 51 U. —; 173 P. —.

Where the Industrial Commission proceeds without any evidence in allowing compensation, it is without jurisdiction, and appeal lies to the courts.

Id.

Even though the Industrial Commission act did not authorize the question of ultimate liability of the employer to be reviewed on appeal or by direct action, such right would exist by virtue of sec. 2, art. 1, of the Constitution.

Id.

3149. Latitude of commission in procedure. The commission shall not be bound by the usual common law or statutory rules of evidence or by any technical or formal rules of procedure, other than as herein provided; but may make the investigation in such manner as in its judgment is best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of this title.

3150. Minor deemed sui juris. A minor working at an age legally permitted under the laws of this state shall be deemed sui juris for the purpose of this title, and no other person shall have any cause of action or right to compensation for an injury to such minor workman, but in the event of the award of a lump sum of compensation to such minor employe, such sum shall be paid only to the legally appointed guardian of such minor.

3151. Agreements of waiver to compensation invalid. No agreement

by an employe to waive his rights to compensation under this title shall be valid. No agreement by an employe to pay any portion of the premium paid by his employer shall be valid, and any employer who deducts any portion of such premium from the wages or salary of any employe entitled to the benefits of this title shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not more than $100 for each such offense.

3152. Right of medical examinations. Any employe claiming the right to receive compensation under this title may be required by the commission, or its medical examiner, to submit himself for medical examination at any time and from time to time at a place reasonably convenient for such employe, and as may be provided by the rules of the commission. If such employe refuses to submit to any such examination or obstructs the same, his right to have his claim for compensation considered, if his claim be pending before the commission, or to receive any payments for compensation theretofore granted shall be suspended during the period of such refusal or obstruction.

3153. Books, records, and payrolls subject to examination. Penalty. All books, records, and payrolls of the employers of the state, showing or reflecting in any way upon the amount of wage expenditure of such employers, shall always be open for inspection by the commission or any of its traveling auditors, inspectors, or assistants, for the purpose of ascertaining the correctness of the wage expenditure, the number of men employed, and such other information as may be necessary for the uses and purposes of the commission in its administration of the law. Refusal on the part of any employer to submit his books, records, and payrolls for the inspection of any member of the commission, or traveling auditor, inspector, or assistant presenting written authority from the commission, shall subject such employer to a penalty of $100 for each such offense, to be collected by civil action in the name of the state, and paid into the state insurance fund to become a part thereof.

3154. Liability of employers for misrepresentation. Any employer who misrepresents to the commission the amount of payroll upon which the premium under this title is based, shall be liable to the state in ten times the amount of the difference in premium paid and the amount the employer should have paid. The liability to the state under this section shall be enforced in a civil action in the name of the state, and all sums collected under this section shall be paid into the state insurance fund.

3155. Application of provisions as to those engaged in interstate commerce. The provisions of this title shall apply to employers and their employes engaged in intrastate and also in interstate and foreign commerce, for whom a rule of liability or method of compensation has been or may be established by the congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce, and then only when such employer and any of his workmen working only in this state, with the approval of the commission, and so far as not forbidden by any act of congress, voluntarily accept the provisions of this title by filing written acceptances, which, when filed with and approved by the commission, shall subject the acceptors irrevocably to the provisions of this title to all intents and purposes as if they had been originally included in its terms, during the period or periods for which the premiums herein provided have been paid. Payment of premium shall be made on the basis of the payroll of the workmen who accept as aforesaid.

3156. Record of injuries. Reports to commission. Every employer shall keep a record of all injuries, fatal or otherwise, received by his employes arising out of and in the course of their employment. Within a week after the occurrence of an accident resulting in personal injury, a report thereof shall be made in writing to the commission upon blanks to be pro-

cured from the commission for that purpose. Such report shall contain the name and nature of the business of the employer, the location of his establishment or place of work, the name, address, and occupation of the injured employe, and shall state the time, the nature, and cause of injury and such other information as may be required by the commission. Any employer who refuses or neglects to make any report required by this section shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not more than $500 for such offense.

3157. Enforcement of title. Upon the request of the commission, the attorney-general or, under his direction, any district attorney or the county attorney of any county, shall institute and prosecute the necessary actions or proceedings for the enforcement of any of the provisions of this title, or for the recovery of any money due the state insurance fund, or any penalty herein provided for, arising within the county in which he was elected, and shall defend in like manner all suits, actions, or proceedings brought against the commission or the members thereof in their official capacity.

3158. Expenditure for information. The commission may make necessary expenditures to obtain statistical and other information provided for herein.

3159. Annual report by commission. General distribution of information. Annually, on or before the 15th day of December, the commission, under the oath of at least two of its members, shall make a report to the governor for the preceding fiscal year, which shall include a statement of the number of awards made by it, and a general statement of the causes of accidents leading to the injuries for which the awards were made, a detailed statement of the disbursements from the expense fund, and the condition of its respective funds, together with any other matters which the commission deems proper to call to the attention of the governor, including any recommendations it may have to make; and it shall be the duty of the commission from time to time to publish and distribute among employers and employes such general information as to the business transacted by the department as in its judgment may be useful.

3160. Classifications, rates, rules, and regulations to be printed. The commission shall cause to be printed, in proper form for distribution to the public, its classifications, rates, rules, regulations, and rules of procedure, and shall furnish the same to any person upon application therefor.

3161. No injunction to issue. Exception. No injunction shall issue suspending or restraining any order, classification, or rate adopted by the commission, or any action of the state auditor, state treasurer, attorney-general, or the auditor or treasurer of any county, required to be taken by them or any of them by any of the provisions of this title; but nothing herein shall effect any right or defense in any action brought by the commission or the state in pursuance of authority contained in this title.

3162. If part is invalid the rest not affected. Should any section or provision of this title be decided by the courts to be unconstitutional or invalid, the same shall not affect the validity of the title as a whole or any part thereof other than the part so decided to be unconstitutional.

3163. Appropriation for insurance and expenses. The sum of $40,000 is hereby appropriated out of any money in the state treasury not otherwise appropriated, and the same is hereby set aside for the state insurance fund, to be administered by the commission as provided in this title; and the further sum of $50,000, or so much thereof as may be necessary, is hereby appropriated out of any money in the state treasury not otherwise appropriated, for the payment of salaries and expenses of the commission and the employes of said commission, during the years 1917 and 1918.

3164. Title effective. This title shall take effect on the 1st day of July, 1917, except §§ 3061 to 3071, inclusive, which shall take effect upon approval.

3165. Repeals. All acts or parts of acts inconsistent with the provisions of this title are hereby repealed.

TITLE 50.

INHERITANCE TAX.

3185. (1220x.) Property subject to tax. Computation. Lien. Deductions. All property within the jurisdiction of this state, and any interest therein, whether belonging to the inhabitants of this state or not, and whether tangible or intangible, which shall pass by will or by the statutes of inheritance of this or any other state, or by deed, grant, bargain, sale, or gift, made in contemplation of the death of the grantor, vendor, or donor, or intended to take effect in possession or enjoyment at or after the death of the grantor, vendor, or donor, to any person in trust or otherwise, shall be subject to the following tax, after the payment of all debts, for the use of the state: Three per cent of its market value in excess of $10,000, and not exceeding $25,000, and 5 per cent of its market value in excess of $25,000; and all administrators, executors, and trustees, and any such grantee under conveyance, and such donee under a gift made during the grantor's or donor's life, shall be respectively liable for all such taxes to be paid by them respectively, except as herein otherwise provided, with lawful interest as hereinafter set forth, until the same shall have been paid. The tax aforesaid shall be and remain a lien on such estate from the death of the decedent until paid. In determining the amount of tax to be paid under the provisions of this section, the debts of the estate shall first be deducted, and the remainder shall be the net estate. Upon all that portion of the net estate in excess of $25,000 the tax of 5 per cent shall be computed. Upon all that portion of the net estate in excess of $10,000 and not exceeding $25,000 the tax of 3 per cent shall be computed; and the court shall determine the amount of tax to be paid by the several devisees, legatees, grantees, or donees of the decedent. '01, p. 61; '03, p. 77; '05, p. 198; '15, p. 153; '17, p. 250.

Corporations to furnish attorney-general information, § 887.

Sec. 1 of the inheritance tax of 1901 is a transcript of the Iowa statute; Iowa construction followed.

Dixon v. Ricketts, 26 U. 215; 72 P. 947.

The inheritance tax law of 1901 is not in violation of the constitutional provision requiring uniformity and equality of taxation. Such laws have been very generally upheld.

Id.

The title of the inheritance tax law does not indicate that the tax is imposed only on the separate portions of the decedent's estate transmitted by gift, legacy, or inheritance which exceed $10,000.

Id.

As amended by chap. 98, laws '15, an estate worth in excess of $25,000 must be assessed 3 per cent on the difference between $10,000 and $25,000, or $15,000, and 5 per cent on the balance, and not 3 per cent in gross upon the entire estate, though after deduction of the $10,000 exemption the balance of the estate is not worth in excess of $25,000.

In re Hone's Estate, 50 U. —; 166 P. 990.

Property received by a wife under § 6406 is not received by her as an heir, and is not subject to an inheritance tax; only the amount received by her over the one-third granted by § 6406 is subject to an inheritance tax.

In re Bullen's Estate 47 U. 96; 151 P. 533.

Where a widow takes under the will, even though the amount is compromised, the amount taken by her is subject to inheritance tax.

In re Osgood's Estate, 51 U. —; 173 P. 152.

3186. (1220x1.) "Debts" defined. The term "debts," as used in this chapter, shall include, in addition to debts owing by decedent at the time of his death, the local or state taxes due from the estate prior to his death, a reasonable sum for funeral expenses, the court costs, the statutory fees of executors, administrators, or trustees, and no other sum; but said debts shall not be deducted unless the same are approved and allowed within fifteen months from the death of decedent, as established claims against the said estate, unless otherwise ordered by the judge of the proper county, or, in case of foreign estates where the property within this state consists of personal property only, allowed by the attorney-general.

'05, p. 98; am'd '15, p. 35.

3187. (1220x2.) Appointment of appraisers. Qualifications. Removal. Vacancy. In each county the court shall annually appoint three competent residents and freeholders of said county to act as appraisers of all property within its jurisdiction which is charged or sought to be charged with an inheritance tax; *provided,* that such appraisers shall not act in making the appraisement of the property of any estate as provided by § 7636. Said appraisers shall serve for one year and until their successors are appointed and qualified. They shall each take an oath to faithfully and impartially perform the duties of the office, but shall not be required to give bond. They shall be subject to removal at any time at the discretion of the court, and the court, or judge thereof in vacation, may also in its discretion, either before or after the appointment of the regular appraisers, appoint other appraisers to act in any given case. Vacancies occurring otherwise than by expiration of term shall be filled by the appointment of the court, or by a judge in vacation. '05, p. 198; am'd '15, p. 35.

3188. (1220x3.) Compensation of appraisers. Penalty for taking fee or reward. Appraisers shall receive $5 per diem for actual services and such necessary expenses incurred in the performance of their duties as may be allowed by the court appointing the same, to be paid out of the state treasury as other state officers are paid. Any appraiser appointed under this title who shall take any fee or reward from any executor, administrator, trustee, legatee, next of kin, or heir of any decedent, or from any other person liable to pay said tax or any portion thereof, shall be guilty of a misdemeanor. '05, p. 198; am'd '15, p. 35.

3189. (1220x4.) Commission to appraisers. When an estate is opened in which there is property which may be subject to the inheritance tax, the clerk shall forthwith issue a commission to the appraisers, who shall fix a time and place for appraisement. '05, p. 199.

3190. (1220x5.) Duties of appraisers. It shall be the duty of all appraisers appointed under the provisions of this title to forthwith give notice to the state treasurer and other persons known to be interested in the property to be appraised, of the time and place at which they will appraise such property, which time shall not be less than ten days from the date of such notice. The notice shall be served in the same manner as is prescribed for the commencement of civil actions, and if not practicable to serve the notice provided for by statute, they shall apply to the court or a judge in vacation for an order as to notice, and upon service of such notice and the making of such appraisement, the said notice, return thereon, and appraisement shall be filed with the clerk, and a copy of such appraisement shall be filed by the clerk with the state treasurer. '05, p. 199.

3191. (1220x6.) Objections to appraisements. Hearing on. The state treasurer or any person interested in the estate appraised may, within twenty days thereafter, file objections to said appraisement, on the hearing of which as an action in equity, either party may produce evidence competent or material to the matters therein involved. If, upon such hearing, the court finds the amount at which the property is appraised is at its value on the market in the ordinary course of trade, and the appraisement was fairly and in good faith made, it shall approve such appraisement; but if it finds that the appraisement was made at a greater or less sum than the value of the property in the ordinary course of trade, or that the same was not fairly or in good faith made, it shall set aside the appraisement, appoint new appraisers, and so proceed until a fair and good appraisement of the property is made at its value in the market in the ordinary course of trade. The state treasurer, or any one interested in the property appraised, may appeal to the supreme court from the order of the district court approving or setting aside any appraisement to which exceptions have been filed. Notice of appeal shall be served within thirty days from the date of the order appealed from, and the appeal shall be perfected in the time now provided

for appeals in equitable actions. In case of appeal, the appellant, if he is not the state treasurer, shall give bond to be approved by the clerk of the court, to pay the tax, which bond shall provide that the said appellant and sureties shall pay the tax for which the property may be liable, with cost of appeal. If upon the hearing of objections to the appraisement, the court finds that the property is not subject to the tax, the court shall, upon expiration of time for appeal, when no appeal has been taken, order the clerk to enter upon the lien book a cancellation of any claim or lien for taxes. If at the end of twenty days from the filing of the appraisement with the clerk, no objections are filed, the appraisement shall stand as approved. '05, p. 199.

3192. (1220x7.) Action on cases now pending. In all cases where the property of an estate has been subject or liable for the payment of the tax provided in this title, or where such property has heretofore been appraised and the tax not yet paid, and the notice required in this title was not given, it shall be the duty of the court, immediately upon the taking effect of this title, to enforce such tax, or to set aside any appraisement heretofore made, and order a reappraisement of the same to be made as in this title provided, anything in the law contrary notwithstanding. '05, p. 200.

3193. (1220x8.) Time of appraisement and payment of tax. All the property of the decedent subject to such tax shall, except as hereinafter provided, be appraised within thirty days next after the appointment of an executor, administrator, or trustee, at its market value in the ordinary course of trade, and the tax thereon, calculated upon the appraised market value after deducting debts for which the estate is liable, shall be paid by the persons entitled to said estate within fifteen months from the death of the testator or intestate, unless a longer period is fixed by the court, and, in default thereof, the court shall order the same, or so much thereof as may be necessary to pay such tax, to be sold. '01, p. 62; '05, p. 200.

3194. (1220x9.) Estates for life or term of years. Whenever any real estate of a decedent shall be subject to such tax, and there be a life estate or interest for a term of years given to one party or parties, and the remainder to another party or parties, the court shall direct the interest of the life estate, or term of years, to be appraised at its market value in the ordinary course of trade, and, upon the approval of such appraisement by the court, the party entitled to such life estate, or term of years, shall, within sixty days thereafter, pay such tax, and in default thereof the court shall order such interest in said estate, or so much thereof as shall be necessary to pay such tax, to be sold. Upon the determination of such life estate, or term of years, the court shall, upon its own motion, or upon the application of the state treasurer, cause such estate to be appraised at its then market value in the ordinary course of trade, from which shall be deducted the value of any improvements thereon, or betterments thereto, if any, made by the remainder man during the time of the prior estate, to be ascertained and determined by the appraisers, and the tax on the remainder shall be paid by such remainder man within sixty days from the approval by the court of the appraisement. If such tax is not paid within said time, the court shall then order said real estate, or so much thereof as shall be necessary to pay such tax, to be sold. Whenever any personal estate of a decedent shall be subject to such tax and there be a life estate or interest for a term of years given to one party or parties, and the remainder to another party or parties, the court shall inquire into and determine the market value in the ordinary course of trade, of the life estate or interest for the term of years, and order and direct the amount of the tax thereon to be paid by the prior estate and that to be paid by the remainder man, each of whom shall pay his proportion of the tax within sixty days from such determination, unless a longer period is fixed by the court, and, in default thereof, the executor, administrator, or trustee shall pay the same out of said property and hold the same from distribution, and invest it at interest under the order of the court until

said tax is paid, or until the interest on the same equals the amount of such tax, which shall thereupon be paid. '01, p. 62; '05, p. 200.

3195. (1220x10.) Where bequest is in lieu of compensation to executor. Whenever a decedent appoints one or more executors or trustees and in lieu of his or their allowance or commission makes a bequest or devise of property to him or them, which would otherwise be liable to said tax, or appoints them as residuary legatees, and said bequests, devises, or residuary legacies exceed what would be a reasonable compensation for his or their services, such excess shall be liable to such tax, and the court having jurisdiction of his or their accounts, upon its own motion or on application of the state treasurer, shall fix such compensation. '01, p. 63; '05, p. 201.

3196. (1220x11.) Where legacy is a charge upon real estate. Whenever any legacies subject to said tax are charged upon or payable out of any real estate, the heir or devisee, before paying the same, shall deduct said tax therefrom and pay it to the executor, administrator, trustee, or state treasurer, and the same shall remain a charge and be a lien upon said real estate until it is paid; and payment thereof shall be enforced by the executor, administrator, trustee, or state treasurer in his name of office, in the same manner as the payment of the legacy itself could be enforced.

'01, p. 63; '05, p. 201.

3197. (1220x12.) Executor, etc., to collect tax. Every executor, administrator, or trustee having in charge or trust any property subject to said tax, and which is made payable to him, shall deduct the tax therefrom, or shall collect the tax thereon from the legatee or person entitled to said property, and he shall not deliver any specific legacy or property subject to said tax to any person until he has collected the tax thereon.

'01, p. 63; '05, p. 202.

3198. (1220x13.) Taxes payable to state treasurer within fifteen months. All taxes imposed by this title shall be payable to the state treasurer, and shall be paid within fifteen months from the death of the testator or intestate. All taxes not paid within fifteen months from death of the testator or intestate shall draw interest at the rate of 8 per cent per annum until paid; *provided,* that upon good cause being shown therefor, the court, or a judge thereof in vacation, or in case of foreign estates where the property within this state consists of personal property only, the attorney-general may extend the period in which such taxes are to be paid in any estate, and may abate the interest thereon for such period of extension.

'01, p. 63; '05, p. 202; am'd '15, p. 36.

3199. (1220x14.) Executor, etc., to collect tax in certain cases, other cases state treasurer. It is hereby made the duty of all executors, administrators, or trustees charged with the management or settlement of any estate subject to the tax provided for in this title, to collect and pay to the state treasurer the amount of the tax due from any devisee, legatee, grantee, or donee of the decedent, except in cases falling under the provisions of §§ 3193, 3194, in which cases the state treasurer shall collect the same. Applications may be made to the district court by such executor, administrator, trustee, or state treasurer to sell the real estate subject to said tax in an equitable action, or, if made to the court having charge of the settlement of the estate, the proceedings shall conform as nearly as may be to those for the sale of real estate of decedent for the settlement of his debts.

'01, p. 63; '05, p. 202.

3200. (1220x15.) No settlement allowed until tax paid. No final settlement of the account of any executor, administrator, or trustee shall be accepted or allowed unless it shall show, and the court shall find, that all taxes imposed by the provisions of this title upon any property or interest therein belonging to the estate to be paid by such executors, administrators, or trustees, and to be settled by said account, shall have been paid, and the

receipt of the state treasurer for such tax shall be the proper voucher for such payment. '01, p. 64; '05, p. 202.

3201. (1220x16.) District court to have jurisdiction. The district court having either principal or ancillary jurisdiction of the settlement of the estate of the decedent shall have jurisdiction to hear and determine all questions in relation to said tax that may arise affecting any devise, legacy, or inheritance, or any grant or gift, under this title, subject to appeal as in other cases, and the state treasurer shall in his name of office represent the interests of the state in any proceedings. '01, p. 64; '05, p. 202.

3202. (1220x17.) State treasurer may demand information from executors, etc. Before issuing his receipt for the tax, the state treasurer may demand from the executors, administrators, or trustees, such information as may be necessary to verify the correctness of the amount of the tax and interest, and, when demanded, they shall send such treasurer certified copies of such parts of their reports as he may demand, and upon the refusal of said parties to comply with the demand of the state treasurer, it is the duty of the clerk of the court to comply with such demand, and the expense of making such copies and transcripts shall be charged against the estate, as are other costs in probate. '05, p. 203.

3203. (1220x18.) Inheritance tax and lien book to be kept by clerk. The clerk of the district court in and for each county, where an inheritance tax is charged or sought to be charged, shall provide and keep a suitable book, substantially bound and suitably ruled, to be known as the inheritance tax and lien book, in which shall be kept a full and accurate record of all proceedings in cases where property is charged or sought to be charged with the payment of an inheritance tax under the laws of this state, to be printed and ruled so as to show upon one page:

1. The name, place of residence, and date of death of the decedent;
2. Whether the decedent died testate, or intestate, and if testate, the record and page where the will was probated and recorded;
3. The name and postoffice address of the executor, administrator, trustee, or grantee, with date of appointment or transfer;
4. The names, postoffice addresses, and relationship, if known, of all the heirs, devisees, and grantees;
5. The appraised valuation of the personal property;
6. The amount of inheritance tax due upon said personal property;
7. A record of payment with amount and date;
8. Date of filing objections and name of objectors;
9. Blank for index and reference to all proceedings, and for memorandum entries of the court or judge in relation thereto.

Upon the opposite page of such record shall be printed:

1. Real estate from (naming decedent) which is subject to the lien prescribed by the statute for inheritance tax;
2. A full and accurate description of such real estate, by forty-acre or fractional tracts, or by lots, or other complete individual description;
3. The appraised valuation as reported by the appraisers with a reference to the record of their report, as to each piece of such real estate;
4. The amount of inheritance tax due upon each such piece;
5. A record of payments, with dates and amounts;
6. Date of filing objections, and names of objectors;
7. Blank for index and reference and to all proceedings, and for memorandum entries of court or judge in relation thereto. '05, p. 203.

3204. (1220x19.) Executor, etc., to report facts. Entry of real estate in lien book. Upon the appointment and qualification of each executor, administrator, and testamentary trustee, the clerk issuing the letters shall at the same time deliver to him a blank form upon which he shall be required to make detailed report of the following facts:

1. Name and last residence of the decedent;

2. Date of death;
3. Whether or not he left a will;
4. Name and postoffice of executor, administrator, or trustee;
5. Name and postoffice of surviving wife or husband, if any;
6. If testate, name and postoffice of each beneficiary under the will;
7. Relationship of each beneficiary to the testator;
8. If intestate, name and postoffice of each heir at law;
9. Relationship of each heir at law to the decedent;
10. Inventory of all real estate of the decedent, giving amount and description of each tract.

Within ten days after his qualification, each executor, administrator, and testamentary trustee shall make and return to the clerk, under oath, a full and detailed report as indicated in the preceding section, any will to the contrary notwithstanding, and upon his failure to do so, the clerk shall forthwith report his delinquency to the district court if in session, or to a judge of said court if in vacation, for such order as may be necessary to enforce an observance of this section. If it appears from the inventory or report so filed that the real estate, or any part of it, is subject to an inheritance tax, it shall be the duty of the executor or administrator to cause the lien of the same to be entered upon the lien book in the office of the clerk of the court in each county where each particular tract of said real estate is situated, and no conveyance of said real estate or interest therein, which is subject to such tax before or after entering of said lien, shall discharge the real estate so conveyed from the operation thereof, and no final settlement of the account of any executor, administrator, or trustee shall be accepted or allowed unless a strict compliance with the provisions of this section has been had by such person. '01, p. 61; '05, p. 204.

3205. (1220x20.) Extension of time for appraisement. Whenever, by reason of the complicated nature of an estate, or by reason of the confused condition of the decedent's affairs, it is impracticable for the executor, administrator, or trustee or beneficiary of said estate to file with the clerk of the court a full, complete, and itemized inventory of the personal assets belonging to the estate, within the time required by statute for filing inventories of the estate, the court may, upon the application of such representatives or parties in interest, extend the time for the making of the inheritance appraisement for a period not to exceed three months beyond the time fixed by law. '05, p. 205.

3206. (1220x21.) Clerk to enter in inheritance tax and lien book. Index. The clerk shall from time to time enter upon the inheritance tax and lien book, the title of all estates subject to the inheritance tax, as shown by the inventories or lists of heirs filed in his office, or as reported to him by the district attorney or the state treasurer, and shall enter in said book as against each estate or title, at the appropriate place, all such information relating to the situation and condition of the estate as he may be able to obtain from the papers filed in his office, or from the district attorney or the state treasurer, as may be necessary to collection and enforcement of the tax. He shall also immediately index all liens entered upon the inheritance tax and lien book in the book kept in his office for that purpose. '05, p. 205.

3207. (1220x22.) Complete record by clerk. In all cases entered upon the inheritance tax and lien book, the clerk shall make a complete record in the proper probate record, of all the proceedings, orders, reports, inventories, appraisements and all other matters and proceedings therein. '05, p. 205.

3208. (1220x23.) Duties of clerk. It shall be the duty of each clerk of the district court to make examination from time to time of all reports filed with him by administrators, executors, and trustees, pursuant to law; also to make examination of all foreign wills offered for probate or recorded within his county, as well as of the record of deeds and conveyances in the recorder's office of said county, and if from such examination, or from in-

formation or knowledge coming to him from any other source, he finds or believes that any property within his county, or within the jurisdiction of the district court of said county, has, since May 14, 1901, passed by will or by the intestate laws of this or any other state, or by deed, grant, sale, or gift made or intended to take effect, in possession or in enjoyment after the death of the testator, donor, or grantor, to any person within this state, he shall make report thereof in writing to the state treasurer, embodying in such report the name and residence of the decedent, date of death, name and address of administrator, executor, or trustee; the description of any property liable to a tax and the county in which it is located, and name and relationship of all beneficiaries or heirs. Any citizen of the state having knowledge of property liable to such tax, against which no proceeding for enforcing collection thereof is pending, may report the same to the clerk, and it shall be the duty of such officer to investigate the case, and if he has reason to believe the information to be true, he shall forthwith institute such proceedings substantially as above indicated. '05, p. 205.

3209. (1220x24.) Duties of court and district attorney. On the first or second day of each regular term, the court shall require the clerk to present for its inspection, the inheritance tax and lien book hereinbefore provided for, together with all reports of administrators, executors, and trustees which have been filed pursuant to this title since the last preceding term. The district attorney shall also attend and make report to the court concerning the progress of all cases pending for the collection of such taxes, together with any other facts which, in his judgment, may aid the court in enforcing the general observance of the inheritance tax law. If from information obtained from the records or reports, or from any other source, the court has reason to believe that there is property within its jurisdiction liable to the payment of an inheritance tax, against which proceedings for collection are not already pending, it shall enter an order of record, directing the district attorney to institute such proceedings forthwith. Should any estate, or the name of any grantee or grantees, be placed upon the book at the suggestion of the district attorney or the state treasurer in which the papers already on file in the clerk's office do not disclose that any inheritance tax is due or payable, the district attorney shall forthwith give to all parties in interest such notice as the court or judge may prescribe, requiring them to appear on a day to be fixed by the said court or judge, and show cause why the property should not be appraised and subjected to said tax. If upon hearing at the time so fixed, the court is satisfied that any property of the decedent, or any property devised, granted, or donated by him, is subject to the tax, the same proceedings shall be had as in other cases, so far as applicable. '05, p. 206.

3210. (1220x25.) Costs, by whom paid. In all cases where any property so passes as to be liable to taxation under the inheritance law, all costs of the proceedings had for determining the amount of such tax or for determining whether the property of the entire estate is sufficient in amount as to render that part passing to heirs subject to the tax, shall be chargeable to such estate, and to discharge the lien upon such property all costs, as well as the taxes, must be paid. In all other cases the costs are to be paid as ordered by the court, and when a decision adverse to the state has been rendered, with an order that the state pay the costs, it is the duty of the clerk of the court in which such action was pending to certify the amount of such costs to the state treasurer, who shall, if said costs be correctly certified, and the case has been finally terminated, present the claim to the state board of examiners, to audit, and, said claim being allowed by said board, the state auditor is directed to issue a warrant on the state treasurer in payment of such costs. '05, p. 207.

3211. (1220x26.) Safe deposit company or bank to give notice before transferring securities. No safe deposit company, bank, or other institution, person, or persons holding securities or assets of the decedent shall deliver

or transfer the same to the executor or administrator or legal representative of said decedent unless notice of the time and place of such intended transfer be served upon the state treasurer at least five days prior to the transfer thereof, or unless the tax for which such securities or assets are liable under this title shall be first paid. It shall be lawful for, and the duty of, the state treasurer personally, or by any person by him duly authorized, to examine such securities or assets at the time of such delivery or transfer. Failure to serve such notice upon the state treasurer, or to allow such examination on the delivery of such securities or assets to such executor, administrator or legal representative before said tax is paid shall render such safe deposit company, trust company, bank, or other institution, person, or persons liable for the payment of the taxes due upon such securities or assets as provided in this title. '05, p. 207.

3212. (1220x27.) Foreign estates, how assessed. Where any property belonging to a foreign estate is subject to the payment of an inheritance tax in this state, such tax shall be assessed upon the market value of such property remaining after the payment of such debts and expenses as are chargeable to the property under the laws of this state, and in the event that the executor, administrator, or trustee of such foreign estate files with the clerk of the court having ancillary jurisdiction, statements in writing exhibiting the true market value of the entire estate of the decedent owner, and the indebtedness for which the said estate has been adjudged liable, which statements shall be in affidavit form and sworn to by such executor, administrator, or trustee, the beneficiaries of said estate shall then be entitled to have deducted such proportion of the said indebtedness of the decedent from the value of the property within this state as the value of the property within this state bears to the value of the entire estate; *provided,* that in all such cases where the property within this state consists of personal property only, the statements hereinbefore provided for shall be filed with the attorney-general. '05, p. 207; am'd '15, p. 36.

3213. (1220x28.) Id. Whenever any property, real or personal, within this state, belongs to a foreign estate, said foreign estate passes in part exempt from the inheritance tax, and in part subject to said inheritance tax, and it is within the authority or discretion of the foreign executor, administrator, or trustee administering the estate to dispose of the property not specifically devised to direct heirs or devisees in the payment of the debts owing by the decedent at the time of his death, or in the satisfaction of legacies, devises, or trusts given to direct and collateral legatees or devisees, or in payment of the distributive shares of any direct and collateral heirs, then the property within the jurisdiction of the state, belonging to such foreign estate, shall be subject to the inheritance tax imposed by this title, and the tax due thereon shall be assessed as provided in the next preceding section of this title, and with the same proviso respecting the deduction of the proportionate share of the indebtedness, as therein provided. '05, p. 208.

3214. (1220x29.) Id. Tax on corporate stock. If a foreign executor, administrator, or trustee shall assign or transfer any corporate stock or obligations in this state standing in the name of a decedent, or in trust for a decedent, liable to such tax, the tax shall be paid to the state treasurer on or before the transfer thereof; otherwise the corporation permitting its stock to be so transferred shall be liable to pay such tax, and it is the duty of the state treasurer to enforce the payment thereof. '05, p. 208.

3215. (1220x30.) State treasurer may compromise certain cases. Whenever an estate charged, or sought to be charged, with the inheritance tax, is of such a nature or is so disposed that the liability of the estate is doubtful, or the value thereof cannot with reasonable certainty be ascertained under the provisions of law, the state treasurer may, with the approval of the attorney-general, which approval shall set forth the reasons therefor,

compromise with the beneficiaries or representatives of such estates, and compound the tax thereon; but said settlement must be approved by the district court or judge of the proper court, and after such approval, the payment of the amount of the taxes so agreed upon shall discharge the lien against the property of the estate. '05, p. 208.

3216. (1220x31.) Title applies to pending cases. This title shall apply to all pending estates which are not closed, and the property subjected by this title to the said tax is liable to the provisions incorporated in this title. '05, p. 208.

TITLE 51.

INQUESTS.

3220. (1221.) Justice to hold inquests in precincts. It shall be the duty of every justice of the peace to hold inquests on the bodies of such persons as are supposed to have died by unlawful means within the precinct of such justice.

3221. (1222.) Id. When absent. If a justice of the peace is absent or unable to attend, the duties of his office in relation to inquests may be discharged by any justice of the peace of the county.

3222. (1223.) Summoning jury. Qualified jurors. When a justice shall have notice that any such body has been found in his precinct, he must issue his warrant to the sheriff or to any constable, requiring him forthwith to summon any three qualified residents of the city or precinct in which the inquest is held that he can most readily find to appear before him at a time and place named in the warrant.

Jury of inquest, § 3596.

3223. (1224.) Id. Form of warrant. The warrant may be in substance as follows:

State of Utah, ... precinct, ... county.

To.....

In the name of the state of Utah, you are hereby required to forthwith summon three qualified electors of ..... precinct to appear before me at (naming the place) at (naming the day and hour or "forthwith") then and there to hold an inquest upon the dead body of ..... there lying, and ascertain by what means he died.

Witness my hand this ..... day of ..... A. D. 19.....

.....

Justice of the peace in ..... precinct in ..... county.

3224. (1225.) Id. Service and return. The officer shall execute the warrant and make return thereof at the time and place named.

3225. (1226.) Failure of juror to appear. If any juror fails to appear, the justice shall immediately cause the proper number to be summoned or returned from the bystanders and proceed to impanel them and administer an oath in substance as follows:

You do solemnly swear (or affirm) that you will diligently inquire and true presentment make, when, how, and by what means the person whose body lies here dead came to his death, according to your knowledge and the evidence to be given you; so help you God.

3226. (1227.) Witnesses. Contempt The justice may issue subpœnas for witnesses within his county, returnable forthwith, or at such time as he shall direct, and shall have the same authority to enforce the attendance of witnesses and to punish them and jurors for contempt in disobeying his process as he shall have in cases triable before him.

3227. (1228.) Id. Oath. An oath (or affirmation) shall be administered to the witness in substance as follows:

You do solemnly swear (or affirm) that the testimony which you shall give at this inquest, concerning the death of the person whose body is here lying dead, shall be the truth, the whole truth, and nothing but the truth; so help you God.

3228. (1229.) When testimony to be written. The justice may require the testimony to be written, and to be subscribed by the witnesses.

3229. (1230.) Experts. Post mortem. Stenographer. The justice, by permission of a majority of the board of county commissioners, may subpœna a physician or surgeon to inspect the body, or a chemist to make an analysis of the contents of the stomach or the tissues of the body, or to hold a post mortem examination of the deceased and to give a professional opinion as to the cause of death, and the justice shall have the testimony given by the witnesses reduced to writing, under his directions, and may employ a stenographer for such purpose at the same relative compensation as is now allowed to stenographers in the district courts of this state; and when such testimony shall have been taken down by the stenographer a transcript thereof, duly certified, shall constitute the deposition of such witness. Any such physician, surgeon, or chemist so subpœnaed shall receive such reasonable compensation from the county as the board of county commissioners shall allow.

3230. (1231.) Verdict. Form. The jurors, having inspected the body, heard the testimony, and made all needful inquiries, shall return to the justice their inquisition in writing, subscribed by them, and stating the matters, so far as found, in substance according to the following form:

State of Utah, ... precinct, ... county.

An inquest having been held at ..... in ..... precinct, ... county, on the ..... day of ....., 19....., before ....., justice of the peace in ..... precinct in said county, upon the body of ..... (or person unknown) there lying dead, by the jurors whose names are hereto subscribed, the said jurors upon their oaths do say, (here stating when, how, by what person, means, weapon, or accident he came to his death, and whether feloniously).

In testimony whereof the said jurors have hereunto set their hands the day and year aforesaid.

The foregoing inquisition must be attested by the justice of the peace.

3231. (1232.) Id. Making same public. If the inquisition find that a crime has been committed on the deceased, and name the person who the jury believe has committed it, the inquest shall not be made public until after the arrest directed in the next section.

3232. (1233.) Person charged arrested if present. If the person charged be present, the justice may order his arrest by an officer or any other person present, and shall there make a warrant, requiring the officer or other person to take him before a justice of the peace.

3233. (1234.) Warrant for arrest if absent. If the person be not present and the justice believes that he can be taken, the justice may issue a warrant to the sheriff or any constable of the county, requiring him to arrest such person and take him before a justice of the peace, when he shall be dealt with as if held under a complaint in the usual form.

3234. (1235.) Form of warrant. Effect of. The warrant of the justice shall substantially recite the transactions before him and the verdict of the jury of inquest leading to the arrest; and such warrant shall be a sufficient foundation for the proceeding of a justice.

3235. (1236.) Justice's return to district court. The justice of the peace shall return to the clerk of the district court of the county the inquisition, the written evidence, and a list of the witnesses testifying to material matter.

3236. (1237.) Disposition of body. Expense. The justice of the peace shall cause the body of a deceased person, which he shall have been called

to view, to be delivered to his friends, if any be present or within convenient distance; if not, he shall cause it to be decently buried, the expense to be paid from any property of the deceased, or, if there be not sufficient property of the deceased to pay the necessary expenses of the burial, the same shall be charged against the county.

Unclaimed body delivered to medical department of University, § 5558.

3237. (1238.) Register of inquests. It shall be the duty of every justice of the peace of each county to keep an official register, to be labeled, "register of inquests," in which he shall enter the date of holding all inquests, the name of the deceased, when known, and when not, such description of the deceased as may be sufficient for identification; property found on the person of the deceased, if any; what disposition was made of the same; the cause of death, when known; and such other information as may pertain to the identity of the deceased.

3238. (1239.) Disposition of property. The justice must, within thirty days after an inquest upon a dead body, deliver to the county treasurer or the legal representative of the deceased, any money or other property found upon the body, except such as may have been disposd of for the decedent's burial, and at the same time file an affidavit with the treasurer, showing:

1. The amount of money or other property belonging to the estate of the deceased person, which has come into his possession;
2. The disposition made of such property.

Action to compel justice to pay over, § 1489. Disposition of such property, §§ 1490-1493.

3239. (1240.) Expense of inquest. The expenses of holding an inquest shall be a charge against the county, but the county shall have a legal claim against the estate of the deceased for the amount, and it shall be the duty of the county attorney to collect the same, if there be any estate, and pay it into the county treasury.

Bills must be certified by county attorney, § 2528.
Expense of inquest a charge against the county, § 1617.
Fees of justice, § 2527.
Fees of jurors and witnesses, §§ 2550, 2551.

TITLE 52.

INSURANCE.

CHAPTER 1.

COUNTY INSURANCE COMPANIES.

('09, p. 208.)

3250. Mutual fire insurance companies. Who may organize. When policies become effective. Any number of persons, not less than fifty, residing in any county or district of this state who collectively shall own property of not less than $50,000 in value, which they desire to have insured, may form an incorporated company for the purpose of mutual insurance against loss or damage by fire or lightning. In no case shall the policies of any such company become effective under this law until $100,000 shall be written upon the books of the company. Am'd '15, p. 128.

General insurance law not applicable, § 1187. Insurance corporation, general, §§ 1120-1186.

3251. "District" defined. The term "district," as used in this chapter, shall include one or more counties, but shall in no case exceed four counties, whose territory must be contiguous. '15, p. 130.

3252. Shall incorporate. Affidavit. Such persons shall execute articles of incorporation in accordance with the provisions of § 861. Instead of the oath to the agreement as required by § 862, at least three of the incorporators

shall make oath or affirmation that the incorporators collectively own property of not less than $50,000 in value, which they desire to have insured.

3253. Bonds. The treasurer and the secretary shall each give bonds to the company for the faithful performance of their duties, in such amounts as shall be prescribed by the board of directors.

3254. Powers and duties. Such corporation and its directors shall possess the usual powers and be subject to the usual duties of corporations and directors thereof, and may make such by-laws, not inconsistent with the constitution or laws of this state, as may be deemed necessary for the management of its affairs in accordance with the provisions of this chapter; also to prescribe the duties of its officers and fix their compensation, and to alter and amend its by-laws when necessary.

3255. Membership. Rights and privileges. Any person owning property in the county or district for which any such company is formed shall become a member of such company by insuring therein, and shall be entitled to all the rights and privileges appertaining thereto and subject to all liabilities connected with such membership; but no person not residing in the county or district in which the company is formed shall become a director of such company. Am'd '15, p. 128.

3256. Insurable property. Limit to risk. Liability of insured. Such company may issue policies only on detached dwellings, school houses, churches, barns (except livery, boarding, and hotel barns), and other farm buildings, and such property as may properly be contained therein; also other property on the premises and owned by the insured, hay and grain in stack, and livestock on the premises of the insured for any time not exceeding five years. It shall be unlawful for any such company to accept any risk for more than $2000 until $1,000,000 of insurance is in force. Companies with more than $1,000,000 and less than $1,500,000 of insurance in force may accept risks of $3000; companies with more than $1,500,000 and less than $2,000,000 may accept risks of $4000; companies with more than $2,000,000 and less than $3,000,000 may accept risks of $6000; companies with $3,000,000 or more in force may increase the amount of the risk in the discretion of their boards of directors. All persons so insured shall give their obligations to the company, binding themselves, their heirs, and assigns to pay their pro rata share to the company of the necessary expenses, and all losses by fire or lightning which may be sustained by any member thereof during the time for which their respective policies are written, and they shall also at the time of effecting the insurance pay such a percentage in cash and such other charges as may be required by the rules or by-laws of the company. Am'd '15, p. 128.

3257. Classification of property. Any such company may classify the property insured therein at the time of issuing policies thereon, under different rates, corresponding as nearly as may be to the greater or less risk from fire or lightning. Am'd '15, p. 128.

3258. Company to operate within defined limits. No such company shall insure any property beyond the limits of the county or district comprised in the formation of the company. Am'd '15, p. 128.

3259. Adjustment of losses. Every member of such company who sustains loss by fire or lightning shall immediately notify the president and the secretary of the company, stating the amount of damage or loss claimed; if not more than $500, then the president and the secretary shall proceed to ascertain the amount of such loss or damage and adjust the same; if the claim for damage or loss shall be an amount greater than $500, then the president of such company, or, in case of his absence, the secretary thereof, shall forthwith convoke the directors of such company, whose duty it shall be, when convenient, to appoint a committee of not less than three disinterested members of such company to ascertain the amount of damage or loss. If in either case there is a failure of the parties to agree upon the amount

of such damage or loss, the claimant may apply to the judge of the district court in the county in which the office of such company is located, whose duty it shall be to appoint three disinterested persons as a committee of reference, who shall have full power and authority to examine witnesses and to determine all matters in dispute and shall make their award in writing to the president of such company, and such award shall be final. The pay of such committee shall be $2 per day for each day's service so rendered, and 4 cents for each mile necessarily traversed in discharge of their duties, which shall be paid by the claimant, unless the award of said committee shall exceed the sum offered by the company in liquidation of such loss or damage, in which case said expenses shall be paid by the company. All adjusting committees shall have power to administer oaths, and examine witnesses upon any matter connected with such loss or damage.

3260. Losses, how paid. Borrowing limits. Assessment. Whenever the amount of any loss shall have been ascertained which exceeds in amount the cash funds of the company, the president shall have the power to borrow money not to exceed one-half of one per cent of all the property insured with which to pay said loss, and when the amount of such loss shall exceed one-half of one per cent of all property insured, the president shall convoke the directors of said company, who shall make an assessment upon all property insured in proportion to the amount for which the several pieces of property are insured, taken in connection with the rate of premium under which it may be classified; *provided,* that such assessments shall be made for an amount sufficient to pay all indebtedness of said company up to the time said assessment is made, and including the loss which occasioned such assessment. Am'd '15, p. 128.

3261. Notice of assessment to members. It shall be the duty of the secretary, whenever an assessment is made, to immediately notify every person composing such company, personally, by an agent, or by letter sent to his usual postoffice address, of the amount of such loss and indebtedness, and the sum due from him as his share thereof, and of the time when and to whom such payment is to be made; but such time shall not be less than thirty nor more than ninety days from the date of such notice.

3262. Suits to collect assessments. Suits at law may be brought against any member of such company who shall neglect or refuse to pay any assessment made upon him by the provisions of this chapter; and the directors of any company so formed, who shall wilfully refuse or neglect to perform the duties imposed upon them by the provisions of this chapter, shall be liable in their individual capacity to the person sustaining such loss. Suits at law may also be brought and maintained against any such company, by members thereof, for loss sustained, if payment is withheld after such losses become due. Am'd '11, p. 195.

3263. Annual statement. It shall be the duty of the secretary to prepare an annual statement, showing the condition of such company on the 31st day of December, and present the same at the annual meeting.

3264. Withdrawals. Any member of such company may withdraw therefrom by surrendering his policy for cancellation, at any time while the company continues the business for which it was organized, by giving notice in writing to the secretary thereof and paying his share of all claims then existing against said company; *provided,* that by the withdrawal of any such member, the number of the members remaining in the company shall not be reduced below the original number of incorporators, or that the amount of property insured will not be reduced below $50,000; *provided, further,* that the company shall have power to cancel or terminate any policy by giving the insured notice to that effect.

3265. Annual statement to be submitted to insurance department. Fee. It shall be the duty of the president and the secretary of every such company, on the 1st day of January of each year, or within ten days thereafter,

to prepare, under their own oath, and to transmit to the insurance department, a statement of the condition of the company on the 31st day of December then next preceding, in such form as the insurance department may direct. If, upon examination, the commissioner of insurance is of the opinion that such company is doing business correctly, in accordance with the provisions of this chapter, he shall thereupon furnish the company his certificate, which shall be deemed authority to continue in business the ensuing year, subject, however, to subsequent compliance with the provisions of this chapter. For such examination and certificate the company shall pay $1, which shall be the only charge in connection with its annual statement. It shall not be necessary to publish an abstract of such annual statement.

CHAPTER 2.

FRATERNAL INSURANCE.

('11, p. 301.)

3271. "Fraternal benefit society" defined. Any corporation, society, order, or voluntary association, without capital stock, organized and carried on solely for the mutual benefit of its members and their beneficiaries, and not for profit, and having a lodge system with ritualistic form of work and representative form of government, and which shall make provision for the payment of benefits in accordance with § 3275, is hereby declared to be a fraternal benefit society.

General insurance law not applicable, § 3274. Family protection, §§ 3111-3116.
General insurance law, §§ 1120-1186.

3272. Lodge system. Any society having a supreme governing or legislative body and subordinate lodges or branches by whatever name known, into which members shall be elected, initiated, and admitted in accordance with its constitution, laws, rules, regulations, and prescribed ritualistic ceremonies, which subordinate lodges or branches shall be required by the laws of such society to hold regular or stated meetings at least once in each month, shall be deemed to be operating on the lodge system.

3273. Representative government. Any such society shall be deemed to have a representative form of government when it shall provide in its constitution and laws for a supreme legislative or governing body, composed of representatives elected either by the members or by delegates elected either directly or indirctly by the members, together with such other members as may be prescribed by its constitution and laws; *provided,* that the elective members shall constitute a majority in number and have not less than two-thirds of the votes, nor less than the votes required to amend its constitution and laws; and *provided, further,* that the meetings of the supreme or governing body, and the election of officers, representatives or delegates shall be held as often as once in four years. The members, officers, representatives, or delegates of a fraternal benefit society shall not vote by proxy.

3274. Exempt from provisions of insurance code. Except as herein provided, such societies shall be governed by this chapter and shall be exempt from all provisions of the insurance laws of this state, not only in governmental relations with the state, but for every other purpose, and no law hereafter enacted shall apply to them, unless they be expressly designated therein.

3275. Powers. Every society transacting business under this chapter shall provide for the payment of death benefits, and may provide for the payment of benefits in case of temporary or permanent physical disability, as the result of disease, accident, or old age; *provided,* the period of life at which the payment of benefits for disability on account of old age shall commence shall not be under seventy years, and may provide for monuments

or tombstones to the memory of its deceased members, and for the payment of funeral benefits. Such society shall have the power to give a member, when permanently disabled or on attaining the age of seventy, all or such portion of the face value of his certificate as the laws of the society may provide; *provided,* that nothing in this chapter contained shall be so construed as to prevent the issuing of benefit certificates for a term of years less than the whole of life which are payable upon the death or disability of the member occuring within the term for which the benefit certificate may be issued. Such society shall, upon written application of the member, have the power to accept a part of the periodical contributions in cash, and charge the remainder, not exceeding one-half of the periodical contribution, against the certificate with interest payable or compounded annually at a rate not lower than 4 per cent per annum; *provided,* that this privilege shall not be granted except to societies which have readjusted or may hereafter readjust their rates of contributions and to contracts affected by such readjustment. Any society which shall show by the annual valuation hereinafter provided for that it is accumulating and maintaining the reserve necessary to enable it to do so, under a table of mortality not lower than the American experience table and 4 per cent interest, may grant to its members extended and paid-up protection or such withdrawal equities as its constitution and laws may provide; *provided,* that such grants shall in no case exceed in value the portion of the reserve to the credit of such members to whom they are made.

3276. Death benefits. The payment of death benefits shall be confined to wife, husband, relative by blood to the fourth degree ascending or descending, father-in-law, mother-in-law, son-in-law, daughter-in-law, stepfather, stepmother, stepchildren, children by legal adoption, or to a person or persons dependent upon the member; *provided,* that if, after the issuance of the original certificate, the member shall become dependent upon an incorporated charitable institution, he shall have the privilege, with the consent of the society, to make such institution his beneficiary. Within the above restrictions each member shall have the right to designate his beneficiary, and from time to time have the same changed in accordance with the laws, rules, or regulations of the society, and no beneficiary shall have or obtain any vested interest in the said benefit until the same has become due and payable upon the death of the said member; *provided,* that any society may, by its laws, limit the scope of beneficiaries within the above classes.

3277. Membership permitted. Any society may admit to beneficial membership any person not less than sixteen and not more than sixty years of age, who has been examined by a legally qualified physician and whose examination has been supervised and approved in accordance with the laws of the society; *provided,* that any beneficiary member of such society who shall apply for a certificate providing for disability benefits need not be required to pass an additional medical examination therefor. Nothing herein contained shall prevent such society from accepting general or social members.

3278. What certificates shall specify. Every certificate issued by any such society shall specify the amount of benefit provided thereby, and shall provide that the certificate, the charter or articles of incorporation, or, if a voluntary association, the articles of association, the constitution, and laws of the society and the application for membership and medical examination, signed by the applicant, and all amendments to each thereof, shall constitute the agreement between the society and the member, and copies of the same certified by the secretary of the society, or corresponding officer, shall be received in evidence of the terms and conditions thereof, and any changes, additions, or amendments to said charter or articles of incorporation, or articles of association, if a voluntary association, constitution, or laws duly made or enacted subsequent to the issuance of the benefit certificate shall bind the member and his beneficiaries, and shall govern and

control the agreement in all respects the same as though such changes, additions, or amendments had been made prior to and were in force at the time of the application for membership.

3279. Investment of funds. Mortuary obligations. Any society may create, maintain, invest, disburse, and apply an emergency, surplus or other similar fund in accordance with its laws. Unless otherwise provided in the contract, such funds shall be held, invested, and disbursed for the use and benefit of the society, and no member or beneficiary shall have or acquire individual rights therein or become entitled to any apportionment or the surrender of any part thereof, except as provided in § 3275. The funds from which benefits shall be paid, and the funds from which the expenses of the society shall be defrayed, shall be derived from periodical or other payments by the members of the society and accretions of said funds; *provided,* that no society, domestic or foreign, shall hereafter be incorporated or admitted to transact business in this state, which does not provide for stated periodical contributions sufficient to provide for meeting the mortuary obligations contracted, when valued upon the basis of the national fraternal congress, August 23, 1899, or any higher standard with interest assumption not more than 4 per cent per annum, nor write or accept members for temporary or permanent disability benefits except upon tables based upon reliable experience, with an interest assumption not higher than 4 per cent per annum. Deferred payments or instalments of claims shall be considered as fixed liabilities on the happening of the contingency upon which such payments or instalments are thereafter to be paid. Such liability shall be the present value of such future payments or instalments upon the rate of interest and mortality assumed by the society for valuation, and every society shall maintain a fund sufficient to meet such liability regardless of proposed future collections to meet any such liabilities.

3280. Id. Every society shall invest its funds only in securities permitted by the laws of this state for the investment of the assets of life insurance companies; *provided,* that any foreign society permitted or seeking to do business in this state, which invests its funds in accordance with the laws of the state in which it is incorporated, shall be held to meet the requirements of this chapter for the investment of funds.

3281. Purposes of payments must be stated. Every provision of the laws of the society for payment by members of such society, in whatever form made, shall distinctly state the purpose of the same and the proportion thereof which may be used for expenses, and no part of the money collected for mortuary or disability purposes or the net accretions of either or any of said funds shall be used for expenses.

3282. Organization. Seven or more persons, citizens of the United States, and a majority of whom are citizens of this state who desire to form a fraternal benefit society, as defined by this chapter, may make, and sign (giving their addresses), and acknowledge, before some officer competent to take acknowledgments of deeds, articles of incorporation, in which shall be stated:

1. The proposed corporate name of the society, which shall not so closely resemble the name of any society or insurance company already transacting business in this state as to mislead the public or lead to confusion;

2. The purpose for which it is formed, which shall not include more liberal powers than are granted by this chapter; *provided,* that any lawful social, intellectual, educational, charitable, benevolent, moral, or religious advantages may be set forth among the purposes of the society, and the mode in which its corporate powers are to be exercised;

3. The names, residences, and official titles of all the officers, trustees, directors, or other persons who are to have and exercise the general control and management of the affairs and funds of the society for the first year until the ensuing election at which all such officers shall be elected by the

supreme legislative or governing body, which election shall be held not later than one year from the date of the issuance of the permanent certificate.

Such articles of incorporation and duly certified copies of the constitution and laws, rules and regulations, and copies of all proposed forms of benefit certificates, applications therefor, and circulars to be issued by such society, and a bond in the sum of $5000, with sureties approved by the commissioner of insurance, conditioned upon the return of the advanced payments, as provided in this section, to applicants, if the organization is not completed within one year, shall be filed with the commissioner of insurance, who may require such further information as he deems necessary, and if the purposes of the society conform to the requirements of this chapter, and all provisions of law have been complied with, the commissioner of insurance shall so certify, and retain and record or file the articles of incorporation, and furnish the incorporators a preliminary certificate authorizing said society to solicit members as hereinafter provided. Upon receipt of said certificate from the commissioner of insurance, said society may solicit members for the purpose of completing its organization, and shall collect from each applicant the amount of not less than one regular monthly payment in accordance with its table of rates as provided by its constitution and laws, and shall issue to each such applicant a receipt for the amount so collected. But no such society shall incur any liabilty other than for such advanced payments, nor issue any benefit certificate, nor pay or allow, or offer to promise to pay or allow, to any person any death or disability benefit until actual bona fide applications for death benefit certificates have been secured upon at least five hundred lives for at least $1000 each, and all such applicants for death benefits shall have been regularly examined by legally qualified practicing physicians, and certificates of such examinations have been duly filed and approved by the chief medical examiner of such society, nor until there shall be established ten subordinate lodges or branches into which said five hundred applicants have been initiated, nor until there has been submitted to the commissioner of insurance, under oath of the president and the secretary, or corresponding officers of such society, a list of such applicants, giving their names, addresses, date examined, date approved, date initiated, name and number of the subordinate branch of which each applicant is a member, amount of benefits to be granted, rate of stated periodical contributions, which shall be sufficient to provide for meeting the mortuary obligation contracted, when valued for death benefits upon the basis of the national fraternal congress table of mortality, as adopted by the national fraternal congress August 23, 1899, or any higher standard at the option of the society, and for disability benefits by tables based upon reliable experience, and for combined death and permanent total disability benefits by table based upon reliable experience, with an interest assumption not higher than 4 per cent per annum, nor until it shall be shown to the commissioner of insurance by the sworn statement of the treasurer, or corresponding officer of such society, that at least five hundred applicants have each paid in cash at least one regular monthly payment as herein provided for $1000 of indemnity to be effected, which payments in the aggregate shall amount to at least $2500, all of which shall be credited to the mortuary or disability fund on account of such applicants, and no part of which may be used for expenses. Said advanced payments shall, during the period of organization, be held in trust, and, if the organization is not completed within one year as hereinafter provided, returned to said applicants. The commissioner of insurance may make such examination and require such further information as he deems advisable, and upon presentation of satisfactory evidence that the society has complied with all the provisions of law he shall issue to such society a certificate to that effect. Such certificate shall be prima facie evidence of the existence of such society at the date of such certificate. The commissioner of insurance shall cause a record of such certificate to be made, and a certified copy of such record may be given in

evidence with like effect as the original certificate. No preliminary certificate granted under the provisions of this section shall be valid after one year from its date, or after such further period, not exceeding one year, as may be authorized by the commissioner of insurance upon cause shown, unless the five hundred applicants herein required have been secured and the organization has been completed as herein provided, and the articles of incorporation and all proceedings thereunder shall become null and void in one year from the date of said preliminary certificate, or at the expiration of said extended period, unless such society shall have completed its organization and commenced business as herein provided. When any domestic society shall have discontinued business for the period of one year, or has less than four hundred members, its charter shall become null and void. Every such society shall have the power to make a constitution and by-laws for the government of the society, the admission of its members, the management of its affairs, and the fixing and readjusting of the rates of contribution of its members from time to time; and it shall have the power to change, alter, add to, or amend such constitution and by-laws and shall have such other powers as are necessary and incidental to carrying into effect the objects and purposes of the society.

3283. Rights of foreign societies. Any society now engaged in transacting business in this state may exercise, after the passage of this chapter, all of the rights, powers, and privileges now exercised or possessed by it under its charter or articles of incorporation not inconsistent with this chapter, if incorporated; or, if it be a voluntary association, it may incorporate hereunder. But no society already organized shall be required to reincorporate hereunder, and any such society may amend its articles of incorporation from time to time in the manner provided therein or in its constitution and laws and all such amendments shall be filed with the commissioner of insurance and shall become operative upon such filing, unless a later time be provided in such amendments or in its articles of incorporation, constitution, or laws.

3284. Merger or transfer. No domestic society shall merge with or accept the transfer of the membership or funds of any other society unless such merger or transfer is evidenced by a contract in writing, setting out in full the terms and conditions of such merger or transfer, and filed with the commissioner of insurance of this state, together with a sworn statement of the financial condition of each of said societies, by its president and its secretary, or corresponding officer, and a certificate of such officers, duly verified under oath of said officers of each of the contracting societies, that such merger or transfer has been approved by a vote of two-thirds of the members of the supreme legislative or governing body of each said societies. Upon the submission of said contract, financial statements, and certificates, the commissioner of insurance shall examine the same, and, if he shall find such financial statement to be correct and the said contract to be in conformity with the provisions of this section, and that such merger or transfer is just and equitable to the members of each of said societies, he shall approve said merger or transfer, issue his certificate to that effect, and thereupon the said contract of merger or transfer shall be of full force and effect. In case such contract is not approved, the fact of its submission and its contents shall not be disclosed by the commissioner of insurance.

3285. Authority to do business renewed annually. Societies which are now authorized to transact business in this state may continue such business until the 1st day of April next succeeding the passage of this chapter, and the authority of such societies may thereafter be renewed annually; but in all cases to terminate on the 1st day of the succeeding April; *provided, however,* the license shall continue in full force and effect until the new license be issued or specifically refused. For each such license or renewal the society shall pay the commissioner of insurance $5. A duly certified

copy or duplicate of such license shall be prima facie evidence that the licensee is a fraternal benefit society within the meaning of this chapter.

3286. Requirements of foreign societies. No foreign society now transacting business, organized prior to the passage of this chapter, which is not now authorized to transact business in this state, shall transact any business herein without a license from the commissioner of insurance. Any such society shall be entitled to a license to transact business within this state upon filing with the commissioner a duly certified copy of its charter or articles of association; a copy of its constitution and laws, certified by its secretary or corresponding officer; a power of attorney to the commissioner as hereinafter provided; a statement of its business under oath of its president and secretary, or corresopnding officers, in the form required by the commissioner, duly verified by an examination made by the supervising insurance official of its home state or other state satisfactory to the commissioner of insurance of this state; a certificate from the proper official in its home state, province, or country that the society is legally organized; a copy of its contract, which must show that benefits are provided for by periodical or other payments by persons holding similar contracts, and upon furnishing the commissioner such other information as he may deem necessary to a proper exhibit of its business and plan of working, and upon showing that its assets are invested in accordance with the laws of the state, territory, district, province, or country where it is organized, he shall issue a license to such society to do business in this state until the 1st day of the succeeding April, and such license shall, upon compliance with the provisions of this chapter, be renewed annually, but in all cases to terminate on the 1st day of the succeeding April; *provided, however,* that license shall continue in full force and effect until the new license be issued or specifically refused. Any foreign society desiring admission to this state shall have the qualifications required of domestic societies organized under this chapter and have its assets invested as required by the laws of the state, territory, district, country, or province where it is organized. For each such license or renewal the society shall pay the commissioner $5. When the commissioner refuses to license any society, or revokes its authority to do business in this state, he shall reduce his ruling, order, or decision to writing and file the same in his office, and shall furnish a copy thereof, together with the statement of his reasons, to the officers of the society, upon request, and the action of the commissioner shall be reviewable by proper proceedings in any court of competent jurisdiction within the state; *provided, however,* that nothing contained in this or the preceding section shall be taken or construed as preventing any such society from continuing in good faith all contracts made in this state during the time such society was legally authorized to transact business herein.

3287. Must appoint process attorney. Every society, whether domestic or foreign, now transacting business in this state, within ninety days after the passage of this chapter, and every such society hereafter applying for admission, shall, before being licensed, appoint in writing the commissioner of insurance and his successors in office to be its true and lawful attorney, upon whom all legal process in any action or proceeding against it shall be served, and in such writing shall agree that any lawful process against it which is served upon such attorney shall be of the same legal force and validity as if served upon the society and that the authority shall continue in force so long as any liability remains outstanding in this state. Copies of such appointment, certified by said commissioner of insurance, shall be deemed sufficient evidence thereof and shall be admitted in evidence with the same force and effect as the original thereof might be admitted. Service shall only be made upon such attorney, must be made in duplicate upon the commissioner of insurance or in his absence upon the person in charge of his office, and shall be deemed sufficient service upon such society; *provided, however,* that no such service shall be valid or binding against any such so-

ciety when it is required thereunder to file its answer, pleading, or defense in less than thirty days from the date of mailing the copy of such service to such society. When legal process against any such society is served upon said commissioner of insurance he shall forthwith forward by registered mail one of the duplicate copies prepaid and directed to its secretary or corresponding officer. Legal process shall not be served upon any such society except in the manner provided herein.

3288. Business may be transacted, where. Any domestic society may provide that meetings of its legislative or governing body may be held in any state, district, province, or territory wherein such society has subordinate branches and all business transacted at such meetings were held in this state. But its principal offices shall be located in this state.

3289. Officers or members not liable for payment of benefits. Officers and members of the supreme, grand, or any subordinate body of such incorporated society shall not be individually liable for the payment of any disability or death benefit provided for in the laws and agreements of such society, but the same shall be payable only out of the funds of such society, and in the manner provided by its laws.

3290. No authority to waive provisions of law of society. The constitution and laws of the society may provide that no subordinate body, nor any of its subordinate officers or members, shall have the power or authority to waive any of the provisions of the laws and constitution of the society, and the same shall be binding on the society and each and every member thereof and on all beneficiaries of members.

3291. Benefits not liable to attachment. No money or other benefit, charity, relief, or aid to be paid, provided, or rendered by any such society shall be liable to attachment, garnishment, or other process, or to be seized, taken, appropriated, or applied by any legal or equitable process or operation of law to pay any debt or liability of a member or beneficiary, or any other person who may have a right thereunder, either before or after payment.

3292. Must file amendments to constitution and laws. Every society transacting business under this chapter shall file with the commissioner of insurance a duly certified copy of all amendments of or additions to its constitution and laws within ninety days after the enactment of the same. Printed copies of the constitution and laws as amended, changed, or added to, certified by the secretary or corresponding officer of the society, shall be a prima facie evidence of the legal adoption thereof.

3293. Annual statement. Report. Valuations. Every society transacting business in this state shall annually, on or before the 1st day of March, file with the commissioner of insurance, in such form as he may require, a statement, under oath of its president and secretary or corresponding officers, of its condition and standing on the 31st day of December next preceding, and of its transactions for the year ending on that date, and also shall furnish such other information as the commissioner may deem necessary to a proper exhibit of its business and plan of working. The commissioner may at other times require any further statement he may deem necessary to be made relating to such society. In addition to the annual report herein required each society shall annually report to the commissioner a valuation of its certificates in force on December 31 last preceding, excluding those issued within the year for which the report is filed, in cases where the contribution for the first year in whole or in part are used for current mortality and expenses; *provided,* the first report of valuation shall be made as of December 31, 1912. Such report of valuation shall show, as contingent liabilities, the present midyear value of the promised benefits provided in the constitution and laws of such society under certificates then subject to valuation; and, as contingent assets, the present midyear value of the future net contributions provided in the constitution and laws as the same are in

practice actually collected. At the option of any society, in lieu of the above, the valuation may show the net value of the certificates subject to valuation hereinbefore provided, and said net value, when computed in case of monthly contributions, may be the mean of the terminal values for the end of the preceding and of the current insurance years. Such valuation shall be verified by a competent accountant or actuary, or, at the request and expense of the society, verified by the actuary of the department of insurance of the home state of the society, and shall be filed with the commissioner within ninety days after the submission of the last preceding annual report. The legal minimum standard of valuation for all certificates, except for disability benefits, shall be the national fraternal congress table of mortality as adopted by the national fraternal congress August 23, 1899, or, at the option of the society, any higher table, or, at its option, it may use a table based upon the society's own experience of at least twenty years and covering not less than one hundred thousand lives with interest assumption not more than 4 per cent per annum. Each such valuation report shall set forth clearly and fully the mortality and interest basis and the method of valuation. Any society providing for disability benefits shall keep the net contribution for such benefits in a fund separate and apart from all other benefit and expense funds and the valuation of all other business of the society; *provided,* that where a combined contribution table is used by a society for both death and permanent total disability benefits, the valuation shall be according to tables of reliable experience, and in such case a separation of the funds shall not be required. The valuation herein provided for shall not be considered or regarded as a test of the financial solvency of the society, but each society shall be held to be legally solvent so long as the funds in its possession are equal to or in excess of its matured liabilities. Beginning with the year 1914 a report of such valuation and an explanation of the facts concerning the condition of the society thereby disclosed shall be printed and mailed to each beneficiary member of the society not later than June 1, of each year, or, in lieu thereof, such report of valuation and showing of the society's condition as thereby disclosed may be published in the society's official paper and the issue containing the same mailed to each beneficiary member of the society. The laws of such society shall provide that, if the stated periodical contributions of the members are insufficient to pay all matured death and disability claims in full and to provide for the creation and maintenance of the funds required by its laws, additional, increased, or extra rates of contribution shall be collected from the members to meet such deficiency; and such laws may provide that, upon the written application or consent of the member, his certificate may be charged with its proportion of any deficiency disclosed by valuation, with interest not exceeding 5 per cent per annum.

3294. Deficiency. Proceedings by commission. New members. If the the valuation of the certificates, as hereinbefore provided, on December 31, 1917, shall show that the present value of future net contributions, together with the admitted assets, is less than the present value of the promised benefits and accrued liabilities, such society shall thereafter maintain said financial condition at each succeeding triennial valuation in respect of the degree of deficiency as shown in the valuation as of December 31, 1917. If, at any succeeding triennial valuation, such society does not show at least the same condition, the commissioner of insurance shall direct that it thereafter comply with the requirements herein specified. If the next succeeding triennial valuation after the receipt of such notice shall show that the society has failed to maintain the condition required herein, the commissioner of insurance may, in the absence of good cause shown for such failure, institute proceedings for the dissolution of such society, in accordance with the provisions of § 3296, or, in the case of a foreign society, its license may be canceled in the manner provided in this chapter. Any such society, shown by any triennial valuation subsequent to December 31, 1917, not to have

maintained the condition herein required, shall, within two years thereafter, make such improvement as to show a percentage of deficiency not greater than as of December 31, 1917, or thereafter, as to all new members admitted, be subject, so far as stated rates of contributions are concerned, to the provisions of § 3282, applicable in the organization of new societies; *provided,* that the net mortuary or beneficiary contributions and funds of such new members shall be kept separate and apart from the other funds of the society. If such required improvement is not shown by the succeeding triennial valuation, then the said new members may be placed in a separate class and their certificates valued as an independent society in respect to contributions and funds. Am'd '17, p. 434.

3295. Valuation of certificates. Losses. Transfer of plan. Reserve Rates. Liability. In lieu of the requirements of §§ 3293, 3294, any society accepting in its laws the provisions of this section may value its certificates on a basis, herein designated "accumulation basis," by crediting each member with the net amount contributed for each year and with interest at approximately the net rate earned and by charging him with his share of the losses for each year, herein designated "cost of insurance" and carrying the balance, if any, to his credit. The charge for the cost of insurance may be according to the actual experience of the society applied to a table of mortality recognized by the law of this state, and shall take into consideration the amount at risk during each year, which shall be the amount payable at death less the credit to the member. Except as specifically provided in its articles or laws or contracts, no charge shall be carried forward from the first valuation hereunder against any member for any past share of losses exceeding the contributions and credit. If, after the first valuation, any member's share of losses for any year exceeds his credit including the contributions for the year, the contribution shall be increased to cover his share of the losses, and if the credit at the time any benefit becomes payable during the life-time of the member, including any available funds, does not equal such benefit, the contribution to be made by him or on his behalf shall be increased by the difference. Any such excess share of losses chargeable to any member may be paid out of a fund or contributions especially created or required for such purpose. Any member may transfer to any plan adopted by the society with net rates on which tabular reserves are maintained, and on such transfer shall be entitled to make such application of his credit as provided in the laws of the society. Certificates issued, rerated, or readjusted on a basis providing for adequate rates with adequate reserves to mature such certificates upon assumptions for mortality and interest recognized by the law of this state shall be valued on such basis, herein designated the "tabular basis"; *provided,* that if on the first valuation under this section a deficiency in reserve shall be shown for any such certificate, the same shall be valued on the accumulation basis. Whenever, in any society having members upon the tabular basis and upon the accumulation basis, the total of all costs of insurance provided for any year shall be insufficient to meet the actual death and disability losses for the year, the deficiency shall be met for the year from the available funds after setting aside all credits in the reserve; or from increased contributions or by an increase in the number of assessments applied to the society as a whole or to classes of members as may be specified in its laws. Savings from a lower amount of death losses may be returned in like manner as may be specified in its laws. If the laws of the society so provide, the assets representing the reserves of any separate class of members may be carried separately for such class as if in an independent society, and the required reserve accumulation of such class so set apart shall not thereafter be mingled with the assets of other classes of the society. A table showing the rates being paid by and the credits to individual members at each age and year of entry, and showing opposite each credit the tabular rates and the tabular reserve required, or at the option of the society the required reserve on a level rate equivalent to that being

paid, according to assumptions for mortality and interest recognized by the laws of this state and adopted by the society, and, in either case, including any benefit payable at a specified age or on account of old age disability, shall be filed by the society with each annual report and also be furnished to each member before July 1 of each year. In lieu of the aforesaid statement there may be furnished to each member within the same time a statement giving the data aforesaid for such member. No table or statement need be made or furnished when the reserves are maintained on the tabular basis. For this purpose, individual bookkeeping accounts for each member shall not be required and all calculations may be made by actuarial methods. Nothing herein contained shall prevent the maintenance of such surplus over and above the credits on the accumulation basis and the reserves on the tabular basis as the society may provide by or pursuant to its laws; nor be construed as giving to the individual member any right or claim to any such reserve or credit other than in manner as expressed in the contract and its laws; nor as making any such reserve or credits a liability in determining the legal solvency of the society. '17, p. 436.

3296. Examinations. The commissioner of insurance, or any person he may appoint, shall have the power of visitation and examination into the affairs of any domestic society. He may employ assistants for the purpose of such examination, and he, or any person he may appoint, shall have free access to all books, papers, and documents that relate to the business of the society, and may summon and qualify as witness under oath and examine its officers, agents, and employes, or other persons, in relation to the affairs, transactions, and condition of the society. The expense of such examination shall be paid by the society examined, upon statement furnished by the commissioner of insurance, and the examination shall be made at least once in three years. Whenever, after examination, the commissioner of insurance is satisfied that any domestic society has failed to comply with any provisions of this chapter, or is exceeding its powers (or is not carrying out its contracts in good faith, or is transacting business fraudulently, or whenever any domestic society, after the existence of one year or more, shall have a membership of less than 400, or shall determine to discontinue business), the commissioner of insurance may present the facts relating thereto to the attorney-general, who shall, if he deem the circumstances warrant, commence an action in quo warranto in a court of competent jurisdiction, and such court shall thereupon notify the officers of such society of a hearing, and if it shall then appear that such society should be closed, said society shall be enjoined from carrying on any further business, and some person shall be appointed receiver of such society, and shall proceed at once to take possession of the books, papers, moneys, and other assets of the society, and shall forthwith, under the direction of the court, proceed to close the affairs of the society and to distribute its funds to those entitled thereto. No such proceedings shall be commenced by the attorney-general against any such society until after notice has been duly served on the chief executive officers of the society and a reasonable opportunity given to it, on a date to be named in said notice, to show cause why such proceedings should not be commenced.

3297. Injunctions. No application for injunction against or proceedings for the dissolution of or the appointment of a receiver for any such domestic society or branch thereof shall be entertained by any court in this state unless the same is made by the attorney-general.

3298. Examination of foreign societies. The commissioner of insurance, or any person whom he may appoint, may examine any foreign society transacting or applying for admission to trasact business in this state. The said commissioner may employ assistants, and he, or any person he may appoint, shall have free access to all the books, papers, and documents that relate to the business of the society, and may summon and qualify as witness under oath and examine its officers, agents, and employes, and other per-

sons, in relation to the affairs, transactions, and condition of the society. He may, in his discretion, accept in lieu of such examination the examination of the insurance department of the state, territory, district, province, or country where such society is organized. The actual expenses of examiners making any such examination shall be paid by the society upon statement furnished by the commissioner of insurance. If any such society or its officers refuse to submit to such examination or to comply with the provisions of the section relative thereto, the authority of such society to write new business in this state shall be suspended or license refused until satisfactory evidence is furnished the commissioner relating to the condition and affairs of the society, and during such suspension the society shall not write new business in this state.

3299. Id. Result not to be made public. Pending, during, or after an examination or investigation of any such society, either domestic or foreign, the commissioner of insurance shall make public no financial statement, report, or finding, nor shall he permit to become public any financial statement, report, or finding affecting the status, standing, or rights of any such society until a copy thereof shall have been served upon such society, at its home office, nor until such society shall have been afforded a reasonable opportunity to answer any such financial statement, report, or finding and to make such showing in connection therewith as it may desire.

3300. Revocation of authority. When the commissioner of insurance, on investigation, is satisfied that any foreign society transacting business under this chapter has exceeded its powers, or has failed to comply with any provisions of this chapter, or is conducting business fraudulently, or is not carrying out its contracts in good faith, he shall notify the society of his findings, and state in writing the grounds of his dissatisfaction, and after reasonable notice require said society, on a date named, to show cause why its license should not be revoked. If on the date named in said notice such objections have not been removed to the satisfaction of the said commissioner, or the society does not present good and sufficient reasons why its authority to transact business in this state should not at that time be revoked, he may revoke the authority of the society to continue business in this state. All decisions and findings of the commissioner made under the provisions of this section may be reviewed by proper proceedings in any court of competent jurisdiction, as provided in § 3286.

3301. To whom this chapter does not apply. Nothing contained in this chapter shall be construed to affect or apply to grand or subordinate lodges of Masons, Odd Fellows, or Knights of Pythias (exclusive of the insurance department of the Supreme Lodge Knights of Pythias), and the Junior Order of United American Mechanics (exclusive of the beneficiary degree or insurance branch of the National Council Junior Order United American Mechanics), or societies which limit their membership to any one hazardous occupation, nor to similar societies which do not issue insurance certificates, nor to any association of local lodges of a society now doing business in this state which provides death benefits not exceeding $300 to any one person, or disability to any one person, or both, nor to any contracts of reinsurance business on such plan in this state, nor to domestic societies which limit their membership to the employes of a particular city or town, designated firm, business house, or corporation, nor to domestic lodges, orders, or associations of a purely religious, charitable, and benevolent description, which do not provide for a death benefit of more than $100 or for disability benefits of more than $150 to any one person in any one year; *provided,* always, that any such domestic order or society which has more than five hundred members, and provides for death or disability benefits, and any such domestic lodge, order, or society which issues to any person a certificate providing for the payment of benefits, shall not be exempt by the provisions of this section, but shall comply with all the requirements of this chapter. The commissioner of insurance may require from any so-

ciety such information as will enable him to determine whether such society is exempt from the provisions of this chapter. No society, which is exempt by the provisions of this section from the requirement of this chapter shall give or allow, or promise to give or allow, to any person any compensation for procuring new members. Any fraternal benefit society, heretofore organized and incorporated and operating within the definition set forth in §§ 3271, 3272, and 3273, providing for benefits in case of death or disability resulting solely from accidents, but which does not obligate itself to pay death or sick benefits, may be licensed under the provisions of this chapter, and shall have all the privileges and shall be subject to all the provisions and regulations of this chapter, except that the provisions of this chapter requiring medical examination, valuations of benefit certificates, and that the certificate shall specify the amount of benefits, shall not apply to such society.

3302. Funds not taxable. Every fraternal benefit society organized or licensed under this chapter is hereby declared to be a charitable and benevolent institution, and all of its funds shall be exempt from all and every state, county, district, municipal, and school tax, other than taxes on real estate and office equipment.

3303. False statements. Penalty. Any person, officer, member, or examining physician of any society authorized to do business under this chapter who shall knowingly or wilfully make any false or fraudulent statement or representation in or with reference to any application for membership, or for the purpose of obtaining money from or benefit in any society transacting business under this chapter, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than $100 nor more than $500, or by imprisonment in the county jail for not less than thirty days nor more than one year, or both, in the discretion of the court; and any person who shall wilfully make a false statement of any material fact or thing in a sworn statement as to the death or disability of a certificate holder in any such society for the purpose of procuring payment of a benefit named in the certificate of such holder, and any person who shall wilfully make any false statement in any verified report or declaration under oath required or authorized by this chapter, shall be guilty of perjury, and shall be proceeded against and punished as provided by the statutes of this state in relation to the crime of perjury. Any person who shall solicit membership for, or in any manner assist in procuring membership in, any fraternal benefit society not licensed to do business in this state, or who shall solicit membership for, or in any manner assist in procuring membership in, any such society not authorized, as herein provided, to do business, as herein defined, in this state, shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than $50 nor more than $200. Any society, or any officer, agent, or employe thereof neglecting or refusing to comply with, or violating any of the provisions of this chapter, the penalty for which neglect, refusal, or violation is not specified in this section, shall be fined not exceeding $200 upon conviction thereof.

FAMILY PROTECTION.

('17, p. 384.)

3311. Additional benefits. Branch organization. Allowances. Any fraternal benefit society authorized to do business in this state, and operating on the lodge plan, may provide in its constitution and by-laws, in addition to other benefits provided for therein, for the payment of death or annuity benefits upon the lives of children between the ages of two and eighteen years at next birthday, for whose support and maintenace a member of such society is responsible. Any such society may, at its option, organize and operate branches for such children, and membership in local lodges and initiation therein shall not be required of such children, nor shall

they have any voice in the management of the society. The total benefits payable as above provided shall in no case exceed the following amounts: at ages at next birthday at time of death, respectively, as follows: Two, $34; three, $40; four, $48; five, $58; six, $140; seven, $168; eight, $200; nine, $240; ten, $300; eleven, $380; twelve, $460; thirteen to fifteen, $520; and sixteen to eighteen years, where not otherwise authorized by law, $600.

3312. Certificates effective. Basis of contributions. Waiver. Extras. No benefit certificate as to any child shall take effect until after medical examination or inspection by a licensed medical practitioner, in accordance with the laws of the society, nor shall any such benefit certificate be issued unless the society shall simultaneously put in force at least five hundred such certificates, on each of which at least one assessment has been paid, nor where the number of lives represented by such certificate falls below five hundred. The death benefit contributions to be made upon such certificate shall be based upon the standard industrial mortality table or the English life table number six and a rate of interest not greater than 4 per cent per annum, or upon a higher standard; *provided,* that contributions may be waived or returns may be made from any surplus held in excess of reserve and other liabilities, as provided in the by-laws; and, *provided, further,* that extra contributions shall be made if the reserves hereafter provided for become impaired.

3313. Reserve fund. Exchange of certificates. Vested rights. Any society entering into such insurance agreements shall maintain on all such contracts the reserve required by the standard of mortality and interest adopted by the society for computing contributions as provided in § 3312, and the funds representing the benefit contributions and all accretions thereon shall be kept as separate and distinct funds, independent of the other funds of the society, and shall not be liable for nor used for the payment of the debts and obligations of the society other than the benefits herein authorized; *provided,* that a society may provide that when a child reaches the minimum age of initiation into membership in such society, any benefit certificate issued hereunder may be surrendered for cancellation and exchanged for any other form of certificate issued by the society; *provided,* that such surrender will not reduce the number of lives insured in the branch below five hundred, and upon the issuance of such new certificate any reserve upon the original certificate herein provided for shall be transferred to the credit of the new certificate. Neither the person who originally made application for benefits on account of such child, nor the beneficiary named in such original certificate, nor the person who paid the contributions, shall have any vested right in such new certificate, the free nomination of a beneficiary under the new certificate being left to the child so admitted to benefit membership.

3314. Financial reports to insurance commissioner. An entirely separate financial statement of the business transactions and of assets and liabilities arising therefrom shall be made in its annual report to the insurance commissioner by any society availing itself of the provisions hereof. The separation of assets, funds, and liabilities required hereby shall not be terminated, rescinded, or modified, nor shall the funds be diverted for any use other than as specified in § 3313, as long as any certificates issued hereunder remain in force, and this requirement shall be recognized and enforced in any liquidation, reinsurance, merger, or other change in the condition of the status of the society.

3315. Specific payments. Any society shall have the right to provide in its laws and the certificate issued hereunder for specified payments on account of the expense or general fund, which payments shall or shall not be mingled with the general fund of the society as its constitution and by-laws may provide.

3316. Continuation of benefits. In the event of the termination of membership in the society by the person responsible for the support of any child, on whose account a certificate may have been issued, as provided herein, the certificate may be continued for the benefit of the estate of the child, provided the contributions are continued, or for the benefit of any other person responsible for the support and maintenance of such child, who shall assume the payment of the required contributions.

TITLE 53.

INTEREST.

3320. (1241.) Legal rate of interest. The legal rate of interest upon the loan or forbearance of any money, goods, or things in action shall be eight per cent per annum. But nothing herein contained shall be so construed as to in any way affect any contract or obligation made before the taking effect of this title. Am'd '07, p. 43.

Judgment to include interest, § 7050.

The usury law of 1907 was taken almost verbatim from the statutes of New York.

Interest on small loans, § 4384.

Public funds to draw interest, § 4500.

In a state where there is a statute making usury penal but not declaring the contract void, a usurious bond and mortgage may be enforced for the amount actually due.

Bernheisel v. Firman, 89 U. S. 170; not reported in Utah reports.

An agreement to pay interest on a note which provides for "interest at the rate of two per cent per month from date," does not extend beyond the time said note becomes due and payable by its terms.

Perry v. Taylor, 1 U. 63.

An account stated carries interest from the day of its liquidation.

Godbe v. Young, 1 U. 55; affirmed 82 U. S. 562.

Without the authority of a statute it is error for a judgment to direct that the judgment bear interest.

Reece v. Knott, 3 U. 451; 24 P. 757.

The rule for computing interest when there have been partial payments is to apply the payment to the discharge of the interest due, and if the payment exceeds the interest, the surplus goes toward discharging the principal; if the payment be less than the interest, the surplus of the interest due must not be taken to augment the principal, but interest continues on the former principal until the period when the payments taken together exceed the interest due, and then the surplus is to be applied toward discharging the principal.

Perry v. Taylor, 1 U. 63.

In a decree of foreclosure of trust deed, compound interest is not allowable, and the decree should allow interest only on the principal at the stipulated rate of 18 per cent.

Stevens Imp. Co. v. South Ogden L. B. & I. Co., 20 U. 267; 58 P. 843.

Where the evidence in the record is not sufficient to justify the computation of interest upon an account current, by monthly rests, it is error to allow such computation.

Jones v. Galligher, 9 U. 126; 33 P. 417.

Where a note provides for interest in regular instalments and the maker defaulted, he is liable for interest on the sums in default at the rate of 8 per cent.

Jensen v. Lichtenstein, 45 U. 320; 145 P. 1036.

Recovery for money loaned denied as unconscionable, where there has been repaid a sum amounting to principal and 15 per cent per annum interest.

Carter v. West, 38 U. 381; 113 P. 1025.

Engert v. Chadwick, 40 U. 239; 120 P. 323.

In an action against a city, for extras under a contract, interest should be allowed at least from the time the claim was presented.

Wilson v. S. L. City, 51 U. —; 173 P. —.

INTEREST AS DAMAGES:

If a debt ought to be paid at a particular time and is not, owing to the default of the debtor, the creditor is entitled to interest from that time, by way of compensation for the delay in payment.

Young v. Godbe, 82 U. S. 562.

Where a purchaser agrees to pay into court the purchase price of a mine concerning which the vendor has litigation, the former will be liable for interest during the time he withholds the money.

Wasatch Mining Co. v. Crescent Mining Co., 7 U. 8; 24 P. 586; affirmed 151 U. S. 317.

Where interest is recoverable as damages for delay in payment, it is a matter largely in the discretion of the court.

Culmer v. Caine, 22 U. 216; 61 P. 1008.

In tort for unliquidated damages, plaintiff held entitled to interest from time of bringing action.

Woodland v. U. P. Ry., 27 U. 543; 26 P. 298; decided 1891 but not reported.

In tort for unliquidated damages, interest on the damages assessed from the date of the commencement of the action up to the date of the verdict is not recoverable.

Lester v. Highland Boy G. M. Co., 27 U. 470; 76 P. 341.

Nichols v. U. P. R. R. Co., 7 U. 510; 27 P. 693.

Damages for injury to a shipment while in transit is the amount of loss, with interest, from the time of delivery; the fact that the damages are unliquidated not being by itself reason for not allowing interest.

Fel v. U. P. Ry. Co., 32 U. 101; 88 P. 1003.

Interest on damages for land condemned should be computed from the time the company takes possession.

S. P., L. A. & S. L. R. Co. v. Bd. of Education, 32 U. 101; 99 P. 263.

Where interest is a legal consequence of a demand without stipulation it may be recovered, though not claimed in the pleadings, and interest is allowed in a tort, where personal property is destroyed, from the date of the destruction

Wheatley v. O. S. L., 49 P. 105; 162 P. 86.

3321. (1241x.) Maximum rate. Exceptions. The parties to any contract may agree in writing for the payment of interest, for the loan or forbearance of any money, goods, or things in action, not to exceed twelve per cent per annum; *provided*, that on loans of money only to the amount of $100 or less it may be agreed in writing to take or receive as interest on said loan not to exceed $1 for the first month only of said loan, but thereafter no greater

interest shall be contracted for, taken or received than is allowed in this section. This proviso shall not be construed so as to allow or permit the splitting up of transactions for the loan of money into small amounts for the purpose of evading the provisions of this title. '07, p. 43.

Prior to §§ 3320-3332, an agreement for any rate of interest was lawful in Utah.
Interest on small loans, § 4392.
Where money was left by a principal with an agent to be loaned, and the agent took usury without the knowledge of the principal, and the principal received no part of the usury, the principal was not chargeable with the effects of the agent's misconduct.
Brown v. Johnson, 43 U. 1; 134 P. 590.

3322. (1241x1.) Id. Penalty. No person, association, or corporation shall, directly or indirectly, take or receive any money, goods, or things in action, or in any other way, any greater sum or greater value for the loan or forbearance of any money, goods, or things in action than is prescribed in § 3321. Any person, association, or corporation, their or its agents, servants, employes, clerks, or attorneys, violating any of the provisions of this section is guilty of a misdemeanor. '07, p. 43; am'd '09, p. 180.

If two constructions are possible, the court will take the one against usury, and a corrupt or unlawful intent to violate the usury law on the part of the lender is essential to render the contract usurious.
Cobb v. Hartenstein, 47 U. 174; 152 P. 424.
Where a lender refused to make a loan because the interest would not pay him for looking up the security, and the borrower agreed to pay a reasonable amount for examining the securities, the acceptance of such an amount does not constitute usury.
Fisher v. Adamson et al., 47 U. 3; 151 P. 351.

3323. (1241x2.) May recover usurious loans or forbearance. Every person who, for any such loan or forbearance, shall pay or deliver any sum or value than is above allowed to be received, or the principal or any part thereof of said usurious loan or forbearance, and his personal representatives, may recover in an action against the person who shall have taken or received the same, and his personal representative, the amount of money so paid or value delivered, both as principal and interest, if such action be brought within one year after such payment or delivery. If such action be not brought within said one year and prosecuted with diligence, then the said sum may be sued for and recovered with costs at any time within three years after the said one year by any county superintendent of schools of the county where such payment may have been made, for the use and benefit of the county school fund, and when collected shall be forthwith paid into said fund. '07, p. 43.

In an action to recover back the plaintiff is not bound to establish the usury beyond a reasonable doubt. This act is constitutional.
Cobb v. Hartenstein, 47 U. 174; 152 P. 424.
This section is not applicable to an action to recover pledged property.
Conner v. Smith, 50 U. —; 169 P. 158.

3324. (1241x3.) Bonds, etc., void, when. All bonds, bills, notes, assurances, conveyances, mortgages, deeds of trust, all other contracts or securities whatsoever, and all deposits of goods or other things whatsoever, whereupon or whereby there shall be reserved or taken or secured, or agreed to be reserved or taken, any greater sum or greater value for the loan or forbearance of any money, goods, or other things in action than is above prescribed, shall be void; but this title shall not affect such contracts as have been made previous to the time it shall take effect. '07, p. 44.

Cited in Culmer Paint & Glass Co. v. Gleason et al., 42 U. 344; 130 P. 66.
A negotiable note, tainted with usury is not void as against an innocent purchaser for value before maturity.
Rosenblum v. Gomoll et al., 51 U. —; 173 P. 243.
To forfeit a note for usury the proof must be clear and convincing.
Id.

3325. (1241x4.) When complaint is filed for discovery of money, etc., borrower need not offer to pay interest, etc. Whenever any borrower of any money, goods, or things in action shall file a complaint for the discovery of the money, goods, or things in action taken or received in violation of this title, it shall not be necessary for him to pay or offer to pay any interest whatever on the sum or thing loaned; nor shall any court require or compel the payment or deposit of the principal sum or thing, or any part thereof, as a condition to the granting of relief to the borrower in any case of a usurious loan forbidden by this title. '07, p. 44.

3326. (1241x5.) Interest, how calculated. Whenever in any statute, act, deed, written or verbal contract, or in any public or private instrument

whatever, any certain rate of interest is or shall be mentioned and no period of time is stated for which such rate is to be calculated, interest shall be calculated at the rate mentioned by the year, in the same manner as if the words per annum or by the year had been added to such a rate. '07, p. 44.

3327. (1241x6.) Defendent may call and examine plaintiff. Whenever in any action the defendant shall plead or give notice of the defense of usury and shall verify the truth of his plea or notice by affidavit, he may, for the purpose of proving the usury, call and examine the plaintiff as a witness in the same manner as other witnesses may be called and examined. '07, p. 44.

3328. (1241x7.) Offender to answer to any complaint filed against him. Every person offending against the provisions of this title may be compelled to answer on oath any complaint that shall be filed against him in any court for relief. '07, p. 44.

3329. (1241x8.) Court shall declare any bond, etc., void, when. Whenever it shall satisfactorily appear by the admission of the party, or by proof, that any bond, bill, note, assurance, pledge, conveyance, mortgage, deed of trust, contract, security, or other evidence of debt has been taken or received in violation of the provision of this title, the court shall declare the same to be void, and enjoin any prosecution thereon, and order the same to be surrendered and canceled, and any property, real or personal, embraced within the term of said contracts or securities delivered up if in possession of the defendant in the action; and if the same be in the possession of the plaintiff, provision shall be made in the judgment or decree in the action removing the cloud of such usurious contracts or securities from the title to such property. '07, p. 45.

A forfeiture for usury will not be declared except on clear and convincing evidence that the lender participated in or benefited by the transaction.
Brown v. Johnson, 43 U. 1; 134 P. 590.

Forfeitures hereunder enforced only when proof is clear and convincing.
Culmer Paint & Glass Co. v. Gleason et al., 42 U. 344; 130 P. 66.
Rosenblum v. Gomoll, 51 U. —; 173 P. 243.

3330. (1241x9.) Interest before and after judgment. Any judgment rendered on a lawful contract shall conform thereto and shall bear the interest agreed upon by the parties, which shall be specified in the judgment; other judgments shall bear interest at the rate of eight per cent per annum, which shall be specified in the judgment. R. S. '98, § 1241; '07, p. 45.

Judgment to include interest after verdict or decision, § 7050.

3331. (1241x10.) Not usurious, when. The discount, sale, and transfer in the regular course of business of negotiable paper by one not the maker thereof without intent to violate this title shall not be construed as usurious. '07, p. 45.

A holder without knowledge of previous usurious transactions may recover on the note.
Rosenblum vs. Gomoll, 51 U. —; 173 P. 243.

3332. (1241x11.) Bona fide lease upon shares of real and personal property not usurious. The bona fide lease upon shares of real and personal property by the owner thereof shall not be construed as a usurious contract. '07, p. 45.

One pledging property to secure the payment of a usurious loan, and making payments aggregating more than the money borrowed, has a right, under this section, to recover the pledged property. If such action is subject to any period of limitation it is that fixed by the general statutes.
Conner v. Smith, 51 U. —; 169 P. 158.

TITLE 54.

PROHIBITING THE MANUFACTURE AND USE OF INTOXICATING LIQUORS, AND REGULATING THE SALE AND TRAFFIC THEREIN.

('17, p. 2.)

3341. Objects. This entire title shall be deemed an exercise of the police powers of the state for the protection of the public health, peace, and morals, and all of its provisions shall be liberally construed for the attainment of that purpose.

This chapter is constitutional. State v. Certain Intox. Liqour, 50 U. —; 172 P. 1050.

This chapter abolishes rights in alcoholic liquors, after August 1, 1917, aside from the exceptions expressly provided for in the chapter, no matter when or how acquired, for what use intended, or what place kept or possessed. Id.

3342. Definitions. The word liquors as used in this title shall be construed to embrace all fermented, malt, vinous, or spirituous liquors, alcohol, wine, porter, ale, beer, absinthe, or any other intoxicating drink, mixture, or preparation of like nature, and all malt or brewed drinks; and all liquids, mixtures, or preparations, whether patented or not, which will produce intoxication; fruits preserved in alcoholic liquors of any kind; and all beverages containing in excess of one-half of one per cent of alcohol by volume, shall be deemed spirituous liquors, and shall be embraced in the word liquors as hereinafter used in this title; and all mixtures, compounds, or preparations, whether liquid or not, which are intended, when mixed with water or otherwise, to produce, by fermentation or otherwise, an intoxicating liquor, shall also be deemed to be embraced within such term.

Wherever the words "this title" appear in any of the laws of this state enacted for the suppression of the liquor traffic, commonly called prohibition laws, they shall be construed to mean and include all such prohibition laws of this state.

The word "person" wherever used in this title shall be construed to mean natural persons, firms, co-partnerships, corporations, and all associations of natural persons, whether acting by themselves or by a servant, agent, or employe.

A "druggist" or "pharmacist," for the purpose of this title, is defined as a person who is actually and in good faith engaged in the wholesale or retail drug business and licensed to compound and dispense drugs or medicines.

The words "warehouse manager," whenever used in this title shall be construed to mean the bonded dispenser at wholesale of alcohol, as provided for in § 3346.

3343. Prohibitions. Except as hereinafter provided, the manufacture, sale, keeping, or storing for sale in this state, or offering or exposing for sale, or importing, carrying, transporting, advertising, distributing, giving away, exchanging, dispensing, or serving of liquors, are forever prohibited in this state. It shall be unlawful for any person within this state knowingly to have in his or its possession any intoxicating liquors, except as in this title provided.

3344. Enforcement. For the purpose of enforcing the provisions of this title the governor is hereby authorized and empowered to appoint and employ all necessary assistants, and to deputize and commission any such assistants to make arrests, seize property, initiate and prosecute criminal proceedings and proceedings under the search and seizure or nuisance and abatement laws, and the provisions of law for the removal of officers; and to do and perform any and every act, duty, or thing in the enforcement hereof which may be done or performed by any executive, peace, or prosecuting officer. And for this purpose the governor may deputize or com-

mission any health, food, hotel, or other inspector, or any game warden or probation officer, or any other employe of the state, as well as any other competent person or persons. And any person so deputized and commissioned shall, within the time and scope of his commission, exercise all the powers, privileges, and duties in the enforcement hereof given by law to any executive, prosecuting, or peace officer within the state.

Search and seizure, §§ 3354-3358. Removal of officers, §§ 8625-8639.
Nuisance and abatement laws, §§ 3350-3353.

3345. Penalties. Any person convicted of violation of any of the provisions of this title shall be deemed guilty of a misdemeanor, and, where the punishment therefor is not herein specifically provided, shall be punished by a fine of not less than $50 nor more than $299, or by imprisonment in the county jail for not less than thirty days nor more than six months, or both such fine and imprisonment. A person having once been convicted of a violation of any of the provisions of this title, except § 3361, who thereafter violates the provisions thereof, shall be considered a persistent violator of this title, and shall be deemed guilty of felony, and, upon conviction thereof, shall be imprisoned in the state prison at hard labor for not less than three months nor more than two years. It shall be the duty of the prosecuting attorney, in all cases, to the best of his ability, to ascertain whether or not the defendant has at any time been convicted of any violation of any of the provisions of this title, and if so, such fact shall be set out in the complaint, and the said prosecuting attorney shall, at the trial of such second or subsequent offense, introduce in evidence a certified copy of any or all such prior judgments of conviction, which shall be sufficient evidence of any such prior convictions; and said prosecuting attorney shall not be permitted to use his discretion in charging and proving said second or subsequent offense.

3346. Sales and shipments. Qualifications and duties of warehouse managers. The governor is hereby authorized and empowered to prescribe rules and regulations for the sale of alcohol for scientific and manufacturing purposes only, and for the sale of alcohol which shall have been denatured by some process approved by the United States commissioner of internal revenue. The governor shall establish or designate a warehouse or warehouses, and appoint or designate a manager or managers thereof, who shall, in accordance with rules and regulations prescribed by the governor, have exclusive authority, except as provided in § 3347, to buy, import, receive, sell, and distribute alcohol; and such warehouse manager or managers shall bear all the expense incident to such business, and shall promptly fill all orders for alcohol at a price not to exceed 10 per cent of the cost of such alcohol laid down at such warehouse, unless a higher per cent be authorized by the governor. The warehouse manager shall have authority to buy and import and make shipments or deliveries of alcohol only according to rules made by the attorney-general, and shall make no imports, shipments, or deliveries which do not bear on the outer package or container, in a conspicuous place, a label or tag securely affixed, obtained from and designed and authorized by the attorney-general, which shall bear the words:

Alcohol shipment No. ..... Date ..... Authorized by the attorney-general.

Said labels or tags shall be numbered consecutively by the attorney-general and an accurate record of all shipments or deliveries, in numerical order bearing the label number, shall be kept by the warehouse manager, which records shall show the date of sale or purchase, quantity bought or sold, name and address of purchaser, and means or route of shipment or delivery. Such records and the stock shall at all times be open to inspection by all executive, prosecuting, and peace officers. Any warehouse manager appointed or designated by the governor, pursuant to this title, shall, before entering upon the duties imposed by this title, give a good and sufficient bond to the state of Utah in the sum of not less than $3000, and conditioned upon the faithful

discharge and performance of such duties Such bond shall be approved by the governor and filed with the secretary of state.

3347. Exceptions. Permits as to wholesale by attorney-general. Records and reports. Alcohol may be purchased at wholesale by druggists, hospitals, scientific and manufacturing institutions only from the warehouse managers, and only on written permit of the attorney-general, for scientific and manufacturing purposes, by filing with the attorney-general a statement in writing, under oath, stating that the applicant desires the alcohol for lawful purposes, and setting forth such purposes. A separate statement shall be made for each purchase on forms supplied by the attorney-general; such statement giving the name, nature, and place of business of the applicant, the place where the alcohol is to be used, the nature of said business, the purposes for which said alcohol is to be used and the quantity desired, and that said applicant will not violate any of the provisions of this title. Any person authorized to ship alcohol shall fill in the actual date of shipment indelibly on tags or labels. An accurate record of all shipments and sales of alcohol must be kept by druggists and a report of all such sent to the attorney-general on the first day of each and every month, giving the date and number of shipment as shown by the tag or label, quantity of alcohol sold or shipped, name and address of purchaser, and means and route of delivery. Any person failing so to record and report such sales and shipments, or falsely making any record or report, shall be deemed guilty of a misdemeanor.

3348. As to retail. Permits by justices of the peace. Duties of druggists. Sales to certain persons prohibited. Penalty. Any person who shall desire to purchase alcohol for scientific or manufacturing purposes, except as provided in § 3347, shall apply in person to a justice of the peace of the precinct or city for a permit to make such purchases. To procure such permit, he shall make and file with the justice of the peace in the county where the alcohol is to be used a statement in writing under oath, stating that the affiant is not of intemperate habits or addicted to the use of any narcotic drug; that he is of sound mind, not a minor or an Indian; that such alcohol will not be used as a beverage nor for any purpose other than that stated, and shall set forth the quantity desired and the purpose for which he desires said alcohol; and that he will not use nor permit any other person to use any such alcohol for an unlawful purpose, and he shall give his residence (street address, in cities where same is generally required for delievery of United States mail), and the place at which such alcohol is to be used, and shall sign his name in full in ink. If the justice of the peace is satisfied as to the good faith of the applicant, he shall issue to said applicant, filled out in ink, a permit to purchase alcohol for scientific or manufacturing purposes. The original of said permit shall have attached thereto a duplicate copy and each shall be numbered with the same number, and be in substantially the following form:

State of Utah, county of ....., ss.

....., residing at ....., is hereby permitted to purchase alcohol in the amount of ..... (here insert quantity written in ink, in words and numerals), to be used for scientific or manufacturing purposes. This permit can be used for only one purchase, and the copy hereof attached hereto shall be conspicuously and securely pasted upon the package containing said alcohol, and this permit to purchase shall be void after twenty days from date hereof.

By order of the justice of the peace of ..... (precinct or city).

Dated this ..... day of ....., 19.....

.....

Justice of the peace.

Sales of alcohol, which are shipped to the purchaser by druggists on permits of justices of the peace, must bear on the outer package in a con-

spicuous place a label or tag, securely affixed, supplied by the attorney-general, which shall bear these words:

Alcohol shipment No. ..... Date ..... Druggist Permit. Authorized by the attorney-general of Utah.

All justices of the peace who shall issue permits under this title shall enter the number of such permit so issued upon the statement and application for the same, together with the quantity of alcohol allowed and the date, and shall file such applications in numerical order, and keep the same on file for at least one year. Such application shall be open to the inspection of any executive, prosecuting, or peace officer at any time. The permit mentioned in this section shall authorize the applicant to purchase, and any druggist to sell and deliver or ship to such applicant, the quantity named in said permit. The permit shall be canceled by such druggist, and kept on file by him in order by dates for at least one year, and the copy of said permit shall be, by the druggist, conspicuously and securely pasted upon the receptacle containing said alcohol, and shall so remain upon said receptacle so long as the same shall contain alcohol. Said permit shall authorize only one purchase and sale. It shall be unlawful for any druggist to sell alcohol without the permit herein specified, or for any person to keep or have in his possession any alcohol, unless the receptacle containing the same shall be distinctly labeled with the copy of the permit authorizting the purchase of the same, or the tags or labels furnished by the attorney-general authorizing the purchase of the same, or the tags and labels furnished by the attorney-general authorizing shipments. The permits on file at any druggist's place of business shall be open to public inspection; *provided, however,* that alcohol, liquors, alcoholic extracts, essences, medicines, or any preparation containing in excess of one-half of one per cent of alcohol by volume, which can be used as a beverage, shall not be sold or furnished by druggists or any other dealer or persons to any person of intemperate habits, or addicted to the use of any narcotic drug, or to a minor, an Indian, or a person of unsound mind. A signed notice in writing served on any justice of the peace or any druggist or other dealer or other person by a peace officer, or by the wife, husband, mother, father, sister, brother, son, daughter, or guardian of any such minor or person, informing any such justice of the peace, druggist, or other dealer or person that the applicant or purchaser is intemperate, or addicted to the use of any narcotic drug, a minor, an Indian, or a person of unsound mind, shall be prima facie evidence of such fact. Any justice of the peace who shall issue a permit to buy alcohol, and any person who shall sell any liquors or preparations mentioned in this paragraph, for six months thereafter, to such debarred person, after such notice has been served, without a hearing having been had to determine the facts, shall be deemed guilty of a misdemeanor. A conviction of any justice of the peace under this section shall also be a forfeiture of his office, and the court before whom such conviction is had shall, in addition to lawful penalties for misdemeanor, order and adjuge a forfeiture of such office. In case of notice served as aforesaid, a hearing thereon shall be held by the justice of the peace, upon petition of the applicant for liquor. Every informant serving notice as aforesaid shall be subpœnaed to appear and testify at such hearing and be given an opportunity to produce any evidence therein, provided that any peace officer, relative, or person, as described herein, upon such hearing, may take a change of venue in the manner provided by law therefor.

3349. Manufacture and sale of vinegar, alcohol, non-intoxicating cider, and food preparations. Sale of Jamaica ginger forbidden. The provisions of this title shall not be construed to prevent any temperate person from manufacturing vinegar or preserved non-intoxicating cider for use or sale; or to prevent the manufacture of pure alcohol for sale to the warehouse manager only, or for shipment out of the state; *provided,* that any person who may engage in the manufacture of vinegar, preserved non-intoxicating

cider, or alcohol for sale, as herein provided, shall, before commencing the manufacture thereof, first obtain a permit from the attorney-general, by filing an affidavit to the effect that said permit is for the purpose of the manufacturing as herein provided; and said person engaged therein shall render a quarterly statement under oath to the attorney-general, giving such facts as shall be called for by the attorney-general, and setting forth the amount of all such vinegar, preserved non-intoxicating cider, or alcohol manufactured, amount sold to warehouse managers and the amount shipped out of the state; or to prevent the manufacture or sale for lawful purposes of any food preparation, or any United States pharmacopœia or national formulary preparation in conformity with the Utah pharmacy laws, which preparation conforms to a standard established by the state chemist, and contains no more alcohol than is absolutely necessary to extract the medicinal, flavoring, or perfume properties of the drug, oil, sap, or other substance, and to preserve the same; and which substance is manufactured and sold as medicines, flavoring extracts, essences, tinctures, perfumes, or other similar products for legitimate and lawful purposes and not as beverages; *provided,* that it shall be unlawful for any person to manufacture or sell or otherwise dispose of the essence or tincture of Jamaica ginger, or any like substances; and *provided, further,* that any preparation containing in excess of one-half of one per cent of alcohol by volume, and which is shown on analysis by the state chemist can be used as a beverage, shall not be sold; or to prevent the manufacture or sale of wood or denatured alcohol under the rules established by the governor, and in compliance with the formulas and rules established by the United States; or to prevent the importation of wines for sacramental purposes only, by religious bodies, in the same manner as provided in § 3346 for the importation of alcohol by the warehouse manager.

Pharmacy laws, §§ 4409-4434.

3350. Property used in violation of this title declared common nuisances. All premises, buildings, vehicles, boats, and all other places where intoxicating liquors are manufactured, sold, bartered, kept, stored, or given away, or used in violation of law, or where persons are permitted to resort for the drinking of intoxicating liquors as a beverage, or where intoxicating liquors are kept for use, sale, barter, or delivery, in violation of law, and all intoxicating liquors, bottles, glasses, kegs, pumps, bars, and other property kept in and used in maintaining such premises, buildings, vehicles, boats, or other places, are hereby declared to be common nuisances; and any person who maintains, or assists in maintaining, any such common nuisance shall be held guilty of a misdemeanor, and upon conviction shall be punished for each offense, as provided in § 3345 for offenses under this title.

3351. Injunction and abatement by suit. Whenever a nuisance is kept, maintained, or exists, as defined in this title, the same may be enjoined and abated by a suit in equity, as provided by §§ 4275-4282, for the abatement of common nuisances; or if any person shall be convicted in a criminal trial of maintaining any such nuisance as herein defined, an injunction shall issue perpetually enjoining said person from maintaining such nuisance the same as though a formal application for an injunction had been applied for. Upon such conviction, the county attorney shall proceed against the property used in keeping or maintaining such a nuisance as provided in §§ 4275-4282, and the record of such conviction shall be prima facie evidence of the fact of said nuisances being kept or maintained at the time and place charged.

3352. Lease of premises where nuisance is maintained is void. If the tenant of a building or tenement uses such premises, or any part thereof, in maintaining a common nuisance as herein defined, or knowingly permits such use by another, such use shall render void the lease under which he holds, and the right to possession shall revert to the owner or lessor, who may avail himself of the remedy provided by law for the forcible detention thereof.

3353. Owner failing to abate nuisance deemed guilty. Any one who knowingly permits any building or premises owned or leased by him, or under his control, or any part thereof, to be used in maintaining a common nuisance, as defined in this title, or who, after being notified in writing by the prosecuting officer or officers, or citizen, of such use, omits to take all proper measures, either to abate said nuisance or, failing therein, to eject therefrom the person or persons so using the same, shall be deemed guilty of assisting in the maintaining of such nuisance.

3354. Search and seizure. Duties of officers. Reports to be made. If any district, county, city, or town attorney or any peace officer or any other person has probable cause to believe that liquors are possessed, manufactured, sold, bartered, given away, or otherwise furnished in violation of this title, or are kept for the purpose of selling, bartering, or giving away or otherwise furnishing in violation of law, it shall be the duty of any such attorney, peace officer, or person, forthwith to make and file with the judge of the district court or any city, town, or precinct justice of the peace, written information supported by his oath or affirmation that he has information of and reason to believe, and does believe, that this title is being violated at a certain place, stating the facts within his knowledge and upon which he bases his belief; and he shall describe as particularly as may be the place, and the names of the persons, if known, participating in such unlawful act. Said judge or justice of the peace, upon finding probable cause to believe that the facts stated in such information are true, shall issue a search warrant, directed to any peace officer in the county whom the complainant may designate, describing as particularly as may be the liquors and the place described in said information, and the persons named or described in said information as the owners or keepers of said liquors, and commanding the said officer to search thoroughly said place; and on finding liquors in unlawful possession or use, to arrest persons found therein and bring them before said court; and to seize the said liquors with the vessels containing them and all implements, furniture, and fixtures used or kept for such illegal acts, and keep the same securely until final action be had thereon. Whereupon the said officer to whom such warrant shall be delivered shall forthwith obey and execute as effectively as possible the commands of said warrant, and make return promptly of his doings to said judge or justice, with an itemized inventory of all liquors and property or things seized; and also a list of all persons in whose possession the same were found, if any; and if no person be found in possession of said liquor or property his return shall so state; and said officer shall securely keep all liquor and other things so seized by him until final action is had thereon. A copy of said warrant shall be served upon the person or persons found in possession of any such liquors, furniture, or fixtures so seized, and if no person be found in possession thereof, a copy of said warrant shall be posted in a conspicuous place on the building or room wherein the same are found. If admission to such building or room is refused, the officer directed to serve the warrant is hereby authorized and required to force open the same. If fluids are poured out, or otherwise destroyed, by any tenant, assistant, or other person, when the premises are searched or about to be searched, apparently for the purpose of preventing their seizure, said fluids shall be held to be prima facie intoxicating liquors, and intended for unlawful use, sale, barter, exchange, or giving away. Any peace officer who shall make a seizure of liquors or any other property under the provisions of this title shall forthwith report in writing on forms supplied by the attorney-general such act, together with detailed information as to the property seized and persons arrested, with the address of the place from which such property was seized, to the prosecuting attorney of the city or county in which such seizure was made, and also to the attorney-general.

Search warrant, §§ 9368-9388. Seizure without warrant, § 3359.

3355. Seized property not released. Trial on merits. Conviction bar

to all suits. When any liquor, vessels, property, or other things shall have been seized by virtue of any such warrant, the same shall not be discharged or returned to any person claiming the same by reason of any alleged insufficiency of description in the warrant, of the liquor, property, or place, nor by writ of replevin, or claim and delivery, or any other process; but the claimant shall only have the right to be heard on the merits of the case; and final jugment of conviction in such proceedings shall in all cases be a bar to all suits for the recovery of any liquors or other things seized, or of the value of same, or for damages alleged to arise by reason of the seizing and detention thereof.

3356. Payment of internal revenue tax prima facie evidence of manufacture and sale. A copy of entries made in the records of the United States internal revenue collector, certified by said collector or a duly qualified notary public, showing the payment of the United States internal revenue special tax after August 1, 1917, for the manufacture or sale of intoxicating liquors, shall be prima facie evidence in the courts of this state of such manufacture or sale by the party named therein within the period set forth in such record.

3357. Returns. Jurisdiction of courts. Proceedings as in criminal prosecutions. Judgment. In the event of a seizure under the warrant as provided for in § 3354, the officer shall forthwith make a return of his acts thereunder, and if said warrant has been issued by a justice of the peace, and by said return it appears that liquors, vessels, or other things used for purposes of selling or otherwise disposing of such liquors contrary to law have been found upon the premises described in said warrant, the jurisdiction of the justice of the peace shall thereupon cease, except that the justice issuing such warrant shall forthwith certify the record and all files to the district court of the county in which said premises are situated, and from time of filing such records and files with the clerk of said district court said court shall have jurisdiction to proceed with said cause and determine the merits thereof as provided by law; and the clerk of the said court shall fix a time for hearing said matter, of which notice shall be given as provided herein. In all cases upon the filing of the warrant and return of the officers in the district court, the clerk thereof shall fix a time for hearing said matter, and shall cause such notice to be left at the place where said liquors were seized; and if said place be a dwelling house, store, or shop, posted in some conspicuous place on or about the said building; and also to be left with or at the last known and usual place of residence of the person named or described in said information as the owner or keeper of said liquors; if he be a resident of this state, a notice summoning such person and all others whom it may concern to appear before said court at a place and time named in said notice, which time shall not be less than five nor more than fifteen days after the posting and leaving of said notice, and show cause, if any they have, why said liquors, together with the vessels in which the same are contained, and other property should not be forfeited; and said notice shall, with reasonable certainty, describe said liquors, vessels, and other property or things, and shall state where, when, and why the same were seized. At the time and place fixed in said notice, the person named in said information, or any person claiming any interest in said liquors, vessels, and other property, or any part thereof, may appear and show cause why the same should not be forfeited. If any person shall so appear he shall become a party defendant in said cause, and said court shall make a record thereof. Whether any person shall so appear or not, said court shall, at the time fixed, proceed to the trial of the case, and the county or district attorney shall appear before said court and prosecute said information, and show cause why said liquors, vessels, or other property should be adjudged forfeited. The proceedings in the trial of such case may be the same substantially as in the cases of criminal prosecutions before such courts, and if any person shall appear and be made a party defendant as herein pro-

vided, and shall make a written plea that said liquors, vessels, or other property, or any part thereof, claimed by him, were not owned or kept with intent to be used in violation of the law, such party defendant may demand a jury to try the issue; and if, upon the evidence presented, the said court or jury, as the case may be, shall by verdict find that said liquors, vessels, or other property was, when seized, owned or kept by any person for the purpose of being sold or used in violation of law, the said court shall render judgment that said liquors, vessels, or other property, or any part thereof, be forfeited. If no person be made defendant in manner aforesaid, or if judgment be in favor of all the defendants who appear and are made such, then the costs of the prosecution shall be paid as in ordinary criminal prosecution where the prosecution fails. If judgment shall be against only one party defendant appearing as aforesaid, he shall be adjudged to pay all the costs of proceedings in the seizure and detention of the liquors or other things claimed by him, and of the trial up to the time of judgment. But if said judgment shall be against more than one defendant claiming distinct interest in said liquor or other things, then the cost of said proceeding and trial shall be, according to the discretion of said court, equitably apportioned among the said defendants for the amounts of costs so adjudged against them. Any person appearing and becoming party defendant as aforesaid may appeal from said judgment or forfeiture, as to the whole or any part of said liquors, vessels, or other property claimed by him and so adjudged forfeited.

3358. Seized property sold, destroyed, or restored. Costs of proceeding. Whenever it shall be finally decided that the liquors, vessels, or other property seized as aforesaid are forfeited, the court rendering final judgment of forfeiture shall issue to the officer a written order, directing him forthwith publicly to destroy said liquors, vessels, or other property; *provided, however,* that if some of such property, except liquors, can be used for lawful purposes, and in the discretion of the court the public interest would be served by selling instead of destroying same, then the court shall direct the officer to sell such property at public auction to the highest bidder after having posted a notice of such intended auction in some conspicuous place on or about the building in which the trial was had, not less than ten days next preceding the date of said auction, said notice containing an inventory and brief description of such property, and time and place to be offered for sale. Upon application of any person desiring to inspect such property, after the order to sell has been issued by the court, the officer in whose custody said property is held shall permit such inspection. All moneys derived from such sales shall be turned over to the county treasurer, and his receipt therefor, together with a report of the sale, listing the selling price of all parcels sold, and a return of said order of the court, with his doings endorsed thereon, shall be immediately made by said office to said court. Whenever it shall be finally decided that any liquors or other property so seized are not liable to forfeiture, the court by whom such final decision shall be rendered shall issue a written order to the officer having the same in custody, or to some other peace officer, to restore said liquors, vessels, or other property to the place where they were seized, as nearly as may be, or to the person entitled to receive them, which order the officers shall obey and make return thereon to the court of his acts thereunder, and the costs of the proceedings in such case attending the restitution, as also the costs attending the destruction or sale of such property in case of forfeiture, shall be taxed and paid in the same manner as is provided in case of ordinary criminal prosecution where the prosecution fails.

3359. Arrest and seizure without warrant. Property held as in other cases. When a violation of any provisions of this title shall occur in the presence of any sheriff, constable, marshal, police officer, or other officer having power to serve criminal process, it shall be the duty of such officer, without warrant, to arrest the offender and seize the intoxicating liquors, vessels, and other property so unlawfully used, and to take such offender or offenders

immediately before the court or judge having jurisdiction in the premises, and there make complaint under oath, charging the offense so committed; and he shall make return, setting forth a particular description of the liquors, vessels, and other property seized, and of the place where the same were seized; whereupon the court or judge shall issue a warrant commanding and directing the officer to hold safely the property so seized in his possession until discharged by due process of law; and such property shall be held in like manner as if the seizure had been made under a warrant therefor. If any peace officer shall have probable cause to believe any person has on or about his person in any kind of receptacle, or in any vehicle under his control, liquors in any quantity, in violation of any of the provisions of this title, such peace officer shall have authority to examine such vehicle and receptacle and the contents thereof, and the finding of any liquors in the possession of any such person, or under his control, not bearing a permit of a justice of the peace or a tag or label of the attorney-general, shall be prima facie evidence that such liquors were kept for an unlawful purpose, and such person shall be forthwith arrested by such officer.

3360. Officers to enforce provisions. Persons to render assistance. Failure subjects officers to removal. Appeals allowed. All sheriffs, deputy sheriffs, mayors, police judges, justices of the peace, constables, marshals, and peace officers, and all district, county, city, and town attorneys, and clerks of courts shall diligently enforce the provisions of this title. And for the purpose of enforcing this title, all peace officers shall have access, ingress, and egress to and from all places of business, factories, farms, buildings, carriages, and cars used in the manufacture, storage, transportation, or sale of any liquors, alcoholic essences, extracts, medicines, or other such preparations, cider, or other beverages, and also in restaurants, dining halls, cafes, places of public resort, hotels, and all rooms thereof, and all other places where beverages are prepared, stored, or served. They shall also have power and authority to open any package, can, or vessel containing or supposed to contain any article manufactured, sold, or exposed for sale, or held in possession with intent to sell, in violation of the provisions of this title, and may inspect the contents thereof, and may take samples therefrom for analysis. All dealers, clerks, bookkeepers, express agents, railroad officials, employes, or common carriers shall render to them all the assistance in their power, when so requested, in tracing, finding, or discovering the presence of any article prohibited by law, and in securing samples thereof as herein provided for. Any refusal or neglect on the part of such dealers, clerks, bookkeepers, express agents, railroad officials, employes, or common carriers to render such aid, or to furnish such samples for analysis, as provided for in this section, shall be a misdemeanor, and shall be punished as herein provided. Immediately upon conviction of any person in any town, city, or county of this state for violation of any provision of this title, or for violation of any city ordinance relating to liquors, it shall be the duty of the clerk of the court or the justice of the peace to notify the attorney-general of such conviction, giving in writing full particulars of the case on forms supplied by the attorney-general. If any officer shall fail or refuse to do or perform any duty required by this title, he shall be removed from office as herein provided. For the purpose of such removal, a petition may be filed in the district court of the county wherein such officer resides, in the name of the state, on the relation of any citizen thereof, upon recommendation of a grand jury, or on the relation of the board of county commissioners, or any executive, prosecuting, or peace officer, or of an attorney appointed by the governor under the provisions of this title. Summons shall be issued and proceedings had thereon to final judgment as in other civil cases; *provided, however,* if an order is made suspending such officer from his office as herein provided, he shall be entitled to demand and have a trial within ten days, if the court be in session. If the court be not in session then the accused shall be entitled to demand and have a trial within

the first ten days of the next term of court. A change of judge or a change of venue shall be allowed as in other civil cases. Pending the trial of said cause, application may be made by the relator therein, or by any attorney appointed by the governor under the provisions of this title, to any judge of the supreme court or to the judge of the district court wherein such cause is pending, for an order suspending said officer from his office during the pendency of said suit; and, after reasonable notice to the defendant of such application and an opportunity to show cause, if any there be, in opposition thereto, if it shall appear to the satisfaction of such judge that such officer has failed, neglected, or refused to perform the duties required of him by this title, then it shall be the duty of such judge to enter an order suspending such officer from office until final trial of the case; and in such order said judge shall appoint a proper person to hold such office and perform all the duties thereof during the suspension. Appeals shall be allowed in any such case as in other civil cases.

3361. Drinking intoxicating liquors in public a misdemeanor. Any person who shall in any street or alley, public place, store, restaurant, hotel lobby or parlor, or in or upon any passenger coach, street car, or upon any other vehicle commonly used for the transportation of passengers, or in or about any depot, platform, waiting station or room, or at any public gathering, drink any intoxicating liquors of any kind, or shall be drunk or intoxicated, shall be deemed guilty of a misdemeanor.

Drunkenness and intoxication by the use of intoxicating liquors are criminal, wherever and whenever they may occur at any place in the state.
Kolb v. Peterson, 50 U. —; 168 P. 97.

3362. Advertising intoxicating liquors a misdemeanor. It shall be deemed a misdemeanor for any person, either directly or indirectly, to advertise intoxicating liquors, imitations thereof, or substitutes therefor, in this state, for sale or gift, in any newspaper, periodical, circular, hand bill, or price list, or on any sign, signboard, billboard, bulletin board, or by displaying or exhibiting said liquors, or in any manner whatsoever advertising same; or for any owner, officer or person in charge of any newspaper, periodical, sign, signboard, billboard, bulletin board, printing office, advertising agency, or publicity bureau, or any other person, to publish or distribute any matter in this state which either directly or indirectly advertises intoxicating liquors.

3363. Appeals allowed. In all cases arising under this statute the state shall have the right to appeal as to the questions of law.

3364. Records of carriers evidence in court. Failure to keep constitutes misdemeanor. Common carriers within this state are hereby required to keep a separate book at the point of delivery in which shall be entered, immediately upon receipt thereof, the name of the person to whom liquors are shipped, the amount and kind received, the date when delivered, and by whom delivered and to whom delivered, after which record shall be a blank space in which the consignee shall be required to sign his name in ink before such liquors are delivered to such consignee, which book shall be open to public inspection at any time during business hours of the company. Such records shall constitute prima facie evidence of the facts therein stated, and shall be admissible as evidence in any court of this state. Any employe or agent of any common carrier failing or refusing to comply with the provisions of this section shall be deemed guilty of a misdemeanor.

3365. Associate counsel. Dismissal of causes only after statements. Any citizen, association, or society may employ an attorney or attorneys to assist the prosecuting attorney to perform his duties under this title, and such attorney shall be recognized by the court and by the said prosecuting attorney as associate counsel in the proceedings; and no prosecution shall be dismissed over the objection of such associate counsel until the reasons of the prosecuting attorney for such dismissal, together with the

objections thereto of said associate counsel, shall have been filed in writing, argued by counsel, and fully considered by the court.

3366. Property rights. There shall be no property rights whatsoever in any liquors, vessels, appliances, fixtures, bars, furniture, and implements kept or used for the purpose of violating, or used in violation of, any provision of this title.

3367. Opening packages in transit prohibited. It shall be unlawful for any person or persons to open any original package or packages in which intoxicating liquor is being shipped while the same is in transit and undelivered; or for any common or special carrier, or any agent or employe of the same, to allow any original package or packages in which intoxicating liquor is being shipped to be opened or divided in any manner whatsoever, while same is upon their premises or in their possession except as provided in § 3360.

3368. Different offenses united for trial under separate counts. When a defendant has been held to answer to the district court for more than one offense under this title, the prosecuting attorney may, in filing his information against such defendant, include therein all the offenses for which such defendant is then held to answer to such district court, stating each offense under separate counts in such information; and upon the filing of such information, the proceedings thereunder shall be the same as though one offense only were charged therein, except that the defendant shall in one trial be tried on all offenses contained therein, and upon the trial of such defendant thereunder, he may be convicted of one or more of the offenses charged therein as the evidence may warrant; and the failure of the jury to find the defendant guilty under any count shall be deemed an aquittal of the defendant of the offense contained in such count.

3369. Accomplices. Exceptions as to agents of authorities. None excused from testifying. Any person who shall aid, abet, counsel, or procure an unlawful sale, unlawful purchase, unlawful gift, or other unlawful disposition of liquors, or shall act as agent or assisting friend of the seller in procuring or effecting the unlawful sale or purchase of any liquors, shall be guilty of a misdemeanor, and punished as provided in § 3345. Nothing in this title shall be construed as prohibiting any person from purchasing liquors contrary to the provisions of this title when acting as the agent of the authorities charged with the enforcement of this title in the detection and conviction of violators of said laws. No person shall be excused from testifying as to any offense committed by another under this title by reason of his testimony tending to incriminate himself, but the testimony given by such person shall in no case be used against him, nor shall he be prosecuted for the offense as to which he testified.

3370. Prescriptions limited. Penalty for violation. It shall be unlawful for any physician, veterinarian, or other person to prescribe for any person any liquors for beverage purposes, or any compound containing in excess of one-half of one per cent by volume of alcohol which is capable of being used as a beverage; or to prescribe any medicine containing in total content of such prescription more than four ounces of alcohol, and such prescription shall not be refilled within seven days. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and shall be punished as provided in § 3345.

3371. Revocation of licenses. Upon conviction of any physician, druggist, or veterinarian for violating any of the provisions of this title, the court before whom such person shall be tried and convicted shall cause a certified copy of such jdgment of conviction to be certified to the state, county, or city board having authority to issue licenses to any such physician, druggist, or veterinarian, as the case may be; and such board shall thereupon declare forfeited the said license, and the same shall become null and void; and no license shall thereafter for one year be granted to the said person to prac-

tice medicine, pharmacy, veterinary science, or to dispense drugs in this state. If any keeper of a hotel, boarding house, pool room, billiard room, bowling alley, store, drug store, or other place requiring any license, or any employe with his knowledge, consent, connivance, or acquiescence, shall keep, store, dispense, or use, contrary to the provisions of this title, any liquors, in addition to the penalties prescribed for the violations of this title, the license of such place shall be revoked for one year for the first offense, and for the second offense no such license shall be granted at the same place or to the person convicted for a period of two years; *provided,* that where the place is run under a lease by a person or persons other than the true owner of the building, nothing herein shall operate to prohibit the issuance of a license to a new lessee who was not in any way connected as an employe or otherwise with the former business therein conducted at the time of the revocation of the license.

3372. Persons may be compelled to disclose evidence. Any person shall be compellable in any proceeding had under this title to disclose from whom or from what place he has received liquors. For a failure or refusal to make such disclosure, if the judge in such proceeding shall be satisfied that such person knows the facts demanded to be disclosed, he shall be guilty of contempt, and shall be fined not less than $5 nor more than $50, and be committed to the jail for a period not exceeding thirty days. No person shall be excused from testifying in any proceeding brought under this title before a judge or justice of the peace on the ground that his testimony might incriminate him, but no person shall be prosecuted or punished on account of any transaction or matter or thing concerning which he shall be compelled to testify, nor shall such testimony be used against him on any prosecution for any crime under the laws of this state.

3373. Perjury, how punished. Any person who shall make any false or any perjured statement in any document, application, affidavit, permit, trial, inquisition, or hearing filed, made, given, or held under this title, or who shall violate any such statement made, shall be guilty of a misdemeanor, and for the second and each subsequent offense he shall be deemed guilty of a felony, and shall be punished as provided for in § 3345.

3374. Inquisitions. Refusal or disobedience punished. If the prosecuting attorney of any district, county, city, or town shall be notified by any officer or other person, or shall have knowledge of any violation of any provisions of this title, it shall be his duty forthwith diligently to inquire into the facts of such violation; and he may make and file, with any justice of the peace or judge of a district court in his county, a statement setting forth that he has probable cause to believe that this title has been or is being violated in such county, and that certain persons, naming them, have information concerning, or knowledge of, such violations; and upon the filing of such statement, or upon the filing by any citizen of an affidavit containing the same information, it shall be the duty of such judge or justice of the peace to issue subpœnas for the persons named in such statement or affidavit, requiring them to appear before him at a time and place to be designated therein, to testify and produce any books, papers, or things that will aid or assist in the prosecution of such investigation concerning any violation of the provisions of this title. Such subpœnas may be served by any person designated by the complainant, judge, or justice of the peace, and shall be served and returned in the same manner as subpœnas in ordinary criminal cases. Any judge or justice of the peace acting under the provisions of this section shall have the power to adjourn such proceedings from time to time, and to punish any witness for contempt or on account of his refusal to be sworn or to answer questions as a witness or to sign his testimony; and the attendance of any witness may be by such magistrate compelled by attachment. If the testimony of any witness at such investigation shall disclose the fact that an offense has been committed, the prosecuting attorney shall immediately prosecute the person or persons committing such offense.

When such witness (or witnesses) shall appear before the judge or justice of the peace, he shall be sworn to make true answers to all questions propounded to him touching the matters under investigation, and the testimony of each witness shall be reduced to writing by the court or under his direction, and shall be signed in ink by the witness. Any disobedience to the subpœna of the court or any refusal to be sworn as a witness, or to sign the testimony given by him, or any refusal to answer any proper questions propounded by the prosecuting attorney or by the court in such inquiry, or any disclosure of any evidence so taken or of any names of witnesses, except when lawfully required to testify as a witness in relation thereto, shall be a misdemeanor.

3375. Sheriffs to enforce law in towns and cities. Other officers not relieved thereby. The sheriffs of the several counties of this state are hereby authorized, and it is made their duty, to enforce the provisions of this title within incorporated cities and towns with the same diligence as within territory in the respective counties outside of such cities and towns; but this provision shall not be so construed as to relieve in any degree whatsoever any city executive, prosecuting, or police officer of his duty and obligation to enforce the provisions of this title.

3376. Governor and attorney-general authorized to initiate and carry on prosecutions. The governor and the attorney-general of the state of Utah are each hereby given the power and authority to initiate and carry on prosecutions for violations of this title in any and all political subdivisions of this state; and all city, county, precinct, and state executive, prosecuting, and peace officers are hereby charged with the enforcement of the provisions hereof; and in the event of the failure of any local officer to take the necessary steps for the enforcement of this law, any and all executive, prosecuting, and peace officers of any larger political unit within which such officer so failing or refusing has jurisdiction are hereby clothed with authority to take the necessary steps for the enforcement of this law.

3377. Holding of any part of this title unconstitutional not to affect remainder. If any section, subsection, clause, or phrase of this title is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this title.

3378. Inventories to be filed by certain dealers. Within two days after the taking effect of this title, every druggist, retail and wholesale liquor dealer within this state is required to file an inventory of all liquors in his possession at the close of business on July 31, 1917. Said inventory must be verified and set forth in detail as to the kind and quantity of all such liquors, and must be filed with the county clerk on August 2, 1917.

3380. Repeal. All acts and parts of acts in conflict with the provisions of this title are hereby repealed.

3381. Title to take effect. This title shall take effect on the 1st day of August, 1917; and wholesale and retail liquor dealers and druggists are allowed ten days after August 1, 1917, within which to remove from the state of Utah all intoxicating liquors in their possession.

TITLE 55.

IRRIGATION AND WATER RIGHTS.

CHAPTER 1.

STATE ENGINEER, WATER RIGHTS ON STREAMS, ETC.

3399. (1261.) Office of state engineer created. Powers and duties. There shall be a state engineer, who shall be appointed by the governor of the state and be confirmed by the senate. He shall hold his office for the term of four years, and until his successor shall have been appointed and qualified. He shall have general supervision of the waters of the state and of their measurement, apportionment, and appropriation, and of all division superintendents and district supervisors. He shall have power to make and publish such rules and regulations as he may deem necessary from time to time to fully carry out the provisions of this title, and secure the equitable and fair apportionment of the water according to the respective rights of appropriators. No person shall be appointed to the office of state engineer who has not such theoretical knowledge and practical experience and skill as shall fit him for the position. R. S. '98, § 2451; '01, p. 141; '03, p. 88; '05, p. 145.

This act must be liberally construed.
Pool v. Utah County Light & Power Co., 36 U. 508; 105 P. 289.

3400. (1262.) Salary and allowances. The state engineer shall receive a salary of $3000 per annum, payable in quarterly instalments by the state treasurer upon warrants drawn by the state auditor. When the state engineer is called away from his office on official business, he shall be entitled to his actual traveling expenses, which shall be paid out of any money appropriated for that purpose, on the certificate of said state engineer, approved by the state board of examiners.

R. S. '98, § 2451; '01, pp. 142, 143; '03, p. 89; '05, p. 145.

Fees of state engineer, § 2516.

3401. (1263.) Office at capital. The state engineer shall keep his office at the state capital. R. S. '98, § 2451; '01, p. 142; '03, p. 89; '05, p. 146.

3402. (1264.) Oath and bond. Before entering upon the duties of his office, the state engineer shall take and subscribe an oath before some officer authorized by the laws of the state to administer oaths, to faithfully perform the duties of his office. He shall file with the secretary of state said oath and his official bond in the penal sum of $5,000, with not less than two sureties, to be approved by the state board of examiners, and conditioned for the faithful discharge of the duties of his office and for the delivery to his successor or other officer appointed by the governor to receive the same, of all moneys, books and other property belonging to the state then in his hands or under his control, or with which he may be legally chargeable as such officer. R. S. '98, § 2451; '01, p. 142; '03, p. 89; '05, p. 146.

3403. (1265.) Report to governor. The state engineer shall prepare and render to the governor biennially, and oftener if required, full and true reports of his work relating to the matters and duties devolving upon him by virtue of his office, which biennial report shall be delivered to the governor on or before the 31st day of December of the year preceding the regular session of the legislature. He shall become conversant with the waterways of the state, and its needs as to irrigation matters, and in his reports to the governor he shall make such suggestions as to the amendment of existing laws or the enactment of new laws as his information and experience shall suggest. He shall keep on file in his office full and proper records of his work, including all field notes, computations, and facts made or collected by him, all of which shall be duly certified by him, and be part of the records of his office and the property of the state. All records, maps, and other pa-

pers recorded or filed in the office of the state engineer shall be open to the public during business hours, and copies thereof, certified by said engineer, shall be furnished on payment of the fees provided for by § 2516.

R. S. '98, § 2458; '01, p. 143; '03, p. 89; '05, p. 146.

3404. (1266.) Duties of engineer. May co-operate with national government. The state engineer shall make a complete hydrographic survey of each river system and water source of the state, beginning such work upon those streams and sources which are most used for irrigation, and from the data so obtained the state engineer shall construct maps, which shall exhibit the essential facts relating to the supply, diversion, and use of the water of each of such river systems or water sources. He shall also collect such other facts as will, in his judgment, aid in ascertaining the existing rights to the use of the water and in determining the volume of the surplus or unappropriated water, if any, of each of such streams or sources. He shall have general supervision of the appropriation of all surplus or unappropriated water in the manner provided by law. Said surveys and collections of facts shall include the location of all suitable sites for dams and reservoirs, and a determination of the approximate capacity and cost of each. In doing such work, the state engineer may co-operate with the agencies of the national government engaged in similar work within the state, for the purpose of interchanging information and avoiding the unnecessary duplication of work. The state engineer shall have a seal which he shall affix to all certificates issued from his office.

R. S. '98, § 2452; '01, p. 142; '03, p. 89; '05, p. 146.

With governor's consent may withhold water from appropriation, § 3573.
Member state road commission, § 2850.
Divide state into water districts, §§ 3430-3441.
Water survey of irrigation district, § 3502.

3405. Duties. Engineer may co-operate with agricultural and interior departments. The state engineer is hereby authorized and empowered, with the consent of the board of examiners, to co-operate with the agricultural and interior departments of the United States government in the development of the resources of the state of Utah; and to that end may enter into, on behalf of the state of Utah, necessary contracts to carry out such purposes; *provided,* that when any contract so entered into involves the expenditure of any moneys, said sum shall be paid from the state engineer's irrigation contingent fund. '17, p. 223.

3406. Hydrographic surveys. Appropriation. The state engineer shall make hydrographic surveys of each stream system and source of water supply in the state, beginning with those most used, obtaining and recording all available data pertaining to the water supply of the state. He is hereby authorized to co-operate with the agencies of the United States government engaged in similar surveys and investigations. For the purpose of making hydrographic surveys, there is hereby appropriated from the general revenues of the state the sum of $5000 annually, such appropriation being contingent upon the United States making a like appropriation for such purpose to be expended within the state. '09, p. 220; am'd '13, p. 90.

3407. (1267.) Id. Notice to be given. Before commencing the hydrographic survey of any river system or water source, the state engineer shall cause notice to be published in some newspaper having general circulation on said river system or water source, stating the time and place of beginning said survey, and said notice shall be published continuously in said newspaper for a period of not less than fifteen days immediately prior to the commencement of said work. '03, p. 90; '05, p. 147.

3408. (1268.) Must examine plans of dams exceeding five feet in height, and inspect dams. Duplicate plans, drawings, and specifications for any dam above five feet in height, across the natural channel of a running stream, or of any other dam intended to retain water above ten feet in height, shall be submitted to the state engineer for his approval, who shall examine such plans, drawings, and specifications, and, if he approves the same, he shall re-

turn one copy of each such plans, drawings, and specifications, with his approval, to the party or parties submitting the same, and file the other in his office. If the state engineer disapproves any of such plans, drawings, or specifications, he shall return the same, with his reasons for such disapproval. The state engineer shall have authority to keep an inspector on any such dam during the construction thereof, and to see that the work is done in accordance with the plans, drawings, and specifications, and the state engineer may require the parties constructing the same to make any additions or alterations during the construction which he considers necessary for the security of the work, the safety of persons, or the protection of property. Any person, corporation, or association beginning the construction of any such dam before the plans, drawings, and specifications shall have been submitted to and approved by the state engineer, or proceeding with such work in the absence of an inspector appointed by said engineer, or who shall fail to comply with any of the requirements made by him in pursuance of this section, shall be guilty of a misdemeanor.

R. S. '98, § 2453; '01, p. 146; '03, p. 90; '05, p. 147.

3409. (1269.) Id. Dam or works examined, when. Should any person, corporation, or association residing on or owning land in the neighborhood of any completed dam or diverting works apply to the state engineer in writing, requesting an examination of such dam or works, the state engineer may order an examination thereof. Before doing so, he may require the applicant for such examination to deposit a sum of money sufficient to pay the expenses of the examination, and in case the application appears to him not to have been justified, he may cause the whole or part of such expense to be paid out of such deposit. In case the request appears to the state engineer to have been justified, he may require the owner of the works to pay the whole or any part of the expenses of such examination.

R. S. '98, § 2456; '01, p. 146; '03, p. 90; '05, p. 148.

3410. (1270.) Id. May inspect ditches, etc., and require alteration. The state engineer shall have authority to examine and inspect, during construction, any ditch or other diverting works, and, at the time of such inspection, he may order the parties constructing the same to make any addition or alteration which he considers necessary for the security of such works, the safety of persons, or the protection of property. Any person refusing or neglecting to comply with such requirements of the state engineer shall be guilty of a misdemeanor. But the provisions of §§ 3408-3410 shall not apply to works constructed by the national government. '03, p. 91; '05, p. 148.

3411. (1271.) State engineer to bring action to determine water rights; jurisdiction of district court. When the state engineer has completed the hydrographic survey of any river system or water source, he shall file a written statement with the clerk of the district court of the county in which the same is situated, or if the system or source extends into more than one county, the statement shall be filed in any county which embraces any part of such river system or water source that the state engineer shall select as most convenient for the water users of the system or source. Said statement shall set forth the fact of the completion of such survey, the names and post-office addresses of all persons, corporations, and associations using water of said river system or water source, so far as the same are known to the state engineer, and shall contain such other facts and information as he may deem necessary. On the filing of such statement, the district court in the county where the same is filed shall have exclusive jurisdiction to determine all water rights on said river system or water source, in accordance with the provisions of this title. '01, p. 143; '03, p. 91; '05, p. 148.

3412. (1272.) Id. Notice to be given claimants to file statements. Within thirty days after the filing of the statement mentioned in the next preceding section, the clerk of the court in which the same shall be filed must give public notice that all persons claiming the right to the use of any water

of said river system or water source must file a written statement with the clerk of said court, within six months after the first publication of said notice, setting forth their respective claims to the use of such water, which notice shall be published at least once a week for three successive months in some newspaper printed and published within the boundaries of said river system or water source and having a general circulation therein; or, if there be no such newspaper, then it shall be published in some newspaper printed and published in this state and having a general circulation on said river system or water source. The clerk of said court shall also mail, by registered letter, to each of the persons, corporations, or associations whose names and addresses are given in such statement filed by the state engineer, a copy of said notice, and a blank form on which said claimant shall present, in writing, as provided in the next succeeding section, all the particulars relating to the appropriation of the water of said river system or water source to which he lays claim. '03, p. 91; '05, p. 148.

3413. (1273.) Id. Claimants to file statements of water rights with the court. Each person, corporation, or association claiming the right to use any water of said river system or water source shall, within six months after the first publication of the notice provided for in the next preceding section, file in the office of the clerk of the court giving said notice a statement, in writing, which shall be signed and verified by the oath of the claimant, and shall include as near as may be the following: The name and postoffice address of the person, corporation, or association making the claim; the nature of the use on which the claim of appropriation is based; the flow per second of water used and the time during which it has been used each year; the name of the stream or other source from which the water is diverted; the place on such stream or source where the water is diverted, and the nature of the diverting works; the date when the first work for diverting the water was begun, and the nature of such work; the dimensions, grade, shape, and nature of the diverting channel, as originally constructed; the date when the original diverting channel was completed; the date when the water was first used, the flow per second, and the time during which the water was used the first year; the date and nature of each subsequent change made in the original diverting channel; the flow per second of the water used and the time it was used each year between each of the changes so made, and the dimensions, grade, shape, and nature of the present diverting channel; the place where and the manner in which the water was first used; the nature of each subsequent change in the place or manner of use, and the place and manner of present use; and such other facts as will clearly define the extent and nature of the appropriation claimed. If the water claimed to have been appropriated is used for irrigation, the statement shall show, in addition to the above required facts, the area of land irrigated the first year and each subsequent year; the total area at present irrigated, and its location in the section, township, and range wherein it is situated; the character of the soil and the kind of crops raised during the first year of use and the first year after each subsequent change of channel, and during the last year in which the water was applied. If the water claimed to have been appropriated is used for developing power, the statement shall show, in addition to the above required facts, the number, size, and kind or waterwheels employed; the head under which each wheel is operated; the extent of the power produced, and the purposes for which and the places where it is used; and the point where the water is returned to the natural stream. If the water claimed to have been appropriated is used for mining, the statement shall show, in addition to the above required facts, the name of the mine and the mining district in which it is situated; the nature of the material mined, and the place where the water is returned to the natural channel of the stream. Within sixty days after the expiration of the six months allowed for filing statements of claims, the state engineer shall tabulate the facts contained in the different statements filed; a copy of said tabulation shall be immediately filed in the office of the clerk of said court, and a copy

in the office of the county recorder of each county which embraces any part of said river system or water source. '03, p. 92; '05, p. 149.

Applications for unappropriated water generally, § 3451.

3414. (1274.) Id. Statements to be filed. Failure to make statement a bar. The clerk of said court shall enter the statement in a book to be kept for that purpose, and shall file and preserve the same in his office, noting the date of filing. The filing of each statement shall be considered notice to all persons of the claim of the party making the same, and any person failing to make and deliver such statement of claim to the clerk of the court within six months after the first publication of the notice provided for in the next preceding section shall be forever barred and estopped from subsequently asserting any rights theretofore acquired to the use of water of said river system or water source, and shall be held to have forfeited all rights to the use of said water theretofore claimed by him; *provided*, that any claimant upon whom no other service of said notice shall be made than by publication in the newspaper may apply to the court for permission to file a statement of claim after the time therefor has expired, and the court or judge thereof, may extend the time for filing said statement, not exceeding one year from the first publication of said notice; but, before said time is extended, the applicant shall give notice by publication in some newspaper having general circulation on said river system, to all other persons interested in the water of that river system or water source, and shall make it appear to the satisfaction of the court that during the pendency of the proceedings he had no actual notice thereof in time to appear and file a statement and make proof of his claim; and all parties interested may present affidavits as to the matter of actual notice of application. '03, p. 93; '05, p. 150.

3415. (1275.) Id. Referee to be appointed. At the expiration of six months after the first publication of the aforesaid notice, the district court of the county in which said statements of claim have been filed may appoint a referee or referees, not exceeding three, to take testimony and determine the rights of said claimants to the use of the water of said river system or water source, as in other equity cases. Any claimant may object to the appointment of any person as referee for the same cause for which challenges for cause may be taken to a petit juror in the trial of a civil action. Such objection must be heard and disposed of by the court, or a judge thereof, and affidavits may be read and witnesses examined concerning the same. '03, p. 93; '05, p. 151.

3416. (1276.) Id. Oath. Power of referee. The referee or referees, before proceeding to hear any testimony, must be sworn well and truly to hear and determine the facts and issues referred to them, and true findings render according to the evidence, and he or they shall have power to administer oaths to all witnesses produced before him or them. '03, p. 93; '05, p. 151.

3417. (1277.) Id. Statements in place of pleadings. Maps and records of engineer's office evidence. The statements filed by the claimants shall stand in the place of pleadings, and issue may be made thereon. They shall, unless the court determines the matter itself without a reference, be referred and delivered to the referee or referees, with all other files and papers relating to water claims of said river system or water source, including the statement and map filed with the state engineer, who shall before the expiration of the six months allowed for filing statements of claim, as aforesaid, file with the clerk of said court, and with the county recorder of each county which embraces any part of said river system or water source, a copy of the map of said river system or water source, made in pursuance of his survey thereof; and whenever requested so to do, the state engineer shall furnish the court, or referee or referees with any information which he may possess, or copies of any of the records of his office which relate to the water of said river system or water source; and in all proceedings for the determination of the rights of claimants to the water of said river system or water source, the

said maps and records, or certified copies thereof, shall be competent and prima facie evidence of the facts stated therein or delineated thereon.
'03, p. 93; '05, p. 151.

3418. (1278.) Id. Amendments permitted. Powers of referee. The referee or referees shall have power to allow amendments to any statement or pleading, as the court might do, and upon the same terms and with like effect. He or they shall have power, and it shall be the duty of the court, or referee or referees to take testimony at such times and places within the boundaries of the river system or water source as may be convenient to the respective claimants interested, and the court, or referee or referees shall determine the rights of all said claimants as hereinafter provided. The court, referee or referees shall give not less than fifteen days' notice to the claimants, stating when and where he or they will begin to take testimony; said notice shall be published in some newspaper having general circulation on said river system or water source, and, upon the date named in the notice, the court, referee or referees shall begin to take the said testimony, and shall continue the same until all the testimony relating to claims to water of said river system or water source is completed; *provided,* that a notice shall be served upon each claimant at least fifteen days before the testimony is taken upon his or its claim, stating the time and place, when and where such testimony will be taken; and said notice shall be served in the same manner as a summons issued out of the district court. But he or they may grant adjournments from time to time as occasion may require, and during all of said time the map or maps and other records furnished by the state engineer, as hereinbefore provided, shall be open to the inspection of all parties interested.
'03, p. 94; '05, p. 151

3419. (1279.) Id. Any interested party may contest. Any person, corporation, or association owning any irrigation works, or claiming any interest in the water of said river system or water source, may contest the rights of any person, corporation, or association that has filed statements of claims for any water of said river system or water source, by filing a written statement of the grounds of such contest with the clerk of said court, within thirty days after the filing of the tabulation of facts provided for in § 3413; which statement of contest shall be verified by the oath of the contestant. Upon the filing of said contest, the referee or referees shall fix the time for hearing the same, which date shall be not less than thirty days nor more than sixty days from the time when the notice is served on the party, which notice and the return thereof shall be made in the same manner as summons is served in civil actions in the district courts of this state. '03, p. 94; '05, p. 152.

3420. (1280.) Id. Subpœnas for witnesses. The referee or referees shall have power to issue subpœnas to witnesses, which shall be served in the same manner as subpœnas issued out of the district court, and all witnesses so subpœnaed shall attend and testify, and produce books and papers and documents, as required, before such referee or referees, and said witnesses shall receive the same fees as in civil cases in the district court, to be paid by the party or parties against whom the contest shall be finally determined. '03, p. 94; '05, p. 152.

3421. (1281.) Id. Referees' findings. On the completion of the evidence, the referee or referees shall state, in writing, the facts found by him or them, as to each claim submitted, and the conclusions of law in relation thereto, separately, and shall report the same, with a form of decree, to the district court; and said court may review said report and enter decree thereon, or set aside, alter, or modify the same and enter decree thereon so altered or modified, and, when necessary, may require the referee or referees to amend his or their reports. All the testimony taken by any referee or referees shall be stenographically reported, and the same, together with all other evidence in the matter, shall be transmitted to, preserved, and filed in the office of the clerk of said district court, with the report of such referee

or referees. Notice of the filing of the report of the referee or referees shall be given by the clerk, as the court may direct; and exceptions to the findings and report of the referee may be taken by the parties, as the court shall prescribe by rule. '03, p. 95; '05, p. 152.

3422. (1282.) Id. Effect of decree. The decree shall determine and establish the rights of the several claimants to the use of the water of said river system or water source; and among other things shall set forth the name and postoffice address of the person, corporation, or association entitled to the use of the water; the quantity of water in acre feet or the flow of water in second feet to be used; the purpose for which the water is to be used; the time during which the water is to be used each year; the name of the stream or other source from which the water is diverted; the place on the stream or other source where the water is diverted; the priority number of the right; the date of the right, and such other matter as will fully and completely define the right of said person, corporation, or association to the use of the water. '03, p. 95; '05, p. 153.

3423. (1283.) Id. Decree may be appealed from. The decree so entered by the district court may be appealed from to the supreme court, in like manner as from decrees and judgments in other cases; *provided,* that such appeal shall be taken within six months after the entry of said decree, and all proceedings on appeal shall be conducted according to the provisions of the code of civil procedure, and the practice on appeals from the district court to the supreme court. '03, p. 95; '05, p. 153.

3424. (1284.) Id. Certificate of water right to be issued. If no appeal is taken from said decree within six months after the same has been entered, or, if the case is appealed, within thirty days after the final decree is entered, it shall be the duty of the clerk of the court making said decree to issue to each person, corporation, or association having been awarded the use of water by said decree, a certificate in duplicate, attested under the seal of the court, setting forth the substance of said decree, as specified in § 3422. One copy of said certificates shall be transmitted, in person or by registered mail, to the appropriator, who shall, within thirty days, have the same recorded in the office of the county recorder of the county in which the water is diverted from its natural channel, and the other shall be delivered to the state engineer, and filed in his office as part of the records thereof. The letter A shall be prefixed to the priority number of each certificate so issued to distinguish it from certificates issued by the state engineer. '03, p. 95; '05, p. 153.

Certificate of state engineer, § 3461.

3425. (1285.) Proceedings when judge or referee is claimant. Payment of expenses. If the referee shall be a claimant to any water of said river system or water source, all testimony and evidence pertaining to his claim shall be taken by the district court of the county in which the statements are filed, and if the district judge is a claimant of any of the water of said river system or water source, he shall file his statement in the district court of the adjoining district, and a copy of the statement in the court of his own county. In such case the court of the adjoining district shall receive and act upon the referee's report and enter decree in the matter. For the pupose of advancing the money required for the expenses of district judges, compensation and expenses of referees and compensation and expenses of stenographers, as provided in §§ 3412-3425, there is hereby appropriated and set apart from any moneys in the general fund in the state treasury, the sum of $8000, to be known as "adjudication of water rights fund," which shall be a permanent fund, and which shall be used only for the payment of expenses as provided herein. The sums allowed by the state board of examiners, upon certificates of the proper district judge to the state auditor, for expenses and services paid from the "adjudication of water rights fund" as herein provided, shall, at the conclusion of a water adjudication, be certified by the state auditor to the judge and clerk of the court in which said adjudication has been made, and the same shall constitute a part of the costs and disbursements in said

cause. The court, at the time of entry of final judgment in said cause, shall adjudge and determine the proportionate amount of such cost of adjudication to be paid by each of the parties of said action; and the respective sums so apportioned are hereby declared to be a lien upon the lands and water rights of the said parties, and the said respective sums shall be entered by the auditors of the proper counties upon the assessment roll of the county in which the property is situated opposite the names of the parties respectively required to pay the same, and said sums shall be collected in the same manner and at the same time as other taxes are collected, and shall be placed in a separate fund, to be remitted to the state treasurer at the same time that other taxes are remitted, and be placed by said treasurer in the "adjudication of water rights fund." '03, p. 96; '05, p. 154; am'd '11, p. 2.

CHAPTER 2.

STATE WATER DISTRICTS.

('11, p. 145.)

3430. (1286.) State engineer to create water districts. In addition to the duties now prescribed by law, the state engineer shall divide the state into water districts, said districts to be so constituted as to secure the best protection to the claimants for water, and the most economical supervision on the part of the state; said water districts, shall not be created until a necessity therefor shall arise; *provided,* that no water district shall include more than one county. '01, p. 143; '03, p. 96; '05, p. 154; am'd '15, p. 116.

3431. (1287.) Water commissioners; how appointed. Term. There shall be appointed by the board of county commissioners one water commissioner for each water district, who shall be selected from persons recommended by the state engineer. Each commissioner shall hold his office until his successor is appointed and shall have qualified; said board of county commissioners, shall, by like selection and appointment, fill all vacancies which may occur in the offices of water commissioners, and may at any time remove any water commissioner for failure to perform his duties as said water commissioner. '01, p. 143; '03, p. 96; '05, p. 154; am'd '15, p. 116.

3432. (1287x.) Id. Bond. Every water commissioner, before entering on his duty, shall give a bond to the state in the penal sum of $1000 for the faithful performance of his duty. '07, p. 56.

3433. (1288.) Id. Powers and duties. The water commissioners appointed under the provisions of this chapter shall be ex officio officers of the courts within their respective water districts to carry into effect the decree of such courts in relation to the division or distribution of water used within any water district created by the provisions of this chapter, and it shall further be the duty of the said water commissioner to divide the water of the natural stream or streams of his district among the several ditches and reservoirs taking water therefrom, according to the prior right of each, respectively, in whole or in part, and to shut and fasten, or cause to be shut and fastened, the headgates of such ditches, and shall regulate or cause to be regulated the controlling works of reservoirs in times of scarcity of water as may be necessary, by reason of the priorities of right existing in said natural streams of his district. Such water commissioner shall have authority to regulate the distribution of water among the various users under any partnership ditch or reservoir where rights have been adjudicated, in accordance with existing decrees. Whenever, in pursuance of his duties, the water commissioner regulates a headgate of a ditch or the controlling works of a reservoir, it shall be his duty to attach to such headgate or controlling works a written notice, properly dated and signed, setting forth the fact that such headgate or controlling works has been properly regulated, and is

wholly under his control, and such notice shall be a legal notice as to the facts therein contained to all parties interested in the division and distribution of water of such ditch or reservoir. It shall be the duty of the county attorney to appear and defend any water commissioner who shall be made a defendant in any case which may arise in the pursuance of the official duties of such officer within the county of said attorney. '03, p. 96; '05, p. 154.

3434. (1288x.) Id. Said water commissioner shall, as near as may be, divide, regulate, and control the use of the water of all streams within his district by such closing or partial closing of the headgates as will prevent the waste of water or its use in excess of the volume to which the appropriator is lawfully entitled, and any person who may be injured by the action of any water commissioner, or by his failure to act pursuant to this chapter, may report to the state engineer, who shall immediately act in the matter and correct or cause to be corrected any wrongful act of such water commissioner if he shall see that injury has been done. Any person dissatisfied with the action of the state engineer may bring an action in the district court of the county wherein the ditch or ditches from which the controversy arises are situated. '01, p. 144; '03, p. 97; '05, p. 154.

3435. (1288x3.) Compensation of commissioners. Water commissioners herein provided for shall receive such compensation as the board of county commissioners shall from time to time fix, the same to be determined with reference to the extent and character of the service performed by such, to be paid by the county in the interest of which the work is performed. Each water commissioner shall keep a true and just account of time spent by him in the discharge of his duties, and shall present a true copy thereof, verified by oath, to the board of county commissioners, and the board of county commissioners shall, upon approval thereof by the state engineer, allow the same. '03, p. 97; '05, p. 155; Am'd '15, p. 116.

3436. (1288x1.) Id. Deputies and assistants. Said water commissioners shall have power, when necessary, to employ deputies or other suitable assistants to aid them in the discharge of their duties. Such assistants shall take the same oath as the water commissioner, and shall obey his instructions, and each shall be entiled to such compensation as his service may demand and as the water commissioner may recommend, not to exceed in any case $5 per day for every day he is employed, such payment to be made upon certificates of the water commissioner, approved by the state engineer, in the same manner as provided for the payment of the water commissioners; *provided,* that the term of service of such assistant commissioner may be terminated at any time by the water commissioner, and shall not in any case continue after the emergency has ceased to exist.

'01, p. 145; '03, p. 97; '05, p. 154.

3437. Commissioners may begin work upon written demand of appropriators. When arrangements are not made for the employment of the water commissioner throughout the irrigation season, the said water commissioner shall begin his work upon written demand being made upon him therefor by one or more appropriators. Such written demand for his services shall be attached to his bill for services and forwarded with it to the county commissioners of the proper county. Where the said commissioner is employed by the month, he shall begin work and terminate his services as the state engineer may direct. The state engineer may, under any condition, call upon the water commissioner for work within his district whenever the necessity therefor may, in his judgment, arise.

3438. Commissioners may make arrests. The water commissioners or their assistants, within their districts, shall have power to arrest any person or persons presently offending, and turn them over to the sheriff of the proper county, and upon delivering any such person so arrested into the custody of the sheriff, it shall be the duty of the water commissioner

making such arrest to immediately, in writing and upon oath, make complaint before the proper justice of the peace against the person so arrested.

3439. Headgates and flumes to be maintained. The owner or owners of any ditch or canal shall maintain, to the satisfaction of the water commissioner in which the irrigation works are located, a substantial headgate at the point where the water is diverted, which shall be of such construction that it can be locked and kept closed by said water commissioner; and such owner shall construct and maintain, when required by the water commissioner, flumes or other measuring devices at such points along such ditch as may be necessary for the purpose of assisting the water commissioner in determining the amount of water that is to be diverted into said ditch from the stream, or taken from it by the various users. Any and every owner or manager of a reservoir located across or upon the bed of a natural stream shall be required to construct and maintain, when required by the water commissioner, a flume or measuring device, of a plan to be approved by the state engineer, below such reservoir at a point not to exceed six hundred feet distant therefrom, and a flume or measuring device above such reservoir on each and every stream or source of supply discharging into such reservoir, for the purpose of assisting the water commissioner in determining the amount of water to which prior appropriators are entitled and thereafter diverting it for such prior appropriators' use. When it may be necessary for the protection of other water users, the water commissioner has authority to require flumes to be installed along the line of any ditch. If any such owner or owners of irrigation works shall refuse or neglect to construct and put in such headgates, flumes, or measuring devices after thirty days' notice to do so by the water commissioner, it shall be the duty of the water commissioner of the district in which such headgate is located to close such ditch to the passage of water, and the same shall not be opened or any water diverted from the source of supply, under the penalties prescribed by law for the opening of headgates lawfully closed, until the requirements of the water commissioner as to such headgate, flume, or measuring device have been complied with, and if any owner or manager of a reservoir located across the bed of a natural stream shall neglect or refuse to put in such measuring device after thirty days' notice to do so by the water commissioner, the water commissioner shall open the sluice gate or outlet of such reservoir, and the same shall not be closed, under penalties of the law for changing or interfering with headgates, until the requirements of the water commissioner as to such measuring devices are complied with.

Injury to headgate, penalty, §§ 3472, 3480. Constructed so as to protect fish, § 2624.

3440. Commissioners to make reports. The water commissioners when on duty shall make reports whenever called upon to do so by the state engineer. Such reports shall contain the following information: The amount of water actually coming into the district to supply ditches, canals, and reservoirs; whether such supply is on the increase or decrease; what ditches, canals, and reservoirs are at that time without their proper supply, and such other and further information as the state engineer may require.

3441. Procedure where joint owners disagree. When two or more persons, companies, or corporations, joint owners in an irrigation ditch or reservoir, are unable to agree relative to the division and distribution of water received through their ditch, or from their reservoir, it shall be lawful for any such owner or owners, or either of them, to apply to the water commissioner of the district in which such ditch or reservoir shall be located, by a written notice setting forth such fact, asking the water commissioner to take charge of such ditch or reservoir, for the purpose of making a just division or distribution of the water from the same to the parties entitled to the use thereof. The said water commissioner shall take exclusive charge of such ditch or reservoir, for the purpose of dividing the water therefrom in accordance with rights established by existing decrees or otherwise, and continuing the said work until the necessity therefor shall cease to exist.

The water commissioner shall have power to determine the loss in transit of any water of a stream, other than the natural flow from a reservoir or other source, by seepage and evaporation, subject to an appeal as provided in this chapter. In all cases where the water commissioner or deputy water commissioner is called upon to divide the waters of a ditch or reservoir between appropriators, when the term of his employment exceeds three consecutive days, he shall be paid in full for his services by the interested water users in proportion to the established rights of each. Any payment not made for the services of such water commissioner after the written demand has been made therefor, the same shall be a lien upon any land or other property not otherwise exempt from execution owned by the interested water user refusing to pay, and may be recovered by the water commissioner in any court of competent jurisdiction.

3442. Rights to use of water restricted. Rights to the use of water shall be limited and restricted to so much thereof as may be necessarily used for irrigation or other beneficial purposes, irrespective of the carrying capacity of the ditch, and all the balance of the water not so appropriated shall be allowed to run in the natural stream from which such ditch draws its supply of water, and shall not be considered as having been appropriated thereby.

CHAPTER 3.

APPROPRIATION OF WATER; PROCEEDINGS; CERTIFICATE.

3450. (1288x5.) Rights to unappropriated water. Rights to the use of the unappropriated water in the state may be acquired by appropriation, in the manner hereinafter provided, and not otherwise. The appropriation must be for some useful or beneficial purpose, and, as between appropriators, the one first in time shall be first in right; *provided,* that when a use designated by an application to appropriate any of the unappropriated waters of the state would materially interfere with a more beneficial use of such water, then the application shall be dealt with as provided in § 3455.

R. S. '98, §§ 1261, 1262; '03, p. 97; '05, p. 155; '11, p. 143.

All existing water rights for any useful or beneficial purpose recognized and confirmed, Con. art. 17, sec. 1.

Waters of all streams, etc., declared to be the property of the public, subject to existing rights, § 3463.

State engineer, with governor's consent, may withdraw water from appropriation, §§ 3555, 3573.

Decrees should be specific as to water rights determined, note to § 6995.

Place of diversion may be changed, § 3469, and note.

Water rights pass with the land, § 3477, and note.

Water rights, except stock, transferred by deed, duly recorded, §§ 3478, 3479.

Court may apportion water stock to land on foreclosure, § 7235.

State water districts, water commissioner, §§ 3430-3442.

Irrigation districts, §§ 3501-3555.

Water reverts upon abandonment, § 3468, and note.

Priority among appropriators, note hereunder, and § 3472.

The jurisdiction of the state engineer is limited to unappropriated water.

Chandler v. Utah Copper, 43 U. 479; 135 P. 108.

The doctrine of riparian rights is not in force in Utah so as to prevent the owner of land from diverting the waters of a stream for purposes of irrigation and domestic use.

Stowell v. Johnson, 7 U. 215; 26 P. 290.

Under § 2339, R. S. U. S., the defendant might obtain a vested right to any of the unappropriated waters of the Provo river, for the operation of machinery, irrigation, or other useful purpose, and construct reasonable dams and reservoirs, so far as necessary, but it was not authorized to oust the plaintiff, who had first appropriated and taken possession of the land in dispute for its right of way.

R. G. W. Ry. Co. v. Telluride P. & T. Co., 16 U. 125; 51 P. 146; appeal dismissed, 175 U. S. 639.

APPROPRIATION AND USE:

The right of a prior appropriator is fixed by the extent of his appropriation for a beneficial use, and others may subsequently appropriate any water of the stream not so used by a prior appropriator. The right of the former being thus fixed, he cannot enlarge his rights to the detriment of the latter.

Becker v. Marble Creek Irr. Co., 15 U. 225; 49 P. 892, 1119.

Monroe v. Ivie, 2 U. 535.

Stowell v. Johnson, 7 U. 215; 26 P. 290.

Salina Creek Irrigation Co. v. Salina Creek Stock Co., 7 U. 456; 27 P. 578.

Hague v. Nephi Irr. Co., 16 U. 421; 52 P. 765.

Beneficial use the basis of right, § 3465.

Though one appropriates a specific quantity of water for a specific purpose, he is entitled to such quantity only as will satisfy the purpose for which the appropriation was made.

Manning v. Fife, 17 U. 232; 54 P. 111.

Becker v. Marble C. Irr. Co., 15 U. 225; 49 P. 892, 1119.

An appropriator of water is not confined to an appropriation simply for the amount of land irrigated during the first year of his diversion. The extent of an appropriation of water is determined by the reasonable necessity for the use of the water, by the intention of the appropriator, followed by a reasonable diligence in executing such intent, and by the beneficial purpose for which the appropriation is made.

Elliot v. Whitmore, 23 U. 342; 65 P. 70.

Hague v. Nephi Irr. Co., 16 U. 421; 52 P. 765.

A prior appropriator of water in a river acquires no right to the corpus of the water

until he has conducted it into his canal for use, and has not the exclusive right to control all the water, as others have the right to its use so long as the former appropriator's use is not interfered with. (On rehearing, 25 U. 456; 71 P. 1069.)

Salt Lake City v. Water & El. P. Co., 24 U. 249; 67 P. 672.

Hague v. Nephi Irr. Co., 16 U. 421; 52 P. 765.

Manning v. Fife, 17 U. 232; 54 P. 111.

Stowell v. Johnson, 7 U. 215; 26 P. 290.

Cleary v. Daniels, 50 U. —; 167 P. 820.

The provisions of this chapter recognize rights that have been acquired by appropriation of the waters of lakes.

Cole v. Richards Irr. Co., 27 U. 205; 75 P. 376.

A person is liable for any interference with appropriated water that lessens the quantity or impairs the quality thereof.

Cole v. Richards Irr. Co., 27 U. 205; 75 P. 376.

Crane v. Winsor, 2 U. 248.

The interest of an appropriator of water extends to its source.

Cole v. Richards Irr. Co., 27 U. 205; 75 P. 376.

An appropriator is not required to furrow his land before irrigating it.

Nephi Irr. Co. v. Vickers, 29 U. 315; 81 P. 144.

Where the appropriator of water for irrigation uses the same without waste and in accordance with his appropriation, no one can complain, and no court can change his manner of using the same.

Id.

Where the waters of a stream have all been appropriated, another can not gain any rights therein by attempting to appropriate and divert the seepage.

Howcroft v. Union Irr. Co., 25 U. 311; 71 P. 487.

Where a public stream, abounding in fish, valuable for food, flowed across defendant's premises, he was entitled to change the course of the stream and construct fish ponds in the old bed, without injury to the public or private interests and without diminishing or polluting the water.

State v. Barker, 37 U. 345; 108 P. 352.

An application is merely a notice of intent to appropriate, and does not establish an appropriation.

Sowards v. Meagher, 37 U. 212; 108 P. 1113.

An inceptive right to use water upon or within an Indian reservation can be initiated or acquired after issuance of a proclamation restoring the lands to the public domain, but before they are subject to entry if the application be made in good faith and not for speculation of monopoly.

Id.

A trespasser on land acquires the right to use the quantity of water which he used, although he posted no notice required by law of 1901; such right is paramount to that of the owner of the land, and the water claimant, when dispossessed of the land, may use the water elsewhere.

Patterson v. Ryan, 37 U. 410; 108 P. 1118.

An appropriation of water cannot be made for the irrigation of unsurveyed, unenclosed, unoccupied public domain of the United States for the sole production of food for wild water fowl, since to effect a valid appropriation of water the beneficial use must be one that inures to the exclusive benefit of the appropriator, subject to his complete control.

Lake Shore Duck Club v. Lake View Duck Club; 50 U. —; 166 P. 309.

Water may be appropriated and used on the public domain, and such right acquired thereby will be recognized and sustained though the appropriator never acquires title to the land; his right to the water will be upheld even after he is dispossessed of the land on which it was used, but in such cases some sort of possessory right, good as against everybody but the government, must exist in favor of the appropriator.

Id.

A land owner may not appropriate water from a ditch for one purpose and then apply it or any part of it to another purpose.

Big Cottonwood T. D. Co. v. Shurtliff, 49 U. 569; 164 P. 856.

Where parties have acquired a vested right to the use of water for beneficial purposes, and have adopted the usual and customary means of conveying it from the point of diversion to the place of use in vogue in this arid region, namely, an open ditch with bed and banks consisting of the natural soil through which it is constructed, they cannot be compelled to substitute and install a more expensive method of diversion in order to prevent loss by seepage and evaporation. They may, however, be compelled to keep their ditch in good repair, so as to prevent unnecessary waste.

Id.

Where a continuous open stream of water is permitted to flow to certain premises for culinary, domestic, and live stock purposes, a reasonable amount of excess water passing the premises may be used in a garden or orchard, or for other irrigation purposes.

Id.

One who exchanges creek water for water to be delivered through a canal from Utah lake and has used canal water for a number of years at a certain place, may, where no injury is done to the other, change the place of use and take it from the canal at another point.

Moyle v. Salt Lake City, 50 U. —; 167 P. 660.

If a prior appropriator diverts for storage, more water than he is entitled to, he must return such surplus to the stream for the use of subsequent appropriators.

Gunnison Irr. Co. v. Gunnison High. Canal Co., 51 U. —; 173 P. —.

If a party stores water in excess of the amount it is entitled to it cannot retain such excess in its reservoir, nor can it require those rightfully entitled to it to purchase the same or to pay storage charges therefor.

Id.

ADVERSE CLAIM AND USE:

A municipal corporation took possession and control of the waters of a certain stream with the express consent of the original locators, and held the stream more than seven years; held, that it acquired the ownership of the water under the statute of limitations.

Springville City v. Fulmer, 7 U. 450; 27 P. 577.

Holman v. Pleasant Grove, 8 U. 78; 30 P. 72.

Lehi Irr. Co. v. Moyle, 4 U. 327; 9 P. 867.

Use of water, to be adverse, must be accompanied by all the elements required to make out an adverse possession.

Smith v. North Canyon W. Co., 16 U. 194; 52 P. 283.

Center Cr. Irr. Co. v. Lindsay, 21 U. 192; 60 P. 559.

Minnie M. Res. Co. v. Grames, 29 U. 225; 81 P. 893.

Use of land for ditch does not become adverse without claim of right.

Yeager v. Woodruff, 17 U. 361; 53 P. 1045.

Where water has been appropriated and used for thirty years the dominion and right to the use and diversion thereof, for beneficial purposes, is vested in the appropriator, who cannot be deprived of such right by a municipal corporation, except by the voluntary act of the appropriator, by forfeiture, or by operation of law.

Fisher v. Bountiful City, 21 U. 29; 59 P. 520.

Adverse user, interruption of possession.

Wasatch Irr. Co. v. Fulton, 23 U. 466; 65 P. 205.

Smith v. North Canyon W. Co., 16 U. 194; 52 P. 283.

A tenant cannot, as against his landlord, acquire water rights by adverse use.

Gill v. Malan, 29 U. 431; 82 P. 471.

Interference with rights. Neither a municipal nor any other corporation has the right to assume control of a stream and distribute the water thereof among the owners.

Fisher v. Bountiful City, 21 U. 29; 59 P. 520.

Bartholomew v. Fayette Irr. Co., 31 U. 1; 86 P. 481; 87 P. 707.

Monroe v. Ivie, 2 U. 535.

PERCOLATING WATERS, ETC.:

The discoverer of percolating waters on public lands, by digging a well for the purpose of collecting the same for use, acquires an easement in the land for the maintenance of his well, and a right to the water as an appropriator thereof.

Sullivan v. N. Spy M. Co., 11 U. 438; 40 P. 709.

The right of one who discovers and appropriates percolating waters on public lands by digging a well to collect the water is subject to the right of a subsequent locator of the land to sink a well adjoining such well, though it dry up the first.

Sullivan v. N. Spy M. Co., 11 U. 438; 40 P. 709.

Crescent M. Co. v. Silver King M. Co., 17 U. 444; 54 P. 244.

Where defendant's tunnels cut the underground channels of springs owned by others, defendants could only acquire a right in such water flowing from the tunnels into the stream as was developed by percolation, and the plaintiff retains its original rights. This, too, although the underground channels of the springs are not traceable. (Distinguished in same case, 25 U. 96; 69 P. 719.)

Herriman Irr. Co. v. Butterfield M. Co., 19 U. 453; 57 P. 537.

Water standing in land beneath the surface, or passing through it by filtration, percolation, chemical attraction, or in undefined and unknown streams, belongs to the land; nevertheless, if it appears that a tunnel driven by one on his own land has partly diverted the water of springs owned by others, the court will make an adjustment of the water flowing from the tunnel. (Distinguishing same case, 19 U. 453; 57 P. 537.)

Herriman Irr. Co. v. Keel, 25 U. 96; 69 P. 719.

Crescent M. Co. v. Silver King M. Co., 17 U. 444; 54 P. 244.

Water intermingling with the ground or flowing through it by filtration or percolation, or by chemical attraction, is but a component part of the earth, has no characteristic of ownership distinct from the land itself, and the rules of law applicable to appropriation of surface waters do not apply thereto.

Willow Cr. Irr. Co. v. Michaelson, 21 U. 248; 60 P. 943.

Where the waters of a stream have all been appropriated, another cannot gain any rights therein by attempting to appropriate and divert the seepage.

Howcroft v. Union Irr. Co., 25 U. 311; 71 P. 487.

Known underground streams, flowing in well defined channels, are subject to appropriation, and cannot thereafter be diverted by the wrongful act of another.

Whitmore v. Utah F. Co., 26 U. 488; 73 P. 764.

Chandler v. Utah Copper Co., 43 U. 479; 135 P. 108.

A spring belongs to the owner of the land, where no prior adverse rights has been acquired.

Willow Cr. Irr. Co. v. Michaelson, 21 U. 248; 60 P. 943.

One who claims and uses the water of a spring on public land is entitled thereto.

Orient M. Co. v. Freckleton, 27 U. 125; 74 P. 652.

Where a party goes upon a stream at or near its source and intercepts a subterannean flow or body of water, and diverts a substantial flow therefrom which he claims to be developed water, and where it is shown that the water is drawn from the same underground flow or body of water that wholly or partially feeds and supplies springs from which a prior appropriator obtains water, the subsequent appropriator claiming developed water must show by clear, positive, and convincing evidence that such water is developed water, and he must bear any expense of measurement and testing of such water.

Mountain Lake M. Co. v. Midway Irr. Co., 47 U. 346; 149 P. 929.

Bastian v. Nebeker, 49 U. 330; 163 P. 1092.

DECREE MUST BE CERTAIN:

A decree adjudging that the defendant should have "one good irrigation stream" is void for uncertainty.

Smith v. Phillips, 6 U. 376; 23 P. 932.

A decree allowing plaintiff enough "water to irrigate sixty acres of land" was affirmed; the court being of opinion that the amount could be approximated.

Holman v. Pleasant Grove, 8 U. 78; 30 P. 72.

But a finding that defendant was entitled to sufficient "water to irrigate thirty-one acres," and to a "small amount of water for culinary and domestic purposes," was ordered modified as uncertain, the court saying that the decree should state the amount of water in miner inches, or fractional parts of the stream in question.

Nephi Irr. Co. v. Vickers, 15 U. 374; 49 P. 301.

A decree adjudging that defendants were the owners of sufficient water from a stream to fill their ditch of specified dimensions, without specifying the grade or fall of the ditch or the velocity of the water flowing therein, or even the amount of land irrigated thereby, was void for uncertainty.

Sharp v. Whitmore, 50 U. —; 168 P. 273.

In every judgment granting the right to the use of water it inheres that any one may use some of it for culinary or domestic purposes at any time when the claimant does not use or require all of it for useful purposes.

Mountain Lake M. Co. v. Midway Irr. Co., 47 U. 371; 154 P. 584.

3451. (1288x6.) Application for unappropriated water. Any person, corporation, or association, to hereafter acquire the right to the use of any public water in the state of Utah, shall, before commencing the construction, enlargement, or extension of any ditch, canal, or other distributing works, or performing similar work tending to acquire the said right or appropriation, make an application in writing to the state engineer. Such application shall be upon a blank to be furnished by the state engineer, and shall set forth the name and postoffice address of the person, corporation, or association making the application; the nature of the proposed use for which the appropriation is intended; the quantity of water in acre feet or the flow of water in second feet to be used, and the time during which it is to be used each year; the name of the stream or other source from which the water is to be diverted; the place on such stream or source where the water is to be diverted, and the nature of the diverting works; and the dimensions, grade, shape, and nature of the proposed diverting channel; and such other facts as will clearly define the full purpose of the proposed appropriation. If the proposed use is for irrigation, the application shall show, in addition to the above required facts, the legal subdivisions of land proposed to be irrigated, with the total area thereof, and the character of the soil. If the proposed use is for developing power, the application shall show, in addition to the above required facts, the number, size, and kind of water wheels to be employed; the head under which each wheel is to be operated;

the extent of the power to be produced and the purposes for which and the places where it is to be used; also, the point where the water is to be returned to the natural stream or source. If the proposed use is for mining, the application shall show, in addition to the above required facts, the name of the mine and the mining district in which it is situated, the nature of the mineral mined, and the place where the water is to be returned to the natural stream or source. The place of diversion and the place of return of the water shall be designated with reference to the United States land corners or mineral monuments, when either the point of diversion or the point of return shall be situated within six miles of the nearest United States land corner. The storage of water by means of a reservoir shall be regarded as a diversion, and the points of diversion in such case shall be deemed to include the point where the water is taken from the stream and the center of the impounding dam of the reservoir. The lands to be inundated by the reservoir shall be described as nearly as may be, and by government subdivisions if upon surveyed land, and the area of the surface thereof when the reservoir is filled shall be given.

R. S. '98, §§ 1268, 1269; '03, p. 98; '05, p. 155; '09, p. 84.

This section limits the jurisdiction of the state engineer to unappropriated waters only, so that he may not entertain proceedings or make any order respecting water rights already acquired and his certificate to an appropriator may not prejudice the rights of a prior appropriator.

Chandler et al. v. Utah Copper Co. et al., 43 U. 479; 135 P. 106.

An application is merely notice of intent to appropriate, and does not establish an appropriation.

Sowards v. Meagher, 37 U. 212; 108 P. 1113.

3452. (1288x7.) Action of engineer thereon. On receipt of said application, it shall be the duty of the state engineer to make an endorsement thereon of the date of its receipt, and to make a record of such receipt in a book kept in his office for that purpose. It shall be his duty to examine said application and ascertain if it sets forth all the above required facts, and if not, it shall be returned with the statement of correction, amendments, or changes required, within thirty days after its receipt, and sixty days shall be allowed for the refiling thereof. If refiled, corrected as required, within said time, the application shall, upon being accepted, take priority as of the date of its original filing, subject to compliance with the further requirements of the law and the regulations thereunder. Any corrected application filed after the time allowed shall be treated in all respects as an original application received on the date of its refiling. The date of the return of the application, with the reasons therefor shall be endorsed on the application and a record made thereof in a book kept for recording applications. Like entries shall be made of the date when corrected applications are received by the state engineer and of the date when rejected applications are returned to the applicant. Applications for a change of the point of diversion or place of use set forth in an approved application shall be treated as a corrected application within the meaning of this section, excepting that such change of an approved application shall not affect the priority of the original application; *provided,* that no change of the point of diversion or place of use set forth in an approved application shall operate to enlarge the time within which the construction work shall begin or be completed. '03, p. 98; '05, p. 156; '07, p. 248; am'd '09, p. 84.

3453. (1288x8.) Notice of application. If not corrected as required, no further proceedings shall be had on such applications, but when filed in compliance with this title, the state engineer shall at once, at the expense of the applicant, to be paid in advance, publish in some newspaper having a general circulation within the boundaries of the river system or water source from which said appropriation is to be made, a notice of the application showing by whom made; the quantity of water sought to be appropriated; the stream from which the appropriation is to be made, and at what point on the stream; the use for which it is to be appropriated and by what means; which notice shall be published at least once a week for thirty days. It is further provided that any change in the proposed point of diversion

or place of use of the water from a stream shall be subject to the approval of the state engineer, under the provisions of § 3469.

'03, p. 98; '05, p. 156; am'd '09, p. 84.

Notice of suit to determine title on river system, § 3413.

3454. (1288x9.) Protest may be made. Any person, corporation, or association interested may, at any time within thirty days after the completion of the publication of said notice, file with the state engineer a written protest against the granting of said application, stating the reasons therefor, which shall be duly considered by said engineer, who shall approve or reject said application. '03, p. 99; '05, p. 157.

3455. (1288x10.) Applications filed and recorded. Action thereon. All applications which shall comply with the provisions of this title, and with the regulations of the state engineer's office, shall be filed and recorded in a suitable book kept for that purpose; and it shall be the duty of said engineer to approve all applications, where the proposed use will not impair the value of existing rights, or will not interfere with the more beneficial use of said water; *provided, however,* that an application for water made by a homesteader, desert entryman, or person in possession of land under a contract to purchase the same, such water to be used exclusively upon the land of such person, may be approved without reference to prior conflict; but the state engineer, upon information furnished by the state conservation commission, or upon his own investigations, or by information in his possession to the effect that there is reason to believe that applications to appropriate water from any stream or other source of water supply within the state will interfere with its more beneficial use for irrigation, domestic, culinary, stock, power, mining, or other purposes, it shall be his duty to withhold the approval or rejection of such application until he shall have investigated the matter. The cost of such inquiry shall be paid for by the person making application to appropriate water; *provided* such application is approved, and *provided, further,* that such charge shall not exceed $10 per day and expenses to be paid the state engineer or his deputy, and $5 per day and expenses for each assistant. When the state engineer is convinced that an application to appropriate water for a designated purpose is not for the most beneficial use, he shall file the application, together with a statement of his findings, in the district court in the county where the proposed appropriation is to be made. On the filing of such a statement, the district court in the county where the same is filed shall have exclusive jurisdiction to determine the merits of the case, and instruct the state engineer to approve or reject such application. But where there is no unappropriated water in the proposed source of supply, or where the proposed use will conflict with prior applications or existing rights, it shall be the duty of the state engineer to reject such application. '03, p. 99; '05, p. 157; am'd '09, p. 84; '11, p. 143.

Mandamus does not lie to compel the engineer to grant the right to perfect the irrigation ditch of a third person so as to avoid waste of water by seepage and to permit the land owner to use the water saved. Tanner v. Beers — U. —; 165 P. 465.

3456. (1288x11.) Proceedings after action. The approval or rejection of an application shall be endorsed thereon and a record made of such endorsement in the state engineer's office. The application, so endorsed, shall be returned to the applicant. If approved, the applicant shall be authorized, on receipt thereof, to proceed with the construction of the necessary works and to take all steps required to apply the water to the use named in the application and to perfect the proposed appropriation. If the application is rejected, the applicant shall take no steps toward the prosecution of the proposed work or the diversion and use of the public water, so long as such rejection shall continue in force. '03, p. 99; '05, p. 157.

3457. (1288x12.) May require additional information. Before either approving or rejecting an application, the state engineer may require such additional information as will enable him to properly guard the public interests, and may require a statement of the following facts: In case of incorporated companies, he may require the submission of the articles of in-

corporation, the names and places of residence of its directors and officers, and the amount of its authorized and its paid-up capital. If the applicant is not an incorporated company, he may require a showing as to the name or names of the party or parties proposing to make the appropriation, and a showing of facts necessary to enable him to determine whether or not they have the financial ability to carry out the proposed work, and whether or not the said application has been made in good faith. '03, p. 99; '05, p. 157.

3458. (1288x13.) Time for beginning and completing work. In his endorsement of approval on any application, the state engineer shall require that actual construction work must begin within six months from the date of such approval; and shall state the time within which the construction shall be completed, not exceeding five years from the date of approval; and, in case the application is for irrigation, shall state the time within which water shall be applied to a beneficial use, not exceeding four years in addition thereto. Any applicant feeling himself aggrieved by the endorsements which the state engineer has made upon his application may appeal therefrom to the district court of the county in which the point of diversion of the proposed appropriation is situated. The construction of the works shall be diligently prosecuted to completion, and if one-fifth of the work is not completed within one-half the time allowed, as determined by the state engineer, he may accept and approve, as herein provided, an application for the use of all or any of the waters included in the application of the prior applicant, and the right to use such water under said prior application shall thereupon be forfeited; *provided,* that before a forfeiture shall be declared by the state engineer as provided herein, he shall give the applicant or his assigns sixty days' notice, by registered mail to his last recorded address, to appear on a date to be designated and show cause, if any he has, why his application shall not be declared forfeited in whole or in part, and on such date the said applicant or his assigns shall be permitted to produce any lawful evidence tending to show compliance on his part with the law. At such hearing the state engineer shall be authorized to hear and consider any and all competent evidence tending to show whether or not the said applicant or his assigns has or have complied with the law; and *provided, further,* that the state engineer shall allow an extension of time on request of the prior applicant equal to the time during which work was prevented by the operation of law, beyond the power of said applicant to avoid; *provided,* that the state engineer shall have power, for good cause shown, to extend the time for completion of construction or for application to a beneficial use, but in no case shall extensions of time be made that would place the date of proof of completion of construction and the proof of beneficial use more than fourteen years from the date of approval, except that the state engineer shall allow extensions of time during which work was prevented by the operation of law beyond the power of said applicant to avoid. R. S. '98, §§ 1270, 1271; '03, p. 100; '05, p. 157; '07, p. 249; am'd '09, p. 86; '11, p. 2.

The engineer may extend the time for the work even beyond the final limit fixed by the statute although the application therefor is made after the time fixed by him has expired. Pool v. Utah County Light & Pow. Co., 36 U. 508; 105 P. 289.

3459. (1288x14.) Aggrieved party may bring action. Any applicant or protestant who is dissatisfied with the action of the state engineer may bring an action in the district court of the county in which the point of diversion of the water proposed to be appropriated is situated, for the purpose of adjudicating the questions involved. Such action must be brought within sixty days of notice of the action of the state engineer, and, if not brought within that time, the engineer shall proceed in accordance with the action taken thereon by him. But if such action be brought within said time, notice thereof shall be filed with the state engineer, and thereafter he shall take no further action upon said application or protest until the questions involved are determined by the courts. Upon the determination of the case by the courts, the clerk of the district court in which the decree is filed shall immediately file a certified copy thereof with the state engineer, and there-

upon he shall proceed in accordance with such decree. And it is further provided that in any case where a decision of the state engineer is involved, the individual, corporation, or association affected by such decision, shall have sixty days to appeal therefrom to the district court, counting from the date when notice of said decision is given to said individual, corporation, or association. If an appeal be taken, the individual, corporation, or association making such appeal shall immediately notify the state engineer thereof, and thereafter the state engineer shall take no further action in the case until the court has passed upon the questions involved. Immediately upon the issuance of the decree of the court in such case, a copy thereof shall be filed with the state engineer by the clerk of said court, and thereafter the state engineer shall proceed in accordance with such decree. If no appeal be taken within the time specified, the decision of the state engineer shall be final. Should no notification of appeal be filed with the state engineer as provided in this section, he shall proceed as if no appeal were taken.

Am'd '09, p. 86; '11, p. 2.

Cited in Salt Lake City v. Gardner, 39 U. 30; 114 P. 147.

Cited in Town of Mapleton v. Kelley, 39 U. 252; 117 P. 52.

3460. (1288x15.) Applicant to file proof and map of works upon completion. State engineer to approve. Sixty days before the date set for the completion of the works to divert the water sought to be appropriated, the state engineer shall notify the applicant by registered mail of the date when proof of completion of works shall be due. On or before the date set for completing the works to divert the water in accordance with his application therefor, the applicant shall make proof thereof, by filing in the state engineer's office, on blanks to be furnished by the state engineer, a statement descriptive of the work done. Said statement shall be sworn to by the applicant and by two disinterested witnesses, one of whom shall be a reputable hydraulic engineer, and shall be accompanied by a map, profile, and drawings, which shall be made on tracing linen, and shall show fully and correctly the location with reference to the United States land surveys; the nature and extent of the completed works; the natural stream or source from which and the place where the water is diverted; the place and manner of connecting with other works or streams; the ground and grade lines, the cross-sections and dimensions of the various forms of the diverting channel; the character of the materials moved and used in construction; the several appliances used to divert, measure, and regulate the water; the character of all structures which cross, support, or constitute the diverting channel or any part of it, and such other matter as will fully and correctly delineate the work done and conform to the general rules and regulations of the state engineer's office. The map, profile, and drawings shall be certified to under oath by the engineer who has made the same and by the applicant whose works they represent, said certificates to be substantially of such form as the state engineer shall by general rule prescribe. As soon as proof of completion of the works has been accepted and approved, the state engineer shall endorse such acceptance and approval upon the applicant's certificate of proof, which shall then be a record of the completion of the works to divert the water sought to be appropriated. Proof made subsequent to the date set for the completion of the works shall cause the postponement of the priority from the date of the original application to the date when the proof is made, and the applications subsequent in time shall have the benefit of such postponement of priority; *provided,* that in case of works constructed by the national government, the official plans, maps, and specifications approved by the proper officer of the reclamation service shall be accepted as a full compliance with the requirements of this section relating to maps, profiles, and drawings. Am'd '09, p. 86; '15, p. 117.

3461. (1288x16.) When appropriation is perfected, state engineer shall issue certificate. Sixty days before the date set for the application of the water to a beneficial use, the state engineer shall notify the applicant by

registered mail when proof of application of the water to a beneficial use shall be due. Upon its being made to appear to the satisfaction of the state engineer that an appropriation has been perfected in accordance with the application therefor, and that the water applied for has been put to a beneficial use, it shall be the duty of the state engineer to issue a certificate, in duplicate, to the party making the same, setting forth the name and post-office address of the person, corporation, or association by whom the water is to be used; the quantity of water in acre-feet or the flow of water in second-feet; the purpose for which the water is to be used; the time during which the water is to be used each year; the name of the stream or source from which the water is to be diverted; the place on the stream or source where the water is to be diverted; the date of the appropriation; and such other matter as will fully and completely define the extent and conditions of actual application of the water to a beneficial use; in no manner, however, shall the certificate extend the rights described in the application, as further defined by the certificate of completion. Failure to make proof of beneficial use of the water on or before the date set therefor shall cause the postponement of the priority from the date fixed theretofore to the date when the proof of beneficial use of the water is made, and application subsequent in time shall have the benefit of such postponement of priority. One copy of said certificate shall be filed in the office of the state engineer, and the other copy shall be delivered to the appropriator and shall, within thirty days, be recorded by him in the office of the county recorder of the county where the water is diverted from the natural stream or source. The certificate so issued and filed shall be prima facie evidence of the appropriator's right to the use of the water in the quantity, for the purpose, and during the time mentioned therein, and shall be evidence of such right. The provisions of this section shall refer to all certificates issued by the state engineer. Am'd '09, p. 86; '15, p. 117.

Where there was evidence to support the findings of an actual appropriation, diversion, and use of waters, the question whether the state engineer's certificate of appropriation was conclusive, or only prima facie, evidence was immaterial. New Era Irr. Co. v. Warren Irr. Co., 48 U. 544; 160 P. 1195.

3462. (1288x17.) Priority. The priority number of an appropriation shall be determined by the date of receiving the written application in the state engineer's office, except as provided in §§ 3460, 3461. Rights claimed under applications for the appropriation of water may be transferred or assigned by instruments in writing. Such instruments, when acknowledged or proven and certified in the manner provided by law for the acknowledgment or proving of conveyances of real estate, may be filed and recorded in the office of the state engineer, and shall, from the time of filing the same for record in said office, impart notice to all persons of the contents thereof. For recording any such instrument the state engineer shall collect the same fees as are allowed by law to county recorders for like service, in addition to the fee for filing. '03, p. 101; '05, p. 159; am'd '09, p. 90.

CHAPTER 4.

GENERAL PROVISIONS CONCERNING WATER.

3463. (1288x18.) Waters public property. The water of all streams and other sources in this state whether flowing above or under the ground, in known or defined channels, is hereby declared to be the property of the public, subject to all existing rights to the use thereof. '03, p. 101; '05, p. 159.

Right to unappropriated waters acquired by appropriation and use, § 3450 and note. Percolating waters, note to § 3450.

3464. (1288x19.) Standard of measurement. The standard unit of measurement of the flow of water shall be the discharge of one cubic foot per second of time, which shall be known as a second foot; and the standard

unit of measurement of the volume of water shall be the acre foot, being the amount of water upon an acre covered one foot deep, equivalent to 43,560 cubic feet. R. S. '98, §§ 1282, 1283; '01, p. 143; '03, p. 101; '05, p. 160.

3465. (1288x20.) Beneficial use. Beneficial use shall be the basis, the measure, and the limit of all rights to the use of water in this state. R. S. '98, § 1262; '03, p. 101; '05, p. 160.

Decisions on beneficial use, note to § 3450.

The rights of prior appropriators of the waters of a lake as against subsequent applicants to appropriate water therefrom depend, not on how much the prior appropriators required, but on the amount they have applied to an original and beneficial purpose within a reasonable time after their appropriation and prior to the application of defendants for an appropriation.

Salt Lake City et al. v. Gardner et al., 39 U. 30; 114 P. 147.

No land owner is entitled to more water from a ditch for any specific purpose than is reasonably necessary to supply his needs for that purpose, regardless of the quantity that has been used and the length of use.

Big Cottonwood T. D. Co. v. Shurtliff, — U. —; 164 P. 856.

3466. (1288x21.) Eminent domain. The use of water for beneficial purposes, as provided in this title, is hereby declared to be a public use. Any person, corporation, or association shall have a right of way across and upon public, private, and corporate lands, or other right of way, for the construction, maintenance, repair, and use of all necessary reservoirs, dams, water gates, canals, ditches, flumes, tunnels, or other means of securing, storing, and conveying water for irrigation or for any necessary public use, or for drainage, upon payment of just compensation therefor, but such right of way shall in all cases be exercised in a manner not to unnecessarily impair the practical use of any other right of way, highway, or public or private road, nor to unnecessarily injure any public or private property. Such right may be acquired in the manner provided by law for the taking of private property for public use. R. S. '98, § 1277; '03, p. 103; '05, p. 160.

Eminent domain generally, §§ 7330-7350.

Railroads may take water under power of eminent domain, for certain purposes, § 1228.

Cities and towns may take water under power of eminent domain, § 570x2.

Right of way for ditches, etc., over state lands, § 5616.

Cited in Fuller et al. v. Sharp et al., 33 U. 431; 94 P. 813.

The taking of property for the purpose of obtaining water for the irrigation of a farm and to render the same productive is a taking for a public use, and hence the owner of the farm may condemn a right of way through another's ditch for the purpose of carrying water to his land for irrigation.

Nash v. Clark, 27 U. 158; 75 P. 371; affirmed 198 U. S. 361.

Ditch on public land. Persons who build an irrigation ditch on the public lands of the United States become the owners thereof, and of the right to use the water first appropriated thereby, but when such ditch is enlarged by others, the original owners not objecting, the parties so enlarging the ditch become owners therein and in the water appropriated thereby, without any conveyance from the original owners.

Lehi Irr. Co. v. Moyle, 4 U. 327; 9 P. 867.

No title against the government in a person taking possession of public land for the purpose of procuring water or digging ditches for canals, without the performance of any work thereon.

Bear River Irr. Co. v. Garland, 164 U. S. 1; affirming 9 U. 350; 34 P. 368.

License to construct pipe line not revocable. A parol license to enter on the land of the owner to construct a pipe line to carry water for purposes of irrigation operates as an irrevocable grant after entry and the construction of the pipe line at considerable expense, and after commencing the use of the water for purposes of irrigation, and the rights acquired under the grant will be protected in equity.

Maple Orchard Co. v. Marshall, 27 U. 215; 75 P. 369.

3467. (1288x22.) Id. Right to enlarge existing canal. When any person, corporation, or association desires to convey water for irrigation or for any other beneficial purpose, and there is a canal or ditch already constructed that can be enlarged to convey the required quantity of water, then such person, corporation, or association, or the owner or owners of the land through which a new canal or ditch would have to be constructed to convey the quantity of water necessary, shall have the right to enlarge said canal or ditch already constructed, by compensating the owner of the canal or ditch to be enlarged, for the damage, if any, caused by said enlargement; *provided,* that said enlargement shall be done at any time from the 1st day of October to the 1st day of March, or at any other time that may be agreed upon with the owner of said canal or ditch. R. S. '98, § 1278; '03, p.103; '05, p. 160.

Right to enlarge existing canal, note to § 3466.

For the purpose of conveying water from a river for the use of its inhabitants, a city may enlarge a canal owned by an irrigation company; such a use by the city being a public one; the owner of the canal may be compensated for any damage caused by the enlargement, the measure of damages therefor being the decrease in value of the canal for canal purposes caused by the enlargement, and by the joint use.

S. L. City v. East Jordan Irr. Co., 40 U. 126; 121 P. 592.

Tanner v. Provo Bench Canal & Irr. Co., 40 U. 105; 121 P. 584.

It is no objection to the maintenance of the proceeding under this section that the

plaintiff's right is a right to divert water at a point above the point of diversion of defendant's canals, nor that the plaintiff has not an actual or subsisting right to the amount of water which he seeks to convey through such canal where he has some water and has made an application to appropriate other unappropriated water, nor that his application for unappropriated water was approved by himself in his official capacity as state engineer.

Tanner v. Provo Bench Canal & Irr. Co., 40 U. 105; 121 P. 584.

3468. (1288x23.) Water reverts upon abandonment. When the appropriator or his successor in interest abandons or ceases to use water for a period of seven years, the right ceases, and thereupon such water reverts to the public, and may again be appropriated, as provided in this title; but questions of abandonment shall be questions of fact, and shall be determined as are other questions of fact. R. S. '98, § 1262; '03, p. 101; '05, p. 160.

Decisions on adverse user, note to § 3450.

Person loses right to ditch and easement for same by non-user for many years.

Staling v. Ferrin, 7 U. 477; 27 P. 686

Owner of ditch is estopped from denying right of another who enlarges ditch and procures land expecting to use same.

Lehi Irr. Co. v. Moyle, 4 U. 327; 9 P. 867.

Morrison v. Winn, 17 U. 484; 54 P. 761.

Water is not deemed to be abandoned by the mere fact that the owner does not make any use of it for a number of years and permits it to flow onto the land of another who does use it.

Gill v. Malan, 29 U. 431; 82 P. 471.

Promontory R. Co. v. Argile, 28 U. 398; 79 P. 47.

In order to constitute an abandonment of water right, there must be an intent to abandon, coupled with some act of relinquishment, by which the intent is carried out.

Promontory R. Co. v. Argile, 28 U. 398; 79 P. 47.

Becker v. Marble Cr. Irr. Co., 15 U. 225; 49 P. 892, 1119.

Non-user for seven years does not constitute abandonment.

Id.

Where one who has developed water incidentally, in digging a tunnel on his own land, turns it into a stream, he does not thereby abandon it, but may take it out again lower down the natural stream, with a proper allowance for seepage and evaporation.

Herriman Irr. Co. v. Keel, 25 U. 96; 69 P. 719.

3469. (1288x24.) Place of diversion may be changed. Vested rights protected. Any person, corporation, or association entitled to the use of water may change the place of diversion, and may use the water for other purposes than those for which it was originally appropriated, but no such change shall be made, if it impairs any vested right, without just compensation; no change of point of diversion or purpose of use shall be made except on the approval of an application of the owner by the state engineer. Before the approval of an application the state engineer must, at the expense of the applicant, to be paid in advance, give notice thereof by publication in some newspaper having general circulation within the boundaries of the river system or water source in which the point of diversion of the water is located; such notice shall give the name of the applicant, the quantity of water involved, the stream or source from which the appropriation has been made, the point on the stream or source where the water is diverted, the point to which it is proposed to change the diversion of the water; the place, purpose, and extent of present use, and the place, purpose, and extent of the proposed use. Said notice shall be published at least once a week for a period of thirty days. Any person, corporation, or association interested may, at any time within thirty days after the completion of the publication of said notice, file with the state engineer a protest against the granting of said application for change of point of diversion or purpose of use, stating the reasons therefor, which shall be duly considered by the state engineer, who shall approve or reject said application for change of point of diversion or purpose of use. Such application shall not be rejected solely for the reason that such change would impair vested rights of others, but the application, if otherwise proper, may be approved conditionally upon such conflicting rights being acquired. The determination of the state engineer shall be final unless appeal is taken to the district court of the county in which the point of the diversion of water is situated, within sixty days of notice of action of the state engineer. Any person holding an approved application for the appropriation of water may change the point of diversion or place of use under proceedings taken substantially as above set forth.

R. S. 98, § 1276; '03, p. 102; '05, p. 162; am'd '09, p. 90.

Generally, corporations forbidden to exchange stock, § 8368, exception in favor of railroad companies, § 1228.

Place of diversion may be changed, if it does not interfere with other vested rights.

Hague v. Nephi Irr. Co., 16 U. 421; 52 P. 765.

A decree conferring upon a power company a secondary use of the water of a river so long as the former appropriator "shall continue to divert its water at its present point of diversion, and to use the same at its present place of use," is effective, though such former appropriator has the right to change its place

of diversion. (On rehearing, 25 U. 456; 71 P. 1069.)
S. L. City v. S. L. City Water & E. P. Co., 24 U. 249; 67 P. 672.

A land owner may not appropriate water from a ditch for one purpose and then apply it or any part of it to another purpose.
Big Cottonwood T. D. Co. v. Shurtliff, 49 U. 569; 164 P. 856.

3470. (1288x25.) Water may be commingled and recovered. Any appropriated water may be turned into the channel of any natural stream, or into a reservoir constructed across the bed of any natural stream, and commingled with its waters and then be taken out, either above or below the point where emptied into the channel, but in so doing the original water in such stream or reservoir must not be diminished in quantity or deteriorated in quality. R. S. '98, § 1264; '03, p. 102; '05, p. 161; am'd '11, p. 60.

Where one who has developed water incidentally, in digging a tunnel on his own land, turns it into a stream, he does not thereby abandon it, but may take it out again lower down the natural stream, with a proper allowance for seepage and evaporation.
Herriman Irr. Co. v. Keel, 25 U. 96; 69 P. 719.

Where one turns water into a stream from another source, he may withdraw from the stream the amount of water which he has turned in.
Spanish Fork City v. Spanish Fork East Bench Irr. Co., 46 U. 486; 151 P. 46.

3471. (1288x26.) Headgates. Every person, corporation, or association using water in this state shall construct and maintain a substantial headgate at the point where the water is diverted, and a measuring device, as near the head of the diverting channel as is practicable, for the purpose of regulating and measuring the quantity of water that may be diverted into the channel from the stream or other source. Said headgate and measuring device shall be of such pattern as the state engineer shall approve, and shall be constructed within thirty days after request from him. Any person, corporation, or association failing to comply with the provisions of this section shall be guilty of a misdemeanor, and the state engineer is hereby authorized to furnish plans and bills of material for such devices, at the expense of the state, when in his judgment the use of such devices will be encouraged thereby. '01, p. 145; '03, p. 102; '05, p. 161.

Must protect fish, § 2624.
Penalty for injury, § 3490.
Failure to construct, duty of commission, § 3484.

3472. (1288x27.) Priority among appropriators. Appropriators shall have priority among themselves according to the dates of their respective appropriations, so that each appropriator shall be entitled to receive the whole supply to which his certificate entitles him before any subsequent appropriator shall have any right; *provided,* that whenever the natural flow of any stream shall have receded in volume in the annual low water stage, then the rights of all users to such flow at such stage shall be deemed to be equal as to priority, and the water, when at or below such stage, shall be apportioned pro rata among said users. But in times of scarcity, while priority of appropriation shall give the better rights as between those using water for the same purpose, the use for domestic purposes shall have preference over use for all other purposes, and use for agricultural purposes shall have preference over use for any other purpose except domestic use.
R. S. '98, § 1265; '03, p. 102; '05, p. 161.

Existing water rights recognized and confirmed, Con. art. 17 sec. 1.
First in time, first in right, § 3450.
Decisions on priority among appropriators, note to § 3450.

3473. (1288x28.) Stock may be taken in other irrigation companies. Any irrigation or reservoir company, incorporated and existing under the laws of this state, may purchase or subscribe for the capital stock of any other similar corporation which, at the time of such purchase or subscription, shall be or is about to be incorporated; *provided,* that such purchase or subscription shall be made only when permitted by the original articles of incorporation or by amendment thereto proposed and adopted according to law, and such corporations are hereby permitted and authorized to amend their articles of incorporation so as to authorize such purchase or subscription. R. S. '98, § 1276; '03, p. 102; '05, p. 162.

Generally, corporations forbidden to exchange stock, § 8368; exception in favor of railroad companies, § 1228.

3474. (1288x29.) Ditches must be kept in repair to prevent damage.

The owner or owners of any ditch, canal, flume, or other water course shall maintain the same in repair, so as to prevent waste of water or damage to the property of others. Such persons are required, by bridge or otherwise, to keep such ditch, canal, flume, or other water course in good repair where the same crosses any public road or highway, so as to prevent obstruction to travel, or damage, or overflow to such public road or highway.

R. S. '98, § 1279; '03, p. 103; '05, p. 162.

City liable for damage done through negligent handling of irrigation water, note to § 816.

The owners of higher lands are entitled to the benefit of the natural flow of water therefrom onto lower lands owned by others, when not brought there by artificial means. They can not lawfully gather water on their lands in artificial drains and discharge it onto the lands of others.

North Point C. I. Co. v. Utah & S. L. C. Co., 16 U. 246; 52 P. 168.

Belknap v. Widdison, 32 U. 246; 90 P. 393.

Lisonbee v. Monroe Irr. Co., 18 U. 343; 54 P. 1009.

The owners of an irrigation canal are required to exercise ordinary care to prevent injury to adjoining land.

Jenson v. Davis & Weber Counties Canal Co., 44 U. 10; 137 P. 635.

3475. (1288x30.) Each person or corporation liable for proportionate expense. When two or more persons, companies, or corporations are associated by agreement or otherwise, in the use of any dam, canal, reservoir, ditch, flume, or other means of conserving or conveying water for the irrigation of land, or for other purposes, each of them shall be liable to the other for the reasonable expense of maintaining, operating, and controlling the same, in proportion to the share in the use or ownership of the water to which he is entitled. If any person, company, or corporation refuses or neglects to pay his proportion of such expense, after five days' notice in writing demanding such payment, he shall be liable therefor in an action for contribution; *provided,* that in any company or corporation owning or controlling more than one canal or ditch, for the purpose of improving or keeping the same in repair, the users of water shall not be required to pay any expenses or assessments in any canal or ditch, other than the one in which they are directly interested. R. S. '98, § 1280; '03, p. 103; '05, p. 162.

3476. (1288x31.) Water rights appurtenant to land under government works. All water hereafter appropriated for irrigation purposes from works constructed or controlled by the United States shall be appurtenant to specified lands owned or occupied by the persons claiming the right to use the water, so long as the water is used beneficially thereon; *provided,* that if for any reason it should at any time become impracticable to use water beneficially or economically for the irrigation of any land to which the right of the same is appurtenant, said right may be severed from said land, and simultaneously transferred, and become appurtenant to other land, without losing priority of right theretofore established, if such change can be made without detriment to existing rights; and in case of such change, the owner of such water right shall execute and acknowledge a proper instrument of transfer describing therein the land from and to which such water is transferred, which instrument shall be recorded in the county recorder's office of the county in which the land is situated. '05, p. 162.

3477. (1288x32.) Rights to water pass with land. Exceptions. A right to the use of water appurtenant to the land shall pass to the grantee of such land, and, in cases where such right has been exercised in irrigating different parcels of land at different times, such right shall pass to the grantee of any parcel of land on which such right was exercised next preceding the time of the execution of any conveyance thereof; subject however, in all cases to payment by the grantee of any such conveyance of all amounts unpaid on any assessment then due upon any such right; *provided,* that any such right to the use of water, or any part thereof, may be reserved by the grantor in any such conveyance, by making such reservation in express terms inserted in such conveyance, or may be separately conveyed.

R. S. '98, § 1281; '03, p. 104; '05, p. 163.

Water rights pass with desert lands, § 5503.

Water rights, except stock, transferred by deed; recording; notice, §§ 3478, 3479.

On foreclosure court may apportion water stock to land, § 7235.

Water stock may be redeemed with land, § 7235.

Springs, percolating water, etc., note to § 3450.

Water in the pipes of a distributing system

is personal property. Water flowing in a natural stream or ditch is not subject to ownership so far as the corpus of the water is concerned; the right to use it is a hereditament appurtenant to the land.
Bear River Irr. Co. v. Ogden City, 8 U. 494; 33 P. 135.

Where deeds included appurtenances to the land, the right to water passed to the grantee.
Smith v. North Canyon W. Co., 16 U. 194; 52 P. 283.

Water appurtenant to land passes by conveyance of the land, unless reserved, or such water rights may be treated as personal property and be separately conveyed.
Snyder v. Murdock, 20 U. 419; 59 P. 91.

Water rights are appurtenant to land and pass by deed, unless reserved; or same may be treated as personal property and be separately conveyed.
Fisher v. Bountiful City, 21 U. 29; 59 P. 520.

Ditch and water pass with the land under "privileges and appurtenances."
Fayter v. North, 30 U. 156; 83 P. 742.

Water rights represented by shares of stock in a water company are personal property, and may be sold and transferred independent of any land, and the water represented by such shares cannot be considered as appurtenant to the land upon which it is used.
George v. Robison, 23 U. 79; 63 P. 819.
Snyder v. Murdock, 20 U. 419; 59 P. 91.

Where water flows into Utah from Idaho and is here appropriated, rights thereto under jurisdiction of Utah courts.
Conant v. Deep Cr. Co., 23 U. 627; 66 P. 188.

A deed to land in statutory form, without reservation of the water, conveys whatever right the grantor has to the water appurtenant to the land.
Anderson v. Hanson, 50 U. —; 167 P. 254.

3478. (1288x33.) Water rights transferred by deed. Exceptions. Water rights shall be transferred by deeds, in substantially the same manner as real estate, except when they are represented by shares of stock in a corporation, and such deeds shall be recorded in the office of the recorder of the county where the place of diversion of the water from its natural channel is situated. Every deed of water right so recorded shall, from the time of filing the same with the recorder for record, impart notice to all persons of the contents thereof, and subsequent purchasers, mortgagees, and lien holders shall be deemed to purchase and take with notice.
'03, p. 104; '05, p. 163.

Water passes with the land, § 3477, and notes.
Water stock transferred by assignment and delivery.
Snyder v. Murdock, 20 U. 419; 59 P. 91.
George v. Robison, 23 U. 79; 63 P. 819.

3479. (1288x34.) Id. Deeds must be recorded. Every deed of water right within this state hereafter made, which shall not be recorded as provided in this title, shall be void as against any subsequent purchaser in good faith, and for a valuable consideration, of the same water right, or any portion thereof, where his own deed shall be first duly recorded.
'03, p. 104; '05, p. 163.

3480. (1288x35.) Penalty. Any person, corporation, or association who shall in any way interfere with, injure, destroy, or remove any dam, headgate, weir, or other appliance for the diversion, apportionment, or measurement of water, or who shall interfere with any of the persons authorized by this title to apportion water, while in the discharge of their duties, shall be guilty of a misdemeanor, and shall also be liable in damages to any person injured by such unlawful act. '03, p. 104; '05, p. 163.

3481. (1288x36.) Obstructions to right of way forbidden. Whenever any person, corporation, or association has the right of way for canals or other water courses, it shall be unlawful for any person to place or maintain in place any obstruction, by fence or otherwise, along or across such canals or water courses, without providing gates sufficient for the passage of the owners of such canals or water courses or their agents. Any person, corporation, or association violating the provisions of this section shall be guilty of a misdemeanor. R. S. '98, § 1286; '03, p. 104; '05, p. 163.

3482. (1288x37.) Legal advisers to state engineer. In all matters requiring legal advice in the performance of his duties, and the prosecution or defense of any action growing out of the performance of his duties, the attorney-general of the state, and the district attorney of the district in which any legal question arises, shall be the legal advisers of the state engineer, and they are hereby required to perform any and all legal services required of them by him, without other compensation than their salaries now or hereafter fixed by law. '03, p. 105; '05, p. 164.

3483. (1288x38.) Assistants and equipment. For the purpose of carrying into effect the provisions of this title, the state engineer shall have power to employ all necessary assistants, purchase all necessary equipment, and do

all other necessary things, the cost of which shall be paid by the state, upon presentation to the state auditor of monthly statements, certified by the state engineer and approved by the state board of examiners; *provided,* that no expense shall be incurred by the state engineer in the performance of his duties which will exceed the amount appropriated for that purpose.

'01, p. 142; '03, p. 105; '05, p. 165.

3484. (1288x39.) Fees of referee and stenographer. The fees of referees and stenographers shall be fixed by the court, and, together with any other expenses not herein provided for that may be incurred in carrying out the provisions of this title, shall be paid out of the state treasury, upon certificates from the proper district judge to the state auditor of the amount due each person for such service. '03, p. 105; '05, p. 165.

Fees of referee generally, § 6835; of stenographer, § 2537.

3485. (1288x40.) Who may be made parties to actions. Damages. Joint ownership. In any action hereafter commenced for the protection of rights acquired to water under the laws of this state, the plaintiff may make any or all persons who have diverted water from the same stream or source parties to such action, and the court may in one judgment settle the relative priorities and rights of all the parties to such action. When damages are claimed for the wrongful diversion of water in any such action, the same may be assessed and apportioned by the jury in their verdict, or by a court if the case be tried without a jury, and judgment thereon may be entered for or against one or more of several plaintiffs, or for or against one or more of several defendants, and may determine the ultimate rights of the parties between themselves. In any action concerning joint water rights, or joint rights in water ditches, unless partition of the same is asked by the parties to the action, the court shall hear and determine such controversy as if the same were several as well as joint.

R. S. '98, § 1274; '03, p. 105; '05, p. 165.

Mont. Civ. C., § 1891.

Power of the court generally in determining rights of parties, § 6854.

Parties generally, §§ 6495-6520.

Parties in action to determine titles on water system, §§ 3413, 3419.

Persons claiming water rights adverse to plaintiff, or who have diverted water from the same stream, may be made parties to a suit to determine their several rights and priorities, even though they reside without the county wherein the suit is commenced.

Deseret Irr. Co. v. McIntyre, 16 U. 398; 52 P. 628.

3486. (1288x41.) Effect of certain repeal. The repeal by the revised statutes of §§ 2403-2427, both inclusive, of the compiled laws of Utah, 1888, shall not be construed to affect the existence of any district or company organized under the aforesaid sections; but any such company or district shall, notwithstanding such repeal, continue in existence with all the rights, privileges, and limitations heretofore conferred or imposed upon it by law, until disincorporated or dissolved according to law. In any case in which an irrigation company or district shall have a right of action against a delinquent member of such company or district for the non-payment of taxes voted according to law, the board of directors thereof may proceed to sell the interest of such member in the canals or ditches of such company or district and his right to the use of the water flowing therein.

R. S. '98, § 1287; '03, p. 106; '05, p. 165.

Notwithstanding the repeal by revised statutes of the provisions of an act of March 13, 1884, p. 127, in respect to irrigation districts, such provisions continue in force by virtue of chap. 52, § 27, laws 1897, as to all irrigation districts organized by virtue of such statute and prior to the repeal.

Harris v. Tarbet, 19 U. 328; 57 P. 33.

3487. (1288x42.) Dissolution of irrigation districts. Whenever a petition is presented to the board of trustees of any irrigation company or district organized under §§ 2403-2427, C. L. U. 1888, signed by one-fourth of the landholders in the district, asking for the abandonment of further operations by the company or district, the board of trustees thereof shall call a special meeting, at which the question of such abandonment shall be submitted. Notice of the time and place and subject of such meeting shall be given by the board of trustees of the district at least ten days previous thereto, by advertising at least three times in some newspaper having general

circulation in the district, or by posting notices in three public places therein. If three-fifths of the landholders of the district voting at such election shall vote for such abandonment, it shall be the duty of the board of trustees to petition the district court of the county in which the greater portion of the lands of the district are situated for the winding up of the affairs of such company or district; and thereafter proceedings shall be had which shall conform as nearly as may be with the proceedings for the voluntary dissolution of corporations. R. S. '98, § 1288; '03, p. 71; '05, p. 166.

Voluntary dissolution of corporations, §§ 7418-7424.

3488. (1288x43.) "Received" and "filed" defined. Whenever the word "received" is used in this title, with reference to any paper deposited in the office of state engineer, it shall be deemed to mean the date when such paper was first received at the state engineer's office; and whenever the term "filed" is used in such reference, it shall be deemed to mean the date when such paper was completed and filed in said office. '05, p. 166.

3489. (1288x44.) Repeal. Chap. 100 of the laws of Utah, 1903, and all other laws and parts of laws in conflict with the provisions of this title, are hereby repealed; but such repeal shall not affect any vested rights, and any person, corporation, or association who may have heretofore filed notice of appropriation of water, or initiated any right under the provisions of said law, or any other law heretofore in force in this state, may complete and perfect such appropriation or right in the same manner and with like effect as if this repeal had not been made; and such right may be perfected in accordance with the provisions of the law under which the right was initiated or under the provisions of this title; nor shall such repeal prevent the water commissioners appointed under the act of 1901 from performing the duties therein prescribed, until they are superseded by the appointment of division superintendents and district supervisors as provided in this title, and, if necessary, other water commissioners may be appointed in the manner provided in said title, to serve until they are superseded, as provided herein. '05, p. 166.

CHAPTER 5.

IRRIGATION DISTRICTS.

('09, p. 144.)

3501. Irrigation districts. In the interest of conserving and putting to beneficial use the public waters of the state, and preventing undue waste thereof, the governor of the state of Utah, upon the recommendation of the state engineer, or fifty or a majority of the owners of lands requiring water in any district, may propose the organization of an irrigation district under the provisions of this chapter, and when so organized such district shall have the powers conferred or that may hereafter be conferred by law upon irrigation districts; *provided,* that where ditches, canals, or reservoirs have been constructed before the passage of this chapter, such ditches, canals, reservoirs, and franchises, and the lands fully watered thereby, shall be exempt from the operation of this law, except such district shall be formed to purchase, acquire, lease, or rent such ditches, canals, reservoirs, and their franchises, or unless such district shall be formed to make contract with the United States under any federal law; *provided, further,* that resident entrymen upon public lands of the United States, and purchasers of state lands, within the proposed district shall be deemed to be the owners of lands within the district for the purpose of becoming petitioners for the organization of such irrigation district, and shall share all the privileges and obligations of private land owners within the district, entrymen upon the public lands of the United States to be subject to the terms of the act of Con-

gress approved August 11, 1916, entitled, "An act to promote reclamation of arid lands." Am'd '17, p. 77.

This act is not invalid as depriving one of property without due process of law, since any land owner has opportunity to be heard if he objects to inclusion of his land within a proposed district; property taken hereunder is for public and not private use, and the assessments are based on benefits accruing to the land; owner of land within an irrigation district may seek redress in the court from an unjust assessment, and raise the issue whether the land is unjustly assessed or burdened to maintain an irrigation system which does not benefit it.

Lundberg v. Green River Irrig. Co., 40 U. 83; 119 P. 1039.

The act does not contemplate taking property without compensation.

Ferry v. Corinne Drainage Dist., 48 U. 1; 156 P. 921.

Moody v. Millard County Drainage Dist., 48 U. 11; 156 P. 924.

Whether the land is exempt from special tax is a question of mixed law and fact, and the court must find the facts and make conclusions of law thereon.

Horn v. Shaffer, 47 U. 55; 151 P. 555.

An irrigation district, when not questioned by quo warranto proceedings within one year after its organization, is deemed a legal district, but an owner may sue to enjoin collection of a special tax assessed by the district on the theory that same is exempt under § 3501.

Id.

3502. Districts established on petition by land owners or by governor. Duties of county commissioners and state engineer. For the purpose of establishing an irrigation district as provided by this chapter, a petition shall be filed with the board of county commissioners of the county which embraces the largest acreage of the proposed district; said petition shall state that it is the purpose of the petitioners to organize an irrigation district under the provisions of this chapter, and shall state the proposed means of water supply, the name proposed for such district, and shall be accompanied by a plat of the lands to be included in the proposed district; the petition shall pray the board to request that a water survey and allotment of water for the lands within the proposed district be made, that the land to be included in the proposed district be determined, listed with water allotment, and platted, and that the question of final organization of the same be submitted to the vote of the land owners within the proposed district; the petition shall be signed by the governor, or, if proposed by land owners, by fifty or a majority of land owners within the proposed district. If the petition is presented by land owners, it must be accompanied by a good and sufficient bond, to be approved by said board of county commissioners, in double the amount of the probable cost of organizing such district, exclusive of the cost of water survey, and conditioned for the payment of all such costs incurred in said proceeding in case said organization shall not be effected; no bond need accompany a petition by the governor. The cost of the water survey, and all other costs incurred upon petition filed by the governor, shall, if organization of the district be not effected, be borne one-half by the county or counties in which the proposed district is situate, in proportion to the acreage, and one-half by the state of Utah; but in case organization of the district is effected all such costs and expenses, including cost of the water survey, shall be repaid by said district. Upon the filing of such petition with the board of county commissioners, they shall send a certified copy of same to the state engineer of the state of Utah with a request that the water survey and allotment be made. Thereupon it shall be the duty of the state engineer to cause to be made a water survey of all lands within the district for the purpose of alloting to the said lands the water or additional water supply necessary and desired therefor; each forty-acre tract or smaller tracts in separate ownership shall be separately surveyed and the allotment made therefor. On completion of said survey and allotment, the state engineer shall file, with the board of county commissioners with which the petition for the said district is filed, his return of survey and report of allotment. Upon receipt of the report and return from the state engineer, the board of county commissioners shall cause to be published for at least two weeks prior to the date set for the hearing, in some newspaper of general circulation printed and published in the county, or if there be no such paper published in the county, then in some newspaper having general circulation in the county, a notice that petition for formation of an irrigation district has been filed, water survey and allot-

ment made, and setting a day for the hearing of applications for exclusion and inclusion of lands, and revision of allotments. Am'd '17, p. 78.

3503. Hearing on petition. Determination of land and water allotments. Election. When a petition has been filed, water survey and allotment made, and notice of hearing published as required by this chapter, the commissioners shall proceed to determine, list, and plat the lands to be included in said proposed district, from the petition, and from such applications for the exclusion of lands therefrom and the inclusion of lands therein as may be made in accordance with the intent of this chapter. They may adjourn such examination from time to time not exceeding two months in all, and shall, by final order duly entered, determine and plat the lands included in such proposed district, and list the lands included therein with the allotment of water made; *provided,* that said board shall not so alter the included lands, shown by the plat accompanying the petition, as to change the objects of said petition, or so as to exempt from the operation of this chapter any lands, requiring water, shown on the plat as included within the petition and susceptible of irrigation by the same system of waterworks applicable to other lands in such proposed district; nor shall any land which will not in the judgment of the board be benefited by such proposed system be included in such district if the owner thereof shall make application at such hearing to withdraw the same; *provided, also,* that lands not included in said proposed district, as shown on the plat accompanying the petition, may, upon application of the owner or owners, be included in such district upon such hearing, and such included lands shall be listed with such allotment of water as the board, using the allotment made by the state engineer for similar lands as a basis, may make. When the lands included in the proposed district shall have been determined, listed, and platted as aforesaid, the county commissioners shall forthwith make an order determining, listing, and platting said lands, and designating the name of such proposed district, and shall, by further order duly entered upon the record, call an election of the land owners of said district to be held for the purpose of determining whether such district shall be organized under the provisions of this chapter, and by such order shall submit the names of one or more persons from each of the three divisions of said district as hereinafter provided to be voted for as directors therein, and for the purpose of said election shall divide said district into three divisions as nearly equal in voting strength as may be practicable, and shall provide that a land owner of each of said three divisions shall be elected a member of the board of directors of said district by the land owners of the whole district. Each of said divisions shall constitute an election precinct, and three judges shall be appointed for each of such precincts, one of whom shall act as clerk of said election; *provided,* that in the hearing of any such petition the board of county commissioners shall disregard any informality therein, and in case they deny the same or dismiss it for any reason on account of the provisions of this chapter not having been complied with, which are the only reasons upon which they shall have a right to refuse or dismiss the same, they shall state their reasons in writing therefor in detail, which shall be entered upon their records, and in case these reasons are not well founded, a writ of mandamus shall, upon proper application therefor, issue out of the district court of said county, compelling them to act in compliance with this chapter, which writ shall be heard within twenty days from the date of its issuance, and which twenty days shall be excluded from the two months after return of survey by the state engineer given the commissioners herein to act upon said petition. The officers of such district shall consist of three directors, a secretary, and a treasurer. Am'd '17, p. 79.

3504. Notice of election. Who entitled to vote. Ballots. The board of county commissioners shall thereupon cause a notice embodying said orders in substance, signed by the chairman of the board of county commissioners and the clerk of said board, to be issued, given, and published, giv-

ing public notice of said election, the time and place thereof, and the matters submitted to the vote of the land owners; said notice and order shall be published once a week for at least three weeks prior to such election in a newspaper of general circulation in said county, and if any portion of such proposed district lies within any other county, or counties, then such order and notice shall be published in a newspaper of general circulation within each of said counties. At all elections held under the provisions of this chapter, all persons shall be entitled to vote who are owners of agricultural lands within the district to which water has been allotted; *provided,* that corporations owning lands within the district shall be considered persons within the meaning of this section. Land owners not residing within the district shall be entitled to vote only in the division of such district wherein their lands, or a major portion thereof, are located; and any individual entitled to vote as aforesaid shall also be eligible to election as a director in and for the division in such district in which the major portion of his lands are located. The ballots to be used and cast at such election for the formation of such district, shall be substantially as follows:

"Irrigation district—yes, ... (name)..... acre feet," or

"Irrigation district—no..... (name)..... acre feet,"

Or words equivalent thereto, and shall also contain the names of the persons to be voted for as members of the board of directors of said district; each land owner may vote for three directors, one for each division, and shall indicate his vote by placing a marginal cross upon the ballot for or against any question submitted or name voted upon and opposite thereto at an election held under this chapter; *provided,* that at all elections each elector, as provided herein, shall be entitled to cast one vote for each acre foot of water or fraction thereof allotted to the land owned by such elector, and shall sign the ballot and indicate along with his or her name the number of acre feet allotted to the lands owned by the elector casting the ballot.

'11, p. 71; am'd '17, p. 80.

3505. Canvass of votes. Result declared. Copy of order, list, and plat to be filed. The said board of county commissioners shall meet on the second Monday next succeeding such election and proceed to canvass the vote cast thereat; and if, upon such canvass, it appears that a majority of the votes cast at said election are "Irrigation district—yes," the board shall, by an order entered on their minutes, declare such territory duly organized as an irrigation district, under the name and style theretofore designated, and shall declare the persons receiving respectively the highest number of votes for such several offices to be duly elected to such office. The said board shall cause a copy of such order, including a list and plat of the lands of said district, with water allotment, duly certified by the clerk of the board of county commissioners, to be immediately filed for record in the offices of the county clerk and county recorder of each county in which any portion of such lands are situated, and no board of county commissioners of any county included in any portion of such district shall, after the date of organization of such district, allow another district to be formed including any of the land of such district, without the consent of the board of directors thereof; and from and after the date of such filing, the organization of such district shall be complete and the officers thereof shall immediately enter upon the duties of their respective offices, upon qualifying in accordance with law, and shall hold such offices, respectively, until their successors are elected and qualified. For the purpose of the election above provided for, the said board of county commissioners must establish a convenient number of election precincts and polling places in said proposed district, and define the boundaries thereof, which said precincts may thereafter be changed by the board of directors of such district, and shall appoint the judges of election for each such precinct, one of whom shall act as clerk of election.

Am'd '11, p. 71; '17, p. 81.

3506. Election of board of directors. Bonds. The regular election of said district, for the purpose of electing a board of directors, shall be held on the first Tuesday after the first Monday in December of each year, at which time one director shall be elected for a term of three years; *provided,* that at the first election held to choose the first board of directors, after the organization of any district shall have been effected, the person having the highest number of votes shall continue in office for the full term of three years; the next highest two years. But if two or more persons have the same number of votes then their term shall be determined by lot, under the direction of the clerk of the county wherein the organization of the district shall have been effected. The person receiving the highest number of votes for any office to be filled at such election is elected thereto. Within ten days after receiving their certificates of election, hereinafter provided for, said officers shall take and subscribe the official oath, and file the same in the office of the county clerk of the county wherein the organization was effected, and on the first day of January following shall assume the duties of their respective offices. Each member of the board of directors shall execute an official bond in the sum of $3000, which bond shall be approved by the clerk of the county wherein such organization was effected, and shall be recorded in the office of the said county clerk. All official bonds herein provided shall be in the form prescribed by law for official bonds for county officials, except that the obligee named in said bonds shall be the district; they shall be filed with the county clerk at the same time as the filing of the oath herein prescribed; *provided,* that in case any district organized under this title is appointed fiscal agent of the United States, or by the United States is authorized to make collections of money for and on behalf of the United States, in connection with any federal reclamation project, each such director shall execute a further and additional official bond in such sum as the secretary of the interior may require, conditioned for the faithful discharge of the duties of his office, and the district shall execute a further and additional bond for the faithful discharge by the district of its duties as fiscal or other agent of the United States under any such appointment or authorization. Such additional official bonds are to be filed as other official bonds hereinabove provided for and any such additional official bond may be sued upon by the United States or any person injured by the failure of any such director or of the district to fully, promptly, and completely perform their respective duties. Am'd '17, p. 82.

3507. Location of office. Board of election. The office of the board of directors shall be located in the county where the organization was effected. Fifteen days before any election held under this chapter, subsequent to the organization of the district, the secretary, who shall be appointed by the board of directors, shall cause notice specifying the polling places of each precinct to be posted in three public places in each election precinct, of the time and place of holding the election, and shall also post a general notice of the same in the office of said board, which shall be established and kept at some fixed place to be determined by said board in said county. Prior to the time for posting the notices, the board must appoint from each precinct, from the electors thereof, three judges, one of whom shall act as clerk, who shall constitute a board of election for such precinct. If the board fails to appoint a board of election, or the members appointed do not attend the opening of polls on the morning of election, the electors of the precinct present at that hour may appoint the board, or supply the place of an absent member thereof. The board of directors must, in its order appointing the board of election, designate the hour and the place in the precinct where the election must be held.

3508. Duties and powers of judges of election. Polls. One of the judges shall be chairman of the election board and may:

1. Administer all oaths required in the progress of an election;

2. Appoint judges and clerks, if during the progress of the election any judge or clerk ceases to act.

Any member of the board of election, or any clerk thereof, may administer and certify oaths required to be administered during the progress of an election. Before opening the polls, each member of the board must take and subscribe an oath to faithfully perform the duties imposed upon him by law. Any elector of the precinct may administer and certify such oath. The polls must be opened at eight o'clock in the morning of election and be kept open until six o'clock p. m. of the same day. It shall be the duty of the clerk of the board of election to forthwith deliver the returns duly certified to the board of directors of the district.

3509. Board of directors to canvass returns. No lists, tally papers, or certificates returned from any election shall be set aside or rejected for want of form if it can be satisfactorily understood. The board of directors must meet at its usual place of meeting on the first Monday after election and canvass the returns. If, at the time of meeting, the returns from each precinct in the district in which the polls were opened have been received, the board of directors must then and there proceed to canvass the returns; but if all the returns have not been received, the canvass must be postponed from day to day until the returns have been received, or until six postponements have been had. The canvass must be made in public and by opening the returns and counting the votes of the district for each person voted for, and declaring the results thereof. The board shall declare elected the person receiving the highest number of votes so returned for each office, and also declare the result of any question submitted.

3510. Secretary to declare result of election. Vacancies. The secretary of the board of directors must, as soon as the result of any election held under the provisions of this chapter is declared, enter in the records of such board and file with the county clerk of the county in which the office of said district is located, a statement of such results, which statement must show:

1. A copy of the publication notice of said election.
2. The names of the judges of said election.
3. The whole number of votes cast in the district and in each precinct of the district.
4. The names of the persons voted for.
5. The office to fill which each person was voted for.
6. The number of votes given in each precinct for each of such persons.
7. The number of the votes given in each district for each of such persons.
8. The names of the persons declared elected.
9. The result declared on any question submitted in accordance with the majority of the votes cast for or against such question.

The board of directors must declare elected the person having the highest number of votes given for each office, and also the result of any question submitted. The secretary must immediately make out and deliver to such person a certificate of election, signed by him, and authenticated with the seal of the board. In case of a vacancy in the board of directors, by death, removal, or inability from any cause to properly discharge the duties as such director, the vacancy shall be filled by appointment by the remaining members of the board, and upon their failure or inability to act within thirty days after such vacancy occurs, then upon petition of five land owners of said district, the board of county commissioners of the county where the office of said board of directors is situated shall fill such vacancy or vacancies. Any director appointed as above provided shall hold his office until the next general election of said district, and until his successor is elected and qualified.

3511. Organization of board. Powers and duties. Meetings. The directors, having duly qualified, shall organize as a board, elect a president from their number, and appoint a secretary. The board shall have power,

and it shall be its duty, to adopt a seal, manage and conduct the affairs and business of the district, make and execute all necessary contracts, employ such agents, attorneys, officers, and employes as may be required, and prescribe their duties. In addition to the means of supplying water for said district proposed by the petition submitted for the formation thereof, the board shall have the power to contract for the purchase of a system of irrigation thereafter to be constructed; construct, or otherwise acquire, any and all canals, ditches, reservoirs, reservoir sites, water, water filings, water rights, rights of way, or other property, or any interest therein, necessary for the use of the district; or to acquire, by condemnation or otherwise, the right to enlarge any ditch, canal, or reservoir already constructed or partly constructed. The board shall also have power to purchase capital stock of mutual irrigation companies organized for the sole purpose of owning water rights and irrigation systems, and distributing water to the stockholders thereof; *provided,* that no irrigation district shall be authorized to purchase less than a majority of the capital stock of a mutual irrigation company. If it shall be proposed by the board of directors to purchase a system of irrigation already constructed, or partially constructed, and to enlarge and complete the same adequate to the needs of the district, the board may in such case embody in one contract the matter of the purchase and completion of the existing contracts without inviting bids for such purchase, completion, or construction; and in case of the purchase of such property, or of entering into any such contract, as aforesaid, by said district, the bonds of the district, hereinafter provided for, may be used at their par value in such amounts and at such times as may be necessary and most advantageous to carry out the provisions of such purchase or contract, without previous offer of such bonds for sale; *provided, however,* that no contract or purchase involving a consideration exceeding $10,000, and not exceeding $25,000, shall be binding, unless such contract shall be first authorized and ratified in writing by land owners of the district having a majority of the votes according to the number of votes cast at the last district election; nor shall any contract or purchase in excess of $25,000 be binding until such contract or purchase shall have been authorized and ratified at an election, in manner as is provided for the issue of bonds. The board, its agents and employes, shall have the right to enter upon any land in the district to make surveys, and to locate and construct any canal or canals and the necessary laterals. Said board shall also have the right to acquire all lands, water rights, franchises, and other property necessary for the construction, use, maintenance, repair, and improvement of its canals, ditches, reservoirs, and water works; and shall also have the right, by purchase or condemnation, to acquire rights of way for the construction or enlargement of any of its ditches, canals, or reservoirs, also lands for reservoir sites. The board may make such investigations and, based thereon, such representations and assurances to the secretary of the interior as may be requisite under the act of congress approved August 11, 1916, and may enter into any obligation or contract with the United States for the construction or operation and maintenance of the necessary works for the delivery and distribution of water therefrom or for the assumption, as principal or guarantor of indebtedness to the United States on account of district lands, or for the temporary rental of water under the provisions of the federal reclamation act, and all acts amendatory thereof, or supplementary thereto, and the rules and regulations established thereunder; or the board may contract with the United States for a water supply under any act of congress providing for or permitting such contract, and may convey to the United States, as partial or full consideration therefor, water rights or other property of the district, and in case contract has been or may hereafter be made with the United States as herein provided, bonds of the district may be deposited with the United States at 95 per cent of their par value to the amount to be paid by the district to the United States under any such contract, the interest on said

bonds to be provided for by assessment and levy as in the case of other bonds of the district, and regularly paid to the United States, to be applied as provided in such contract, and if bonds of the district are not so deposited, it shall be the duty of the board of directors to include, as part of any levy or assessment now provided for by law, an amount sufficient to meet each year all payments accruing under the terms of any such contract; and the board may accept, on behalf of the district, appointment of the district as fiscal agent for the United States, or authorization of the district by the United States to make collection of moneys for or on behalf of the United States in connection with any federal reclamation project, whereupon the district shall be authorized so to act and to assume the duties and liabilities incident to such action, and the said board shall have full power to do any and all things required by the federal statutes now or hereafter enacted in connection therewith, and all things required by the rules and regulations now or that may hereafter be established by any department of the federal government in regard thereto. Districts co-operating with the United States may rent or lease water to private lands, entrymen, or municipalities in the neighborhood of the district, in pursuance of contract with the United States. The board shall establish equitable rules and regulations for the distribution and use of water among the owners of lands included in the district, and may provide therein that no water shall be delivered to lands which are delinquent or in default in the payment of any toll, charge, tax, or assessment. The said rules and regulations shall, as soon as adopted, be printed in convenient form for distribution in the district; *provided, however,* that water, the right to the use of which is acquired by the district under any contract with the United States, shall be distributed and apportioned by the district in accordance with the acts of congress and regulations of the secretary of the interior, and the provisions of said contract in relation thereto. The board of directors shall have power to lease or rent the use of water not needed by the land owners of said district, or contract for the delivery thereof to occupants of other lands within or without the said district, at such prices and on such terms as they may deem best; *provided,* the rental shall not be less than one and one-half times the amount of the district tax for which said land would be liable if already included in the district; and *provided, further,* that no lease or rental agreement running for a period of more than five years shall be made, and no vested or prescriptive right to the use of such water shall attach to said land by virtue of such lease or such rental; and, *provided, also,* that any land owner in said district may, with the consent of the board of directors, assign the right to the whole or any portion of the water so apportioned to him for any one year where practicable to any other bona fide land owner, to be used in said district for use on his land for said year, provided such land owners shall have paid all amounts due on assessments upon such lands. The board shall generally perform all such acts and have all such powers as shall be necessary fully to carry out the purposes of this chapter. The board of directors shall hold a regular quarterly meeting in their office on the first Tuesday in January, April, July, and October, and such special meetings as may be required for the proper transaction of business. A special meeting may be called by a written request of one-third of the electors of said district, addressed to the president of the board of directors, or by the president of the board, or by any two directors. All meetings of the board must be public; and two members shall constitute a quorum for the transaction of business; and on all questions requiring a vote, there shall be a concurrence of at least two members of said board. All records of the board must be open to the inspection of any land owner during business hours. Am'd '11, p. 71; '17, p. 83.

3512. Contracts. Hearing. The board of directors shall further have power to lease or rent the use of water or to contract for the delivery thereof to settlers upon or occupants of state lands and of the public domain, whose entries shall not have been subordinated to the district, through com-

pliance with the aforesaid act of congress approved August 11, 1916, on the terms hereinabove provided; and in such case the board of directors shall have the further power to make a contract, on behalf of the district, with such settler or occupant, to the effect that the lands of such settler or occupant shall, upon entry or purchase thereof and upon the payment of his proportionate share of the bond assessments as provided in § 3535, be included within said district, and such settler or occupant shall, upon such inclusion, be entitled to all the rights and privileges of a member of said district. Before the execution of such contract the board of directors shall cause notice of such contract to be given substantially as provided in § 3533 with such changes in the form of the notice as may be necessary, and a hearing upon said contract, and all objections thereto shall be had as provided in § 3534. If, upon said hearing, the board of directors deem it not for the best interest of the district that said contract be executed, they shall by order refuse to execute said contract; but if they deem it for the best interests of the district that said contract be executed, the board may execute said contract, and in such case said contract shall be valid and binding upon all parties thereto, and when the said settler or occupant shall have complied with said contract, the board shall, upon proof of such compliance, and without any further notice or hearing upon the matter, enter an order of inclusion of said lands as provided in § 3536; *provided,* that if, within thirty days from the execution of said contract, a majority of the land owners of the district protest in writing to said board against the execution of said contract, said contract shall be held for naught, and shall not be binding upon any party thereto. Am'd '11, p. 73; '17, p. 86.

3513. Title of property. The title to all property acquired under the provisions of this chapter shall immediately and by operation of law vest in such irrigation district, in its corporate name, and shall be held by such district in trust for, and is hereby dedicated and set apart for, the uses and purposes set forth in this chapter, and shall be exempt from all taxation, and said board is hereby authorized and empowered to hold, use, and acquire, manage, occupy, and possess said property as herein provided; *provided,* that when any district contemplated in this chapter shall find it necessary to procure and acquire a supply of water from outside the boundaries of this state, then in such event it shall be lawful for said district to contract and pay for the same in the same manner as other property acquired by the district is purchased and paid for; *provided, further,* that any property acquired by the district may be conveyed to the United States in so far as the same may be needed for the construction, operation, and maintenance of works by the United States for the benefit of the district under any contract that may be entered into with the United States pursuant to this chapter. Am'd '17, p. 86.

3514. Conveyances. Litigation. The said board is hereby authorized and empowered to take conveyances or assurances for all property acquired by it under the provisions of this chapter in the name of such irrigation district to and for the purposes herein expressed, and to institute and maintain any and all actions and proceedings, suits at law or in equity, necessary or proper in order to fully carry out the provisions of this chapter or to enforce, maintain, protect, or preserve any or all rights, privileges, and immunities created by this chapter or acquired in pursuance thereof. And in all courts, actions, suits, or proceedings the said board may sue, appear, and defend in person or by attorneys and in the name of such irrigation district. Judicial notice shall be taken in all actions, suits, and judicial proceedings in any court of this state of the organization and existence of any irrigation district of this state, now or hereafter organized, from and after the filing for record in the office of the county clerk of the certified copy of the order of the board of county commissioners mentioned in § 3503; and a certified copy of said order shall be prima facie evidence in all actions, suits, and proceedings in any court of this state of the regularity and

legal sufficiency of all acts, matters, and proceedings therein recited and set forth; and any such irrigation district, in regard to which any such order has been heretofore or may hereafter be entered, and such certified copy thereof so filed for record, and which has exercised or shall exercise the rights and powers of such a district, and shall have had or shall have in office a board of directors exercising the duties of their office, and legality or regularity of the formation or organization whereof shall not have been questioned by proceedings in quo warranto instituted in the district court of the county in which such district or the greater portion thereof is situated within one year from the date of such filing, shall be conclusively deemed to be a legally and regularly organized, established, and existing irrigation district within the meaning of this chapter; and its due and lawful formation and organization shall not thereafter be questioned in any action, suit, or proceeding whether brought under the provisions of this chapter or otherwise.

This section is constitutional. Horn v. Shaffer, 47 U. 55; 151 P. 555.

3515. Issuance of bonds. Contract with United States. Special election to decide. Nature of bonds. Previous issues confirmed. For the purpose of constructing or purchasing or acquiring necessary reservoir sites, reservoirs, water, water filings, water rights, canals, ditches, and works, capital stock of mutual irrigation companies, and acquiring the necessary property and rights therefor, for the assumption of indebtedness to the United States for district lands, for the purpose of paying interest upon the bonds herein authorized during the period of construction and for not more than four years thereafter, and otherwise carrying out the provisions of this chapter, the board of directors of any such district shall, as soon after such district has been organized as may be practicable, estimate and determine the amount of money necessary to be raised for such purposes, and shall forthwith call a special election, at which election shall be submitted to the land owners of such district, possessing the qualifications prescribed by this chapter, the question of whether or not the bonds of said district shall be issued in the amount so determined. A notice of such election shall be given by posting notices in three public places in each election precinct in said district for at least twenty days, and also by publication of such notices in some newspaper published in the county; if there be no such paper published in said county, then the same shall be published in some newspaper having general circulation in said county, where the office of the board of directors of such district is required to be kept, once a week for at least three successive weeks. Such notice shall specify the time of holding the election, the amount of bonds proposed to be issued, and said election must be held and the result thereof determined and declared in all respects as nearly as possible in conformity with the provisions of this chapter governing the election of officers: *provided,* that no informalities in conducting such election shall invalidate the same, if the election shall have have been otherwise fairly conducted. At such election, the ballots shall contain the words "Bonds—yes," or "Bonds —no," or words equivalent thereto. If a two-thirds majority of the votes cast at such election are "Bonds—yes," the board of directors shall immediately cause bonds in such amounts to be executed and payable in series as follows, to wit:

At the expiration of eleven years, and annually thereafter, a certain percentage, not less than 3 per cent, of the whole amount and number of said bonds; at the expiration of the final period for which the bonds have been issued, which period shall in no event exceed forty years, a percentage sufficient to pay off the remainder of said bonds; that the several enumerated percentages be of the entire amount of the bond issue; that each bond must be payable at the given time for its entire amount, and not for a percentage; that said bonds shall bear interest at the rate of not to exceed 6 per cent per annum, payable semi-annually on the first day of June and December of each year.

The principal and interest shall be payable at the office of the county treasurer of the county in which the organization of the district was effected as aforesaid, and at such other place as the board of directors may designate in such bonds. Said bonds shall be each of the denomination of not less than $100 nor more than $1000, shall be negotiable in form, executed in the name of the district and signed by the president and the secretary, and the seal of the district shall be affixed thereto. Bonds deposited with the United States may call for the payment of such interest not exceeding 6 per cent per annum, may be of such denomination, and may call for the repayment of the principal at such times as may be agreed upon between the board and the secretary of the interior, and where contract is made and bonds are not deposited with the United States, the contract may likewise call for the repayment of the principal at such time as may be agreed upon. Said bonds shall be numbered consecutively as executed, and bear the date at the time of their execution. Coupons for the interest shall be attached to each bond bearing the lithographed signature of the president and the secretary. Said bonds shall express on their face that they are issued by the authority of this chapter, stating its title and date of approval. The secretary shall keep a record of the bonds sold, their number, date of sale, the price received, the name of the purchaser, and may keep a transfer register; *provided,* any such district may provide for the issuance of bonds that will mature in any number of years less than forty, and arrange for the payment thereof, in series as above provided; *provided, further,* that when the money provided by any previous issue of bonds has become exhaused by expenditures herein authorized therefor, and it becomes necessary to raise additional money for such purposes, additional bonds may be issued after submitting the question at a special election to the qualified voters of said district, and otherwise complying with the provisions of this section in respect to an original issue of such bonds; *provided, also,* that the lien for taxes, for the payment of interest and principal of any bond issue, or for any indebtedness under any contract with the United States for or with which bonds have not been deposited, shall be a prior lien to that of any subsequent bond issue. All bonds heretofore executed by any irrigation district wherein proceedings for the organization of such district and authorizing the sale of such bonds have been approved and confirmed by the district court of the judicial district within which such irrigation district is located, are hereby confirmed and validated. If contract is proposed to be made with the United States and bonds are not to be deposited with the United States in connection therewith, the question to be submitted to the voters at such special election is whether contract shall be entered into with the United States. The notice of election shall state under the terms of what act or acts of congress contract is proposed to be made, and the maximum amount of money payable to the United States for construction purposes exclusive of penalties and interest, and the water rights and other property, if any, to be conveyed to the United States as in § 3511 provided. The ballots for such election shall contain the words "Contract with the United States—yes" and "Contract with the United States—no," or words equivalent thereto.

Am'd '11, p. 74; '17, p. 87.

3516. Sale of bonds. The board may sell bonds from time to time in such quantities as may be necessary and most advantageous to raise the money for the construction or purchase of canals, reservoir sites, reservoirs, water rights and works, capital stock of mutual irrigation companies, and otherwise to fully carry out the objects and purposes of this chapter. Before making any sale the board shall, at a meeting, by resolution declare its intention to sell a specified amount of the bonds, and the day and hour and place of such sale, and shall cause such resolution to be entered in the minutes, and notice of the sale to be given by publication thereof at least twenty days in any daily newspaper published in the city of Salt Lake, and in any other newspaper, at their discretion. The notice shall state that sealed

proposals will be received by the board at their office, for the purchase of the bonds, till the day and hour named in the resolution. At the time appointed the board shall open the proposals and award the purchase of the bonds to the highest responsible bidder, and may reject all bids; but said board shall, in no event, sell any of said bonds for less than 95 per cent of the face value thereof. In case no bid is made and accepted as above provided, the board of directors is hereby authorized to use said bonds for the purchase of canals, reservoir sites, reservoirs, water rights and works, capital stock of mutual irrigation companies, or for the construction of any canal, reservoir and works; *provided,* such bonds shall not be disposed of at less than 95 per cent of the face value thereof. Am'd '13, p. 198.

3517. Bonds and contracts paid by assessments on land. Said bonds and the interest thereon, and all payments due or to become due to the United States under any contract between the district and the United States accompanying which bonds of the district have not been deposited with the United States, shall be paid by revenue derived from an annual assessment upon the real property of the district, and the real property of the district shall be and remain liable to be assessed for such payments as herein provided. Public lands of the United States within any district shall be subject to taxation for all purposes of this chapter to the extent provided by the act of congress approved August 11, 1916, and upon full compliance therewith by the district. Am'd '17, p. 89.

3518. Board to estimate required annual revenue. It shall be the duty of the board of directors, on or before September 1 of each year, to determine the amount of money required for the ensuing year, to pay any interest on and all maturing instalments of principal of any bonds, and all payments due or to become due to the United States under any contract between the district and the United States accompanying which bonds of the district have not been deposited with the United States as in § 3511 provided; and all operation and maintenace or rental payments to be made by the district to the United States under the provisions of any such contract between the United States and the district, and to meet the maintenance, operating and current expenses, including the payment of assessments upon capital stock of mutual irrigation companies owned by the irrigation district, and to certify to the county commissioners of the county in which the office of said district is located, said amount, together with such additional amount as may be necessary to meet any deficiency in the payment of said expenses thertofore incurred. Am'd '13, p. 198; '17, p. 89.

3519. Duty of county assessor. It shall be the duty of the county assessor of any county embracing the whole or a part of any irrigation district to assess and enter upon his records as assessor in its appropriate column the assessment of all real estate to which water has been allotted, exclusive of improvements, situated, lying, and being within any irrigation district in whole or in part in such county. The assessor shall assess the lands on the basis of the value per acre foot of water allotted to the lands within the district; *provided,* that the board of directors of any such irrigation district may divide the district into units and fix a different value per acre foot of water in the respective units, and in such case the assessor shall assess the lands within each such unit upon the same basis of value per acre foot of water allotted to lands within such unit. Immediately after said assessment shall have been extended as provided by law, the assessor shall make returns of the total amount of such assessment to the county commissioners of the county in which the office of said district is located. In case of contract with the United States, however, under the federal reclamation laws, the assessment of real estate within the district may be otherwise apportioned in the following manner:

1. Assessments shall conform to the requirements of the said federal laws and particularly the act approved August 13, 1914, unless otherwise provided by contract with the United States.

2. It may be provided by contract with the United States that water shall be furnished to the district, or to part of the irrigable lands thereof, upon a temporary rental basis, whereupon lands of the district for which rental charges for any given year are not required to be paid to the United States by the district shall not be taxed for such purposes.

3. District lands shall not be taxed for purposes of payment to the United States in any year when, and to the extent that, on account of exceptional difficulties of reclamation, the district shall be exempted by contract with the United States from said payment to the United States for such lands.

4. The lands of any irrigation district may be, by contract with the United States, divided into units and placed upon a basis of repayment to the United States in successive units, which shall not necessarily be composed of contiguous lands, and in such event the lands of units not yet, in any year, placed upon the repayment basis shall not, during such year, be subject to taxation for payment of building costs.

5. In case lands which shall have been irrigated by means of ditches, canals, and reservoirs constructed prior to the organization of any district, shall be included within such district under the terms of § 3501, equitable credit shall be given in the making of assessments for any water and ditch rights appurtenant to such lands. Such adjustment shall be made by the board of directors of such irrigation district, which adjustment shall be equitably made so that the cost of the additional rights, property, or benefits acquired by the district under contract from the United States will be fairly and equitably proportioned between the lands having rights in such old ditches, reservoirs, or other works and the lands of the district having no such rights, and due and equitable allowance made to the lands to which any such rights may be appurtenant; *provided,* that before making any such adjustment or allowance the board of directors shall publish notice for a period of at least three weeks in a newspaper published in the county in which the greater portion of the irrigable lands of the district are located, or if there be no such newspaer published in such county then in some newspaper of general circulation in that county, which notice shall state that a meeting of the board will be held for the purpose of making such adjustment and allowance, and that all parties interested therein who desire to be heard on the matter will be given an opportunity to appear and present evidence, and such notice shall state the date, the day, and hour that such meeting will be held, and the place of meeting, and at the date and place provided in the notice the board shall proceed to hear such evidence, if any be presented, and to make such adjustment or allowance in the manner herein prescribed. After such adjustment and allowance by the board of directors, the board shall proceed in the manner prescribed in §§ 3550, 3551, 3552, 3553, 3554, to have such adjustment and allowance duly confirmed by decree of the court in similar manner to that provided in said sections with reference to confirmation of the bond issue, and the court shall proceed in like manner as provided in said §§ 3550, 3551, 3552, 3553, 3554, to examine into the regularity of said proceedings of the board and the equity of the adjustment or allowance made by the board, and should the court find said proceedings regular and said allowance or adjustment equitable, then the court shall file its findings and decree confirming the said allowance and adjustment, but if the court shall find that such allowance and adjusment is not equitable, then the court shall itself make an allowance and adjustment which shall be just and equitable as between the various classes of lands in the district, and shall file a decree confirming such apportionment in like manner and with like effect as the findings and decree provided for in said § 3554; *provided,* that in no case shall any land be taxed for irrigation purposes under this chapter which from any natural cause cannot be irrigated, or is not susceptible of cultivation. Am'd '17, p. 90.

3520. Tax levy to be fixed by board of county commissioners. It shall

be the duty of the county commissioners of the county in which is located the office of any irrigation district, immediately upon receipt of the returns of the total assessment of said district, and upon the receipt of the certificate of the board of directors certifying the total amount of money required to be raised as herein provided, to fix the rate of levy necessary to provide said amount of money, including the amount required to pay the interest and principal of the bonds of said district as the same shall become due, and all payments due or to become due to the United States accompanying which bonds of the district have not been deposited with the United States as in § 3511 provided; also to fix the rate necessary to provide the amount of money required for any other purposes as in this chapter provided, and which are to be raised by the levy of assessments upon the real property of said district and to certify said respective rates to the county commissioners of each county embracing any portion of said district. The rate of levy necessary to raise the required amount of money on the assessed valuation of the property of said district shall be increased 15 per cent to cover delinquencies. For the purposes of said district it shall be the duty of the county commissioners of each county in which any irrigation district is located in whole or in part, at the time of making levy for county purposes, to make a levy, at the rates above specified, upon all real estate in said district within their respective counties. All taxes levied under this chapter are special taxes. Am'd '17, p. 92.

3521. Duty of county treasurer. Collection of money. Bond fund. Contract fund. General fund. The county treasurer of the county in which is located the office of any irrigation district shall be and is hereby constituted ex officio district treasurer of said district, and said county treasurer shall be liable upon his official bond and to indictment and criminal prosecution for malfeasance, or failure to perform any duty herein prescribed as county treasurer or district treasurer, as is provided by law in other cases as county treasurer. Said treasurer shall collect, receive, and receipt for all moneys belonging to said district. It shall be the duty of the county treasurer of each county in which any irrigation district is located, in whole or in part, to collect and receipt for all taxes levied as herein provided in the same manner and at the same time and on the same receipt as is required in the collection of taxes upon real estate for county purposes; *provided, however,* that such county treasurer shall receive in payment of the general fund tax above mentioned for the year in which said taxes were levied, warrants drawn against said general fund the same as so much lawful money of the United States, if such warrant does not exceed the amount of the general fund tax which the person tendering the same owes; *provided, further,* that such county treasurer shall receive in payment of the district bond fund taxes above mentioned for the year in which said taxes were levied, interest coupons or bonds of said irrigation district maturing within the year the same as so much lawful money of the United States, if such interest coupons or bonds do not exceed the amount of district bond fund tax which the person tendering the same owes. The county treasurer of each county comprising a portion only of the irrigation district, excepting the county treasurer of the county in which the office of said district is located, shall, on the first Monday of each month, remit to the district treasurer aforesaid all moneys, warrants, coupons, or bonds theretofore collected or received by him on account of said district, and said county treasurer shall keep a bond fund account, United States contract fund account, and a general fund account. The bond fund account shall consist of all moneys received on account of interest and principal of bonds issued by said district; said accounts for interest and principal shall be kept separate; and the United States contract fund account shall consist of all moneys received on account of any and all payments due or to become due the United States, accompanying which bonds of the district have not been deposited with the United States as in § 3511 provided. The general fund shall consist of all

other moneys or general fund warrants received by the collection of taxes or otherwise. The district treasurer aforesaid shall pay out of said bond fund, when due, the interest and principal of the bonds of said district, at the time and place specified in said bonds, and shall pay out of said United States contract fund when due all payments to the United States under any contract between the district and the United States accompanying which bonds of the district have not been deposited with the United States as in § 3511 provided. In cases where bonds have been deposited with the United States as provided in this chapter, the moneys to be paid to the United States for rentals or operation and maintenance charges, if not secured by bonds, shall be paid out of the general fund account; and the district treasurer shall pay out of said general fund only upon the order of the district, signed by the president and countersigned by the secretary of said district, as herein provided. The district treasurer, on the 15th day of each month, shall report to the secretary of the district the amount of money in his hands to the credit of the respective funds above provided; the amount of warrants paid during the previous month, and the amount of registered warrants, if there be any. All such district taxes collected and paid to the county treasurers as aforesaid shall be received by said treasurers in their official capacity, and they shall be responsible for the safe-keeping, disbursement, and payment thereof the same as for other moneys collected by them as such treasurers; *provided,* said county treasurer shall receive as his sole compensation for the collection of such taxes, such amount as the board of directors may allow, to be not less than $25 nor more than $100 per annum, which compensation shall be additional to the regular salary of such county treasurer as provided by law. Am'd '13, p. 198; '17, p. 92.

3522. State revenue laws applicable. Sale and redemption. The revenue laws of this state for the assessment, levying, and collecting of taxes on real estate for county purposes, except as herein modified, shall be applicable for the purposes of this chapter, including the enforcement of penalties and forfeiture for delinquent taxes; *provided,* that lands sold for delinquent district taxes shall be sold separately for such tax, and a separate certificate of sale shall issue therefor; and *provided, further,* that the period of redemption from sale for taxes under this chapter shall be two years. All taxes levied by an irrigation district under the provisions of this chapter, or any act supplemental or amendatory thereof, shall constitute a first lien on the property assessed, which lien shall remain in force until the taxes are paid. Am'd '17, p. 94.

3523. Bids for construction. After adopting a plan for the construction of canals, reservoirs, and works, the board of directors shall give notice by publication thereof not less than twenty days in a newspaper published in each of the counties into which any such irrigation district extends, provided a newspaper is published therein, and in such other newspapers as they may deem advisable, calling for bids for the construction of said work or any portion thereof. If less than the whole work is advertised, then the portion so advertised must be particularly described in such notice. Said notice shall set forth that plans and specifications can be seen at the office of the board, and that the board will receive sealed proposals therefor, and that the contract will be let to the lowest responsible bidder, stating the time and the place for opening the proposals, which at said time and place shall be opened in public, and as soon as convenient thereafter the board shall let said work, either in portions or as a whole, to the lowest responsible bidder, or it may reject any or all bids, and must thereupon readvertise for proposals, and if no satisfactory proposals are then received, it may proceed to construct the work under its own superintendence. Contracts for the purchase of material shall be awarded to the lowest responsible bidder. The person or persons to whom a contract may be awarded shall enter into a bond, with good and sufficient sureties, to be approved by the board, payable to said district for its use, for not less than 10 per cent of the amount

of the contract price, conditioned for the faithful performance of said contract. The work shall be done under the direction and to the satisfaction of the engineer in charge, and be approved by the board; *provided,* that the provisions of this section shall not apply in the case of any contract between the district and the United States. Am'd '17, p. 95.

3524. Claims, how paid. Warrant register. No claims shall be paid by the district treasurer until the same shall have been allowed by the board, and only upon warrants signed by the president and countersigned by the secretary, which warants shall state the date authorized by the board and for what purpose; and if the district treasurer has not sufficient money on hand to pay such warrant when it is presented for payment, he shall endorse thereon, "Not paid for want of funds; this warrant draws interest from date at 6 per cent per annum," and endorse thereon the date when so presented, over his signature, and from the time of such presentation until paid such warrant shall draw interest at the rate of 6 per cent per annum; *provided,* when there is more than the sum of $100 in the hands of the treasurer it shall be applied upon said warrant. All claims against the district shall be verified the same as required in the case of claims filed against counties in this state, and the secretary of the district is hereby authorized and empowered to administer oaths to the parties verifying said claims, the same as the county clerk or a notary public might do. The district treasurer shall keep a register in which he shall enter each warrant presented for payment, showing the date and amount of such warrant, to whom payable, the date of the presentation for payment, the date of payment, and the amount paid in redemption thereof, and all warrants shall be paid in the order of their presentation for payment to the district treasurer. All warrants shall be drawn payable to the claimant or bearer, the same as county warrants.

3525. Tolls and charges. For the purpose of defraying the expenses of the organization of the district, and the care, operation, management, repair, and improvement of all canals, ditches, reservoirs, and works, including salaries of officers and employes, or for the payment of charges to the United States for any of said purposes, or for rental of water, the board may either fix rates of tolls and charges and collect the same of all persons using said canal and water for irrigation, or other purposes, or in the case of such charges to be paid to the United States the same shall be collected from lands for which water service can be made, pursuant to contract with the United States, and in addition thereto may provide, in whole or in part, for the payment of such expenditures by levy of assessments therefor, as heretofore provided, or by both tolls and assessments, provided that if contract be made with the United States the charges for operation and maintenace or rental, as the case may be, may be fixed in accordance with the federal laws, notice, and rules, and the contract with the United States; *provided, further,* that in case the money raised by the sale of bonds issued be insufficient, or in case bonds be unavailable for the completion of the plans of works adopted, it shall be the duty of the board of directors to provide for the completion of said plans by levy of assessments therefor in the same manner in which levy of assessments is made for the other purposes provided for in this chapter. Am'd '17, p. 95.

3526. Works may be extended across property of others. The board of directors shall have the power to construct the said works across any stream of water, water course, street, avenue, highway, railway, canal, ditch, or flume which the route of said canal or canals may intersect or cross; and if such railroad company and said board, or the owners and controllers of said property, thing, or franchise so to be crossed, cannot agree upon the amount to be paid therefor, or the points or the manner of said crossings, the same shall be ascertained and determined in all respects as is provided in respect to the taking of land for public uses. The right-of-way is hereby given, dedicated, and set apart to locate, construct, and maintain said works

or reservoirs over, through or upon any of the lands which are now or may be the property of the state.

3527. Compensation of board of directors. The board of directors shall each receive compensation at the rate of not more than $10 per day while attending meetings, and their actual and necessary expenses while engaged in official business. The salary of the secretary shall not exceed $800 per annum. No director or any officer named in this chapter shall, in any manner, be interested, directly or indirectly, in any contract awarded or to be awarded by the board, or in the profits to be derived therefrom; nor shall he receive any bonds, gratuity, or bribe, and for any violation of this provision such officer shall be deemed guilty of a felony, and upon conviction therefor he shall forfeit his office, and be punished by a fine not exceeding $500, or by imprisonment in the penitentiary not exceeding five years nor less than one year. Am'd '17, p. 95.

3528. No liabilities other than provided in this chapter shall be incurred. The board of directors, or other officers of the district, shall have no power to incur any debt or liability whatever, either by issuing bonds or otherwise, in excess of the express provisions of this chapter, and any debt or liability incurred in excess of such express provisions shall be and remain absolutely void.

3529. Distribution of water. In case the volume of water in any canal, reservoir or other works in any district shall not be sufficient to supply the continual wants of the entire district lands susceptible of irrigation therefrom, then it shall be the duty of the board of directors to distribute all available waters upon certain or alternate days to different localities, as they may in their judgment think best for the interest of all parties concerned. All water, however, the right to the use of which is acquired by the district under any contract with the United States, shall be distributed and apportioned by the district in accordance with the acts of the department of the interior and the provisions of said contract in relation thereto. Am'd '17, p. 95.

3530. Prior rights not to be disturbed without compensation. Nothing herein contained shall be deemed to authorize any person or persons to divert the waters of any river, creek, stream, canal, or reservoir to the detriment of any person or persons having a prior right to the waters of such river, creek, stream, canal, or reservoirs, unless previous compensation be ascertained and paid therefor, under the laws of this state authorizing the taking of private property for public use.

3531. Inclusion and exclusion of lands. Lands may be included in or excluded from any irrigation district, now or hereafter organized under the provisions of this chapter, in the manner herein prescribed; but any such inclusion or exclusion of lands shall not impair or affect the district organization or its rights in or to property, or any of its rights or privileges of whatsoever kind or nature, nor shall it affect, impair, or discharge any contract, obligation, lien, or charge for or upon which it was or might become liable or chargeable had such inclusion or exclusion of lands not been made; *provided,* that in case contract has been made between the district and the United States as provided in this chapter, no lands shall be included in or excluded from the district until the secretary of the interior shall assent thereto in writing, and such assent be filed with the board of directors. Am'd '17, p. 96.

3532. Owners of neighboring lands may petition to be included in district. The holder or holders of title or evidence of title, representing a majority of the acreage of any body of land in the vicinity of the lands in any irrigation district, may file with the board of directors of said district a petition in writing, praying that such lands be included in such district. The petition shall describe the tracts or body of land owned by the petitioners, and the proposed method of supplying water thereto, but such de-

scription of the lands need not be more particular than is required when such lands are entered by the county assessor in the assessment book. Such petition shall be deemed to give the assent of the petitioners to the inclusion in said district of the lands described in the petition, and such petition must be acknowledged in the same manner that conveyances of land are required to be acknowledged. Am'd '17, p. 96.

3533. Notice of petition. The secretary of the board of directors shall cause notice of the filing of such petition to be given and published once each week for three successive weeks in a newspaper published in the county where the office of said board is situated, which notice shall state the filing of such petition and the names of the petitioners, a description of the lands mentioned in said petition, and the prayer of said petitioners; giving notice to all persons interested to appear at the office of said board at a time named in said notice, and show cause, in writing, if any they have, why the petition should not be granted. The time specified in the notice at which it shall be required to show cause shall be the regular meeting of the board next after the expiration of the time for the publication of the notice. The petitioner or petitioners shall advance to the secretary sufficient money to pay the estimated cost of all proceedings under such petition before the secretary shall be required to give such notice.

3534. Id. Action thereon. The board of directors, at the time and place mentioned in said notice, or at such time or times to which the hearing of said petition may have been adjourned, shall proceed to hear the petition, and all objections thereto, presented in writing by any person, showing cause as aforesaid, why said petition should not be granted. The failure of any person interested to show cause, in writing, as aforesaid, shall be deemed and taken as an assent on his part to the inclusion of such lands in said district as prayed for in said petition.

3535. Condition upon which petition may be granted. The board of directors to whom such petition is presented may require, as a condition precedent to the granting of the same, that the petitioners shall severally pay to such district such respective sums, as nearly as the same can be estimated by the board, as said petitioners or their grantors would have been required to pay to such district as assessments for the payment of the pro rata share of all bonds and the interest thereon, which may have previously thereto been issued by said district, or for the payment of the pro rata share of the cost of the construction under any contract between the district and the United States accompanying which bonds of the district have not been deposited with the United States as in this chapter provided, had such lands been included in such district at the time the same was originally formed or when said bonds were so issued, or when said contract with the United States was made. Am'd '17, p. 96.

3536. Rejection or granting. The board of directors, if they deem it not for the best interests of the district to include therein the lands mentioned in the petition, shall by order reject the said petition; but if they deem it for the best interests of the district that said lands be included, the board may order that the district be so changed as to include therein the lands mentioned in the said petition. The order shall list and allot water to the included lands, and require the same to be platted as district lands; *provided,* if within thirty days from the making of such order a majority of the land owners of the district protest in writing to said board against the inclusion of such lands in said district, said order shall be held for naught and such lands shall not be included therein. Am'd '17, p. 97.

3537. Certified copy of order of board to be recorded. Upon the allowance of such petition, and in case no protest has been filed with the board within thirty days after the entry of said order as aforesaid, a certified copy of the order of the board of directors making such change, and a plat of such district showing such change, if any, certified by the president and the secretary, shall be filed for record in the office of the clerk and the record-

er, and the district shall remain an irrigation district, as fully to every intent and purpose as if the lands which are included in the district by the change as aforesaid had been included therein at the organization of the district; and said district as so changed and all the lands therein shall be liable for all existing obligations and indebtedness of the organized district.

Am'd '17, p. 97.

3538. Secretary shall make record. Upon the filing of the copies of the order and the plat, as in the last preceding section mentioned, the secretary shall record in the minutes of the board the petition aforesaid; and the said minutes, or a certified copy thereof, shall be admissible in evidence with the same effect as the petition.

3539. Executor or administrator of estate may sign petition. A guardian, an executor, or an administrator of an estate, who is appointed as such under the laws of this state, and who, as such guardian, executor, or administrator, is entitled to the possession of the lands belonging to the estate which he represents, may, on behalf of his ward or the estate which he represents, upon being authorized by the proper court, sign and acknowledge the petition in this chapter mentioned, and may show cause, as in this chapter mentioned, why lands should not be included in or excluded from the district. Am'd '17, p. 97.

3540. Proceeding when additional land is included. In case of the inclusion of any land within any district by proceedings under this chapter the board of directors shall, at least thirty days prior to the next succeeding general election, make an order redividing such district into three divisions, as nearly equal in size as may be practicable, which shall be numbered first, second, and third, and one director shall thereafter be elected from each division. For the purpose of election, the board of directors shall establish a convenient number of election precincts in said districts, and define the boundaries thereof, which said precincts may be changed from time to time as the board may deem necessary.

3541. Exclusion of land. Any tract of land included within any such district, at or after its organization, under the provisions of this chapter may be excluded therefrom, in the manner herein prescribed, but such exclusion of land from the district shall not impair or affect its organization, or its rights in or to property, or any of its rights or privileges of whatever kind or nature; nor shall such exclusion affect, impair, or discharge any contract, obligation, lien, or charge for or upon which the district would or might become liable or chargeable had such land not been excluded from the district. Am'd '17, p. 97.

3542. Exclusion of land by petition. The owner or owners of any lands constituting a portion of any irrigation district may file with the board of directors of the district a petition praying that such lands may be excluded and taken from said district. The petition shall describe the lands which the petitioners desire to have excluded, but the description of such lands need not be more particular than required when lands are entered in the assessment book by the county assessor. Such petition must be acknowledged in the same manner and form as is required in case of a conveyance of land.

3543. Id. Notice of hearings. The secretary of the board of directors shall cause a notice of the filing of such petition to be published for at least three weeks in some newspaper published in the county where the office of the board of directors is situated, and if any portion of said district lie within another county or counties, then said notice shall be so published in a newspaper published within each of said counties; or if no newspaper be published therein, then by posting such notice for the same time in at least three public places in said district, and in case of the posting of said notices, one of said notices must be so posted on the lands proposed to be excluded. The notice shall state the filing of such petition, the names of the petitioners, description of the lands mentioned in said petition, and the prayer of said

petitioners; and it shall notify all persons interested to appear at the office of said board at a time named in said notice, and show cause in writing, if any they have, why said petition should not be granted. The time to be specified in the notice at which they shall be required to show cause shall be the regular meeting of the board next after the expiration of the time for the publication of the notice. The petitioner or petitioners shall advance to the secretary sufficient money to pay the estimated cost of all proceedings under such petition before the secretary shall give such notice.

3544. Id. Hearings. The board of directors, at the time and place mentioned in the notice, or at the time or times to which the hearing of said petition may be adjourned, shall proceed to hear the petition and all objections thereto, presented in writing by any person showing cause as aforesaid why the prayer of said petition should not be granted. The filing of such petition which such board, as aforesaid, shall be deemed and taken as an assent by each and all of such petitioners to the exclusion from such district of the lands mentioned in the petition, or any part thereof.

3545. When petition denied. The board of directors, if they deem it not for the best interest of the district that the lands mentioned in the petition, or some portion thereof, should be excluded from said district, shall order that said petition be denied; but if they deem it for the best interest of the district that the lands mentioned in the petition, or some portion thereof, be excluded from the district, and if there are no outstanding bonds of the district, then the board may order the lands mentioned in the petition, or some defined portion thereof, to be excluded from the district; *provided,* if within thirty days from the making of such order a majority of the land owners of the district protest in writing to said board against the exclusion of such lands from said district, said order shall be held for naught and such lands shall not be excluded therefrom; *provided, further,* that in case contract has been made between the district and the United States, no lands shall be excluded from said district unless the secretary of the department of the interior shall assent thereto in writing, and such assent be filed with the board of directors. Am'd '17, p. 98.

3546. Proceedings filed with clerk and recorder. Upon the allowance of such petition, and in case no protest has been filed with the board within thirty days after the entry of said order as aforesaid, a certified copy of the order of the board of directors making such change, and a plat of such district showing such change, certified by the president and the secretary, shall be filed for record in the office of the clerk and the recorder of each county in which are situated any of the lands of the district, and the district shall remain an irrigation district as fully to every intent and purpose as if the lands which are excluded by the change as aforesaid had not been excluded therefrom. Am'd '17, p. 98.

3547. Division of district. At least thirty days before the next general election of such district, the board of directors thereof may make an order dividing said district into three divisions as nearly equal in size as practicable, which shall be numbered first, second, and third, and one director shall be elected from each division by the land owners of the whole district. For the purpose of election in such district, the said board of directors must establish a convenient number of election precincts, and define the boundaries thereof, which said precincts may be changed from time to time as the board of directors may deem necessary.

3548. Dissolution of district. Special election. Whenever land owners, representing a majority of the number of acre-feet of water allotted to the lands in any irrigation district organized, or hereafter to be organized, under this chapter, shall petition the board of directors to call a special election for the purpose of submitting to the land owners of said irrigation district a proposition to vote on the dissolution of said irrigation district, setting forth in said petition that all bills and claims of every nature whatsoever have been fully satisfied and paid, it shall be the duty of said directors, if

they shall be satisfied that all claims and bills have been fully satisfied, to call an election, setting forth the object of said election, and to cause notice of said election to be published in some newspaper in each of the counties or county in which said district is located, for a period of thirty days prior to said election, setting forth the time and place for holding said election in each of the three voting precincts in said district. It shall also be the duty of the directors to prepare ballots to be used at said election on which shall be written or printed the words: "For dissolution—yes," and "For dissolution —no"; *provided,* that in case contract has been made between the district and the United States the board shall have no jurisdiction to consider any such petition for dissolution of the district, no such special election shall be held, and such district shall not be disorganized or declared disorganized until it shall have been certified to the board of directors by the secretary of the interior that all payments and obligations due or to become due to the United States under such contract have been fully paid or that the secretary of the interior consents to such dissolution. Am'd '17, p. 98.

3549. Canvassing vote. Subsequent proceedings. The board of directors shall name a day for canvassing the vote, and if it shall appear that a majority of the votes cast are "For dissolution—yes," then it shall be the duty of said board of directors to declare said district to be disorganized, and shall certify to the county clerk of the respective counties in which the district is situated, stating the number of signers to said petition and the number of acre-feet of water allotted to them; that said election was called and set for the ..... day of ..... (month), 19.....; that said election was held and that so many votes (stating the number) had been cast for, and that so many votes (stating the number) had been cast against, said proposition; said certificate to bear the seal of the district, and the signatures of the president and the secretary of said board of directors. And it shall be the duty of said respective clerks to have all such certificates recorded in the records of the county recorder of the respective counties. Should it appear that a majority of the votes cast at said election were "For dissolution—no," then the board of directors shall declare the proposition lost, and shall cause the result and the vote to be made a part of the records of said irrigation district. Am'd '17, p. 99.

3550. Special proceedings to secure judicial confirmation. The board of directors of an irrigation district organized under the provisions of this chapter may commence special proceedings in and by which its acts and the acts of the district, in authorizing the issue and sale of the bonds of said district, or providing for the authorization of contract with the United States and the validity of such contract, whether said bonds or any of them have or have not been sold or disposed of, or such contract or proposed contract shall or shall not have been actually signed by the secretary of the interior or the district, may be judicially examined, approved, and confirmed.

Am'd '17, p. 99.

3551. Petition for confirmation. The board of directors of an irrigation district shall file in the district court of the county in which the lands of the district, or some portion thereof, are situated, a petition praying, in effect, that the proceedings aforesaid may be examined, approved, and confirmed by the court. The petition shall state the facts showing the proceedings had for the issue and sale of said bonds, or for the authorization of contract with the United States, as the case may be, and shall state generally that the irrigation district was duly organized, and that the first board of directors was duly elected, but the petition need not state the facts showing such organization of the district, or the election of said first board of directors. Am'd '17, p. 100.

3552. Id. Notice set for hearing. The court shall fix the time for the hearing of said petition, and shall order the clerk of the court to give and publish notice of the filing of said petition. The notice shall be given and published for three successive weeks in a newspaper published in the

county where the office of the district is situated. The notice shall state the time and place fixed for the hearing of the petition and the prayer of the petitioners, and that any person interested in the organization of said district, or in the proceedings for the issue or sale of said bonds, or in the making of contract with the United States, may, on or before the day fixed for the hearing of said petition, demur to or answer said petition. The petition may be referred to and described in said notice as the petition of the board of directors of ..... irrigation district (giving its name), praying that the proceedings for the issue and sale of said bonds of said district, or that the proceedings for the authorization of contract with the United States, and the validity thereof, may be examined, approved, and confirmed by the court. Am'd '17, p. 100.

3553. Demurrers. Any person interested in said district, or in the issue or sale of said bonds, or in the making of contract with the United States, may demur to or answer said petition. The provisions of the code of civil procedure respecting the demurrer and answer to a verified complaint shall be applicable to a demurrer and answer to said petition. The person so demurring or answering said petition shall be the defendant to the special proceedings, and the board of directors shall be the plaintiff. Every material statement of the petition not specifically controverted by the answer shall, for the purpose of said special proceedings, be taken as true, and each person failing to answer the petition shall be deemed to admit as true all the material statements of the petition. The rules of pleading and practice relating to appeals and writs of error provided by the code of civil procedure which are not inconsistent with the provisions of this chapter are applicable to the special proceedings herein provided for. Am'd '17, p. 100.

3554. Findings and decree. Upon the hearing of such special proceedings, the court shall find and determine whether the notice of the filing of the petition has been duly given and published for the time and in the manner in this chapter prescribed, and shall have power and jurisdiction to examine and determine the legality and validity of, and approve and confirm, each and all of the proceedings for the organization of said district under the provisions of said chapter, from and including the petition for the organization of the district, and all other proceedings which may affect the legality or validity of said bonds, and the order of the sale and the sale thereof, and all of the proceedings, if any, for the authorization of contract with the United States, and the terms of said contract. The court, in inquiring into the regularity, legality, or correctness of said proceedings, must disregard any error, irregularity, or omission which does not affect the substantial rights of the parties to said special proceedings; and the court may by decree approve and confirm such proceedings in part, and disapprove and declare illegal or invalid other or subsequent parts of the proceedings. The costs of the special proceedings may be allowed and apportioned between the parties, in the discretion of the court. Am'd '17, p. 101.

3555. Governor may suspend right of appropriation. For the purpose of preserving the surplus and unappropriated waters of any stream or other source of water supply for use by irrigation districts, as provided in this chapter, the governor, by proclamation, may, upon the recommendation of the state engineer, temporarily suspend the right of the public to appropriate such surplus or unappropriated water; *provided,* that any such suspension shall in no case exceed the term of five years. '17, p. 101.

Similar provisions, § 3573.

CHAPTER 6.

CONSERVATION OF UNDERGROUND WATER.

('17, p. 430.)

3561. County commissioners control flow of artesian wells. For the purpose of conserving the underground waters of the state of Utah, and to protect the soil in the vicinity of artesian wells from being saturated, it shall be the duty of the county commissioners in the several counties of the state to enact rules and regulations which shall govern the periods of flow from water developed through artesian wells. If, in the opinion of the county commissioners, the underground water may be conserved by the capping of the larger wells in the county, this chapter gives them authority to enforce such action, but if, in their opinion, it would endanger or lessen the flow from an artesian well by stopping it for certain periods of the year, they may grant permits which will allow partial or complete flows from such wells.

3562. Owners of artesian wells must furnish data. To provide for a complete record of the existing wells, the owners of property on which such existing artesian wells are located are hereby required to file with the board of county commissioners of the county in which such property is located, the following information in duplicate:

1. The location of the well with reference to the nearest section corner;
2. The size of the pipe or casing used;
3. Depth of the well;
4. The amount of water flowing from each such well, in gallons per minute or cubic feet per second.

Failure on the part of any such owner of property on which an existing well is located to supply these data shall empower and authorize the county commissioners to close such well, which may again be opened when the information above mentioned is furnished. Duplicate copies furnished to the county commissioners shall be forwarded to the office of the state engineer.

3563. Powers may be delegated. To provide for the enforcement of this chapter, the county commissioners of the county where such wells are in use may delegate the power of enforcement to the various officers as may in their judgment make this chapter effective.

3564. Data of proposed wells. Every person, association, or corporation driving wells after the date of this enactment shall furnish, or cause to be furnished, to the county commissioners in the county where the well is to be drilled, the following data:

1. The name and address of the owner of the well;
2. The location of the well with reference to the nearest United States land corner;
3. The size and kind of casing used, and the approximate flow if a flow is encountered.

3565. Reports by well drillers. Any person operating well drilling machinery shall make a report containing the following data concerning each well drilled:

1. The name of the person, association, or corporation operating the well driving machinery.
2. The name of the county in which well is located, its location with reference to the nearest section corner;
3. The name and address of the owner of the well, and the date on which the well began to flow; if no flow was encountered, then that fact shall be reported;
4. The depth of the well;
5. If casing is perforated, the depth or depths at which perforations are made;
6. If artesian water has been encountered, depths at which water

was encountered, height to which it rises in the pipe, and if the water flows from the well, the amount of flow, and the method by which the said amount of flow is determined;

7. The static pressure at the mouth of the well, and if more than one flow has been encountered, the rise of the water level or the static pressure of each flow;

8. The temperature of the water of each flow;

9. The log of the well; that is, the record of the thickness of each kind of material through which the drill has passed.

Such report in duplicate to be furnished to the county clerk within thirty days after the completion or abandonment of the well. The duplicate copies furnished to the county commissioners shall be forwarded to the office of the state engineer.

3566. Penalty. It shall be a misdemeanor for any person owning, leasing, or having charge of any artesian well to allow same to flow unrestrained, except as provided in this chapter. A failure on the part of either the well owner or well driller to furnish data as provided in this chapter shall be deemed a misdemeanor.

3567. Exceptions. The provisions of this chapter are not made applicable to artesian wells supplying cities and towns.

CHAPTER 7.

WITHDRAWING WATERS OF LOGAN RIVER FROM APPROPRIATION.

('17, p. 246.)

3570. Water not to be diverted from natural channel. No person, association, or corporation shall have any right to appropriate any of the waters of the Logan river flowing between Rick's springs, on the left fork of said river, and the back water of the Logan City power plant for purposes of generating power; *provided, however,* that water may be appropriated from the said portion of said river if the water so appropriated be not diverted from the natural channel of said river.

CHAPTER 8.

UNAPPROPRIATED WATERS OF THE STATE.

('17, p. 221.)

3573. May be withdrawn from appropriation. The right and authority is hereby given to the state engineer, by and with the consent of the governor, when in their judgment the welfare of the state demands it, to withdraw from appropriation any unappropriated waters in this state, for a period not to exceed five years.

Similar provision, § 3555.

3574. Restoring to entry. Whenever any waters have been withdrawn from appropriation, under the terms of this chapter, and in the opinion of the state engineer and the governor the need for such withdrawal has ceased, an order shall be made by the state engineer restoring such waters to entry.

TITLE 56.

JUDGMENT LIEN; U. S. COURTS.

3589. (1289.) Attaches, when. The judgment of a district or circuit court of the United States rendered in this state may be made a lien upon the real estate owned by the judgment debtor not exempt from execution, and also upon all such real estate as he may acquire for the period of five years from the date of the judgment, by filing a transcript thereof, or of the original docket, certified by the clerk of such court, with the recorder of any county in which any such real estate may be; and no lien shall attach to lands in any county in this state until the date of filing of such transcript, except in the county in which the judgment was rendered, in which case the lien shall attach from the time the same is docketed.

3590. (1290.) Satisfaction. Damages. When the amount due on any judgement is paid or satisfied in full, the judgment creditor, or those acting legally for him, must acknowledge satisfaction thereof in the margin of the record of the judgment, or by filing in the office of the recorder of every county where the judgment is a lien, a satisfaction in writing duly acknowledged. For failure to so acknowledge satisfaction of judgment within sixty days after having been requested in writing so to do, the judgment creditor shall forfeit to the judgment debtor, in addition to the amount of actual damage sustained, the sum of $50.

TITLE 57.

JURORS.

3591. (1291.) Jury defined. A jury is a body of persons temporarily selected from the citizens of a particular county and invested with power to present and indict a person for a public offense, or to try a question of fact.

Jurors to report daily, § 2543. Fees and mileage of jurors, §§ 2542-2555.

3592. (1292.) Kinds of juries. Juries are of three kinds:

1. Grand juries;
2. Trial juries;
3. Juries of inquest.

3593. (1293.) Grand jury. A grand jury is a body of persons, seven in number, returned in pursuance of law from citizens of a county before a court of competent jurisdiction, and sworn to inquire into public offenses committed or triable within the county.

Grand jury, when summoned, Con. art. 1, sec. 13.

3594. (1294.) Trial jury. A trial jury is a body of persons returned from the citizens of a particular county before a court or officer of competent jurisdiction, and sworn to try and determine by verdict a qestion of fact.

Fees and mileage of jurors, §§ 2542-2555.

3595. (1295.) Id. Number of Jurors. A trial jury in capital cases shall consist of twelve jurors. A trial jury in other criminal cases and in civil cases in the district courts shall consist of eight jurors; *provided,* that in civil cases and cases of misdemeanor, the jury may consist of any number less than eight upon which the parties may agree in open court. A trial jury in a justice's court, both in civil and criminal cases, shall consist of four persons, or of any number less than four upon which the parties may agree in open court.

The provisions of this section are taken from Con. art. 1, sec. 10, and decisions construing same have been placed in a note thereunder.

BEFORE STATEHOOD:

Prior to statehood. the Utah courts held that the right of trial by jury prescribed by the seventh amendment to the constitution of the U. S. requires a jury of twelve men.

Reece v. Knott, 3 U. 451; 24 P. 757.

The legislature of Utah territory in 1892 provided that in civil cases a verdict might be rendered by nine or more concurring jurors; held, in the following cases that the law was not in conflict with the seventh amendment to the constitution of the U. S.

Hess v. White, 9 U. 61; 33 P. 243.

Am. Pub. Co. v. Fisher, 10 U. 147; 37 P. 259.
Tucker v. Salt Lake City, 10 U. 173; 37 P. 261.
Wolf v. S. L. Brewing Co., 10 U. 179; 37 P. 262.
Riley v. Rapid Transit Co., 10 U. 428; 37 P. 681.
Pratt v. Parsons, 13 U. 31; 43 P. 620.
Smith v. S. L. City Ry. Co., 13 U. 33; 43 P. 919.
Scott v. Provo City, 14 U. 31; 45 P. 1005.
On appeal to the supreme court of the U. S., said law was declared unconstitutional.
Am. Pub. Co. v. Fisher, 166 U. S. 464.
S. L. City v. Tucker, 166 U. S. 707.

3596. (1296.) Jury of inquest. A jury of inquest is a body of persons summoned from the citizens of a particular city or precinct before a justice of the peace to inquire into particular facts.

Inquests, jurors, etc., §§ 3220-3239.

3597. (1297.) Who competent as jurors. A person shall be competent to act as a juror:

1. Who is a citizen of the United States over the age of twenty-one years; and,

2. Who can read and write the English language; and,

3. Who resides in, and has resided in the county in which such person is called upon to serve, for six months next preceding the time such person is selected; *provided,* that the residence required to render a person competent to serve as a juror in a justice's court or on an inquest shall be in the city or precinct for six months next preceding the time actually called to serve; and,

4. Who is a taxpayer in the state; and,

5. Who is of a reputable sound mind and discretion, and who is not so disabled in body as to be unable to serve.

Religious belief or the lack of it not to affect competency of juror, Con. art. 1, sec 10.
Unconstitutional territorial law. Act. Jan. 21, 1859, in so far as it prescribes that a juror shall be a taxpayer, is in violation of U. S. constitution, and void.
Reece v. Knott, 3 U. 451; 24 P. 757.
Id. The provision that a person shall not serve as a petit juror unless he is the owner of taxable property cannot be disregarded. The qualification must exist at the time he is offered, and not when the jury list was prepared.
Conway v. Clinton, 1 U. 215.
U. S. v. Reynolds, 1 U. 227.
Color not a test of one's right to render jury service under the provisions of this section.
McPherson v. McCarrick, 22 U. 232; 61 P. 1004.

3598. (1298.) Who incompetent. A person shall not be competent to act as a juror:

1. Who does not possess the qualifications prescribed by the next preceding section;

2. Who has been convicted of malfeasance in office or any felony or other high crime;

3. Who is an officer or soldier of the United States, or a person subject to the military control thereof.

A pardon granted to an offender has the effect of amnesty, and when summoned as a juror he cannot be challenged.
U. S. v. Bassett, 5 U. 131; 13 P. 237.

3599. (1299.) Who exempt from jury duty. A person shall be exempt from liability to act as a juror who is:

1. A judicial or civil officer of the United States, or of the state of Utah, or who is a member of the organized militia of the state of Utah;

2. A person holding a county, city, town, or precinct office;

3. An attorney and counselor at law;

4. A person editing a newspaper or periodical;

5. A teacher in a university, college, academy, or school;

6. A practicing physician or surgeon;

7. An officer, keeper, or attendant of an almshouse, hospital, asylum, or other charitable institution;

8. A person engaged in the performance of duty as officer or attendant of a county jail or of the state prison;

9. An express agent, mail carrier, telegraph or telephone employe, miller, or keeper of a public ferry or toll gate;

10. A dispensing druggist of a perscription drug store;

11. A superintendent, engineer, conductor, fireman, or station agent of a railroad;

12. A person drawn as a juror in any court of record in this state, upon a regular panel, who has served as such within a year; but this exemption

shall not extend to a person who is summoned as a juror for the trial of a particular case;

13. An active member of a regularly organized fire company of any city or town in this state;

14. A female citizen. Am'd '05, p. 123.

3600. (1300.) Juror excused, when. A juror cannot be excused by the court for slight or trivial cause, or for hardship or inconvenience to his business, but only when material injury or destruction to his property, or of property entrusted to him is threatened, or when his own health, or the sickness or death of a member of his family, requires his absence.

Juror excused on his own motion on first day not entitled to fees, § 2542.

Excusing jurors for the term prior to calling a cause for trial is in the sound discretion of the court.

Anderson v. Wasatch & J. V. Ry. Co., 2 U. 518.

Judge could excuse jurors at chambers before court convened.

State v. Bates, 25 U. 1; 69 P. 70.

The provisions of §§ 1678, 1817 are not in conflict with, but in addition to, § 3600, enumerating causes authorizing the court to discharge jurors, and § 3618, providing that the clerk, on the day trial jurors are summoned to appear, shall call their names, and that the names of those not excused shall be put into the trial jury box.

Id.

3601. (1301.) Person exempt, how excused if summoned. If a person exempt from liability to act as a juror, as provided in this title, be summoned as a juror, he may make and transmit his affidavit to the clerk of the court for which he is summoned, stating his office, occupation, or employment; and such affidavit shall be delivered by the clerk to the judge of the court when the name of such person is called, and if sufficient in substance, shall be received as an excuse for non-attendance in person. The affidavit shall then be filed by the clerk.

3602. (1302.) Appointment of jury commissioners. The judge or judges of the district court of each county shall, prior to December 1st of each calendar year, appoint for the next calendar year two persons as jury commissioners, who shall be voters of the county, well known to be of opposite politics and of good character for intelligence, morality, and integrity.

Ind. R. S. (1881) § 1385*.

The provisions of this section fixing time for appointment of jury commissioners, as well as § 3606, providing for the selection of jurors by them, is directory as to time.

Nelson v. Southern P. Co., 18 U. 244; 55 P. 364.

The provisions of this section and § 3606 are directory merely, and an objection to the panel on the ground that the commissioners were appointed and made their selections after Jan. 1, 1896, was properly overruled.

Kennedy v. O. S. L. R. R. Co., 18 U. 325; 54 P. 988.

Williams v. O. S. L. R. R. Co., 18 U. 210; 54 P. 991.

3603. (1303.) Id. Notification. Oath. Such commissioners shall be immediately notified of their appointment by the clerk, and, before entering upon the duties of their office, take an oath or affirmation before the county clerk in the following form: "You do solemnly swear (or affirm) that you will honestly and without favor or prejudice, perform the duties of jury commissioners during the term of your office; that in selecting persons to be drawn as jurors you will select none but persons whom you believe to be of good repute for intelligence and honesty; that you will select none whom you have been requested to select, and that in all your selections you will endeavor to promote only the impartial administration of justice."

Ind. R. S (1881) § 1385*.

3604. (1304.) Who disqualified. Refusal to act. No person shall be appointed a jury commissioner who, at the time, is party to or interested in a cause pending in the county which may be tried by a jury to be drawn during the calendar year next succeeding his appointment. Any person appointed a jury commissioner, who shall fail to take upon himself such office, or, having accepted the same, shall fail without good cause to discharge any of the duties thereof, shall be deemed guilty of contempt of court, and shall be summarily punished by a fine of not less than $5 nor more than $100.

Ind. R. S. (1881) § 1391*.

3605. (1305.) Filling vacancy in office of jury commissioner. Compensation. Should a vacancy occur in the office of jury commissioner at any time, or should any such commissioner fail to act when required, the dis-

trict judge shall appoint a person, either in open court or by letter or telegram, to fill such vacancy or to act for the time being, as the case may require, who shall take the oath required by § 3603. For the time actually and necessarily employed in the performance of his duties, each jury commissioner shall be allowed by the board of county commissioners of the county in which such service is rendered $3 per day, and upon such allowance the county auditor shall draw his warrant therefor and the same shall be paid out of the county treasury. Am'd '05, p. 14.

3606. (1306.) Selection of jurors. It shall be the duty of the jury commissioners, before the 15th day of December, after their appointment, to select from the names of the legal voters on the assessment roll of the county for the current year, a written list of names from which the grand and petit jurors shall be drawn to serve in the district court of such county during the succeeding calendar year. In making the selection of names, they shall choose only those who are not exempt from serving on juries, who are in possession of their faculties, who are not infirm or decrepit, who are well informed and free from legal exceptions, and, as far as practicable, who have not been returned on the jury list of the next preceding year. No person shall be selected as a juror who is known to them to be interested in or has a cause pending which may be tried by a jury to be drawn from the names so selected, or who, either personally or by any other means, has solicited his selection as such.

Ind. R. S. (1881) § 1386*.
The provisions of this section, providing for the selection of jurors by jury commissioners, as well as those of § 3602, fixing time for appointment of commissioners, is directory as to time.

Nelson v. Southern P. Co., 18 U. 244; 55 P. 364.
Kennedy v. O. S. L. R. R. Co., 18 U. 325; 54 P. 988.
Williams v. O. S L. R. R. Co., 18 U. 210; 54 P. 991.

3607. (1307.) Id. Number. List. In counties in which at the last general election more than 4,000 votes were cast, there shall be selected four names for every 100 votes cast; and in counties in which, at such election, a less number of votes were cast, there shall be selected six names for every 100 votes so cast; *provided,* that in no case shall less than seventy-five names be selected. Names shall be selected, as far as practicable, from the several precincts of the county in proportion to the number of votes cast therein. The name and residence of each person selected shall be entered upon a list. The list shall be certified by the jury commissioners, and shall be filed immediately after its preparation in the office of the clerk of the district court; and a duplicate copy, made and duly certified by the clerk, shall be filed in the office of the sheriff.

3608. (1308.) Commissioners kept free from intrusion. During the preparation of the list of jurors, the jury commissioners shall be kept free from the intrusion of any person, and shall not separate without leave of court until they shall have completed the duties required.

Ark. Dig. of S. (1894) § 4270.

3609. (1309.) Names of jurors deposited in "jury box." On receiving such list, the county clerk shall file the same in his office, and shall write down the names contained therein on separate pieces of paper of the same size and appearance, as nearly as may be, and shall fold up each of such pieces of paper, so as to conceal the names thereon, and deposit them in a box to be kept by him for such purpose, to be labeled "jury box." Before depositing the names in such box, the clerk shall destroy the papers therein containing the names of jurors theretofore selected.

3610. (1310.) Drawing grand and petit jurors. Officers to be present. At least fifteen days before any term of the court at which a petit jury shall be required by law, or a grand jury be ordered by the court, the clerk of the county where such court is to be held shall draw from the jury box such number of names to serve as petit jurors and such number to serve as grand jurors as the judge may verbally, by letter, or by telegram direct. The names of persons to serve as grand jurors shall be drawn first. At least three days before the drawing of such jurors, the clerk shall give notice to the county

attorney and the county treasurer of the day and hour when such drawing will take place. At the date so appointed, it shall be the duty of such officers to attend at the clerk's office to witness such drawing, and if any two of such officers shall attend at the time and place appointed, the clerk shall proceed in their presence to draw the jurors. If two of the officers so notified do not appear, the clerk shall adjourn the drawing of such jurors until the next day, and shall, by written notice, require any justice of the peace of the county to attend such drawing on the adjourned day.

Drawing of grand jury discretionary with judge, § 8786; Con. art. 1, sec. 13.
Grand jury impaneled from jurors obtained on venire issued not less than thirty days prior to beginning of term is not legal.
Thorp v. People, 3 U. 441; 24 P. 908.

3611. (1311.) Drawing, how conducted. The clerk shall conduct such drawing as follows:

1. He shall shake the jury box so as to thoroughly mix the slips of paper upon which the names of the jurors are written;

2. He shall then publicly draw out of the box as many of said slips as shall be required by law, or ordered by the judge;

3. A minute of the drawing shall be kept by one of the attending officers, in which shall be entered the name contained on every slip of paper so drawn before any other such slip shall be drawn;

4. If, after drawing the whole number required for grand or petit jurors, the name of any person shall appear to have been drawn who is dead or insane, or who has removed from the county, to the knowledge of the clerk or any other attending officer, or who is exempt from such service, an entry of such fact shall be made in the minute of the drawing, and the slip containing such name shall be destroyed;

5. Another name shall then be drawn in place of that contained on the slip so destroyed, and shall be entered in the minute of the drawing;

6. The same proceedings shall be had as often as may be necessary to complete the whole number of jurors required;

7. The minute of the drawing shall then be signed by the clerk and the attending officers, and filed in the clerk's office;

8. Separate lists of the names of the persons so drawn for petit jurors and for grand jurors, with their places of residence, shall be made and certified by the clerk and attending officers, and delivered to the sheriff of the county. The clerk of the court shall issue a venire to the sheriff or his deputy directing him to summon the persons so drawn. The slips so drawn from the box shall be preserved, but shall not be returned to nor again placed therein until the balance of the slips therein shall have been drawn out; *provided*, that if, during the year, all of the slips shall have been drawn from the box, they must be again placed therein, and the same procedure had as hereinbefore provided.

Act of clerk in restoring to the jury box, before it was exhausted, slips containing the names of jurors which had been drawn therefrom, was not prejudicial to the defendant in a murder case, where subsequently, and before he was brought to trial, all the names were drawn from the box and again placed therein.
State v. White, 40 U. 342; 121 P. 579.

3612. (1312.) Additional drawing. Open venire. Costs. If, during any term of the district court, any additional grand or petit jurors shall be necessary, the same shall be drawn from the said box by the sheriff or his deputy in open court; but if in the judgment of the court the attendance of those drawn cannot be obtained within a reasonable time, they may be laid aside and other names may be drawn in their place and in the same manner. If on payment of $30 any person having a case to be tried shall, in open court on the day next preceding the trial, demand a new list of jurors, the judge shall order a drawing for such number of jurors as he may deem necessary to try such case, in the same manner, but such jurors so drawn shall not be used on the regular panel. If all names become exhausted at any term, the judge may order an open venire for such number of jurors as he may deem necessary, who shall be summoned to serve. In no case shall the money so paid be taxed as costs. Am'd '01, p. 154.

The district court under the Poland act might issue an open venire to summon jurors.
U. S. v. Clawson, 4 U. 34; 5 P. 689; affirmed 114 U. S. 477.
Where the venire of jurors for the term has been exhausted and additional names are drawn from the box, the names of jurors not readily accessible because residing at a distance may properly be laid aside and other names drawn.
State v. Cluff, 48 U. 102; 158 P. 701.

3613. (1313.) Separate panels in certain districts. In districts having more than one judge, each judge therein shall have the power to order drawn such number of grand and petit jurors as may be necessary to serve in the court presided over by such judge.

Notwithstanding the provisions of this section, the several judges of a district may proceed as provided in §§ 3610, 3611, and order a general panel of jurors to be drawn in each county in the district, for the purposes of the district court of such county, and the jurors so drawn may serve in any division of such court in the county where drawn.
Conner v. Salt Lake City, 28 U. 248; 78 P. 479.

3614. (1314.) Copies of list, when furnished. The clerk of the district court must furnish any person applying therefor, and paying the fees allowed by law for the same, a copy of the list of jurors drawn to attend any court.

3615. (1315.) Service of venire by mail. It shall be the duty of the clerk when issuing any venire for jurors to ascertain, whenever practicable, and insert therein, their postoffice addresses; and when the venire shall have been received for service by the sheriff, if the time is sufficient for service by mail, he shall address to each person summoned, whose postoffice address shall have been given or can be promptly ascertained, a notice requiring such person to be and appear at the time and place for the purpose mentioned in the venire. The sheriff shall sign the notice officially, and shall register and mail it, postage and registry fee prepaid, to the person summoned, at his postoffice address, with a request indorsed on the envelope in the usual form for the return of the letter to the sender, if not delivered within five days. The receipt of such registered letter by the person to whom it is addressed shall be deemed valid service upon him of the venire, and the returned registry receipt signed by such person or by any other person in his behalf, shall be taken as prima facie evidence of service, and the sheriff shall make return accordingly.

3616. (1316.) Personal service. If the time is insufficient for service of the notice by mail, or if having been sent it shall be returned through the mail undelivered, the sheriff may make or cause to be made personal service of the venire.

Notices, etc., may be sent by telegraph or telephone, §§ 6117, 6118.
Under provisions of § 1523, where the sheriff is a party, in view of §§ 3606 et seq., showing that sheriff has nothing to do with the selection and drawing of jurors, but is only required to summon them in the manner prescribed, a reversal for the denial of defendant's challenge to the panel on the sole ground that the sheriff served the venire is not justified.
Whipple v. Preece, 24 U. 364; 67 P. 1072.

3617. (1317.) Id. How made. Whenever, after the return through the mail of notice, it shall be necessary to make personal service of the same, and the person upon whom service is to be made resides or is to be found at a place other than that at which the court issuing such venire is held, then, except in cases of emergency, such venire shall be by the officer having the same for service sent by mail to any sheriff or deputy sheriff residing nearest the locality where such service is to be made, and such sheriff or deputy sheriff shall make return to the officer sending the same by mail.

3618. (1318.) Names of trial jurors, how kept. At the opening of the court on the day trial jurors have been summoned to appear, the clerk shall call their names, and the court may then hear their excuses; the names of those attending and not excused must then be written by the clerk upon separate slips of paper, folded so as to conceal the names, placed in a box, to be called the "trial jury box," and thoroughly shaken. From this box the trial jury must be drawn.

Impaneling jury, §§ 6790, 8927.
Fees of jurors, § 2542.
Juror excused on first day on his own motion not entitled to fees, § 2542.
The provisions of §§ 1678, 1817, are not in conflict with, but in addition to § 3600, enumerating causes authorizing the court to discharge jurors, and the provisions of this section.
State v. Bates, 25 U. 1; 69 P. 70.

3619. (1319.) Grand jury, how formed. When, of the persons summoned as grand jurors competent and not excused, seven are present, they

shall constitute the grand jury. If more than seven of such persons are present, their names must be written by the clerk on separate ballots, folded so as to conceal the names, and placed in a box. The clerk must then draw out of the box seven ballots, and the persons whose names are thereon shall constitute the grand jury.

Grand jury to consist of seven; five may find an indictment, Con. art. 1, sec. 13; §§ 8787, 8820.

Fees of grand jurors, § 2542.

3620. (1320.) Jurors in justice's court. Summoning. When jurors are required in any jusice's court, the number required by law must, upon the order of the justice thereof, be summoned by a peace officer of the jurisdiction.

Fees of jurors in justices' courts, § 2550.

Payment of fees in advance, § 2554.

3621. (1321.) Id. Qualifications. Such jurors must be summoned from the persons resident in either the city or precinct, competent to serve as jurors, and not exempt from such service, by notifying them orally that they are so summoned, and of the time and place at which their attendance is required.

3622. (1322.) Id. Return. The officer summoning such jurors must, at or before the time fixed for their appearance, return the order to the court, with a list of the persons summoned indorsed thereon.

3623. (1323.) Id. Number summoned. How drawn. At the time appointed for a jury trial in justices' courts, the list of jurors summoned, which shall be eight, or double the number agreed upon before the trial by the parties, must be called, and the names of those attending and not excused must be written upon separate slips of paper, folded so as to conceal the names, and placed in a box, from which the trial jury must be drawn.

Mont. Civ. C. § 340*.

Jury trial in justice's court, civil procedure, §§ 7485-7487.

Jury trial in justice's court, criminal procedure, §§ 9434-9445.

TITLE 58.

LABOR.

CHAPTER 1.

BOARD OF LABOR.

3634. (1324.) Appointment. Qualifications. Term. Upon the approval of this chapter (March 14, 1901), the governor, by and with the consent of the senate, shall appoint three persons, not more than two of whom shall belong to the same political party, who shall be styled a state board of labor, conciliation, and arbitration. One shall be an employer of labor; another shall be an employe and be selected from some labor organization; the third shall be some person who is neither an employe nor an employer of manual labor, and shall be chairman of the board. One shall serve for one year, one for three years, and one for five years, as may be designated by the governor at the time of their appointment. At the expiration of their terms their successors shall be appointed in like manner for the term of four years. Should a vacancy occur at any time, the governor shall, in the same manner, appoint some one to serve the unexpired term, and until the appointment and qualification of his successor. Each member of said board shall, before entering upon his duties, take the constitutional oath of office. Am'd '01, p. 68.

Authority for creation of board, Con. art. 16, sec. 2.

Duties of board imposed on industrial commission, sub. 9 § 3076.

3635. (1325.) Secretary. The board shall select from its members a secretary and shall establish suitable rules of procedure. Am'd '01, p. 68.

3636. (1326.) Duty of board when strike or lockout is threatened. Whenever it shall come to the knowledge of the said board that a strike, or lockout is seriously threatened in the state, involving any employer and his employes, if he is employing not less than ten persons, it shall be the duty of the said board to put itself into communication as soon as may be with such employer and employes, and endeavor by mediation to effect an amicable settlement. Said board shall also request each of the parties to forward to its secretary an application for arbitration. R. S. '98, § 1333; '01, p. 68.

Bureau of immigration, labor, and statistics, §§ 3024-3034.

Duties of this chapter imposed on the industrial commission, sub. 9, § 3076.

Laborers may organize, §§ 3651-3658.

3637. (1327.) Duty of board after application to arbitrate received. As soon as practicable after receiving such applications, the board shall request each of the parties to the dispute to agree upon a written statement of facts relating to the controversy, and to submit the same to the board; *provided,* that, when such agreement and statement cannot be reached, each of said parties may separately submit to the board a written statement of grievances. Applications to the said board for arbitration on the part of employers must precede any lockout, and, on the part of the employes, any strike; *provided,* that, in case lockout or strike already exists, the board shall accord arbitration if the parties shall resume their relations with each other, as employers and employes. Said applications shall include a promise to abide by the decision of the board and shall be signed by the employer or employers, or his or their authorized agent, on the one side, and by a majority of his or their employes on the other. '01, p. 69.

3638. (1328.) Board to arbitrate. May employ stenographer. As soon as practicable after receiving said applications, the board shall proceed to arbitrate. When it shall be necessary, in the judgment of said board, it may engage the services of a stenographer to take and transcribe an account of any arbitration proceedings. '01, p. 69.

3639. (1329.) May subpœna witnesses. General powers. The board shall have power to summon as witnesses by subpœna any operative or expert in departments of business affected, and any person who keeps the record of wages earned in those departments, or any other person, and to administer oaths, and to examine said witnesses, and to require the production of books, papers, and records. In case of disobedience to a subpœna the board may invoke the aid of any court in the state in requiring the attendance and testimony of witnesses, and the production of books, papers, and documents under the provisions of this section. Any of the district courts of the state, within the jurisdiction of which such inquiry is carried on, may, in case of contumacy, or refusal to obey a subpœna issued to any such witness, issue an order requiring such witness to appear before said board and produce books and papers if so ordered, and give evidence touching the matter in question. Any refusal to obey such order of the court may be punished by such court as a contempt thereof. R. S. '98, § 1330; '01, p. 69.

3640. (1330.) Mayors and sheriffs to notify board of threatened strikes or lockouts. It shall be the duty of mayors of cities and sheriffs of counties, when any condition likely to lead to a strike or lockout exists in the cities or districts where they have jurisdiction, to immediately forward information of the same to the secretary of the state board of conciliation and arbitration. Such information shall include the names and addresses of persons who should be communicated with by the board. '01, p. 69.

3641. (1331.) Sheriff to serve process. Any notice or process issued by the state board of labor, conciliation, and arbitration shall be served by any sheriff to whom the same may be directed, or in whose hands the same may be placed for service, without charge. R. S. '98, § 1335; '01, p. 69.

3642. (1332.) Decision of board. As soon as practicable after the board has investigated the differences existing between employer and employes, it shall make an equitable decision, which shall state what, if anything, should

be done by either or both parties to the dispute, in order to amicably settle and adjust the differences existing between them. The findings of a majority of the board shall constitute its decision. R. S. '98, § 1331; '01, p. 70.

3643. (1333.) Decision to be recorded and made public. This decision shall at once be made public; shall be recorded upon the proper book of record to be kept by the secretary of said board, and a short statement thereof published in an annual report to be made to the governor before the 1st day of March, of each year. R. S. '98, § 1327; '01, p. 70.

3644. (1334.) Compensation of members. The members of the board shall each receive a compensation of $4 for each day's service while engaged in arbitration, said compensation to be paid by the parties to the controversy in such proportion as the board may decide; they shall also receive the actual and necessary expenses incurred in the performance of their official duties, which expenses shall be paid out of the state treasury.

R. S. '98, § 1334; '01, p. 70.

CHAPTER 2.

BETTERING CONDITIONS OF LABOR.

('17, p. 210.)

3651. Labor unions not unlawful. It shall not be unlawful for working men and women to organize themselves into, or carry on, labor unions for the purpose of lessening the hours of labor, increasing the wages, bettering the conditions of the members of such organization; or carrying out their legitimate purposes as freely as they could do if acting singly.

Unlawful to coerce one to join or support organization, §§ 8329, 8330.

Penalty for soliciting or receiving money from employes, § 8326.

3652. Injunctions in labor disputes prohibited. No restraining order or injunction shall be granted by any court of the state of Utah, or a judge or the judges thereof, in any case between an employer and employes, or between employers and employes, or between employers, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right of the party making the application, for which injury there is no adequate remedy at law, and such property or property rights must be described with particularity in the application, which must be in writing and sworn to by the applicant, or by his agent or attorney.

3653. Right to cease labor secured. Right to assemble. And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful means and lawful means so to do; or from paying or giving to or withholding from any person engaged in such dispute any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of the law of the state of Utah.

3654. Contempts. Orders to show cause. Procedure. Bail. Whenever it shall be made to appear to any district court or judge thereof, or to any

judge therein sitting, by the return of a proper officer on lawful process, or upon the affidavit of some creditable person, or by information filed by any district attorney, that there is reasonable ground to believe that any person has been guilty of such contempt, the court or judge thereof, or any judge therein sitting, may issue a rule requiring the said person so charged to show cause upon a day certain why he should not be punished therefor, which rule, together with a copy of the affidavit or information, shall be served upon the person charged, with sufficient promptness to enable him to prepare for and make return to the order at the time fixed therein. If upon or by such return, in the judgment of the court, the alleged contempt be not sufficiently purged, a trial shall be directed at a time and place fixed by the court; *provided, however,* that if the accused, being a natural person, fail or refuse to make return to the rule to show cause, an attachment may issue against his person to compel an answer, and in case of his continued failure or refusal, or if for any reason it be impracticable to dispose of the matter on the return day, he may be required to give reasonable bail for his attendance at the trial and his submission to the final judgment of the court. Where the accused is a body corporate, an attachment for the sequestration of its property may be issued upon like refusal or failure to answer.

3655. Trial by jury. In all cases within the purview of this chapter, such trial may be by the court, or, upon demand of the accused, by a jury; in which latter event the court may impanel a jury from the jurors then in attendance, or the court or the judge thereof in chambers may cause a sufficient number of jurors to be selected and summoned, as provided by law, to attend at the time and place of trial, at which time a jury shall be selected and impaneled as upon a trial for misdemeanor; and such trial shall conform, as near as may be, to the practice in criminal cases prosecuted by indictment or upon information.

3656. Judgment. Payments. Limitations. If the accused be found guilty, judgment shall be entered accordingly, prescribing the punishment, either by fine or imprisonment, or both, in the discretion of the court. Such fine shall be paid to the state of Utah, or to the complainant, or other party injured by the act constituting the contempt, or may, where more than one is so damaged, be divided or apportioned among them as the court may direct, but in no case shall the fine to be paid to the state of Utah exceed, in case the accused is a natural person, the sum of $1000, nor shall such imprisonment exceed the term of six months; *provided,* that in any case the court or a judge thereof may, for good cause shown, by affidavit, or proof taken in open court or before such judge and filed with the papers in the case, dispense with the rule to show cause, and may issue an attachment for the arrest of the person charged with contempt; in which event such person, when arrested, shall be brought before such court or a judge thereof without unnecessary delay, and shall be admitted to bail in reasonable penalty for his appearance to answer to the charge or for trial for the contempt; and thereafter the proceedings shall be the same as provided herein in case the rule had issued in the first instance.

3657. Anti-trust laws not applicable to labor organizations. The labor of a human being is not a commodity or article of commerce. Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purpose of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws.

3658. Right of trial by jury—practice. In all cases where persons are charged with contempt of court for the violation of writs of injunction, issued within the purview of this chapter, unless such contempt be committed in the immediate presence of the court, the accused shall have the right to a jury trial

upon demand, and, in case a jury trial be demanded, such jury shall be selected and impaneled as in criminal cases, and the trial shall conform as nearly as may be to the district court practice in criminal cases.

CHAPTER 3.

EIGHT-HOUR LAW.

3666. (1336.) On public works. Eight hours shall constitute a day's work in all penal institutions in this state, whether state, county, or municipal, and on all works and undertakings carried on or aided by the state, county, or municipal governments. Any officer of the state or of any county or municipal government, or any person, corporation, firm, contractor, agent, manager, or foreman, who shall require or contract with any person to work in any penal institution or upon such works or undertakings longer than eight hours in one calendar day, except in cases of emergency, where life or property is in imminent danger, shall be guilty of a misdemeanor.

Am'd '01, p. 37; '03, p. 85.

3667. (1337.) In mines and smelters. The period of employment of working men in all underground mines or workings, and in smelters and all other institutions for the reduction or refining of ores or metals, shall be eight hours per day, except in cases of emergency, where life or property is in imminent danger. Any person, body corporate, agent, manager, or employer who shall violate any of the provisions of this section shall be deemed guilty of a misdmeanor.

Authorized by Con. art. 16, sec. 6.
Limiting hours of employment of females, § 3677.
This law held to be constitutional.
State v. Holden, 14 U. 96; 46 P. 1105.
Ex parte Holden, 14 U. 71; 46 P. 756; affirmed 169 U. S. 366.
The provisions of this section and chap. 72, p. 219, laws 1896, apply with equal force to employer and employe, and a person who works for another in a mill or reduction works more than eight hours per day cannot recover on a quantum meruit for his services during the overtime.
Short v. Bullion B. & C. M. Co., 20 U. 20; 57 P. 720.

CHAPTER 4.

EMPLOYMENT OF FEMALES AND CHILDREN.

3668. (1338.) In mines and smelters forbidden. It shall be unlawful for any person, firm, or corporation to employ any child under fourteen years of age, or any female, to work in any mine or smelter in the state of Utah. Any person, firm, or corporation who shall violate any of the provisions of this section shall be deemed guilty of a misdemeanor.

Authorized by Con. art. 16, sec. 3.

3669. (1339.) Proprietor to provide seats for female help. The proprietor, manager, or person having charge of any store, shop, hotel, restaurant, or other place where women or girls are employed as clerks or help therein, shall provide chairs, stools, or other contrivances where such clerks or help may rest when not employed in the discharge of their respective duties. Any person who shall violate any of the provisions of this section shall be guilty of a misdemeanor.

MINIMUM WAGE SCALE FOR FEMALES.

('13, p. 94.)

3671. Unlawful to pay less than scale. It shall be unlawful for any regular employer of female workers in the state of Utah to pay any woman less than the wage in this section specified, to wit: For minors, under the age of eighteen years, not less than 75 cents per day; for adult learners and apprentices, not less than 90 cents per day; *provided,* that the learning period of

apprenticeship shall not extend for more than one year; for adults who are experienced in the work they are employed to perform, not less than $1.25 per day.

3672. Certificate of apprenticeship. All regular employers of female workers shall give a certificate of apprenticeship for time served to all apprentices.

3673. Penalty. Any regular employer of female workers who shall pay to any woman less than the wage specified in § 3671 shall be guilty of a misdemeanor.

3674. Commissioner of immigration, labor, and statistics to enforce chapter. The commissioner of immigration, labor, and statistics shall have general charge of the enforcement of this chapter, but violations of the same shall be prosecuted by all the city, state, and county prosecuting officers in the same manner as in other cases of misdemeanor.

Duties of commissioner of immigration, labor, and statistics imposed on industrial commission, § 3076.

EMPLOYMENT OF FEMALES.

('11, p. 265.)

3677. Limiting hours of employment. Exceptions. No female shall be employed in any manufacturing, mechanical, or mercantile establishment, laundry, hotel, or restaurant, or telegraph or telephone establishment, hospital or office, or by any express or transportation company in this state, more than nine hours during any one day, or more than fifty-four hours in any one week, except in cases of emergency in hospitals and in cases of emergency or where life or property is in imminent danger or where materials are liable to spoil by the enforcement of this section.

3678. Penalty. Any person or persons, corporation, or other association engaged in conducting or operating any of the business institutions or enterprises set forth in the foregoing section, requiring or employing any female to work longer than the period of nine hours constituting a day's labor, except as above provided, or more than fifty-four hours in any one week, shall be guilty of a misdemeanor, and, upon conviction thereof shall be fined not less than $25 nor more than $100, and costs of prosecution.

Duty of commissioner of immigration, labor, and statistics, to enforce, § 3027.
The industrial commission is the commissioner of immigration, labor and statistics, sub. 9, § 3076.

CHAPTER 5.

BLACKLISTING.

3680. (1340.) Forbidden. No company, corporation, nor individual shall blacklist, or publish, or cause to be published or blacklisted, any employe, mechanic, or laborer, discharged or voluntarily leaving the service of such company, corporation, or individual, with intent and for the purpose of preventing such employe, mechanic, or laborer from engaging in or securing similar or other employment from any other corporation, company, or individual.

Exchange of blacklists forbidden, Con. art. 12, sec. 19; art. 16, sec. 4.

3681. (1341.) Penalty. If any person or any officer or agent of any company, corporation, or individual shall blacklist, or publish, or cause to be published, any employe, mechanic, or laborer, discharged by such corporation, company, or individual, with the intent and for the purpose of preventing such employe, mechanic, or laborer from engaging in or securing similar or other employment from any other corporation, company, or individual, or shall in any manner conspire or contrive, by correspondence, or otherwise, to prevent such discharged employe from securing employment, he shall be

deemed guilty of a felony and, upon conviction, shall be fined not less than $500, nor more than $1,000, and be imprisoned in the state prison not less than sixty days nor more than one year.

CHAPTER 6.

FELLOW SERVANTS.

3682. (1342.) Who are vice-principals. All persons engaged in the service of any person, firm, or corporation, foreign or domestic, doing business in this state, who are intrusted by such person, firm, or corporation as employer with the authority of superintendence, control, or command of other persons in the employ or service of such employer, or with the authority to direct any other employe in the performance of any duties of such employe, are vice-principals of such employer and are not fellow servants.

Who are fellow servants, § 3683, and note.

Negligence cases not bearing upon any provision of the statutes are not included in this volume.

NOT FELLOW SERVANTS:

The conductor of a railway train with a brakeman upon the the train.

Openshaw v. U. & N. Ry. Co., 6 U. 132.

A brakeman with a car inspector.

Daniels v. U. P. Ry. Co., 6 U. 357; 23 P. 762.

An engineer with a brakeman.

Brown v. Sou. Pac. Ry. Co., 7 U. 288; 26 P. 579.

A switchman signaling to an engine with the men repairing the car.

Pool v. Sou. Pac. Co., 7 U. 303; see same case, 160 U. S. 438.

A car repairer with an engineer.

Webb v. R. G. W. Ry. Co., 7 U. 363; 26 P. 981.

Neither a section foreman nor those working under him, nor a telegraph operator, with an engineer.

Neesley v. Sou. Pac. Ry. Co., 35 U. 259; 99 P. 1067.

A yardman with the foreman of his own crew nor with the foreman of another crew working in the same yard at the same time.

Armstrong v. O. S. L. Ry. Co., 8 U. 420; 32 P. 693.

A railroad foreman having full charge of loading cars in a gravel pit with such laborers.

Anderson v. Ogden Ry and Depot Co., 8 U. 128; 30 P. 305.

A laborer in car shops and foreman of switchmen in train department.

Pool v. S. P. Co., 20 U. 210; 58 P. 326.

Plaintiff held to be a volunteer, not a servant.

Mickelson v. East Tintic Ry. Co., 23 U. 42; 64 P. 463.

The foreman of a mine having entire charge of the underground workings with a miner working under his direction.

Cunningham v. U. P. Ry. Co., 4 U. 206; 7 P. 795.

Trihay v. Brooklyn Mining Co., 4 U. 468; 11 P. 612.

A superintendent of a mine with a common laborer.

Reddon v. U. P. Ry. Co., 5 U. 344; 15 P. 262.

A miner with one employed as a tool-carrier, whose only duty it is to take sharpened tools into the mine and throw them off at various levels and bring up the dull ones.

Jenkins v. Mammoth M. Co., 24 U. 513; 68 P. 845.

A miner with one whose duty it is to manage and operate a cage by which the miners are conveyed in and out of the mine.

Id.

Acting foreman on telegraph line with a lineman.

Fritz v. Western Union T. Co., 25 U. 263; 71 P. 209.

Two miners working on different levels.

Shields v. Silver King Coalition, 50 U. —; 166 P. 988.

A furnaceman with grater whom he directs,

Utah Con. M. Co. v. Paxton, 150 F. 114.

A mucker called to assist in removing certain timbers from cars by means of the hoisting engine with the engineer.

Vota v. Ohio Copper Co., 42 U. 129; 129 P. 349.

Employes working under a superintendent in repairing the right-of-way of a railroad, while being carried by a train to their work with the train crew.

Jachetta v. San Pedro etc. R. R. Co., 36 U. 470; 105 P. 100.

Where two sections of a train are operated as two distinct and independent trains, the members of the crew of one section with the members of the crew of the other section.

Meyers v. San Pedro etc. R. R. Co., 36 U. 307; 104 P. 736.

A man working on the railroad tracks with those operating the trains.

Groo v. O. S. L. R. R. Co., 47 U. 26; 150 P. 970.

Where a foreman of a mine, as the agent of the company, selects an employe to take the place temporarily of another employe who is excused from work, and the person so selected is subject to the direction and control of the company, which may discharge him at any time, the relationship between him and the company is that of master and servant.

Wilson v. Sioux Con. M. Co., 16 U. 392; 52 P. 626.

VICE PRINCIPALS:

Whatever was done by the foreman in the mine in leaving the hole in the platform was chargeable to the company.

Downey v. Gemini M. Co., 24 U. 431; 68 P. 414.

Where, in an action for injuries, the uncontradicted evidence showed that B. was defendant's foreman, it was not error for the court to assume that he was a vice-principal.

Black v. Rocky Mt. Bell Tel. Co., 26 U. 451; 73 P. 514.

Persons engaged in the service of the master, who are intrusted by him with the management or direction of his general work, or with some particular part thereof, are not fellow servants with the subordinate employes, but vice-principals.

Johnson v. U. P. Coal Co., 28 U. 46; 76 P. 1089.

In the absence of a statute in Nevada defining fellow servants, the test to be applied is whether the negligent act which caused the injury was a breach of a positive duty owing by the master to his servant, in which case the person performing the act is a vice-principal, and not a fellow servant.

Morrison v. San Pedro R. Co., 32 U. 85; 88 P. 998.

Merrill v. O. S. L. R. R. Co., 29 U. 264; 81 P. 85.

Pool v. S. P. Co., 20 U. 210; 58 P. 326.

Where the facts are undisputed, whether coemployes are fellow-servants is a question of law for the court; but if facts are disputed, the court should construe the statutes, and leave the question to the jury.

Shepherd v. D. & R. G. R. R. Co., 41 U. 469; 126 P. 692.

In an action for wrongful death of a servant of a railroad company killed in a foreign state, it will be presumed, in the absence of evidence thereon, that laws similar to the above section and § 6505 were in force at the place of the accident, and that under such laws the employes in charge of the railroad train were not fellow servants of track laborers.

Grow v. O. S. L. R. R. Co., 44 U. 160; 138 P. 398.

A charge in the language of the statute as to what constitutes vice-principals and fellow servants was error, but as the evidence showed that the plaintiff and the person causing the injury were not fellow servants, it was not prejudicial.

Dimmick v. Utah Fuel Co., 49 U. 430; 164 P. 872.

An engineer who operates a mine hoist carrying miners to and from the lower level is to them a vice-principal.

Farnon v. Silver King Coalition M. Co., 50 U. —; 167 P. 675.

One having the general control and supervision of railroad repair work and giving general directions respecting the movements of work trains is a vice-principal of the laborers employed to do repair work.

Jechetta v. San Pedro, etc., R. R. Co., 36 U. 470; 105 P. 100.

3683. (1343.) Who are fellow servants. All persons who are engaged in the service of such employer, and who, while so engaged, are in the same grade of service and are working together at the same time and place and to a common purpose, neither of such persons being intrusted by such employer with any superintendence or control over his fellow employes, are fellow servants with each other; *provided,* that nothing herein contained shall be so construed as to make the employes of such employer fellow servants with other employes engaged in any other department of service of such employer. Employes who do not come within the provisions of this section shall not be considered fellow servants.

Who are not fellow servants, § 3682, and note.

Defense of fellow servant allowed when employer carries insurance, § 3127; and denied when employer does not carry insurance, § 3129.

WHO ARE FELLOW SERVANTS:

The above definition of the term "fellow servants" is one that the legislature had authority to make.

Dryburg v. Mercur M. Co., 18 U. 410; 55 P. 367.

In an action for injuries received prior to fellow servant law of 1896, the relation of plaintiff and the engineer was to be determined by common law rule, and, under it, they were fellow servants.

Stoll v. Daly M. Co., 19 U. 271; 57 P. 295.

A track walker of railroad company, under common law, is fellow servant with an engineer.

Stephani v. S. P. Co., 19 U. 196; 57 P. 34.

The common law rule that a train conductor is not a fellow servant with his subordinates cannot be changed by a regulation of the company.

Id.

The shift bosses were, as to one another, fellow servants, and defendant was not liable for their carelessness, unless the carelessness was brought to the attention of the defendant, who negligently failed to communicate the danger to the plaintiff.

Anderson v. Daly M. Co., 16 U. 28; 50 P. 815.

In Idaho the foreman was a fellow servant of plaintiff, who was a member of a fence gang, and hence plaintiff could not recover for his negligence in permitting the rear car to be run in violation of the rules.

Sartin v. O. S. L. R. R. Co., 27 U. 447; 76 P. 219.

Instruction defining fellow servants held sufficient.

Braegger v. O. S. L. R. R. Co., 24 U. 391; 68 P. 140

In Nevada, whose statutes do not define who are fellow servants, a foreman is a fellow servant with one of bridge crew.

Owens v. San Pedro Co., 31 U. 208; 89 P. 825.

Decisions on the test to be applied in Nevada, note to § 3682.

Where an injury is the result of two concurring causes, and the master is responsible for or contributed to one of them, he is not exempt from liability because a fellow servant who is responsible for the other cause may have also been culpable. The servant assumes the risk and negligence of a fellow servant, but not that of the master.

Jenkins v. Mammoth M. Co., 24 U. 513; 68 P. 845.

Handley v. Daly M. Co., 15 U. 176; 49 P. 295.

Pool v. S. P. Co., 20 U. 210; 58 P. 326.

The employer is liable for an injury to an employe from the concurrent negligence of the master and fellow servants.

Hicks v. S. P. Co., 27 U. 526; 76 P. 625.

Merrill v. O. S. L. R. R. Co., 29 U. 264; 81 P. 85.

Wright v. Sou. Pac. Co., 15 U. 421; 46 P. 374.

A laborer engaged in the construction of a road bed and a brakeman on a construction train hauling gravel for the road bed are fellow servants.

Lukic v. So. Pac. Co., 160 F. 135.

CHAPTER 7.

WAGES A PREFERRED DEBT.

3684. (1344.) When business is suspended. When any property of any company, corporation, firm, or person shall be seized upon by any process of any court, or when their business shall be suspended by the act of creditors, or be put into the hands of a receiver, assignee, or trustee, either by voluntary or involuntary action, the wages, not to exceed $400 to each claimant, owing to workmen, clerks, traveling or city salesmen, or servants for work or labor performed within five months next preceding the seizure or transfer of such

property or merchandise, shall be considered and treated as preferred debts, and such workmen, clerks, traveling or city salesmen, or servants shall be preferred creditors and shall first be paid in full; and if there be not sufficient to pay them in full, then the same shall be paid to them pro rata, after paying costs; *provided, however,* that no officer, director, or general manager of such a corporation nor any member in such association or partnership shall be entitled to the preference herein provided. Am'd '13, p. 26.

Lien of mechanics, etc., § 3722.

Wages preferred in assignments, § 296.

The claims of the operatives of a street railroad for work performed sixty days next preceding the appointment of a receiver are entitled to priority over a trust deed on the company's property, since such work is done for the benefit of the mortgagees.

Litzenberger v. Jarvis-Conklin Trust Co., 8 U. 15; 28 P. 871.

Chap. 30, laws of 1892, declaring that debts due for services performed by laborers within six months before the seizure of the debtor's property on process, or the suspension of his business by the action of creditors, or before his property shall be put in the hands of a receiver or trustee, shall be treated as preferred, does not affect the rights of the existing grantees, mortgages, or lienholders.

Salt Lake Litho. Co. v. Ibex M. and S. Co., 15 U. 440; 49 P. 768.

Id., 15 U. 445; 49 P. 832.

A court of equity, when called upon to appoint a receiver of railroad property, with power to operate the road and conduct its business pending a foreclosure suit, may, in the exercise of its judicial discretion, as a condition of issuing the order, direct the receiver, out of money coming to his hands from such business, to pay the outstanding debts for labor, supplies, equipments, or permanent improvements of the mortgaged property as may under the circumstances of the order be reasonable

Central Trust Co. v. Utah Cent. Ry. Co., 16 U. 12; 50 P. 813.

3685. (1345.) Claim. Notice to persons interested. Any such employe, laborer, or servant desiring to enforce his claim for wages under this chapter shall present a statement, under oath, showing the amount due after allowing all just credits and set-offs, the kind of work for which such wages are due, and when performed, to the officer, person, or court charged with such property, within ten days after the seizure thereof on any writ of attachment, or within thirty days after the same may have been placed in the hands of any receiver, assignee, or trustee; any person with whom any such claim shall have been filed shall give immediate notice thereof by mail to all persons interested; and it shall be the duty of the person or the court receiving such statement to pay the amount of such claim or claims to the person or persons entitled thereto, after first paying all costs occasioned by the seizure of such property, out of the proceeds of the sale of the property seized, if the claim be not contested as provided in the next succeeding section.

3686. (1346.) Contest of claim. Costs. Any person interested may contest such claim or claims, or any part thereof, by filing exceptions thereto, supported by affidavit, with the officer having the custody of such property, within ten days after the notice of presentment of said statement, and thereupon the claimant shall be required to reduce his claim to judgment before some court having jurisdiction thereof, before any part thereof shall be paid, and the party contesting shall be made a party defendant in any such action and shall have the right to contest such claim, and the prevailing party shall recover proper costs.

CHAPTER 8.

ATTORNEYS' FEES IN SUITS FOR WAGES.

3687. (1347.) When allowed. Amount. Whenever a mechanic, artisan, miner, laborer, servant, or employe shall have cause to bring suit for wages earned and due according to the terms of his employment, and shall establish by the decision of the court or verdict of the jury that the amount for which he has brought suit is justly due, and that a demand had been made in writing, at least fifteen days before suit was brought, for a sum not to exceed the amount so found due, then it shall be the duty of the court before which the case shall be tried to allow to the plaintiff a reasonable attorney's fee in addition to the amount found due for wages, to be taxed as costs of suit. In a justice's court such attorney's fee shall not be more than $5, and in

the district court not more than $10, except in cases on appeal from a justice's court to the district court, when he plaintiff may recover an attorney's fee, not exceeding $25.

Attorneys' fees generally, § 346.
Attorneys' fees in foreclosure of lien for labor, etc., § 3750; in action on bond for public work, § 3755; on appeal from industrial commission, § 3148.

Sec. 3750 providing for attorneys' fee to lien claimant held unconstitutional prior to amendment of 1899.
Brubaker v. Bennett, 19 U. 401; 57 P. 170.

CHAPTER 9.

INTERFERENCE WITH PERSONAL RIGHTS.

3688. (1347x.) Unlawful to interfere with the rights of any individual. It shall be unlawful for any person, persons, association of persons, combination of persons, or body of persons to interfere with the rights of any individual engaged in labor, to exercise his full privileges under the constitution of this state or of the United States, as to where he shall be employed, by whom he shall be employed and at what compensation he shall be employed. Any one violating the provisions of this section shall be guilty of a misdemeanor.

'07, p. 82.

Rights of the individual, Con. art. 1, sec. 1-27.
Intimidating an employe a misdemeanor, § 8493.

Unlawful coercion prohibited, § 8329.
Workers may organize, § 3651.

TITLE 59.

LEGISLATURE.

('11, p. 2.)

3690. Bills and documents to be engrossed or typewritten. All bills and other documents ordered enrolled or engrossed by the legislature shall be delivered to the engrossing clerk of the house ordering the enrollment or engrossment, who shall, without delay, have them properly engrossed with pen and ink or typewritten with record ink on suitable paper in the order received by him.

TITLE 60.

LIBEL.

3692. (1348.) Libel published in good faith. Retraction. Damages. If it shall appear on the trial of any action brought for the publication of any alleged libel in any newspaper published in this state, that the said alleged libel was published in good faith, that the publication thereof was due to mistake or misapprehension of the facts, and that a full and fair retraction of any statement therein alleged to be erroneous was published in the next regular issue of such newspaper, or in case of daily papers, within three days after such mistake or misapprehension was brought to the notice of such publisher or publishers, at the head of the second column on the editorial page in the same type as was the article complained of as libelous, for three days, reference to such retraction to be made also on the local page of such paper; *provided,* that if such libel was published in the Sunday edition of such newspaper, one of the publications of the retraction herein provided for shall be in an edition of such newspaper published on a Sunday; then the plaintiff in such cases shall recover only actual damages; *provided,* that the provisions of this title shall

not apply to the case of any libel against any candidate for a public office at any election in this state, or avowed candidate for nomination to any office before any political convention, unless the retraction of the charge is made editorially in a conspicuous manner at least five days before the holding of such election or political convention, in case such libelous article was published in a daily paper, or, if published in a weekly paper, at least ten days before the holding thereof.

Freedom of the press, Con. art. 1, sec. 15.

Libel and slander, how pleaded, § 6604.

Truth and mitigating circumstances, § 6605, and note.

Criminal libel defined and punishment, §§ 8072, 8073.

Misdemeanor to give to newspaper false news, § 8084.

It is a libel to publish of a man that he has committed adultery, and that the current report of the affair makes it a crime of rape.
Lowe v. Herald, 6 U. 175; 21 P. 991.

Letter capable of the construction that the person libeled was guilty of mal-administration of the affairs of a corporation, and fraudulent practices to conceal the same, is a libel.
Lowe v. Herald, 6 U. 175; 21 P. 991.
People v. Ritchie, 12 U. 180; 42 P. 209.

A newspaper article relating to the acts of a family respecting the cruel treatment of a child is not a privileged communication, though made in good faith as a matter of news.
Fenstermaker v. Tribune Pub. Co., 13 U. 532; 45 P. 1097.

A candidate for public office is amenable to public or private criticism made in good faith upon reasonable or proper cause, since the community has a right to know the character, habits, mental and moral qualifications of its public servants.
People v. Glasmann, 12 U. 238; 42 P. 956.

In assessing damages for libel, the elements taken into consideration are: (1) the plaintiff's injured feelings and tarnished reputation; (2) the nature of the imputation; (3) the character of the defendant and influence of the parties; and (4) all mitigating circumstances shown by the defendant. The amount of such damages rests with the jury but must be purely compensatory.
Fenstermaker v. Tribune Pub. Co., 13 U. 532; 45 P. 1097.
Lowe v. Herald Co., 6 U. 175; 21 P. 991.

TITLE 61.

LIBRARIES.

CHAPTER 1.

STATE LIBRARY.

3699. (1349.) Board of control. The governor, secretary of state, chief justice, and associate justices of the supreme court shall constitute the board of control of the state library.

3700. (1350.) Rules. The public shall have access to the state library, and the board of control may make such rules and regulations not inconsistent with the provisions of this chapter, as it may deem proper for the use of the library by the public and the officers herein named, and may prescribe penalties for any violation thereof, which shall be collected in the same manner as forfeitures for the non-return or injury of any book.

3701. (1351.) Who may take books from library. Books may be taken from the state library by members of the legislature and its officers, the officers of the executive department of the state, justices of the supreme and district courts, and the attorney general, but no other person shall be permitted to take or detain any book from the library.

3702. (1352.) Register of books issued. Return. The state librarian shall keep a register of all books issued and returned, showing to whom they are issued, by whom they are returned, and the time they are so issued and returned. No book taken from the library shall be detained more than ten days, except when taken for the use of officers and members of the legislature while it is in session, and all books taken out by officers or members of the legislature shall be returned at the close of the session.
Clerk of supreme court is ex officio libraria n, § 1652.

3703. (1353.) Id. Failure. Injury. If any person injures or fails to return any book taken from the library he shall forfeit and pay to the librarian for the use of the library the damage thereto, including costs and reasonable counsel fees for collecting the same, to be recovered in an action in the name

of the state in any court of competent jurisdiction; and it shall be the duty of the librarian in behalf of the state to commence suit for the collection of all such forfeitures and all fines.

3704. (1354.) Annual report of librarian. The librarian shall, on or before the 20th day of December in each year, report to the governor the condition of the library, stating the number of volumes contained therein, the number of volumes purchased during the last year and the cost thereof, the number of volumes received by donation, the number of volumes injured or not returned, if any, and the amounts received in compensation therefor, and such suggestions and further information as may be deemed by him desirable.

3705. (1355.) Catalogue. It shall be the duty of the librarian to make out a written catalogue, conveniently arranged in alphabetical order, and cause the same to be printed and distributed to the officers entitled to the use of such library, of all books, pamphlets, maps, charts, globes, papers, apparatus, and valuable specimens in the library, adding thereto as the library is increased; which catalogue shall be kept for the use of those authorized to use books. He shall also make out and place in some conspicuous place a copy of the rules and regulations of the library.

3706. (1356.) Books to be labeled. It shall be the duty of the librarian to cause every book in the library to be labeled with printed or stamped label containing the words "Utah State Library," and also cause the same words to be written or stamped on one or more pages of each volume.

3707. (1357.) Sale or exchange of books. The board of control of the library may sell or exchange any surplus or duplicate sets of reports or law books in the library and use the money arising from such sale in purchasing other law books or reports for the library.

3708. (1358.) Penalties. If the librarian shall permit or allow any person not authorized by this chapter to take a book from the library, he shall be liable, upon conviction thereof, to pay a fine of not less than $5 nor more than $50 for each book so taken. All fines and forfeitures collected shall be used for the benefit of the library according to the best judgment of the board of control.

3709. (1359.) Id. If any person not authorized by this chapter shall take a book from the library, either with or without the consent of the librarian, or violate any of the provisions of this chapter, he shall, upon conviction thereof, be fined in any sum not less than $10 nor more than $50 for each book so taken.

CHAPTER 2.

PUBLIC LIBRARIES.

3710. (1360.) Cities of the first and of the second class may establish. Annual tax. The governing body of each city of the first and of the second class shall have power to establish and maintain a public library and reading room for the use and benefit of the inhabitants of such city; and for that purpose cities of the first class must levy a tax of one-third of one mill on the dollar, and may levy a tax of not to exceed two-thirds of one mill on the dollar; and cities of the second class may levy a tax of not to exceed one mill on the dollar, annually, on all the taxable property in the city; such tax to be levied and collected in the same manner as other general taxes of said city, and to be known as the library fund; *provided,* that no such tax shall be levied in the first instance in any city of the first class until a petition, signed by at least 1,000 qualified voters and property taxpayers, shall have been filed with the governing body of such city; nor in any city of the second class until such petition, signed by at least 250 qualified voters and property taxpayers, residents of such city, shall have been so filed. Am'd '07, p. 20.

Cities may establish and maintain, § 570x77. Annual city taxes, § 671.

3711. (1361.) Directors. Appointment. When the city council in any city of the first or of the second class shall have decided to establish and maintain a public library and reading room, under the provisions hereof, the mayor of such city shall, with the approval of the city council, proceed to appoint a board of nine directors for the same, chosen from the citizens at large with reference to their fitness for such office; and not more than one member of the city council shall be at any one time a member of said board.

Cities of first and second class, commission appoints, § 533.

3712. (1362.) Id. Terms. Removal. Said directors shall hold office as follows: One-third for one year, one-third for two years, and one-third for three years, from the 1st day of July following their appointment, and at their first regular meeting shall cast lots for the respective terms; and annually thereafter the mayor shall, before the 1st day of July of each year, appoint, as before, three directors to take the place of the retiring directors, who shall hold office for three years, and until their successors are appointed. The mayor may, by and with the consent of the city council, remove any director for misconduct or neglect of duty.

3713. (1363.) Id. Vacancies. Vacancies in the board of directors, occasioned by removals, resignations, or otherwise, shall be reported to the city council, and be filled in like manner as original appointments, and no director shall receive any compensation.

3714. (1364.) Id. Powers. Said directors shall, immediately after appointment, meet and organize by the election of one of their number as president, and the election of such other officers as they may deem necessary. They shall make and adopt such by-laws, rules, and regulations for their own guidance, and for the government of the library and reading room, as may be expedient, not inconsistent with law. They shall have the exclusive control of the expenditure of all money collected for the benefit of the library fund, and of the construction of any library building, and of the supervision, care, and custody of the grounds, rooms, and buildings constructed, leased, or set apart for that purpose; *provided,* that all moneys received for such library shall be deposited in the treasury of said city to the credit of the library fund, and shall be kept separate and apart from other moneys of such city, and drawn upon by the proper officers of such city upon the properly authenticated vouchers of the library board. Said board shall have power to purchase or lease grounds, to lease or erect an appropriate building or buildings for the use of said library, to appoint a suitable librarian and necessary assistants, to fix their compensation, to remove such appointees at will, and, in general, to carry out the spirit and intent of the provisions of this chapter, in establishing and maintaining a public library and reading room.

3715. (1365.) Use of library. Every library and reading room, established under this chapter, shall be forever free to the use of the inhabitants of the city where located, subject, however, to such reasonable rules and regulations as the library board may adopt, in order to render the use of said library and reading room of the greatest benefit to the greatest number; and said board may exclude from the use of said library and reading room any and all persons who shall wilfully violate such rules. Said board may extend the privileges and use of such library and reading room to persons residing outside of such city, but in the state, upon such terms and conditions as said board may from time to time by its regulations prescribe.

3716. (1366.) Directors' report. The said board of directors shall make, on or before the second Monday in June, an annual report to the city council, stating the condition of their trusts on the 1st day of June of that year, the various sums of money received from the library fund and from other sources, and how much money has been expended, and for what purposes; the number of books and periodicals on hand, the number added by purchase, gift, or otherwise, during the year; the number of books lost or missing; the number of visitors attending; the number of books loaned out,

and the general character and kind of such books; with such other statistics, information, and suggestions as they may deem of general interest. All such portions of said report as relate to the receipt and expenditure of money, as well as the number of books on hand, books lost or missing, and books purchased, shall be verified by affidavit.

3717. (1367.) Injuries to books. The city council of said city shall have power to pass ordinances imposing suitable penalties for the punishment of persons committing injury upon such library, or the grounds or other property thereof, and for injury to or failure to return any book belonging to such library.

3718. (1368.) Donations. Any person desiring to make donations of money, personal property, or real estate, for the benefit of such library, shall have the right to vest the title to the money or real estate so donated in the board of directors created under this chapter, to be held and controlled by such board, when accepted, according to the terms of the deed, gift, devise, or bequest of such property; and as to such property, said board shall be held and considered to be special trustees.

3719. (1369.) Libraries and gymnasiums in third class cities and towns. When 10 per cent of the legal voters of any city of the third class or incorporated town shall present a petition to the city council or town board of trustees, asking that a public library be established and maintained, or that a public library and in connection therewith a gymnasium be established and maintained, and shall specify in their petition a rate of taxation not to exceed 1 mill on the dollar for the establishment and maintenance of such public library, or not to exceed 1.3 mills on the dollar for the establishment and maintenance of a public library and gymnasium in connection therewith, then and in that event the city council, or board of trustees, as the case may be, shall call an election to determine such question, and a majority vote of the property taxpayers voting shall determine the question of levying such tax in any amount not to exceed the rate named in this section; and the town or city so voting is hereby authorized to establish and maintain a free public library, or a free public library with a public gymnasium, in accordance with the prayer of the petition. If a majority of the property taxpayers voting at such election vote for a free public library to be established, then the city council or board of trustees is hereby authorized to levy a tax not to exceed 1 mill on the dollar, or if a public gymnasium be established in connection with said public library, then they are authorized to levy a tax not to exceed 1.3 mills on the dollar of taxable property within such city or town. Such tax shall be assessed and collected at the same time during each year that other municipal taxes are assessed and collected. And it shall be known as the "library fund," or the "library and gymnasium fund," as the case may be; and when a library is established under the provisions of this section the city council or board of trustees shall have all the power and authority conferred on city councils of the first and the second classes under the provisions of this chapter. '07, p. 111; '09, p. 13; '11, p. 103; '15, p. 192.

3720. (1370.) Id. Directors. Terms. Powers. When the city council or board of trustees of any city of the third class or incorporated town shall have established a public library or public library and gymnasium in accordance with the provisions of the next preceding section, the mayor of such city or president of the board of trustees of such town shall, with the approval of the city council or board of trustees, immediately appoint six directors who, in connection with the mayor of such city or president of the board of trustees of such town, shall constitute the board of directors of such library or library and gymnasium, whose terms of office shall be for six years, except the first appointees, who shall be appointed two for two years and two for four years, and two for six years, so that thereafter the terms of office of two members of the board of directors shall expire each two years; *provided,* that all directors now elected and serving on any public library board shall fill

out the unexpired term for which they have been elected or appointed. Such board of directors shall have all the powers conferred by this chapter upon directors created for the management of public libraries in cities of the first and the second class, and shall serve without compensation. '11, p. 103.

3721. (1371.) Co-operation between cities and school districts. The city council of a city of the third class or the board of trustees of an incorporated town and the school board or trustees of the school district in which such city or town is located are hereby authorized to co-operate in the establishment of a free public library, and to contract between them as to the proportion that such city or town and school district shall pay toward the establishment and maintenance of such public library. '11, p. 103.

TITLE 62.

UTAH STATE PROPERTY LIENS.

CHAPTER 1.

MECHANICS' LIENS.

3722. (1372.) Who may have. Extent. On what property. Mechanics, material men, contractors, sub-contractors, builders, and all persons of every class performing labor upon or furnishing materials to be used in the construction, alteration, addition to, or repair, either in whole or in part, of any building, bridge, ditch, flume, aqueduct, tunnel, fence, railroad, wagon road, or other structure or improvement upon land, and also architects, engineers, and artisans who have furnished designs, plats, plans, maps, specifications, drawings, estimates of cost, surveys, or superintendence, or who have rendered other like professional service or bestowed labor in whole or part, describing, illustrating, or superintending such structure or work done or to be done, or in any part connected therewith, shall have a lien upon the property upon which they have rendered service, or performed labor, or furnished materials, for the value of such service rendered, labor done, or materials furnished, by each respectively, whether at the instance of the owner or of any other person acting by his authority or under him as agent, contractor, or otherwise; *provided,* that a lien or liens shall attach only to such interest as the owner or lessee may have in the real estate.

Lien upon personal property for labor, § 3773.
Wages of employes preferred, when, §§ 296, 3684-3686.
Lien of foundrymen, etc., § 3747.
Priority over incumbrances, §§ 3734-3735, and note.
Lands and buildings subject to, §§ 3729, 3731, 3737, and notes.
Notice of lien, recording, construction, § 3736, and note.
Construction of lien statutes, note to § 3736.
Lien attaches to mine lessee's interest, § 3732.
Lien upon mines, etc., § 3731, and note.
Lien of contractor on desert lands, § 5647.
No lien upon public building or improvement, § 3749, and note.
Public work, bond required, § 3753.
Non-licensed architects' rights restricted, § 286.
Rights in lieu of in public and municipal work, §§ 3753-3755.
Bond for labor and material, §§ 3759-3761.

Lien for materials delivered but not used.
Sierra N. L. Co. v. Whitmore, 24 U. 130; 66 P. 779.
Eclipse Mfg. Co. v. Nichols, 1 U. 252.

In the absence of a special contract fixing the value of the services, etc., the limit of the lien would be the reasonable value of such services.
Sierra N. L. Co. v. Whitmore, 24 U. 130; 66 P. 779.
Eclipse Mfg. Co. v. Nichols, 1 U. 252.

OWNERSHIP OF PROPERTY; LIABILITY:

A lien for work done upon a canal constructed upon the public lands attaches in favor of a material man as the canal is made.
Garland v. Bear River Irr. Co., 9 U. 350; 34 P. 368; affirmed 164 U. S. 1.

One in possession of land under a contract of purchase is the owner under laws of 1890.
Carey-Lombard Lumber Co. v. Partridge, 10 U. 322; 37 P. 572.

The right to a mechanic's lien against a leasehold estate is not lost by the purchase of such estate by the lessor, the latter having knowledge of the improvements for which a lien is claimed. The two estates will be preserved from merger, in order to effectuate the lien against the leasehold.
Ellis v. Brisacher, 8 U. 108; 29 P. 879.
S. L. Foundry Co. v. Mammoth M. Co., 6 U. 351; 23 P. 760; affirmed 151 U. S. 447.

Where real property was leased, upon which lessee erected improvements, under special stipulation that he was to expend $2,500 in permanent improvements, a mechanic's lien does not attach to the interest of the lessor as reversioner.
Morrow v. Merrit, 16 U. 412; 52 P. 667.

Where husband, without the consent and against the protests of the wife, contracts for a dwelling house on land owned by her, a

material man, under laws of 1894, p. 44, acquires no lien for materials furnished.
Morrison, M. Co. v. Clark, 20 U. 432; 59 P. 235.

Neither laborer nor material man can acquire a lien on land for work done or material furnished, unless done or furnished at the instance of the owner or of some person acting by his authority or under him as agent, contractor, or otherwise.
Eccles Lumber Co. v. Martin, 31 U. 241; 87 P. 713.
Morrison M. Co. v. Clark, 20 U. 432; 59 P. 235.
Sanford v. Kunkel, 30 U. 379; 85 P. 363.

Where agent had apparent authority to contract, the property of the corporation was bound.
S. L. Foundry Co. v. Mammoth M. Co., 6 U. 351; 23 P. 760; affirmed 151 U. S. 447.

Sec. 2871, providing that a homestead shall be subject to execution to satisfy judgments on debts secured by mechanics' liens for labor done for the improvement of the same, is in conflict with Con. art. 22, sec. 1, requiring the legislature to provide for the selection and exemption of a homestead; the constitution exempting a homestead from execution sale without exception.
Volker Lum. Co. v. Vance, 32 U. 74; 88 P. 896.

Where the owner of a homestead voluntarily incumbers it in the manner prescribed by § 2870, by giving a material man furnishing materials for an improvement thereon a lien therefor, the material man acquires a lien not by virtue of the statute creating a lien, but by virtue of the contract.
Id.

The interest of the vendor of land in possession of the vendee under contract of sale is not subject to material man's lien for materials furnished to the vendee; a mere permission for the vendee to make improvements does not estop the vendor.
Belknap v. Condon, 34 U. 213; 97 P. 111.

WAIVER OF LIEN:

A lien is not waived by the taking of notes for the amount due in the absence of an express agreement to that effect.
Doane v. Clinton, 2 U. 417.

It seems that where a party has a claim for a mechanic's lien and there is a controversy about the correctness of a part of the claim, and the party brings an action of debt to settle that part, he waives the right to have that claim adjudged to be rightfully included in the mechanic's lien.
Garland v. Bear River Irr. Co., 9 U. 350; 34 P. 368.

A corporation files a notice of intention to claim a lien, but cancels the notice and receives part payment; a mortgage is filed, whereupon the corporation files another lien for material, which was commenced to be furnished before the date of filing the mortgage; held, that the lien took precedence of the mortgage, but that under the evidence the lienor is estopped from insisting on such priority.
Spargo v. Nelson, 10 U. 274; 37 P. 495.

Where a mechanic stipulates with the vendee that he will look to some other person for payment for his services, or that all his claims have been paid, he waives his lien, which is merely a privilege conferred by statute and ordinarily may be waived by express agreement.
Dwyer v. Copper Mfg. Co., 14 U. 339; 47 P. 311.

A lien for lumber is not waived by the levy of an attachment afterwards dismissed, on the same property to secure the same demand.
Salt Lake Litho. Co. v. Ibex M. and S. Co., 15 U. 440; 49 P. 768.

Any lien claimant may waive his right to a lien, either by not filing a notice of his intention to claim a lien within the time prescribed, or by informing the owner that he had received payment from the original contractor, or that he will not insist on his right to file one.
West v. Pinkston et al., 44 U. 123; 138 P. 1152.

3723. (1373.) As between owner, contractor, and others. Prepayments. In case of a contract between an owner and a contractor, the lien shall extend to the entire contract price, and such contract shall operate as a lien in favor of all persons except the contractor to the extent of the whole contract price; and after all such liens are satisfied, then as a lien for any balance of the contract price in favor of the contractor; *provided,* that if at the time of the commencement to do work or furnish materials, the owner has paid upon the contract, and in accordance with the terms thereof, any portion of the contract price, the liens hereby created shall extend only to the unpaid balance of such contract price and of which such laborers and material men shall have had notice. No part of the contract price shall, by the terms of any contract, be made payable, nor shall the same or any part thereof be paid in advance of the commencement of the work, for the purpose of evading or defeating the provisions of this chapter.

Lien of sub-contractor, § 3728.
A material man is not entitled to personal judgment against an owner where the owner has contracted the work and, if the property is a homestead, is not entitled to a lien thereon for material furnished.
Park City M. Co. v. Comstock Sil. Mg. Co., 36 U. 145; 103 P. 254.

A sub-contractor's lien cannot be enforced beyond the amount due under the contract with the original owner.
Langton L. & C. Co. v. Peery, 48 U. 112; 159 P. 49.
Langton L. & C. Co. v. Smith, 48 U. 112; 159 P. 49.

3724. (1374.) Payments before time due. No payment made prior to the time when the same is due, under the terms and conditions of the contract, shall be valid for the purpose of defeating, diminishing, or discharging any lien in favor of any person except the contractor; but as to such liens such payment shall be deemed as if not made, and shall be applicable to such liens notwithstanding that the contractor to whom it was paid may thereafter abandon his contract or be or become indebted to the owner, in any amount for damages or otherwise, for non-performance of his contract or otherwise.

This section is applicable where the contractor abandoned his contract, and, where treating premature payments as not made, the owner had in his hands money applicable to labor claims, so that a payment made by the owner to labor claimants of one-third of the amount due to them, could not discharge his liability for the balance on the theory that, where one not the debtor and who is not legally or morally bound to pay, pays a sum less than the whole debt, upon the agreement that it discharges it, cannot be sued for the remainder, such principle being inapplicable.

Smoot v. Checketts, 41 U. 211; 125 P. 412.

3725. (1375.) Payments other than cash. As to all liens except that of the contractor, the whole contract price shall be payable in money, except as herein provided, and shall not be diminished by any prior or subsequent indebtedness, offset, or counterclaim in favor of the owner and against the contractor, except when the owner has contracted to pay otherwise than in cash, in which case the owner shall post in a conspicuous place on the premises a statement of the terms and conditions of the contract, before materials are furnished or labor is performed, which notice must be kept posted and when so posted shall give notice to all parties interested of the terms and conditions of the contract. Any person wilfully tearing down or defacing such notice shall be guilty of a misdemeanor.

As against labor claimants, the burden is on the owner to show compliance with the provisions of this section where contract price has been paid in a medium other than money.

Smoot v. Checketts et al., 41 U. 211; 125 P. 412.

3726. (1376.) Alteration of contract. No alteration of any contract shall affect any lien acquired under the provisions of this chapter.

3727. (1377.) Lien attaches to franchises. In case of corporations, the lien shall attach to all franchises and privileges that may in any manner pertain to the property against which the lien is claimed.

3728. (1378.) When lien of sub-contractor attaches. When any person entitled to a lien under the provisions of this chapter, other than the original contractor, shall have actually commenced to perform labor upon or to furnish materials for any building, improvement or structure herein mentioned, the property shall be charged with the liens in this chapter provided, and no payment made to the original contractor shall in anywise defeat or impair the claims for such liens.

"Contractor" and "sub-contractor" defined, § 3733.

Under §§ 3806, 3807 of the Compiled Laws of 1888, the lien of the sub-contractor attaches from the time he begins to perform labor or furnish materials, provided he gives notice within thirty days, but the amount of all liens cannot exceed the amount of the contract with the owner.

Teahen v. Nelson, 6 U. 363; 23 P. 764.

The lien of the sub-contractor attaches on the date of the furnishing of the first material, and not on the date of filing for record the lien notice.

Morrison v. Carey-L. Co., 9 U. 70; 33 P. 238.

Morris v. Gamble, 14 U. 201; 46 P. 1104.

Culmer v. Clift, 14 U. 286; 47 P. 85.

The owner is charged with notice of the fact that the contractor has a right to sub-contract, and that the sub-contractor is entitled to a lien within the limit of the original contract price.

Sierra N. L. Co. v. Whitmore, 24 U. 130; 66 P. 779.

Carey-L. L. Co. v. Partridge, 10 U. 322; 37 P. 572.

3729. (1379.) Land affected. Fixtures. The liens granted by this chapter shall extend to and cover so much of the land whereon such building, structure, or improvement shall be made, as may be necessary for the convenient use and occupation of such building, structure, or improvement, and the same shall be subject to such liens; and in case any such building shall occupy two or more lots or other subdivisions of land, such lots or other subdivisions shall be deemed one lot for the purposes of this chapter, and the same rule shall hold in cases of any other such improvements that shall be practically indivisible, and shall attach to all machinery and other fixtures used in connection with any such lands, buildings, or structures.

Lien on franchise of corporation, § 3727.

Lien against two or more buildings, etc., §§ 3731, 3737, and notes.

The removal of a building by third persons to land other than that on which it was originally erected, without the knowledge and consent of the owner thereof or the lienholders, did not relieve the building in its new location from liability for a deficiency existing on the sale of the land on which the building was erected to satisfy such liens.

Sanford v. Kunkel, 30 U. 379; 85 P. 363, 1012.

The question of how much land is necessary is one of fact.

Park City M. Co. v. Comstock S. M. Co., 36 U. 145; 103 P. 254.

If the owner selects the lot on which improvements are made as a homestead, and has no other real estate, the person furnishing materials is not entitled to a lien thereon, and the material man is not entitled to a lien on other property than that which was improved.

Id.

Where only two lots are necessary for the convenience, use, and occupation of the building constructed thereon, material men can have no lien on other property.

Volker-Scowcroft Lbr. Co. v. Vance, 36 U. 348; 103 P. 970.

3730. (1380.) Lien takes precedence of attachment, etc. No attachment, garnishment, or levy under an execution upon any money due to an original contractor from the owner of any property subject to lien under this chapter, shall be valid as against any lien of a sub-contractor or material man, and no such attachment, garnishment, or levy upon any money due to a sub-contractor or material man, as herein provided, from the contractor, shall be valid as against any lien of a laborer employed by the day or piece.

Priority of liens over other incumbrances, §§ 3734, 3735, and note.

Exemption of materials, § 3745.

3731. (1381.) Liens on mines. The provisions of this chapter shall apply to all persons who shall do work or furnish materials for the working, preservation, or development of any mine, lode, mining claim, or deposit yielding metals or minerals of any kind, or for the working, preservation, or development of any such mine, lode, or deposit in search of such metals or minerals, and to all persons who shall do work or furnish materials upon any shaft, tunnel, incline, adit, drift, drain, or other excavation of any such mine, lode, or deposit; *provided,* that when two or more such lodes or deposits, owned or claimed by the same person or persons, or where the owners are different persons, and the same with the consent of all shall be worked through a common shaft, tunnel, incline, adit, drift, or other excavation, then all the mines, lodes, or deposits so worked, shall, for the purpose of this chapter, be deemed one mine.

Who entitled to liens and upon what, § 3722, and note.

An overseer and foreman of a body of miners who performed manual labor upon a mine is entitled for his services to a lien on the mine under the statute of Utah giving a lien thereon.

Flagstaff Mining Co. v. Cullins, 2 U. 219; affirmed 104 U. S. 176.

Sandberg v. Victor M. Co., 24 U. 1; 66 P. 360.

One who furnishes materials and labor for the erection of stretchers on the property of a mining corporation, pursuant to a contract made in the company's name by its authorized agent, is entitled to a mechanic's lien, notwithstanding the existence of an agreement, unknown to him, whereby the agent was to have possession of the property and make the improvements on his own sole credit.

S. L. Foundry & M. Co. v. Mammoth M. Co., 6 U. 351; 23 P. 760; affirmed 151 U. S. 447.

Statement of lien against several mining claims and buildings held sufficient.

Garner v. Van Patten, 20 U. 342; 58 P. 684.

S. L. Lith. Co. v. Ibex M. Co., 15 U. 440; 49 P. 768.

Mill deemed fully constructed, when.

Cahoon v. Fortune M. Co., 26 U. 86; 72 P. 437.

S. L. Lith. Co. v. Ibex M. Co., 15 U. 440; 49 P. 768.

Applies for work done on a mill on a mining claim.

Park City Meat Co. v. Comstock Sil. Mng. Co., 36 U. 145; 103 P. 254.

The claims constituting the mine, and all the property necessarily used in connection with the mine, and mining claims, including an easement in adjoining land, necessarily appertaining to the mine, must be regarded as a unit to all of which the lien attaches.

Park City Meat Co. v. Comstock Sil. Mng. Co., 36 U. 145; 103 P. 254.

3732. (1382.) Id. Attaches to lessee's interest. The next preceding section shall not be deemed to apply to the owner or owners of any mine, lode, deposit, shaft, tunnel, incline, adit, drift, or other excavation when the same shall be worked by a lessee, under bond or otherwise; but, in such case, persons entitled to a lien under this chapter shall have a lien on the leasehold interest and on the ores and mineral bearing rock or dirt mined and excavated by the lessee.

Lien attaches to lessee's interest, § 3722.

3733. (1383.) "Contractors" and "sub-contractors" defined. Whoever shall do work or furnish materials by contract, express or implied, with the owner as in this chapter provided, shall be deemed an original contractor, and all other persons doing work or furnishing materials shall be deemed sub-contractors.

When lien of sub-contractor attaches, § 3728, and note.

3734. (1384.) Priority over other incumbrances. The liens provided for herein are preferred to any lien, mortgage, or other incumbrance which may have attached subsequent to the time when the building, improvement, or structure was commenced, work done, or materials were commenced to be furnished; also to any lien, mortgage, or other incumbrance of which the lienholder had no notice and which was unrecorded at the time the building, improvement, or structure was commenced, work done, or materials commenced to be furnished.

See note to next section.

Priority over attachment, § 3730.

Lien of a mortgage given for the purpose of raising funds to construct a building is prior

to that of the sub-contractor supplying labor and materials for such building only to the amount actually advanced on the mortgage.

Culmer Paint & Glass Co. v. Gleason et al., 42 U. 344; 130 P. 66.

Where the purchaser of lots gave a blanket mortgage limiting the amount on any one lot to $350, and began erection of a dwelling house on one lot for which petitioners furnished materials, and the mortgagee released the lot from the blanket mortgage and took two new mortgages in a sum approximating the value of the house and lot, such transaction was not a renewal of the old mortgage, but was done for the purpose of securing increased security on the old debt, and therefore mechanic's liens acquired prior to the taking of the second mortgage were superior to such mortgage.

Badger Coal & Lumber Co. v. Olsen, 50 U. —; 167 P. 680.

3735. (1385.) Id. Relates back. The liens herein provided shall relate back to and take effect as of the time of the commencement to do work upon and furnish materials on the ground for the structure or improvement, and shall have priority over any lien or incumbrance subsequently intervening, except a lien herein provided for of the same class, or which may have been created prior thereto, which was not then recorded and of which the lienor under this chapter did have actual notice.

Record imparts notice to lienholders, § 4900.

Waiver of lien, note to § 3722.

Priority of lien over attachment, § 3730.

A deed of trust which covers all the property the owner then had, or might thereafter acquire, cannot take precedence of a mechanic's lien for work done and material furnished in building the canal.

Garland v. Bear River Irr. Company, 9 U. 350; 34 P. 368; affirmed 164 U. S. 1.

A mechanic's lien filed within the time specified by § 3736 takes effect as of the date of the commencement of the work and the furnishing of materials, and is prior to intervening equities.

Sanford v. Kunkel, 30 U. 379; 85 P. 363.

Culmer v. Caine, 22 U. 216; 61 P. 1008.

Fields v. Daisy M. Co., 25 U. 76; 69 P. 528.

3736. (1386.) Notice of lien; recording. Every original contractor, within sixty days after the completion of his contract, and every person save the original contractor claiming the benefit of this chapter, must, within forty days after furnishing the last material or performing the last labor for any building, improvement, or structure, or for any alteration, addition to, or repair thereof, or performance of any labor in or furnishing any materials for any mining claim, file for record with the county recorder of the county in which the property or some part thereof is situated, a claim in writing containing a notice of intention to hold and claim a lien, and a statement of his demand, after deducting all just credits and offsets, with the name of the owner, if known, and also the name of the person by whom he was employed, or to whom he furnished the material, with a statement of the terms, time given, and conditions of his contract, specifying the time when the first and last labor was performed, or the first and last materials furnished, and also a description of the property to be charged with the lien, sufficient for identification, which claim must be verified by the oath of himself or of some other person.

Excessive claim, penalty, § 3749.

Ownership of property, note to § 3722.

Waiver of lien, estoppel, note to § 3722.

Record of lien imparts notice, § 3739.

Notice of intention to claim lien may be recorded before commencing work or afterward, § 3738.

NOTICE; CONTENTS; CONSTRUCTION:

Under act of 1869 the notice of lien must state the amount of money due, but need not state the time when due or to become due.

Doane v. Clinton, 2 U. 417.

Under same act it was held that not only the contractor but laborers and material men had three months after the completion of the building in which to file a notice of lien.

Eclipse Mfg. Co. v. Nichols, 1 U. 252.

Sub-contractor not required to state in his notice the terms of contract between owner and original contractor.

Brubaker v. Bennett, 19 U. 401; 57 P. 170.

Statement of lien against two buildings held sufficient.

Garner v. Van Patten, 20 U. 342; 58 P. 684.

Eccles Lumber Co. v. Martin, 31 U. 241; 87 P. 713.

It is not fatal that a notice claimed more than was actually due.

Garner v. Van Patten, 20 U. 342; 58 P. 684.

Culmer v. Caine, 22 U. 216; 61 P. 1008.

On foreclosure of mechanic's lien, a variance between the date alleged as to making of contract, and the date proved, is immaterial; as is a non-prejudicial variance as to the terms of the contract.

Sandberg v. Victor M. Co., 24 U. 1; 66 P. 360.

When all the items of a material man's account relate to one continuous transaction between the same parties, the account will be regarded as continuous and dates from the first item thereof, though the goods are furnished on separate orders at different dates.

Fields v. Daisy G. M. Co., 25 U. 76; 69 P. 528.

Materials delivered in January were not furnished pursuant to the original contract completed in July, so as to entitle plaintiffs to a mechanic's lien for the balance due on all the material furnished by filing their claim within sixty days after the last delivery.

Cahoon v. Fortune M. Co., 26 U. 86; 72 P. 437.

Though lumber be delivered and used in the construction of a granulator two months after the operation of the smelter commenced, it may be included in the lien for the lumber to build the smelter, if the granulator enables it to be more economically operated, and was contemplated as a part of the plant.

S. L. Litho. Co. v. Ibex M. Co., 15 U. 440; 49 P. 768.

Where a mill is fully constructed and put in operation, it is deemed to be completed, though some repairs and alterations are made incidentally thereafter.

Cahoon v. Fortune M. Co., 26 U. 86; 72 P. 437.

A right to a lien in case of an original contractor, though existing on the completion of the contract and for sixty days thereafter, is not in fact created until the contractor files notice for record.
Elwell v. Morrow, 28 U. 278; 78 P. 605.

A mechanic's lien, filed within the the time specified by § 3736, takes effect as of the the date of the commencement of the work and the furnishing of the materials and is prior to intervening equities.
Sanford v. Kunkel, 30 U. 379; 85 P. 363.
Culmer v. Caine, 22 U. 216; 61 P. 1008.
Fields v. Daisy M. Co., 25 U. 76; 69 P. 528.

A mechanic's lien is statutory and not contractual, and cannot be acquired unless the claimant complies with the statutory provisions.
Eccles Lumber Co. v. Martin, 31 U. 241; 87 P. 713.
Volker v. Vance, 32 U. 74; 88 P. 896.
Morrison, M. & Co., v. Willard, 17 U. 306; 53 P. 832.
Doane v. Clinton, 2 U. 417.

A lien once acquired by labor performed on a building with the consent of the owner should not be defeated by technicalities when no rights of others are infringed and no express command of the statute is disregarded.
Eccles Lumber Co. v. Martin, 31 U. 241; 87 P. 713.
Flagstaff M. Co. v. Collins, 104 U. S. 176; affirming 2 U. 219.
Sandberg v. Victor M. Co., 24 U. 1; 66 P. 360.
Elwell v. Morrow, 28 U. 278; 78 P. 605.

The various sections of the lien law must be construed together.
Eccles Lumber Co. v. Martin, 31 U. 241; 87 P. 713.

A substantial compliance with the statutes is sufficient, and necessary appurtenances including an easement in other lands than that on which the building stands, need not be mentioned in the notice of intention to claim a lien. It is enough to describe the particular thing, the building and the lot on which it stands.
Park City Meat Company v. Comstock Silver Mining Co., 36 U. 145; 103 P. 254.

A contractor's agreement to keep a building free from liens does not affect the material man's right to a lien.
Langton L. & C. Co. v. Peery, 48 U. 112; 159 P. 49.
Langton L. & C. Co. v. Smith, 48 U. 112; 159 P. 49.

Where an owner exercised his contract right to change contractors, any mechanic's lien notice is in time when filed over forty days after the first contractor quit, but within forty days after delivering material to the second contractor, for the contract is continuing.
Langton L. & C. Co. v. Peery, 48 U. 112; 159 P. 49.
Langton L. & C. Co., v. Smith, 48 U. 112; 159 P. 49.

3737. (1387.) Joining liens on separate properties. Liens against two or more buildings, mining claims, or other improvements owned by the same person or persons may be included in one claim; but in such case the person filing the claim must designate therein the amount claimed to be due to him on each of such buildings, mining claims, or other improvements.

Where building covers two or more lots, § 3729.
Property subject to liens, § 3722, and notes.
A lien for lumber used in several structures on the same tract, under one contract, may exist on the whole, when they constitute one plant.
S. L. Litho. Co. v. Ibex M. Co., 15 U. 440; 49 P. 768.
Sale of building and lots to satisfy liens.
Sanford v. Kunkel, 30 U. 379; 85 P. 363, 1012.
Statement of lien against two or more buildings or properties held sufficient.
Garner v. Van Patten, 20 U. 342; 58 P. 684.
Eccles Lumber Co. v. Martin, 31 U. 241; 87 P. 713.

3738. (1388.) Filing claim before doing work. Any sub-contractor before commencing to furnish materials or to perform work, or at any time thereafter and before the completion of his contract, may file a statement of claim with the recorder as hereinbefore provided, containing a notice of intention to hold and claim a lien, a description of the property to be charged, and the probable value of the work to be done, or the probable value of the materials to be furnished, as near as may be. From the time such statement shall have been filed, he shall have a lien for the work thereafter done, or materials furnished by him, not exceeding the sum stated as the probable value thereof; and in the event of such sub-contractor claiming to have done work or furnished materials before the filing of such statement, he may include therein a statment of the value of the work already done or material furnished, as near as may be, for which, to the extent of the sums mentioned, his lien shall likewise attach.

Notice of lien generally, § 3736.

3739. (1389.) Record is notice. The recorder must record the claim in a book kept by him for that purpose, and from the time of the filing thereof for record, all persons shall be deemed to have notice.

3740. (1390.) Time for enforcing. The liens herein provided for may be enforced by an action in any court of competent jurisdiction, at any time within twelve months after the completion of the original contract or the suspension of work thereunder for a period of thirty days, on setting out in the complaint the particulars of the demand, with a description of the premises to be charged with a lien.

Where a right under a lien law is in process of becoming complete and a remedy exists by statute to enforce that right, but before the right becomes complete another remedy is given by the statute, the right must be enforced according to the later statute
Garland v. Bear River Irr. Co., 9 U. 350; 34 P. 368; affrmed 164 U. S. 1,

3741. (1391.) Foreclosure. Notice. Hearing. Rank of liens. At the time of filing the complaint and issuing the summons, the plaintiff shall cause a notice to be published at least once a week for three consecutive weeks in one newspaper of general circulation, published in the county, notifying all persons holding or claiming liens on said premises, under the provisions of this chapter, to be and appear before said court on a day specified therein, and during a regular term thereof, and to exhibit then and there the proof of said liens. On the day appointed, all persons claiming liens against the premises shall appear before said court and exhibit the same, whereupon the court shall proceed to hear and determine the claims in a summary way, or may refer the same to a referee to ascertain and report thereon, and shall enter judgment according to the rights of the parties, and all liens not so exhibited shall be deemed to be waived against the property. In every case in which different liens are claimed against the same property, the rank of each lien or class of liens, as between the contractor and sub-contractor, shall be declared and ordered to be satisfied, in the decree, in the following order, viz.:

1. Sub-contractors who were laborers or mechanics working by the day or piece, but without furnishing materials therefor;
2. All other sub-contractors and all material men;
3. The original contractors.

Public work, bond required, § 3573.

Where one action is brought to foreclose two miners' liens, owned separately, on the same property, a separate decree as to each lien may be rendered.
Venard v. Green, 4 U. 67; 6 P. 415.

Where summons was issued and served, but no notice of lien was published, and the record failed to show that any person other than plaintiff claimed or had filed a lien, the failure to give the statutory notice was not fatal to plaintiff's cause of action, since the defendant was not shown to have been prejudiced.
Morrison, M. Co. v. Clayton, 17 U. 306; 53 P. 832.

The failure to give the statutory notice was not fatal to plaintiff's cause of action, since defendant was not shown to have been prejudiced thereby.
Sandberg v. Victor M. Co., 24 U. 1; 66 P. 360.

In an action to foreclose a mechanic's lien and to recover for services rendered under a contract of employment, it was proper to allow interest on the sum awarded.
Id.

Since this section, providing for the foreclosure of mechanic's liens is a remedial statute, a substantial compliance with its provisions is sufficient.
Elwell v. Morrow, 28 U. 278; 78 P. 605.

Where a contractor published notice under this section, and, on the date fixed for hearing, another contractor's time within which he could file a lien had not expired, his failure to appear and prove his lien on the day specified was not a waiver of his lien.
Id.

The holder of a mortgage may be made a party in a mechanic's lien foreclosure suit and his claim may be litigated.
Badger Coal & Lumber Co. v. Olsen, 50 U. —; 167 P. 680.

Likewise, one who contracts for sale of land on instalments, claims a lien; and the adjudication thereon is final.
Cain v. Parfit, 48 U. 81; 158 P. 448.

3742. (1392.) Sale. Redemption. Disposition of proceeds. The court shall cause the property to be sold in satisfaction of the liens and costs, as in the case of foreclosure of mortgages, subject to the right of redemption of the owner and creditors as provided by law; and if the proceeds of sale, after the payment of costs, shall not be sufficient to satisfy the whole amount of liens included in the decree, then said proceeds shall be paid in the order above designated, and pro rata to the persons claiming in each class, where the sum realized is insufficient to pay the persons of one class in full. In case of any excess of proceeds of sale, the remainder shall be paid over to the owner.

The decree and order of sale in a mechanic's lien foreclosure should describe the property with such certainty as is ordinarily required in the execution of a deed.
Park City Meat Co. v. Comstock Sil. Mg. Co., 36 U. 145; 103 P. 254.

3743. (1393.) Deficiency judgment. Every person whose claim is not satisfied as herein provided may have judgment docketed for the balance unpaid, and execution therefor against the party personally liable.

3744. (1394.) Costs. As between the owner and the contractor, the court shall apportion the costs according to the right of the case, but in all instances sub-contractors shall have their costs, including the costs of preparing and recording statement of claim, awarded to them, for each claimant exhibiting a lien.

3745. (1395.) Materials exempt from attachment, etc. Exception. Whenever materials have been furnished for use in the construction, alteration or repair of any building, work, or other improvement mentioned in

§ 3722, such materials shall not be subject to attachment, execution, or other legal process, to enforce any debt due by the purchaser of such materials, other than a debt due for the purchase money thereof, so long as in good faith the same are about to be applied to the construction, alteration, or repair of such building or improvement. Nothing contained herein shall be construed to impair or affect the right of any person to whom a debt may be due for any work done, or material furnished, to maintain a personal action to recover the same.

3746. (1396.) Assignment of liens. All liens under this chapter shall be assignable as other choses in action, and the assignee may commence and prosecute actions thereon in his own name, in the manner herein provided.

Subsequent payment by debtor after notice of assignment.
McCornick v. Saddler, 10 U. 210; 37 P. 332.
Id., 11 U. 441; 40 P. 711.
Id., 14 U. 463; 47 P. 667.
Id., 21 U. 62; 60 P. 547.
It is competent for different parties having claims for material to assign them, for the purpose of suit.
Culmer v. Clift, 14 U. 286; 47 P. 85.
Venard v. Green, 4 U. 67; 6 P. 415.
The right to perfect a laborer's lien is assignable, and the assignee is authorized to take steps necessary to establish the same.
Smoot v. Checketts, 41 U. 211; 125 P. 412.

3747. (1397.) Liens for foundrymen and boilermakers. All foundrymen and boilermakers and all persons performing labor or furnishing machinery, or boilers, or castings, or other material for the construction or repairing or carrying on of any mill, manufactory, or hoisting works shall have a lien on such mill, manufactory, or hoisting works, for such work or labor done on such machinery, or boiler, or castings, or other material furnished by each respectively. And all the provisions of this chapter respecting the mode of filing, recording, securing, and enforcing the liens of contractors and others, and the word superstructure whenever it occurs in this chapter shall be applicable to the provisions of this section.

3748. (1398.) Cancellation of lien. Penalty. The claimant of any lien filed as provided herein, on the payment of the amount thereof, together with the costs incurred and the fees for cancellation, shall, at the request of any person interested in the property charged therewith, enter or cause said lien to be canceled of record within ten days from the request, and, upon failure to so cancel said lien within the time aforesaid, shall forfeit and pay to the person making the request the sum of $20 per day until the same shall be canceled, to be recovered in the same manner as other debts.

3749. (1399.) Excessive claim. Penalty. No lien on public buildings, etc. Any person who shall knowingly cause to be filed for record a claim of lien against any property whatever, which shall contain a greater demand than the sum due him, with the intent to cloud the title or to exact from the owner or person liable, by means of such excessive claim of liens, more than is due him, or to procure any advantage or benefit whatever, shall be deemed guilty of a misdemeanor.

It is not fatal that notice of lien claimed more than was actually due, if in good faith.
Garner v. Van Patten, 20 U. 342; 58 P. 684.
Culmer v. Caine, 22 U. 216; 61 P. 1008.
A mechanic's lien cannot attach to property devoted to a public use.
Board of education v. S. L. Pressed Brick Co., 13 U. 211; 44 P. 709.
Smith v. Bowman, 31 U. 33; 88 P. 687.
Public work, bond required, § 3753.
Where a contractor, under a contract to construct a public building, gives a bond in the nature of a penalty for the benefit of the state, whose public buildings are not subject to liens, and the contract contains no express covenant to pay claims of material men and laborers, the state may waive its right to retain any sum reserved on account of stipulations in the contract respecting payments for labor and material.
Montgomery v. Rief, 15 U. 495; 50 P. 623.

3750. (1400.) Attorney's fee. In any action brought to enforce any lien under this chapter, the successful party shall be entitled to recover a reasonable attorney's fee, to be fixed by the court not to exceed $25, which shall be taxed as costs in the action. Am'd '99, p. 81.

Attorneys' fees in suits for wages, § 3687.
Attorneys' fees generally, § 346 and note.
The provisions of this section, prior to amendment of 1899, giving to a successful lienholder an attorney's fee, held to be a special law, in violation of Con. art. 6, sec. 26, sub. 18.
Brubaker v. Bennett, 19 U. 401; 57 P. 170.

3751. (1399.) Chapter not applicable public building. The provisions of this chapter shall not apply to any public building, structure or improvement.

CHAPTER 2.

LIABILITY OF CITY, TOWN, ETC.

('17, p. 105.)

3753. (1400x.) Bonds must be exacted on all public work. Material men and laborers may intervene. Time limit. The state, any state institution, county, city, town, village, or school district entering into a contract with any person, firm, or corporation for the construction or alteration of, or addition to, any public building, structure, or other improvement, or the prosecution and completion of, or alteration or addition to, any public work or improvements shall, before any such work is commenced, exact and obtain from such person, firm, or corporation having such contract a penal bond, with good and sufficient surety or sureties, for the faithful performance of said contract, with the additional obligation that such contractor or contractors shall promptly make payment to all persons supplying labor and material used in the prosecution of the work provided for in such contract; and any person, company, association, or corporation who has furnished labor or material used in the construction or repair of any public building, public work, or improvement, payment for which has not been made, shall have the right to intervene and be made a party to any action instituted by the obligee on the bond of the contractor, and to have their rights and claims adjudicated in such action, and judgment rendered thereon, subject, however, to the priority of the claim and judgment of the obligee therein. If the full amount of the liability of the surety on said bonds is sufficient to pay the full amount of said claims and demands, then after paying the full amount due the obligee, the remainder shall be distributed pro rata among said intervenors. If no suit should be brought by the obligee within six months from the completion and final settlement of said contract, then the person or persons supplying labor and materials shall, upon application therefor and furnishing an affidavit to the obligee that labor or materials for the prosecution of the work has been supplied by him or them, and payment of which has not been made, be furnished with a certified copy of said contract and bond, upon which he or they shall have a right of action, and shall be and are hereby authorized to bring suit in the name of the obligee in any court having jurisdiction in the county in which said contract was to be performed and executed, and not elsewhere, for his or their use and benefit, against said contractor and his sureties, and to prosecute the same to final judgment and execution; *provided,* that where suit is instituted by any such creditors on the bond of the contractor, it shall not be commenced until after the complete performance of said contract and final settlement thereof, or abandonment thereof, but shall be commenced within one year after the performance and final settlement or abandonment of said contract, and not later; and, *provided further,* that where suit is so instituted by a creditor or creditors, only one action shall be brought, and any creditor may file his claim in such action and be made party thereto within the time hereinafter provided, and not later. If the recovery on the bond should be inadequate to pay the amounts found due to all of said creditors, judgment shall be given to each creditor pro rata of the amount of recovery. The surety on said bond may pay into court for distribution among said claimants and creditors the full amount of the surety's liability, to-wit: The penalty named in the bond, less any amount which the said surety may have had to pay the obligee by reason of the execution of said bond, and upon so doing the surety will be relieved from further liability; *provided, however,* that in all suits instituted under the provisions of this chapter, such personal notice of the pendency of such suits, informing them of their right to intervene, as the court may order, shall be given to all known creditors, and in addition thereto, notice by publication in some newspaper of general circulation published in the county where the contract is being per-

formed for at least three successive weeks, the last publication to be at least two months before the time limited therefor; and all claimants and creditors who do not intervene within the time herein provided shall be forever barred from recovery upon said bond. '05, p. 101.

No lien upon public buildings, etc., § 3749 and note.

This statute is remedial and should receive a liberal construction and application; it is maintainable without first obtaining a personal judgment against the contractor and without obtaining personal service on him when a nonresident, and it need only be shown that a part of the contract price is unpaid and in the hands of the public corporation.

Mellon v. Vendorhorst Bros. et al., 44 U. 300; 140 P. 30.

This statute gives a preferential right against the contract price to laborers and material men bringing an action or intervening in some other action while such price remains in the hands of the school district, and an assignee of moneys due or to become due under the contract takes subject to such preferential right.

South High School v. McMillen Paper & S. Co., 49 U. 477; 164 P. 1041.

Geo. A. Lowe Co. v. Leary, 49 U. 506; 164 P. 1052.

The rights of material men to a fund due the contractor from a school district are superior to the rights of the contractor's trustee in bankruptcy.

Geo. A. Lowe & Co. v. Leary, 49 U. 506; 164 P. 1052.

The failure of the school district to require a bond from the contractor does not render it liable to one to whom the contractor assigned moneys due under the contract, and whose right to such moneys was made subordinate to claims for labor and materials.

South High School v. McMillan Paper & S. Co., 49 U. 477; 164 P. 1041.

The failure of a school district to require a bond does not make it liable to the persons for whose protection the bond is required.

Jos. Nelson Supply Co. v. Leary, 49 U. 493; 164 P. 1047.

Where the school district trustees failed to provide for the bond herein required, neither the school district nor the trustees are responsible to parties supplying the labor and material for failure to supply the bond.

New York Blower Co. v. Carbon Co. High School, 50 U. —; 167 P. 670.

3754. Right of action in case bonds are not exacted. Any state institution, county, city, town, village, or school district subject to the provisions of § 3753, which shall fail or neglect to exact and obtain a penal bond as herein required, shall thereupon itself promptly make payment to all persons supplying labor and material used in the prosecution of the work provided for in such contract, and any such creditors shall have a direct right of action upon their said accounts against any such state institution, county, city, town, village, or school district in any court having jurisdiction in the county in which said contract was to be performed and executed and not elsewhere, which action may be commenced at any time within one year after complete performance and final settlement of said contract, or the abandonment thereof, and notice of such action as prescribed by the court, and by publication, shall be given as provided in § 3753 for suits upon the bonds provided hereunder.

3755. Attorney's fees. In any suit or action brought upon the bond provided for in § 3753, the prevailing party upon each separate cause of action shall recover a reasonable attorney's fee, not exceeding the sum of $50, to be taxed as costs.

CHAPTER 3.

LIABILITY OF OWNER.

('15, p. 127.)

3759. Owner to exact bond from contractor. Terms. Any person who makes a contract involving $500 or more, with a builder, contractor, or other person to construct, alter, repair, or make an addition to, either in whole or in part, a building or other structure, or improvement upon land in this state, shall obtain from such builder, contractor, or other person, a good and sufficient bond, with a surety or sureties worth at least the amount of the penalty specified in the bond over and above all their just debts and liabilities, exclusive of property exempt from execution, which bond shall be made payable in favor of the owner for the benefit of the owner and of any party or parties interested, in a sum equal to the contract price, and shall be conditioned for the faithful performance of the contract and for the prompt and faithful payment of the accounts contracted for material furnished and labor performed in constructing, altering, repairing, or making any addition

to said building, structure, or other improvement. "Any person" as used herein refers to the owner of the land, or of any interest therein, whether acting directly, or with, or through any other person authorized by, or acting with the knowledge and consent of such owner.

Public work, bond required, § 3573.
This chapter is not unconstitutional as depriving land owner of due process of law.
Rio Grande Lumber Co. v. Darke, 50 U. —; 167 P. 241.

3760. Bond to be exhibited to interested parties. Any person subject thereto shall obtain possession of said bond and shall, upon request, at any time during business hours, exhibit the same to any material man, sub-contractor, or mechanic, or other person who may be interested.

3761. Right of action against sureties. Every material man, sub-contractor, or mechanic, or other person, or concern that may furnish materials, or perform labor, for or upon any such building, structure, or other improvement, shall have a direct right of action against the surety or sureties of said bond, which right of action shall arise forty days after the completion of the contract for construction, alteration, addition to, or repair of said building, structure, or other improvement, or, in case of a default under said contract, then forty days after such default.

3762. Liability of owner for failure to obtain bond. Any person subject to the provisions of § 3759 who fails to obtain from the builder, contractor, or other person engaged under said contract, such good and sufficient undertaking, or who refuses to exhibit the same as required by § 3760, shall be personally liable for all accounts or balances due from the said builder, contractor, or other person, to material men, sub-contractors, and mechanics, and other persons for materials supplied and labor performed for said building.

3763. Liability of sureties. Limit. The liability of the surety or sureties on said undertaking, and of the owner, shall be limited to the reasonable value of all materials supplied and of all labor performed for said building, structure, or other improvement, less payments made on account thereof, not exceeding, however, in any case the prices which said builder, contractor, or other person having the contract agreed to pay for such materials and labor.

CHAPTER 4.

LIENS OF INNKEEPERS, RANCHMEN, AND OTHERS.

3771. (1401.) Ranchmen, herders, etc. Any ranchman, farmer, agister, or herder of cattle, tavern keeper, or livery stable keeper, to whom any horses, mules, cattle, sheep, or asses shall be intrusted for the purpose of feeding, herding, pasturing, or ranching, shall have a lien upon such animals for the amount that may be due him for such feeding, herding, pasturing, or ranching, and shall be authorized to retain possession of such animals until the said amount is paid.

Lien on mare and colt for services of stallion or jack, § 2904.
Warehouse lien, §§ 6227-6236.
This lien is not prior in right to a prior recorded valid chattel mortgage on an animal.
Grubb v. Lashus, 42 U. 254; 129 P. 1029.

3772. (1402.) Innkeepers. Every hotel, tavern, or boarding house keeper, or person who lets furnished rooms shall have a lien upon the baggage of his patrons, boarders, guests, and tenants for the amount that may be due from any such persons for such boarding, lodging, or rent, and he is hereby authorized to hold and retain possession of such baggage until the amount so due for boarding, lodging, or rent, or either, is paid.

Lien of common carrier for storage, § 3790.
A party living at a hotel as a regular monthly boarder, is in no sense a guest so as to hold the proprietors liable as innkeepers. In such a case they are liable only as boarding house keepers, and are held to ordinary diligence only.
Lawrence v. Howard, 1 U. 142.

3773. (1404.) For repair of personal property. Any mechanic or other person who shall make, alter, repair, or bestow labor upon any article of personal property, at the request of the owner of such property, shall in like manner have a lien upon such articles for his reasonable charges for the labor performed and for any materials furnished and used in making such alteration, repair, or improvement.

Where plaintiff's agent took plaintiff's automobile to a garage for repairs, believing that the repairs would be made by S., but the repairs were made by defendant, the implied contract to pay for repairs was sufficient to sustain defendant's lien.
Westminster Inv. Co. v. McCurtain, 39 U. 544; 118 P. 564.

3774. (1405.) Foreclosure and sale. At any time after thirty days after default made in the payment of a debt secured by a lien upon personal property, such lien may be foreclosed by advertisement, upon the notice and in the manner provided for the foreclosure of mortgages on personal property; *provided,* that a copy of the notice shall, at the time of posting or publication, be delivered to the owner of the property, or if he does not reside in the county, shall be transmitted to him by mail at his usual place of abode, if known. After paying the reasonable expenses of the sale, together with the amount due and the cost of keeping the property up to the time of the sale, the residue, if any, shall be rendered to the owner of the property. If the property be sold by advertisement, a statement shall be rendered to the owner of the property as the law prescribes shall be made to a mortgagor, and on failure to render such statement, the lienholder shall forfeit to the owner the sum of $25 damages. The fees for the publication of notices shall in no case exceed the sum of $3, and the fees of the person crying the sale shall be $2 per day.

Fee of crier, § 2538.
Cited in: Howard et al. v. Paulson & Co., 41 U. 490; 127 P. 284.

3775. (1406.) Right of action. Nothing in this chapter shall take away the right of action of the party to whom such lien is given, for his charges, or for any residue thereof, after sale of such property.

A warehouseman, by presenting to an executor a claim against an estate for storage charges, without mentioning his lien, by suing thereon after rejection, which action was dismissed, did not make an election of remedies so as to bar the assertion of his lien by way of counterclaim in a subsequent action by the executor to recover the property.
Howard et al. v. Paulson & Co., 41 U. 490; 127 P. 284.

CHAPTER 5.

LESSORS' LIENS.

3776. (1407.) Attach to what. Limitation. Lessors, except as hereinafter provided, shall have a lien for rent due upon all of the property of the lessee not exempt from execution as long as the lessee shall occupy the leased premises, and for thirty days thereafter.

A landlord may proceed in equity to foreclose his lien, notwithstanding the provision of this chapter
Houston Real Estate Co. et al. v. Hechler, 44 U. 64; 138 P. 1159.

3777. (1408.) Priority. A lien for rent as provided for under this chapter shall have priority over all other liens, except taxes, mortgages for purchase money, and liens of employes for services as provided by law; *provided, however,* that when a lessee shall be adjudged a bankrupt, or shall make an assignment for the benefit of creditors, or when the lessee's property shall be put into the possession of a receiver, the lien herein provided shall be limited to the rent for six months prior thereto. Am'd '13, p. 20.

A lessee from month to month having died, the lessor instituted proceedings for rent thirty-four days after lessee's death, claiming the benefit of the lessor's lien; held, that the lessor's claim was not superior to all other claims, the total value of the estate being less than $1,500, and that the estate should have been set apart for the support of the widow and minor children of the deceased.
In re Stone's estate, 14 U. 205; 46 P. 1101.
Where proceedings to enforce a lessor's lien are not instituted until after the time limited by statute, the lien is lost.
Id.

3778. (1409.) Application for writ of attachment. Jurisdiction. Where any rent shall become due or the lessee shall be about to remove his property

from such leased premises, it shall be lawful for the lessor, his attorney, agent, or assigns, to apply to a justice of the peace of the precinct, or if the rent is not less than the sum of $300, then to the district court of the district wherein the premises are situated, for a warrant to seize the property of such lessee.

Attachment generally, § 6704.
Jurisdiction in district or justices court, § 1792.

3779. (1410.) Id. Affidavit. Bond. The lessor, his attorney, agent, or assigns shall, before the issue of such writ of attachment, file in the court aforesaid an affidavit duly sworn to, setting forth the amount of rent sued for over and above all offsets and counterclaims, and a brief description of the leased premises, and shall further state, under oath, that said writ of attachment is not sued out for the purpose of vexing or harassing the lessee; and the person applying for such writ of attachment shall execute a bond, with two or more good and sufficient sureties, conditioned that the lessor will pay the lessee such damages as he may sustain in case such writ of attachment has been illegally and unjustly sued out, which bond shall be approved and filed with the papers in the case.

An amendment striking from the complaint the prayer that attachment issue against defendant, and that plaintiffs have a first lien upon all of defendant's property not exempt, leaving merely prayer for general relief, did not change the nature of the action or affect the rights of the parties, and would be stricken on motion of plaintiffs.
Houston Real Estate Inv. Co. v. Hechler, 44 U. 64; 138 P. 1159.

Where property is attached in an action between third persons hereunder, the claimant may, as a matter of right, intervene in such action and have determined his right to or interest in the property attached.
Id.

3780. (1411.) Issuance of writ. Upon the filing of such affidavit and bond, it shall be the duty of the court wherein the same is filed to issue a writ of attachment to the proper person, commanding him to seize the property of the defendant not exempt from execution, or so much thereof as shall satisfy the demand.

3781. (1412.) Id. Duty of officer. It shall be the duty of the officer to whom the writ of attachment is directed to seize the property of such lessee not exempt from execution, or as much thereof as shall be of value sufficient to satisfy such debt, costs, and reasonable attorney's fee, and to keep the same until the determination of the action pending between the lessor and lessee, unless the property be sooner released by bond or the attachment be discharged.

3782. (1413.) Bond for release. A bond for the release of the attached property may be given, and motion to discharge the attachment may be made, in the manner provided by law for the release of property taken under attachment or for the discharge of a writ of attachment.

Application to release or discharge, §§ 6724-6727.

A lessor brought suit for rent under lessors' lien law of 1894 and attached the lessee's goods; held, that the lessee is entitled to give a bond and have the property released from attachment under the provisions of the law concerning attachments, since the lessors' lien law did not of itself afford a complete remedy.
Woolley v. Maynes-Wells Co., 15 U. 341; 49 P. 647.

3783. (1414.) What property liable to sale. All property, including growing and harvested crops and all ore mined or upon the premises, or so much of said property as may be necessary to pay the amount of rent due and costs, shall be liable to sale to enforce the payment of the lien hereby created.

Where the court makes a formal order for the sale of attached property, a subsequent order of the court recalling a special execution issued in pursuance of the order is a nullity, does not affect the order of sale.
State ex rel. Newell v. District Court, 37 U. 418; 108 P. 1121.

3784. (1415.) Chapter not applicable to building on leased land. This chapter shall not be applicable to a written lease for a term of years, in which, as part of the consideration thereof, the lessee or assigns shall erect a building or buildings, or improvements upon the leased premises.

CHAPTER 6.

COMMON CARRIERS' LIENS.

3789. (1416.) Unclaimed property. Delivery to warehouseman. Whenever any railroad company or other common carrier, except an express company, shall have transported any baggage or freight of any kind to the place of consignment within this state, and the owner, consignee, or party entitled to receive the same shall omit, for the period of sixty days after the arrival of the baggage or freight at the place of consignment, to accept and remove the same and pay the charges thereon, it shall be lawful for such carrier to deliver such freight, for storage, to some person or company conducting the business of storing goods, subject to the charges thereon for transportation, storage by the carrier, and conveyance and drayage to the place of storage, accompanied by a substantial copy of the bill of lading in case of freight, or, in case of baggage, by a statement of the place from which, and the place to which such baggage was transported, together with the check numbers; and any carrier whose route for transportation reaches to this state may collect and store as aforesaid at any station in this state the unclaimed freight from all or any points or stations on its line within this state.

Common carriers' lien, § 3791.
Warehouse lien, §§ 6227-6236.

3790. (1417.) Id. Freight and storage. Disposition of proceeds. Sale. The person or company receiving such unclaimed baggage or freight for storage shall keep a record of such bill of lading or statement and shall have a lien on such baggage or freight for the charges of the carrier and reasonable charges for subsequent care and storage, and in case the owner or person entitled to receive the same does not pay all such charges and receive and remove the property within ninety days after the same is received from the carrier, the party having the same in storage as aforesaid may proceed to sell the same, upon a notice given for the length of time and in the manner provided by law for the sale of personal property on execution, and retain, out of the proceeds of sale, the amount of the lien and reasonable costs and charges of sale, and in case the proceeds are more than sufficient, the surplus shall be deposited with the state treasurer, and on request of the party entitled thereto, made within two years from the date of sale, shall be paid to such owner or person entitled thereto, and if not so claimed shall be forfeited to the state.

Sale of personal property on execution, § 6929.
Sale of freight by common carrier, §§ 3792, 3793.

SALE OF UNCLAIMED FREIGHT.

3791. (1417x.) Common carriers' lien. All common carriers in this state shall have a lien upon all goods, wares, merchandise, baggage, and property in their possession for freight, handling, expenses, and storage charges, and charges advanced to connecting carriers. '99, p. 54.

Common carriers' lien, § 3789.

3792. (1417x1.) How enforced. The carrier may enforce the lien by a sale of the property in the following cases: If the property be not accepted, taken away, and charges paid by the consignee or person or party authorized to receive the same, within two months after the arrival of the property at the point of consignment, or after its arrival at the point nearest the point of consignment, if not consigned to a station on the line or to a connecting carrier; or if the charges be not paid and the property taken away within two months after a connecting carrier shall have refused to accept the property for further transportation and advance the back charges, and thirty days' notice of refusal by mail to the consignor, if known, directed to the place of shipment; or in case property is left with the carrier to await shipment, and no shipping instructions given and shipment made for two months. '99, p. 54.

3793. (1417x2.) Sale at auction. The sale shall be at public auction to the highest bidder for cash, after advertising for ten days in a newspaper of general circulation published at the place of sale, giving the time and place of sale, the amount of the lien other than the expenses of the sale, and a brief description of the property, with the names of the consignor and consignee, if known. All property in one shipment may be sold as one parcel, and the carrier shall not be required to break bulk or open boxes or packages to expose the contents. Property to be sold may be collected from the stations on the line, at one or more points convenient for sale, and the lien thereon shall include reasonable charges for such transportation. Of the proceeds of sale, the carrier may retain the amount of the lien, and reasonable costs and expenses of sale, and on demand pay any excesses to the owner or person entitled thereto, on the production of the shipping bill properly indorsed, or of other satisfactory evidence of the right of the claimant to such proceeds.

Secs. 3791-3793 shall not be deemed to repeal §§ 3789, 3790, nor to prohibit the foreclosure in the courts of Utah of a common carrier's lien. '99, p. 55.

TITLE 63.

LOAN COMMISSIONERS.

CHAPTER 1.

GENERAL POWERS.

3800. (1418.) State board. The governor, the secretary of state, and the attorney general shall constitute a state board of loan commissioners, and shall exercise the powers and perform the duties provided in this title.

The State Board of Loan Commissioners has received special authorization, viz: to refund the territorial bond issue of 1892 and dispose of the funds provided by law for the redemption thereof. Chapter 65, Laws '09, to issue bonds in the amounts and for the purposes as follows:

$200,000.00 for the state capitol, chap. 67, L. '09.

$1,000,000.00 for the erection of the state capitol, chap. 8, L. '11.

$200,000.00 for University building, chap. 14, L. '11.

$650,000.00 for the State Capitol building, chap. 64, L. '15.

$1,000,000.00 for construction, repair and maintenance of state roads, secs. 2864-2870, chap. 32, L. '17.

3801. (1419.) Auditor's warrant for interest on bonds. The state auditor shall draw his warrant on the state treasurer for the amount of interest which shall fall due on the 1st day of January and on the 1st day of July of each year, on the bonds negotiated and issued by the state board of loan commissioners by virtue of "An act creating a state board of loan commissioners, providing for the issuing and disposal of state bonds, and for the refunding of the bonds of the territory or state already issued," approved April 2, 1896, which said interest warrant shall be drawn at least one month previous to the maturing of the interest; and the sum of $8,000 annually, or so much thereof as may be necessary, is hereby appropriated and set aside from the general fund of the state, from year to year, to pay the interest upon said bonds.

3802. (1420.) Bond redemption fund. At the expiration of ten years after the issuing of said bonds, there shall be set apart and is hereby appropriated out of the general funds in the hands of the state treasurer, annually, the sum of $20,000, to be drawn on the warrant of the auditor, to pay the principal of said bonds as the same shall fall due. Said amount shall be held and placed by the treasurer in a fund to be known as the redemption fund for the redemption of said bonds.

3803. (1421.) Report to legislature. It shall be the duty of the state board of loan commissioners to make a full report of all its proceedings under the provisions of this title to the state legislature, during the first week of the next session and biennially thereafter.

3804. (1422.) Board may refund territorial bonds. The state board of loan commissioners is hereby given power and authority, under such rules and regulations as the board may prescribe, not in conflict herewith, to refund all outstanding territorial bonds, by issuing therefor negotiable coupon bonds similar in form to those issued under the provisions of the aforesaid act of April 2, 1896. The number and denomination of said bonds shall be determined by the board.

3805. (1423.) Bonds not taxable. No bonds issued under the provisions of this title shall be taxed for any purpose within this state.

CHAPTER 2.

MAY BORROW MONEY.

3806. (1423x.) Board of loan commissioners authorized to borrow money. The state board of loan commissioners, whenever there are no available funds in the state treasury with which to pay warrants drawn on the treasurer, are authorized to borrow money for the state, at such rate of interest as they may agree upon; *provided,* that such interest shall not exceed the rate of six per cent per annum, and to execute promissory notes in the name of the state for such loans; *provided,* that no such loans shall be for a longer period than until the 1st day of January next following the date of the loan. All moneys borrowed under the provisions of this chapter shall be paid into the state treasury upon the delivery of the note made for such loan.

'99, p. 22.

3807. (1423x1.) Requisition on auditor. Whenever any loan made under the provisions of this chapter is about to mature, the state board of loan commissioners must make a requisition upon the state auditor for warrants to pay such loan and interest, and the auditor must thereupon draw his warrants in favor of the lender for the amounts stated in the requisition, and must take up and cancel such promissory notes and file the same in his office.

'99, p. 23.

3808. (1423x2.) Appropriation. The sum of $5,000, or so much thereof as may be necessary, is hereby appropriated annually to pay interest on money borrowed under the provisions of this chapter. '99, p. 23.

CHAPTER 3.

INVESTMENT OF REDEMPTION FUNDS.

3809. (1423x3.) Redemption fund to be invested. The state board of loan commissioners is hereby authorized and directed to invest the redemption funds for the redemption of the bonds issued by the state of Utah in state, municipal, or school district bonds of this state, or in warrants on the reservoir land grant fund issued under the provisions of §§ 5659-5670.

'03, p. 120; am'd '13, p. 91; '15, p. 42.

Investment of other sinking funds, § 5200.

3810. (1423x4.) Warrant to be drawn. Whenever the state board of loan commissioners shall order the investment of any of said funds, it shall make a requisition upon the state auditor, and he shall draw his warrant for the amount stated in requisition upon said redemption fund. '03, p. 121.

3811. (1423x5.) Delivered to treasurer. Whenever any bonds are purchased as investments of said fund, the same shall be delivered to the state treasurer, who shall be charged upon his official bond for the safe keeping of said bonds. '03, p. 121.

3812. (1423x6.) Interest to be collected. As the interest matures on any of the bonds purchased as an investment of said fund, the state treasurer shall collect the same and deposit the proceeds thereof in the general fund of the state. '03, p. 121.

TITLE 64.

MATCHES.

MANUFACTURE, STORAGE, SALE AND DISTRIBUTION OF MATCHES.

('13, p. 49.)

3820. Manufacture, sale, etc., of non-safety matches prohibited. Definition. No person, association, or corporation shall manufacture, store, offer for sale, sell, or otherwise dispose of, or distribute white phosphorous, single-dipped, strike-anywhere matches of the type popularly known as "parlor matches"; nor manufacture, store, sell, offer for sale, or otherwise dispose of, or distribute, white phosphorous, double-dipped, strike-anywhere matches or any other type of double-dipped matches, unless the bulb or first dip of such match is composed of a so-called safety or inert composition, non-ignitable on an abrasive surface; nor manufacture, store, sell, or offer for sale, or otherwise dispose of, or distribute matches which when packed in a carton of five hundred approximate capacity and placed in an oven maintained at a constant temperature of 200 degrees F., will ignite in eight hours; nor manufacture, store, offer for sale, sell, or otherwise dispose of, or distribute blazer, or so-called wind matches, whether of the so-called safety or strike-anywhere type.

3821. Packages to be labeled. Requirements for storage. No person, association, or corporation shall offer for sale, sell, or otherwise dispose of, or distribute any matches, unless the package or container in which such matches are packed bears, plainly marked on the outside thereof, the name of the manufacturer and the brand or trademark under which the matches are sold, disposed of, or distributed; nor shall more than one case of each brand of matches of any type or manufacture be opened at any time in the retail store where matches are sold or otherwise disposed of; nor shall loose boxes or paper wrapped packages of matches be kept on shelves or stored in such retail stores at a height exceeding five feet from the floor; all matches, when stored in warehouses, must be kept only in properly secured cases, and not piled to a height exceeding ten feet from the floor; nor be stored within a horizontal distance of ten feet from any boiler, furnace, stove, or other like heating apparatus, nor within a horizontal distance of twenty-five feet from any explosive material kept or stored on the same floor; all matches shall be packed in boxes or suitable packages, containing not more than seven hundred matches in any one box or package; *provided, however,* that when more than three hundred matches are packed in any one box or package the said matches shall be arranged in two nearly equal portions, the heads of the matches in the two portions shall be placed in opposite directions, and all boxes containing three hundred and fifty or more matches shall have placed over the matches a center holding or protecting strip, made of chip board, not less than one and one-quarter inches wide; said strip shall be flanged down to hold the matches in position when the box is nested into the shuck or withdrawn from it.

3822. Id. Manner of packing. All match boxes or packages shall be packed in strong shipping containers or cases; maximum number of match

boxes or packages contained in any one shipping container or case shall not exceed the following numbers:

Number of boxes	Nominal Number of matches per box.
½ gross	700
1 gross	500
2 gross	400
3 gross	300
5 gross	200
12 gross	100
20 gross, over 50 and under	100
25 gross, under	50

No shipping container or case constructed of fibre board, corrugated fibre board, or wood, nailed or wire bound, shall exceed a weight, including its contents, of seventy-five pounds; and no lock cornered wooden case containing matches shall have a weight, including its contents, exceeding eighty-five pounds; nor shall any other article or commodity be packed with matches in any such container or case; and all such containers and cases in which matches are packed shall have plainly marked on the outside of the container or case the words, "strike-anywhere matches" or "strike-on-the-box matches."

3823. Penalty. Any person, association, or corporation violating any of the provisions of this title shall be deemed guilty of a misdemeanor and shall be fined for the first offense not less than $5 nor more than $25, and for each subsequent violation, not less than $25.

3824. Repeal. All laws in conflict with the provisions of this title are hereby repealed.

TITLE 65.

MILITIA AND ARMORIES.

CHAPTER 1.

STATE MILITIA.

('17, p. 289.)

3826. Composition of militia. Exemptions. All able-bodied male citizens, and all able-bodied males of foreign birth who have declared their intention to become citizens, more than eighteen and less than forty-five years of age, who are residents of this state, shall constitute the militia, subject to the following exemptions:

1. Persons exempted by the laws of the United States;
2. Persons exempted by the laws of this state;
3. All persons who have been honorably discharged from the army, navy, or volunteer forces of the United States;
4. Active members of any regularly organized fire or police department in any city or town, but no member of the active militia shall be relieved from duty therein because of his joining any volunteer fire company or department;
5. All persons who have served five years in the active militia of this state, and have received an honorable discharge;
6. Judges and clerks of courts of record; state and county civil officers holding office by election; or state officers appointed by the governor for a specified term of office; ministers of the gospel; practicing physicians; superintendents, officers, and assistants of hospitals, prisons, and jails; conductors, brakemen, flagmen, engineers, firemen, and all other employes of railways, actually employed in train service;
7. Idiots, lunatics, and persons convicted of infamous crime.

All such exempted persons except those enumerated in subdivisions 1 and 7 shall be liable to military duty in case of war, insurrection, invasion, or imminent danger thereof or after they have voluntarily enlisted in the national guard of this state.

Whom militia shall consist of, Con. art. 15. secs. 1 and 2.

Members not liable for action in line of duty, § 3836.

3827. National guard. Unorganized militia. The militia of this state shall be divided into two parts, the national guard and the unorganized militia.

National guard may use state armory and ar senal, § 3887.

3828. Commander-in-chief. The governor of the state, by virtue of his office, shall be commander-in-chief of the national guard and of the unorganized militia and of any portions of the unorganized militia which may hereafter be organized, except when such portions of the militia may be in the service of the United States.

Governor issues call, Con. art. 7, sec. 4.

3829. Staff of commander-in-chief. The staff of the commander-in-chief shall consist of the adjutant-general, the assistant adjutant-general, and such other members as he shall choose from the officers of the national guard, the national guard reserve, or active or retired officers of the United States army, navy, or marine corps. The members of the staff shall serve as such without pay from the state.

3830. Governor may order militia into service. The governor shall have power, in case of insurrection or invasion or imminent war, or in case of tumult or riot when it clearly appears that the civil authorities are unable to preserve order, to order into active service the national guard or the unorganized militia or such portions thereof as he may deem necessary. In the event it is necessary to order into active service any members of the unorganized militia, the governor shall have power to adopt such methods as he shall deem most expedient for that purpose.

3831. Failure to respond to order. Penalty. Every member of the unorganized militia or the national guard ordered out, or who volunteers or is drafted into active service, who does not appear at the time and place designated by proper authority, within forty-eight hours after receipt of order so to do, or who does not produce a satisfactory certificate of physical disability, shall be taken as a deserter and dealt with as prescribed by the articles of war of the United States.

3832. Mustering. Time. Organization. Rules. Members of the unorganized militia called into service of this state shall be mustered into service for such a period, not to exceed the period of one enlistment in the national guard, as the governor shall deem necessary. Militia so mustered into service shall be organized into units as provided by the rules and regulations governing the regular army of the United States, or as otherwise provided by law.

3833. State of insurrection. Martial law. Proclamations. Whenever a portion of the militia is employed in the aid of the civil authorities, the governor, if in his judgment the maintenance of law and order will thereby be promoted, may by proclamation declare a county, city, or town, or any specified portion thereof in which the troops are serving, to be in a state of insurrection, and may proclaim martial law.

3834. Subject to call of president. Encampments. Discipline. The national guard of this state at all times shall be subject to the call of the president of the United States, and when called into the service of the United States shall be governed by the laws and military regulations of the United States provided therefor. The national guard and the members thereof shall attend such drills, encampments, and maneuvers as the president or the secretary of war shall direct. The discipline in the national guard shall at all times conform to that provided by the laws of the United States.

3835. Government of unorganized militia. All militia called into service

shall be governed as herein provided for the national guard, unless otherwise provided by law.

3836. Liability in line of duty. Actions. Members of the militia ordered into active service of the state by any proper authority shall not be liable civilly or criminally for any act or acts done by them in line of duty. When an action or proceeding of any nature shall be commenced in any court by any person against any officer of the militia for any act done by such officer in his official capacity in the discharge of any duty under this chapter, or an alleged omission by him to do an act which it was his duty to perform, or against any person acting under the authority or order of any such officer or by virtue of any warrant issued by him pursuant to law, the defendant may require the person instituting or prosecuting the action or proceeding to file security for the payment of costs that may be awarded to the defendant therein, and if such bond be not filed within five days after demand therefor, such action shall be dismissed.

3837. Adjutant-general. Powers. Duties. Salary. Bond. Seal. The governor shall appoint an adjutant-general, who shall have been an officer of the national guard in active service for not less than five years and who shall be in control of the military department of the state and subordinate to the governor only in matters pertaining to said department. He shall perform such duties as are now, or shall hereafter be, imposed by the laws of this state and of the United States and by the rules and regulations of the war department; but if any duties imposed by the statutes of this state shall at any time hereafter conflict with those imposed by the laws of the United States, then the duties imposed by the statutes of this state, as far as they conflict, shall be abrogated. He shall keep a register of the officers and enlisted men of the national guard, and a record of all orders and regulations pertaining to the national guard and the unorganized militia. He shall, when he deems it necessary, at the expense of the state, purchase, or cause to be printed, and issue to members of the national guard or other persons, copies of the military law, the various orders of the war department, and such other literature as he shall deem best for the interests of the service. He shall cause to be prepared all blanks, books, forms, and reports necessary to carry out the provisions of this chapter, but all blanks or forms shall be identical, or as nearly so as possible, with those required by the war department for use by the regular army or national guard. He shall, under the direction of the state armory board, have supervision and charge of all the armories, stables, and lands used for military purposes by this state. He shall, each year, on or before the 1st of February, appoint a board, consisting of three officers of the national guard, who shall serve without pay as such, whose duty it shall be to encourage rifle practice and to secure for this state all benefits possible under the provisions of the laws of the United States governing rifle practice. He shall, on or before the 1st day of January next preceding the regular session of the legislature, make a full and detailed report to the governor of all transactions of his office, with the expense thereof, for the preceding two years, and shall report at such other times and on such other matters as the governor shall require or as he shall deem advisable. He may appoint, with the approval of the governor, a quartermaster-sergeant for permanent duty at the armory in Salt Lake City, at a salary not to exceed $80 per month. He shall be disbursing and property officer for the state. He shall draw all vouchers or checks for sums expended for military purposes, and shall submit a written report of such expenditures, semi-annually, to the governor. He shall, semi-annually, or oftener if he deems necessary, report to the governor what service arms, with all accessories, field artillery material, engineer, signal, and sanitary material, accouterments, field uniforms, clothing, equipage, publications, and military stores of all kinds, including public animals, are necessary to arm, uniform, and equip for field service the national guard of this state. Upon receipt of this report it shall be the duty of the governor to requisition such property from the United States. He shall also furnish to the governor, from time

to time, a list of stores, supplies, material of war, and military publications furnished to the army which he shall deem it advisable to purchase for the use of the national guard, including the officers thereof. Such property may, upon requisition and delivery, he sold for cash at actual cost, plus transportation, to officers of the national guard, or to enlisted men thereof, upon the recommendation of a commissioned officer. He shall, with the approval of the governor, draw vouchers on the state appropriation for the national guard, payable to the United States, to cover any damage to the United States property charged to the state, when such damage shall have been properly adjudged to be payable by the state. All military property of the state, which after proper inspection shall be found unserviceable, shall, under the direction of the governor, be disposed of by the adjutant-general at public or private sale, as he may deem advisable; *provided,* that where said property shall be deemed by the inspecting officer to exceed $50 in value, such sale shall be made after ten days' notice in a newspaper published in the county where such sale is to be made; and if such unserviceable property shall be found by the inspecting officer to be of no actual value, it shall be destroyed under the direction of the adjutant-general. He shall, from time to time, render a true account to the governor of the sales made by him and, under the direction of the governor, expend the proceeds of the same for other military property. Such account shall include sales of property made to officers and men of the guard. The adjutant-general shall have charge of and shall carefully preserve the colors, flags, guidons, and military trophies of war belonging to the state, and shall not allow the same to be loaned out or removed from their proper places of deposit, and shall also be the custodian of and preserve all military documents and records of every nature which may be placed in his charge, relating to the Indian wars within the state or wars in which the United States has participated. He is hereby authorized to detail one commissioned officer of the national guard for permanent duty at the office of the adjutant-general, at a salary not to exceed $1500 per year. He is also authorized to employ such clerical assistance as shall be necessary to perform the duties of his office. He is authorized to detail for permanent duty, at a salary of not less than $1500 per year, one commissioned officer with each organization of the national guard, and to detail as his assistant, at a salary of not less than $60 per month, one enlisted man from his organization. The officers and men so detailed for duty with the national guard shall devote at least eight hours daily, excepting Sundays and holidays, to such work, and their duties shall be such as are prescribed by the adjutant-general. The salary of the adjutant-general shall be $1500 per year. He shall give bond to the state in the penal sum of $10,000, with at least two sureties, to be approved by the governor. The seal of the adjutant-general's office shall be circular in form, containing a circle; within the inner circle shall be the shield with "Utah" impressed thereon, and between the circles shall be impressed "national guard, adjutant-general."

Salary, § 5071.
Commissioner Indian war records, §§ 3040-3043.
Member armory board, § 3881.
Approve claims injured members, § 3873.

3838. Detail of United States officer. The governor shall detail, with the approval of the secretary of war, an officer of the United States for the national guard of this state.

3839. Assistant adjutant-general. Property and disbursing officer. Duties. The governor shall appoint an assistant adjutant-general, who shall be the same person appointed by the governor and approved by the secretary of war as property and disbursing officer of the United States for this state. In all matters pertaining to state property or affairs he shall be under the supervision of the adjutant-general. He shall attend to the safe-keeping, issue, and repairing of all military property of the state or of the United States which may be charged to this state, and of all other property used for military purposes. He shall give a bond to the state in the penal sum of $10,000. He may, when necessary, with the approval of the adjutant-general, employ such

common labor as may be necessary to maintain the property, both state and federal, under his care in a proper state of repair. He shall receive a salary of $600 per year, which shall be exclusive of any compensation paid him by the United States government.

3840. Strength and organization of national guard. The strength and organization of the national guard, and the branches of the service maintained in this state, shall be such as are now or shall hereafter be provided by the laws of the United States.

3841. Location of units. Training. The commander-in-chief shall designate the location and home stations of all units of the national guard, including the headquarters. He may, if he deem it advisable, direct that the two halves of any unit shall be placed at different locations, but in that event shall provide for the proper training of the unit as a whole.

3842. Designations by president. Orders of location by governor. Upon the designation by the president of the United States of the particular unit or units, as to branch or arm of service, that shall be maintained in this state, it shall be the duty of the governor, through the adjutant-general, to issue an order stating at what cities or towns organizations of the national guard shall be located.

3843. Lists of eligibles furnished by county assessors. The county assessor of each county shall annually, on or before the 1st day of September, file with the county commissioners of each county and with the adjutant-general a list of all male residents of that county not exempt by § 3826 who are more than eighteen and less than twenty-two years of age, and a separate list of all such males more than twenty-two and less than forty-five years of age. He shall, within thirty days after the designation by the governor of any city or town as the location of an organization of the national guard, file with the adjutant-general a list of all male persons between the ages of eighteen and twenty-two years, inclusive, who reside within the said city or town. All such lists shall contain the names, ages, occupations, and addresses of the persons listed, and shall state whether they are married or single. Duplicates of the lists shall be filed with the county commissioners.

3844. Call for volunteers upon location of organization. Notices. Immediately upon the designation of any city or town as the location of an organization of the national guard, the adjutant-general shall cause to be posted in not less than five public places within such city or town notices of such designation, and shall call for volunteers between the ages of eighteen and forty-five for such organization.

3845. Insufficient enlistments. Drawings to increase organizations. If, at the expiration of thirty days after the posting of the proclamation in the preceding section, there have not been sufficient enlistments to bring the organization up to the strength required by law, or if at any time thereafter there are not sufficient enlistments to maintain such strength, the adjutant-general shall forthwith cause to be placed in a box suitable for that purpose the names of all persons listed by the assessor as residing within the said city or town, and shall cause to be drawn therefrom, without prejudice or favor to anyone, the names of sufficient persons to increase the organization to the strength provided by law.

3846. Examinations. Exemptions. Term of enlistment. The names so drawn shall be sent forthwith to the officer in charge of such organization, and such officer shall, upon receipt of the same, direct all such persons when, where, and to whom to report for a physical and such other examination as may be provided by law. If any person so examined shall fail to pass the examination, he shall be given a certificate stating that fact, and shall thereafter be exempt from military duty for a period of two years; but all such persons who successfully pass the examination shall, unless otherwise exempted by law, become members of the national guard for a period of six years, dating from the date on which their names were drawn. As such, they shall be sub-

ject to all the privileges, duties, and liabilities of a person who voluntarily enlists in the national guard.

3847. Failure to appear and qualify. Penalty. Releases. Any person whose name is drawn as hereinbefore provided, who shall fail to appear when ordered by the officer in charge of an organization or other competent authority to do so, or who shall refuse to take and subscribe the oath provided by law for the members of the national guard, shall be guilty of a misdemeanor, and upon conviction thereof by a court having jurisdiction of misdemeanors shall be imprisoned for not less than one nor more than six months. Nor shall any period served under a sentence imposed as herein provided for be construed as a portion of the enlistment period of such person; *provided,* that the governor may release such person on probation and, if he deem just, apply time served in the national guard during such probation period upon the enlistment of such person.

3848. Officers. Appointments. Qualification. Age limits. Vacancies. Rank. All officers of the national guard shall be appointed by the governor, subject to the approval of the secretary of war, or subject to such approval as shall be prescribed by the laws of the United States or rules or regulations thereof governing the national guard. No officer shall be commissioned unless he shall successfully pass such tests, both physical and mental, as shall be prescribed by the president of the United States; nor shall any officer be commissioned unless he shall have taken the oath prescribed by the laws of the United States; shall be over twenty-one years of age, a citizen of the United States, and shall have been selected from one of the following classes: Officers or enlisted men of the national guard; officers on the reserve or unassigned list of the national guard; officers, active or retired, or former officers of the United States army, navy, and marine corps; graduates of the United States military and naval academies, and graduates of schools, colleges, and universities where military science is taught under the supervision of an officer of the regular army, which graduates have taken the regular course in military science prescribed by such school, college, or university, and, for the technical branches and staff corps or departments, such other civilians as may be especially qualified for duty therein. Staff officers, including officers of the pay, inspection, subsistence, and medical departments, and any other officers not detailed with organized units, shall be of the classes aforementioned, and shall hold their positions until they shall have reached the age of sixty-four years, unless retired prior to that time by reason of resignation, disability, or for cause to be determined by a court-martial legally convened for that purpose, and vacancies among said officers shall be filled by appointment from the officers of the national guard of this state. Commissions shall be issued under the seal of the adjutant-general's office, signed by the governor, and countersigned by the adjutant-general. They may be vacated in such manner as is now or shall hereafter be provided by law in regard to commissions of the regular army and the national guard of the United States. The relative rank of officers of the same grade shall be determined by length of service in that grade, whether continuous or not, and if the length of service of two or more officers is the same, their rank shall be determined by lot.

3849. Enlistments. Qualifications. Assignments. Discharges. Any male between the ages of eighteen and forty-five years, who is a citizen of the United States or who has declared his intention to become a citizen, may be enlisted in the national guard, subject to such physical and other examinations as may be prescribed by the secretary of war. All persons herein named who shall enlist in the national guard shall take and subscribe the oath provided by the laws of the United States, and upon so doing shall become members of the national guard for such period as may be prescribed by the laws of the United States, unless sooner discharged. Enlisted men may be discharged as provided by the laws of the United States and regulations of the war department.

The commander-in-chief shall assign enlisted men to the various organizations within the state as he shall deem advisable.

3850. Non-commissioned officers. The appointment and reduction of non-commissioned officers shall be made in like manner as in the regular army of the United States.

3851. Furloughs and leaves of absence. Unless otherwise provided by laws of the United States or the regulations of the war department, the commanding officer of any troop, battery, or other unit shall have power to excuse members of his organization from attendance at drill for good and sufficient reason; he shall also have power to grant furloughs and leaves of absence, by and with the consent of the adjutant-general.

3852. State employes in service get full pay. Dependents provided for. All state employes who are or shall become members of the national guard of this state shall be allowed full pay for all time spent on duty at annual encampments or rifle competitions or other duties in connection with the national guard not in service, and such time shall not be deducted from any vacations such employes may be entitled to. If the national guard of this state be called into the service of the United States, the state shall provide for the dependents of members of the national guard so called into service. The state board of examiners shall cause an examination to be made into the merits of all cases of alleged dependency, and upon finding that any mother, father, grandfather, grandmother, wife, sister, brother, child, or children of such member of the national guard, or any or either of them are dependent upon such member for support, the state board of examiners shall determine the amount to be paid by the state to any or each of dependent class, and shall cause the state auditor to draw his warrant on the state treasurer for such sum or sums in favor of such specific and determined dependents, which sum or sums shall be payable out of any amounts available for military purposes or for the maintenance and support of the national guard. If there be not sufficient funds available to pay for the necessary support of all the state dependents determined and specified by the board of examiners, the funds available shall be pro-rated among the dependents specified by the board of examiners. The board of examiners, in specifying the amount or amounts to be paid to such dependents, may provide for a payment on a weekly or monthly basis and on such conditions as it may deem best in each particular case.

3853. Promotions. Exceptions. In making promotions of officers, preference shall be given to those of highest rank, unless, in the opinion of the commander-in-chief, such course would be inimical to the best interests of the service.

3854. Prizes and competitions. To encourage marksmanship the governor is authorized to offer annually, a state decoration to those who shall excel in small arms practice, also prizes, not exceeding a total of $100 in value, to be competed for annually by the armed organizations. All such prizes shall be competed for under the regulations to be prescribed by a board of three officers to be appointed by the governor, and all such competitions shall be open to all officers and enlisted men of the guard. The governor may also offer prizes, not to exceed in value the amount of $75 per year, to be bestowed upon the company or companies showing the highest degree of proficiency in the performance of any prescribed duty, such prize to become the property of the company winning said prize.

3855. Participation in public ceremonies is military duty. Participation in public ceremonies and parades and other duties in the service of the state shall be deemed military duties of the national guard, and when participated in by the national guard, or any portion thereof, under the instructions of the commander-in-chief, the expenses and pay incident to the service of the state shall be allowed by the proper auditing officers from the state appropriation for the support of the militia.

3856. Rules and regulations. Offenses against. The commander-in-chief is authorized and has power to establish and prescribe such rules and regulations, forms, and precedents, not inconsistent with the provisions of law, or such regulations governing the national guard promulgated by the president of the United States, as he may deem proper for the use, government, and instruction of the national guard, and to carry into full effect the provisions of law relative thereto. Such rules and regulations, forms, and precedents shall, from time to time, he revised as may be deemed necessary, and shall be promulgated in orders and compiled in such form as may be deemed advisable for the information of the national guard. The forces organized as prescribed in this chapter shall be considered in the actual service of this state, and the members thereof shall be subject to military rules and regulations, and all military offenses prescribed therein, such as disobedience of orders, non-attendance at drill, assemblies, parades, reviews, or encampments, or neglect or non-performance of such other duties as they may be lawfully called upon to perform or conduct to the prejudice of good order and military discipline, shall be considered, and they are hereby declared to be, offenses against the general police regulations of the State, and shall be punished by fine and imprisonment as hereinafter provided. Regimental, battalion, and company rules of government and by-laws, regularly adopted by a majority of the commissioned officers of such regiments and battalions or members of companies, and approved by the commander-in-chief, may be adopted and enforced in such regiments, battalions, and companies if they are not in conflict with the laws and regulations of this state or military regulations of the United States governing the national guard.

3857. Orders for duty, how served. Penalty for failure to obey. Orders for duty may be oral or written. Officers and enlisted men may be warned for duty as follows: Either by stating the substance of the order or by reading the order to the person warned, or by delivering a copy of such order to such person, or by leaving a copy at his last known place of abode or business, or by mailing it to the postoffice nearest thereto. Such warning may be given by any officer or non-commissioned officer. In case any enlisted man warned for duty fails to appear for duty, the officer or non-commissiond officer giving such notice or warning shall make a return thereof containing the name of the person warned, and the time, place, and manner of warning, if required by the officer issuing the order; such return may be verified by his oath, which may be administered by any commanding officer. Such verified returns shall be evidence on the trial of any person returned as a delinquent of the facts therein stated.

3858. Military offenses tried by court-martial. Procedure. Judgment. and sentence. All military offenses under the articles of war of the United States, or under this chapter, and under the rules and regulations which may from time to time be made and published in accordance with the provisions of this chapter, or under the laws of the United States, shall be tried by or under the laws of the United States by courts-martial. Courts-martial shall be constituted as provided by the laws of the United States or the military rules and regulations thereof, of three kinds, namely: General courts-martial, special courts-martial, and summary courts-martial. They shall be constituted like and have cognizance of the same subjects and possess like powers, except as to punishments as similar courts provided for by the laws and regulations governing the United States national guard, and the proceedings of courts-martial of the national guard shall follow the forms and modes of procedure prescribed for said similar courts. All punishments and sentences adjudged, found, or imposed by the courts-martial, unless therwise provided for in the sentence or punishment itself, shall be executed by the civil authorities the same as if the said sentence or punishment had been imposed by a judge of a civil court in a criminal case. A certified copy of the judgment rendered and sentence imposed by the court-martial certified to by the judge-advocate, or the president of the court-martial rendering said judgment and

imposing said sentence shall be filed in the office of the proper civil authorities, and the same docketed in a special docket kept for said purpose. If the sentence imposed by the court-martial is a sentence involving a fine less than $299 or less than six months' imprisonment in the county jail, or both such fine and imprisonment, the certified copy of said judgment and sentence shall be filed in a justice court, whose precinct is within the limits of the place where the court-martial has been held. If the fine imposed be more than $299, or the imprisonment more than six months in the county jail, or imprisonment for more than six months in any jail or penitentiary, the certified copy of said judgment and sentence shall be filed in the office of the clerk of the district court of the judicial district in which said court-martial was held. In the case of any filing of certified copy of judgment and sentence, the same shall be docketed as above specified, and execution shall take effect upon said file and docketed judgment and sentence the same as in a criminal judgment tried in the civil courts.

Information or indictment not necessary, § 8549.

3859. Approval of sentence by governor before execution. Powers of court-martial officers. No sentence of dismissal from the service or dishonorable discharge imposed by a court-martial shall be executed until approved by the governor. Presidents of courts-martial and summary court officers shall have power to issue warrants to arrest accused persons and to bring them before the court for trial whenever such persons shall have disobeyed an order in writing from the convening authority to appear before such court, a copy of the charge or charges having been delivered to the accused with such order; and to issue subpœnas and subpœnas duces tecum, and to enforce by attachment attendance of witnesses and the production of books and papers, and to sentence for a refusal to be sworn or to answer as provided in actions before civil courts, but such courts shall have power to issue process in any county within the state.

3860. Disposition of fines. All fines collected under the provisions of this chapter and the regulations governing the national guard of the United States, unless their disposition is otherwise provided for by law, shall be paid to the captain or treasurer of the organization of which the delinquent is a member for the benefit of the military fund of the organization, or if such delinquent is a member of the staff, to the state treasurer for the credit of the military fund.

3861. Actions against members and officers of military court. No action or proceeding shall be prosecuted or maintained against a member of a military court or officer, or person acting under its authority, or reviewing its proceedings, on account of the imposition, approval, or execution of any sentence, or the imposition or collection of a fine or penalty, or the execution of any warrant, writ, execution, process, or mandate of a military court.

3862. Jurisdiction of courts. Burden of proof. The jurisdiction of the courts established by this chapter shall be presumed, and the burden of proof shall rest on any person seeking to oust said court of jurisdiction in any action or proceeding.

3863. Arsenal. Military supplies. Liability of officers. The governor is hereby authorized to provide an arsenal at the state capitol for the storage of arms, equipment, and military supplies. Military supplies shall be issued upon requisition of the officer requiring same. Military supplies for the respective organizations shall be issued to and receipted for by the cammanding officer thereof, who shall be responsible to the state for the care and preservation of the same. Commanding officers will be responsible to the state for the money value of all property issued to them, which may be lost by reason of carelessness and negligence upon their part, and the governor may require such officers, and all other officers receiving property, to give a good and sufficient bond, in such form as the governor or adjutant-general may prescribe, with sureties to be approved by the adjutant-gen-

eral; but in such case the state shall pay the premium on such bond. Band instruments and uniforms and equipment for the band shall be issued to the regimental adjutant.

3864. Property exempt from civil process. All military property issued to or owned by members of the national guard shall be exempt from all civil process.

3865. Arms, ordnance stores and equipment are military property of state. Penalty for disposition of or injury to. No exceptions. Arms, ordnance, quartermaster's stores, camp equipment, and other military property, whether the property of the United States or of this state, for the purpose of this section shall be deemed the property of the state, and shall be used only in the discharge of military duties. Any member of the national guard who shall embezzle, misapply, dispose of, secrete, remove, and retain in his possession without authority, or who shall wilfully injure or destroy such property, or shall fail to produce the same or its equivalent when so ordered, shall be deemed guilty of a misdemeanor and subject to trial by court-martial, or by a justice of the peace in any county where the accused may be found; and on conviction thereof, shall be fined in a sum double the value of the property involved, together with the cost of prosecution, and in default of payment thereof, shall be imprisoned not less than one nor more than three months in the jail of the county where the offense was committed, or where the court is held. Any person not a member of the national guard, who shall knowingly and wilfully receive in pawn or pledge, or who shall purchase or otherwise acquire, or shall have in his possession and refuse upon demand to deliver any such property, shall be deemed guilty of a misdemeanor, and upon conviction by any civil court of competent jurisdiction shall be punished by a fine not exceeding $299 or by imprisonment not to exceed three months in the county jail, or by both such fine and imprisonment. No exemption shall be allowed on execution issued for the collection of such fines. So much of the money assessed in the cases aforesaid as may be necessary shall be paid to the adjutant-general to enable him to replace by purchase the articles of property involved in the prosecution, and the remainder shall be paid into the treasury of the state; and placed to the credit of the military fund.

3866. Encampment. Authority of commander. Punishment for abusing or interfering with soldier. The commanding officer of any parade, review, or drill and the officer of any rendezvous may cause the ground selected for that purpose to be marked or designated in such manner as not to obstruct the passage of travelers on any public highway, and prohibit the entrance thereon of all unauthorized persons; he may also prohibit and prevent the sale or use of all spirituous liquors, wine, ale, beer, the holding of huckster or auction sales, and all gambling within the limits of such encampment or within such limits, not exceeding one-half mile therefrom, as he may prescribe, and he may abate as a nuisance any such traffic within the prescribed limits. Every person who wilfully disobeys the orders of any commanding officer made under the provisions of this section, and every person who interrupts, molests, or insults, by abusive words or behavior, any officer or enlisted man while in the performance of any duty, or when he is on his way to or from the place of the performance of any duty, or who attempts by means of any threat or violence, coercion or advice to deter or prevent any officer or enlisted man from performing any lawful duty, or who knowingly resists, by use of force or violence, such member in the performance of any duty, shall be guilty of a misdemeanor, and shall be punished by a fine not exceeding $100, or by imprisonment in the county jail not exceeding three months. Any person violating the provisions of this section may be immediately put under arrest and turned over to the civil authorities for punishment, or kept under arrest and confinement at the discretion of the commanding officer of the forces engaged in the performance of such

duty until the setting of the sun of the day succeeding that on which the offense was committed.

3867. Prosecutions other than by court-martial. It is hereby made the duty of the county attorney of each county of the state wherein any of the offenses punishable by fine or imprisonment mentioned in this chapter have been committed, or wherein the accused has been arrested, unless a court-martial shall have jurisdiction of the offense, to prosecute such accused person at the expense of the state.

3868. Pay of militia in service of state. When called into the service of the state and not in the service of the United States, the members of the national guard shall receive the following compensation: Privates, $1.50 per day; except one cook to each organization shall receive $3 per day; corporals, $1.75 per day; sergeants, $2 per day; first sergeants and non-commissioned staff officers of battalions and regiments, $2.25 per day; *provided, however,* that in all cases where the pay of non-commissioned officers of the regular army in any branch of the military service exceeds the amounts herein stated, the non-commissioned officers of the national guard shall receive the same pay as the non-commissioned officers of like rank in the regular army. Commissioned officers shall receive the same pay as officers of a like grade in the regular army of the United States. In addition to the above pay, each officer and enlisted man shall receive one ration per day; *provided,* that this state shall make no payments to members of the militia in the case of service for which the United States government makes payment. The annual encampment of the national guard will be considered as in the service of the state.

3869. Civilian employes. Whenever the national guard shall be ordered into encampment by the commander-in-chief, or otherwise called into service of the state, the commander-in-chief may authorize the employment of such civilians as may be expedient and necessary to perform such duties as are not of a military nature pertaining to such camp or duty.

3870. Military company not to leave state without consent of commander-in-chief. No military company, unless called into the service of the United States, shall leave the state with arms and equipment without the consent of the commander-in-chief, and any persons causing any company to so leave the state shall be guilty of a misdemeanor.

3871. Members privileged from arrests. The members of the national guard shall, in all cases, except those of treason, felony, or breach of the peace, be privileged from arrest during their attendance at drill, parades, encampments, and the election of officers, and in going to and returning from the same.

3872. Exempt from poll tax. Every officer and enlisted man of the national guard of Utah shall be exempt from head or poll tax of every description for the year during any part of which he shall hold commission as an officer or be enrolled as an enlisted man of the national guard of Utah.

3873. Care and relief of members injured in service. Board of inquiry. Report and payment. Every member of the active militia who shall be wounded or disabled while in the performance of his duty in the service of the state shall receive care and medical attention at the expense of the state, and shall receive per diem provided for in this chapter during the time he shall be temporarily incapacitated from pursuing his usual duties and occupation. He shall receive such other just and reasonable relief as the legislature may provide. All claims arising under this section shall be inquired into by a board appointed by the commander-in-chief, of at least three officers, one of whom shall be a medical officer, such board to be appointed upon the application of the member claiming to be injured. Such board shall have the power possessed by general courts-martial. A report of said board shall be filed with the secretary of state for action by the board of examiners. The state auditor is hereby authorized and required to draw his warrant on the state

treasury for the purposes and amounts specified in this chapter on the presentation to him of itemized bills and estimates, verified by affidavit of the claimants, approved by the adjutant-general, and audited by the state board of examiners; *provided,* such per diem shall not exceed the amount appropriated by the legislature.

3874. Subject to military laws of the United States. Power of governor to make same effective. The national guard of this state and the unorganized militia shall at all times be subject to the laws and military regulations of the United States governing the same, and the governor shall have power at any time to prescribe such rules and regulations as may be necessary to make the laws and military regulations of the United States effective within this state. '09, p. 120; '11, p. 22; '17, p. 289.

CHAPTER 2.

STATE ARMORY BOARD.

('09, p. 168; '11, p. 23.)

3880. State armory board created. There is hereby created a state armory board, which is hereby constituted a body corporate with pereptual succession. It may have and use a common seal and under the name aforesaid may sue and be sued, and contract and be contracted with. It may take and hold by purchase, gift, devise, grant, or bequest, real and personal property required for its use. It may also convert property received by gift, devise, or bequest, and not suitable for its uses in other property so available, into money. It shall have the power to borrow money for the purpose of erecting arsenals and armories upon the sole credit of the real property to which it has the legal title, and may secure such loans by mortgage upon such property, and said property so mortgaged shall be the sole security for such loan, and no deficiency judgment shall be made, rendered, or entered against said board upon the foreclosure of any such mortgage; *provided, however,* that property in one city shall not be mortgaged for the purpose of obtaining money for the erection of armories in any other place. Said board shall be deemed a public corporation, and its property shall be exempt from all taxes and assessments.

Armory may be erected on capitol grounds, § 3886.

3881. Members. Powers and duties. The state armory board shall consist of the governor, the secretary of state, and the adjutant-general. The board shall have the supervision and control of the armories and arsenals and of all real property held or acquired for the military purposes of the state, and power and authority to provide suitable armories and arsenals for the different organizations of the national guard. It shall have the power to lease suitable buildings for armory and arsenal purposes in various places throughout the state, wherever necessary for the use of organizations of the national guard and for the storage of state and government property, for a term of years not exceeding twenty, at such rental as it may deem reasonable. It shall have the further power to take options for the purchase of any premises under lease to the state for armory and arsenal purposes at any time within the life of such lease, when it shall appear to be to the interest of the state to purchase the same at such prices as the board and the owner of such premises may agree upon; *provided,* that no option shall be binding upon the state until ratified by act of the legislature. It shall have the power to erect armories and arsenals at such places within the state as it may deem expedient and necessary upon lands to which it shall have acquired the legal title, and may expend from the military fund in the hands of the state treasurer in acquiring the legal title to lands and in the erection of

armories and arsenals such sums as it may from time to time deem advisable and necessary.

3882. Appropriation. For the use of this board, and for the purpose of the payment of rentals for armories, and for the purpose of paying interest on any sum borrowed by said board for the erection of armories, the sum of $10,000 per annum is appropriated out of the moneys of the state treasury not otherwise appropriated, to be held by the treasurer of the state as a military fund, and to be by him disbursed upon the order of the board. All unexpended balances of any money appropriated by the state for military purposes for a stated period shall be turned over to the treasurer of the state for the credit of the military fund.

3883. Id. Borrowing. The borrowing power of said armory board referred to in § 3880 shall be and the same is hereby limited to the sum of $85,000, to which said sum it may become indebted to any person, board, association, or corporation, and the state board of land commissioners is hereby authorized and empowered, in its discretion, to lend to said state armory board any sum not exceeding $85,000; *provided, however,* that any loan made to said state armory board shall not run for a longer period than twenty years, and shall not draw interest at a rate exceeding 6 per cent per annum.

3884. May acquire title to real estate. Whenever the state armory board and the owners of land sought to be acquired for the erection of armories are unable to agree upon the price therefor, the attorney-general shall acquire title to such property in the name of the state armory board under the provisions of law relating to eminent domain.

3885. City councils may appropriate funds. The city councils of cities of the first, second and third classes shall have power to appropriate from any funds of the city available for general purposes, such sums as they may deem expedient for the purpose of assisting the state armory board in the erection of armories within their respective cities, and for the maintenance of armories located and maintained therein, and in all cities where water-works and electric light are owned by the city, the water and electric light used in armories maintained therein may, at the discretion of the city council, be furnished without cost.

CHAPTER 3.

AUTHORIZING ERECTION OF ARMORY AND ARSENAL ON CAPITOL GROUNDS.

3886. Setting aside portion of capitol grounds for armory and arsenal. The state board of examiners is hereby authorized and empowered, with the consent of Salt Lake City, to set apart such portion of the state capitol grounds as may be necessary, and which will in no wise interfere in the erection of a state capitol, for the use of the national guard of Utah and for the construction of an armory and arsenal thereon; and when the same has been so set apart and the boundaries thereof determined, the legal title thereto shall, with the consent of Salt Lake City, vest in and be in the state armory board. '09, p. 183; '11, p. 29.

3887. Power. The state armory board is hereby authorized and empowered to erect upon the ground set apart under the provisions of § 3886 a state armory and arsenal for the use of the national guard of Utah, provided they shall deem such location the most available and suitable for such purpose.

'09, p. 183.

TITLE 66.

MINES AND MINING.

CHAPTER 1.

MINING CLAIMS.

3890. (1495.) Extent. No location to be made until discovery of vein. A mining claim, whether located by one or more persons, may equal, but shall not exceed, 1500 feet in length along the vein or lode; but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. Any lode mining claim may extend 300 feet on each side of the middle of the vein at the surface except where adverse rights render a lesser width necessary. The end lines of each claim must be parallel. Am'd '99, p. 26.

Discovery monument, where placed, § 3891, and note.

Notice of location, contents, description, etc., § 3891, and notes.

Construction of notice of location, note to § 3891.

Annual labor, note to § 3895.

Partitioning, manner of, § 9272.

Occupation and privilege tax, §§ 5945-5962.

State geologist examine and inspect certain, §§ 5779, 5780.

School of mines, §§ 5547-5557.

Congress has given the local laws and customs of miners the force and effect of laws, so far as they are not in conflict with any superior law.

McCormick v. Varnes, 2 U. 355.

The right of a state to pass acts supplementing the mining act of congress in respect to the location, etc., of mining claims is recognized by § 2394, R. S. U. S.

Copper Globe M. Co. v. Allman, 23 U. 410; 64 P. 1019.

In re Monk, 16 U. 100; 50 P. 810.

The surface of mineral lands may be owned by one person and the mineral underneath by another, each with an indefeasible title; when so owned they constitute separate corporeal hereditaments with all the incidents of separate ownership, and the surface land may be partitioned the same as where there is no mineral under it.

Smith v. Jones, 21 U. 270; 60 P. 1104.

The provisions of § 2323, R. S. U. S., apply to one who locates a tunnel for discovery purposes as well as for development purposes, but failure to prosecute work on such tunnel for six months works an abandonment of the right to all undiscovered veins on the line of such tunnel.

Fissure M. Co. v. Old Susan M. Co., 22 U. 438; 63 P. 587.

DISCOVERY, NECESSITY FOR:

Discovery and appropriation are the sources of title to mining claims, and development by working is the condition of continued possession.

O'Reilly v. Campbell, 116 U. S. 418.

Discovery may be at any point within the boundaries of the claim.

Harrington v. Chambers, 3 U. 94; 1 P. 362; affirmed 111 U. S. 350.

Discovery must be made before location, and discovery monument must be erected in close proximity thereto.

Copper G. M. Co. v. Allman, 23 U. 410; 64 P. 1019.

The location of a mining claim is void when its dicovery point is placed within the lines of an existing valid claim.

Watson v. Mayberry, 15 U. 265; 49 P. 479.

Argentine M. Co. Benedict, 18 U. 183; 55 P. 559.

Reynolds v. Pascoe, 24 U. 219; 66 P. 1064.

Bunker H. M. Co. v. Pascoe, 24 U. 60; 66 P. 574.

Lavagnino v. Uhlig, 26 U. 1; 71 P. 1046; but see same case on appeal, 198 U. S. 443.

Lockhart v. Farrell, 31 U. 155; 86 P. 1077.

One who located a mining claim, based on a discovery within the limits of an existing location, was a trespasser, and his location was void, and the subsequent forfeiture of the senior claim for non-performance of annual labor did not give him any rights. (Distinguishing Lavagnino v. Uhlig, 198 U. S. 443.)

Lockhart v. Farrell, 31 U. 155; 86 P. 1077.

Where discovery is lost by being included within the lines of a junior location, the senior claim does not thereby become invalid if a new discovery is made.

Silver City M. Co. v. Lowry, 19 U. 334; 57 P. 11; dismissed 179 U. S. 196.

DISCOVERY, WHAT CONSTITUTES:

Valid location of a mining claim may be made whenever the prospector has discovered such indications of mineral that he is willing to spend his time and money in following them, in the expectation of finding ore.

Harrington v. Chambers, 3 U. 94; 1 P. 362; affirmed 111 U. S. 350.

Hayes v. Lavagnino, 17 U. 185; 53 P. 1029.

Wilson v. Triumph M. Co., 19 U. 66; 56 P. 300.

One locating an abandoned claim may use the discovery of the former locator.

Hayes v. Lavagnino, 17 U. 185; 53 P. 1029.

Vein or lode defined.

Harrington v. Chambers, 3 U. 94; 1 P. 362; affirmed 111 U. S. 350.

Hayes v. Lavagnino, 17 U. 185; 53 P. 1029.

Grand Cent. M. Co. v. Mammoth M. Co., 29 U. 490; 83 P. 648.

There must be something beyond a mere guess on the part of the miner to authorize him to make a location which will exclude others from the ground, such as the discovery of the presence of the precious metals at the place where the notice of location is posted, or in such proximity to it as to justify a reasonable belief in the existence of a lode there.

Copper Globe M. Co. v. Allman, 23 U. 410; 64 P. 1019.

Rock or matter of any kind, in order to constitute a vein or lode within the meaning of the statute, must be metalliferous and contain such mineral value as will distinguish it from the country rock, especially where no well-defined walls appear.

Grand Cent. M. Co. v. Mammoth M. Co., 29 U. 490; 83 P. 648.

APEX RIGHTS:

A location of a mining claim upon a lode or vein of ore should be laid along the same lengthwise of the course of its apex at or near the surface, as well under the mining act of 1866 as under that of 1872. If located otherwise, the location will only secure so much of the lode or vein as it actually covers.

Flagstaff Mining Co. v. Tarbet, 98 U. S. 463.

McCormick v. Varnes, 2 U. 355.

Prior to the act of congress of May 10, 1872, a locator was entitled to but one vein; since

then he is entitled to all veins having an apex within his surface lines.
Blake v. Butte S. M. Co., 2 U. 54.

The owner of a vein located prior to May 10, 1872, in possession, may follow his vein on its dip into the unpatented ground of another.
Id.

The act of 1866 qualifies and enlarges the common law right by which miners hold their locations, to this extent only; that the owner of a mining claim may follow his lode or vein from the apex found within his surface ground, on its dip, to any depth, although in its downward course it may so far depart from a perpendicular as to enter the land adjoining; but he cannot go beyond or outside of his side lines on the course or strike of the vein.
McCormick v. Barnes, 2 U. 355.

The first locator, having the apex of a vein entirely within the surface lines of his claim for a portion of its length, and for the remaining portion partly within and partly without, and within the surface lines of another claim, but never entirely departing from such first location, owns the entire lode within the end lines of his claim.
Bullion-Beck Mining Co. v. Eureka Hill Mining Co., 5 U. 3; 11 P. 515.
See Lawson v. U. S. Min. Co., 207 U. S. 1; decided October 21, 1907.

The location of a vein or lode made upon the surface where the vein or lode finds its apex will not be defeated by the secret underground workings and possession by parties having no possession of or right to the surface embracing it.
Eilers v. Boatman, 3 U. 159; 2 P. 66; affirmed 111 U. S. 356.

A locator working subterraneously into the dip of the vein belonging to another locator who is in possession of his location is a trespasser and liable to an action for taking ore therefrom.
Flagstaff M. Co. v. Tarbet, 98 U. S. 463.

Locator presumed to own all ore within planes drawn vertically downward through boundary lines.
Grand Cent. M. Co. v. Mammoth M. Co., 29 U. 490; 83 P. 648.

What constitutes a discovery that will validate a location is a very different thing from what constitutes an apex to which attaches the statutory right to invade the possession of and appropriate the property which is presumed to belong to the adjoining owner.
Grand Cent. M. Co. v. Mammoth M. Co., 29 U. 490; 83 P. 648.

When the owner of an apex seeks to follow his vein on its dip into the land of another, the burden is on him.
Grand Cent. M. Co. v. Mammoth M. Co., 29 U. 490; 83 P. 648.
Red Wing M. Co. v. Clays, 30 U. 242; 83 P. 841.

U. S. PATENT; ADVERSE CLAIM:

In action for possession, plaintiff must prove discovery and a location according to U. S. and local laws.
Harrington v. Chambers, 3 U. 94; 1 P. 362; affirmed 111 U. S. 350.
Hayes v. Lavagnino, 17 U. 185; 53 P. 1029.
Copper Globe M. Co. v. Allman, 23 U. 410; 64 P. 1019.

As proceedings on an adverse claim are had for the purpose of determining which of the parties is entitled to patent, each must rely on the strength of his own title and not on the weakness of that of his adversary.
Murray H. M. & M. Co. v. Havenor, 24 U. 73; 66 P. 762.

Sec. 2326, R. S. U. S., authorizes an adverse claimant to commence with an action at law or a suit in equity, as may be most appropriate, to determine right of possession
Perego v. Dodge, 9 U. 3; 33 P. 221; affirmed 163 U. S. 160.
Parley's Park M. Co. v. Kerr, 3 U. 235; 2 P. 709; affirmed 130 U. S. 256.

Adverse proceedings authorized by § 2326, R. S. U. S., are not to determine the rights of the contestants to a patent, but to determine the right of possession of the disputed claim.
Lavagnino v. Uhlig, 26 U. 1; 71 P. 1046; affirmed 198 U. S. 443.

In an action to determine the right of possession of a lode mining claim, arising out of proceedings had in the U. S. land office, state statutes regulating generally actions for the recovery of real property have no application in view of the provisions of § 2326, R. S. U. S., relating to mining and providing for the filing of adverse claims.
Lily M. Co. v. Kellog, 27 U. 111; 74 P. 518.

Under § 2325, R. S. U. S., providing that it shall be presumed that there are no adverse claims to a mineral deposit for which application has been filed, unless they are filed within the sixty days during which notice of such application is required to be published, it will be conclusively presumed that one who fails to file an adverse claim within the prescribed time, has none.
Lavagnino v. Uhlig, 26 U. 1; 71 P. 1046; affirmed 198 U. S. 443.

On an application for a patent to a mining claim, the land office, in the absence of the filing of an adverse claim, will indulge the presumption that no conflicting claims exist to the premises described in the application, but when an adverse claim is filed, the presumption does not arise.
Lockhart v. Farrell, 31 U. 155; 86 P. 1077.

U. S. PATENT; EFFECT OF:

Mining claims are real property and pass by deed.
Houtz v. Gisborn, 1 U. 173.

A patent passes the government title to the surface and any veins beneath it not otherwise granted, and its issuance presumes a compliance with the mining law.
Kahn v. Telegraph Mining Co., 2 U. 174.

Mining patents based upon locations made under the act of 1866 grant title to the ground mentioned therein, subject to the right of other locators to follow any other vein or lode held under locations made prior to the act of May 10, 1872.
Blake v. Butte Mining Co., 2 U. 54.

A patent from the United States is the highest evidence of title, and ordinarily it cannot be varied, contradicted, nor controlled by evidence outside the patent; but after the United States has parted with its title and the individual has become vested with it, the equities subject to which he holds it may be enforced.
Kimball v. McIntyre, 3 U. 77; 1 P. 167.

A patent from the United States for mineral lands may be avoided in equity for mistake, or fraud and misrepresentation practiced upon the government.
Parley's Park Mining Co. v. Kerr, 3 U. 235; 2 P. 709; affirmed 130 U. S. 256.

A patent for a mining claim allowing a width of 600 feet is valid under the act of congress of 1872, where it is doubtful under the evidence whether the mining laws of the district prescribed a lesser width.
Id.

The decision of the land department of the United States that land is non-mineral, or is occupied, is conclusive on the courts when the patent issued in pursuance of such decision is colaterally attacked.
Ferry v. Street, 4 U. 521; 11 P. 571.

3891. (1496. Discovery monument. Notice of location; contents. The locator, at the time of making the discovery of such vein or lode, must erect a monument at the place of discovery, and post thereon his notice of location, which notice shall contain:

1. The name of the lode or claim;
2. The name of the locator or locators;

3. The date of the location;

4. If a lode claim, the number of linear feet claimed in length along the course of the vein each way from the point of discovery; with the width on each side of the center of the vein, and the general course of the vein or lode, as near as may be, and such a description of the claim, located by reference to some natural object or permanent monument as will identify the claim;

5. If a placer or millsite claim, the number of acres or superficial feet claimed, and such a description of the claim or millsite located by reference to some natural object or permanent monument as will identify the claim or millsite. Am'd '99, p. 26.

No location before discovery of vein, § 3890, and note.

Discovery within lines of prior claim, note to § 3890.

Notice recorded within thirty days, § 3893, and note.

Destruction of notice, penalty, § 3937.

Fraudulently antedating notice of location of mining claim for purpose of defeating an actual locator thereon is a fraud against such rightful claimant and the government.

Muldoon v. Brown, 21 U. 121; 59 P. 720.

Lessee not permitted to take advantage of defects in lessors title and make adverse location.

Silver City M. Co. v. Lowry, 19 U. 334; 57 P. 11; dismissed 179 U. S. 196.

Bunker H. M. Co. v. Pascoe, 24 U. 60; 66 P. 574.

Reynolds v. Pascoe, 24 U. 219; 66 P. 1064.

Fraudulent relocation by agent.

Utah M. Co. v. Dickert, 6 U. 183; 21 P. 1002.

Argentine M. Co. v. Benedict, 18 U. 183; 55 P. 559.

U. S. deputy mineral surveyor cannot locate a mining claim.

Lavagnino v. Uhlig, 26 U. 1; 71 P. 1046; case affirmed 198 U. S. 443, though that point not passed on. (Contra held by S. C. of Nev. in Hand v. Cook, Nov. 1907.)

Where alien located mining claim and conveyed to a citizen, no rights of third persons having attached prior to conveyance, the conveyance vests title in the citizen.

Wilson v. Triumph M. Co., 19 U. 66; 56 P. 300.

Stewart v. G. & C. M. Co., 29 U. 443; 82 P. 475.

The rights of a citizen locator of mining ground and his subsequent grantees cannot be affected by the fact that his co-locator was an alien.

Strickley v. Hill, 22 U. 257; 62 P. 893.

The location of a mining claim by an alien is not void, but only voidable on a direct attack by the government.

Stewart v. G. & C. M. Co., 29 U. 443; 82 P. 475.

MARKING OF BOUNDARIES:

Sec. 2324, R. S. U. S., merely requires that locations shall be distinctly marked, so that their boundaries can be readily traced.

Victoria Mining Co. v. Haws, 7 U. 515; 27 P. 695; affirmed 160 U. S. 303.

The fact that the description in a notice of location calls for stakes, when in fact the monuments are trees cut off about three feet from the ground and blazed and squared, is immaterial.

Hanson v. Fletcher, 10 U. 266; 57 P. 480.

A mining claim marked by a discovery monument on which is placed the notice of location, and by a stake at each of the three corners of the claim, and a monument at the center of each end line, leaving one corner of the claim unmarked, is sufficiently marked under § 2324, R. S. U. S.

Warnock v. De Witt, 11 U. 324; 40 P. 205.

A locator of a mining claim, in marking his claim on the ground so that its boundaries can be readily traced, is not required to be exact in running the lines or in fixing the corners or other posts.

Eilers v. Boatman, 3 U. 159; 2 P. 66; affirmed 111 U. S. 356.

A fact that the location of a mining claim as marked on the ground is 300 feet longer and 50 feet wider and is allowed by law does not render the location void, where the excess was included through mistake.

Hanson v. Fletcher, 10 U. 266; 37 P. 480.

A claim is sufficiently marked on the ground where the stakes and monuments are set at accessible places, the inaccessible places being definitely referred to by courses and distances.

Eilers v. Boatman, 3 U. 159; 2 P. 66; affirmed 111 U. S. 356.

Brockbank v. Albion M. Co., 29 U. 367; 81 P. 863.

Monuments of abandoned claims may be used in making a new location of same ground.

Brockbank v. Albion M. Co., 29 U. 367; 81 P. 863.

Within thirty days location must be marked upon the ground; or at least before other rights intervene.

Copper Globe M. Co. v. Allman, 23 U. 410; 64 P. 1019.

Brockbank v. Albion M. Co., 29 U. 367; 81 P. 863.

Discovery or location monument is the initial point of the lode from which the boundaries of the claim are to be determined. It must be placed at or near place of discovery.

Copper Globe M. Co. v. Allman, 23 U. 410; 64 P. 1019.

CONSTRUCTION OF NOTICE:

The location notice of a claim describing it as being "fifteen hundred feet in length on this ledge * * * and three hundred feet on each side of the center of location," and as running east three hundred feet and west twelve hundred feet "from monument," the ledge being "situated up near the head of the right hand fork of what is known as Tie Canyon, about five miles from" a certain railroad; held, insufficient.

Darger v. Le Sieur, 8 U. 160; 30 P. 363.

Id., 9 U. 192; 33 P. 701.

The construction of notice of location should be liberal, not technical; and the sufficiency of reference to natural object or permanent monument is a question of fact.

Eilers v. Boatman, 3 U. 159; 2 P. 66; affirmed 111 U. S. 356.

Hanson v. Fletcher, 10 U. 266; 37 P. 480.

Wilson v. Triumph M. Co., 19 U. 66; 56 P. 300.

Fissure M. Co. v. Old S. M. Co., 22 U. 438; 63 P. 587.

Farmington M. Co., v. Rhymney M. Co., 20 U. 363; 58 P. 832.

Wells v. Davis, 22 U. 322; 62 P. 3.

Bonanza M. Co. v. Golden Head M. Co., 29 U. 159; 80 P. 736.

Trees blazed and squared, rock monuments, and the prospect hole are permanent objects, within the meaning of § 2324, R. S. U. S., requiring the notice of the location of a mining claim to describe the same by reference to some natural object or permanent monument.

Hanson v. Fletcher, 10 U. 266; 37 P. 480.

A tie to an adjoining claim is sufficient.

Wilson v. Triumph M. Co., 19 U. 66; 56 P. 300.

Notice of location held sufficient which ties the claim to little else than its own stakes.

Bonanza M. Co. v. Golden Head M. Co., 29 U. 159; 80 P. 736.

3892. (1497.) Boundaries marked. Mining claims and millsites must be distinctly marked on the ground so that the boundaries thereof can be readily traced. Am'd '99, p. 26.

Marking of boundaries, note to § 3891. Penalty for destroying stakes, etc., § 3937.

3893. (1498.) Filing copy of notice. Fee. Within thirty days from the date of posting the location notice upon the claim, the locator or locators, or his or their assigns, must file for record in the office of the county recorder of the county in which such claim is situated, if said claim be situated without and beyond an original mining district, a substantial copy of such notice of location. Such county recorder shall charge and collect a fee of 50 cents for first folio, and for each additional folio, 20 cents; *provided,* that where more than two locators sign the said notice of location, an additional fee of 10 cents shall be charged for each additional name. Said fee shall be for filing, recording, indexing, and abstracting such notice; *provided,* that such notice of location shall not be abstracted unless a subsequent conveyance affecting the same property be filed for record, when said notice shall be abstracted. Am'd '99, p. 26; '09, p. 79.

Contents of notice, posting etc., § 3891, and note.

The notice of location of a mining claim need not be recorded, if, at the time of the location, the rules of the district which require recording have fallen into disuse, there being no statutory requirement that such notice should be recorded.

Victoria Mining Co. v. Haws, 7 U. 515; 27 P. 695; affirmed 160 U. S. 303.

The locator must, within thirty days, mark the boundaries of his claim substantially as indicated by the notice of location, and, within the time as required by § 3893, he must record a substantial copy of the notice of location with the county recorder.

Copper Globe M. Co. v. Allman, 23 U. 410; 64 P. 1019.

Though monuments are not all erected according to law within the thirty days, it is sufficient if the law is complied with before other rights have intervened. Monuments of prior lapsed location may be used to mark new location.

Brockbank v. Albion M. Co., 29 U. 367; 81 P. 863.

3894. (1499.) Notice of assessment work being done. Every person or company owning a group of claims and doing the development or assessment work for said group at one point shall post a notice upon each claim at the discovery monument stating where such work is being done, and also post a notice at the entrance of the workings where said work is done, stating the names of the claims for which the work is done. Am'd '99, p. 27.

3895. (1500.) Filing affidavit of work done. The owner of any quartz lode or placer mining claim who shall do or perform or cause to be done or performed the annual labor or improvements required by the laws of the United States, in order to prevent a forfeiture of the claim, must, within thirty days after the completion of such work or improvements, file in the office of the county recorder in which the greater part of the mining district, in which such claim is located, is situated, his affidavit or an affidavit or affidavits of the person or persons who performed or directed such labor or made or directed such improvements, and shall file a duplicate thereof with the district mining recorder of the district in which said claim is situated, showing:

1. The name of the claim and where situated;
2. The number of days' work done and the character and value of the improvements placed thereon;
3. The date or dates of performing said labor and making said improvements, and number of cubic feet of earth or rock removed;
4. At whose instance or request said work was done or improvements made;
5. The actual amount paid for said labor and improvements, and by whom paid, when the same was not done by the owner or owners of said claim.

Such affidavits or duly certified copies thereof shall be prima facie evidence of the facts therein stated. Am'd '99, p. 27.

Fee for recording affidavits of labor, § 3901.

Notice of work performed for benefit of group, § 3894.

A claim on which the required labor has been performed is not open to relocation by failure to file affidavit required by this section.

Murray H. M. & M. Co. v. Havenor, 24 U. 73; 66 P. 762.

ANNUAL LABOR:

Held, that the owner of a lode claim, who has failed to do his annual assessment work, has the right to make a new location covering the same ground.

Warnock v. De Witt, 11 U. 324; 40 P. 205.

Where adverse possession held wrongfully,

the rightful owner or locator is excused from doing the assessment work during the continuance of such adverse holding.

Utah Mining Co. v. Dickert & Meyers Sulphur Co., 6 U. 183; 21 P. 1002.

Victoria Mining Co. v. Haws, 7 U. 515; 27 P. 695; 160 U. S. 303.

The attempt of an agent employed to do annual assessment work on a mining claim, after failure to do the work, to relocate the claim is a fraud on his principal.

Utah M. Co. v. Dickert, 6 U. 183; 21 P. 1002.

Argentine M. Co. v. Benedict, 18 U. 183; 55 P. 559.

Where A. fails to perform his annual labor, and B. locates the ground and afterward abandons it; if A. then re-enters and begins work, his title is good as against C. who afterward locates.

Klopenstein v. Hays, 20 U. 45; 57 P. 712.

Where there was a conflict between a senior and junior location and the senior later failed to perform his annual labor, does the ground in conflict inure to the junior without any further act on his part?

Lavagnino v. Uhlig, 198 U. S. 443; same case, 26 U. 1; 71 P. 1046.

Contra, Lockhart v. Farrell, 31 U. 155; 86 P. 1077.

ON GROUP OF CLAIMS:

Work done outside of a mining claim, if done for the purpose and as a means of developing the same, is as available for holding the claim as if done within the boundaries of the claim itself. One general system of work may be devised, well adapted and intended to develop several continguous claims, and when such is the case, work in furtherance of the system is work on the claims intended to be developed by it.

Harrington v. Chambers, 3 U. 94; 1 P. 362; affirmed 111 U. S. 350.

Where the testimony tends to show the consolidation of a group of claims for development and working purposes and that the required amount of work was done on one claim for all, the question of whether work on one would inure to the benefit of all was properly left to the jury.

Wilson v. Triumph M. Co., 19 U. 66; 56 P. 300.

Klopenstine v. Hays, 20 U. 45; 57 P. 712.

Wells v. Davis, 22 U. 322; 62 P. 3.

Where the testimony tends to show that respondent's mining claims were consolidated or worked for development purposes; that work on the tunnel and shafts was done to apply on the respective claims; that respondent had an interest in all of these claims, and that the development work was a benefit to all the claims, the testimony is sufficient to sustain the finding.

Fissure M. Co. v. Old S. M. Co., 22 U. 438; 63 P. 587.

3896. (1501.) District organization. Rules. Boundary. Mining districts may be organized, and all existing districts may be reorganized, and the rules and regulations of the said mining district shall govern the said district according to the laws of the United States, in cases where a district organization is desired; *provided,* that the nearest boundary line of any mining district shall not be within thirty miles from the county recorder's office of any county. Am'd '17, p. 380.

3897. (1502.) Copying records. Expense. Upon application of the district mining recorder of any mining district to the board of county commissioners of the county having in custody the records of the said mining district, the said board of county commissioners shall cause the records of such district to be copied by the county recorder, and shall cause all records of documents pertaining to district mining records, recorded since June 4, 1896, up to the time of delivery, to be recorded in the original records of the mining district in which the property is situated, and the original records, when so amended, shall be delivered to such district mining recorder. The copy so made shall remain in the office of the county recorder, and shall be considered as the original record. One-half of the expense of copying such records shall be paid out of the county treasury and one-half shall be paid out of the state treasury. R. S. '98, § 1506; '99, p. 27.

By provisions of § 3904, mining records were transferred to county recorder's office.

3898. (1503.) Duplicate notice of location filed with county recorder. Fee. Penalty. It shall be the duty of every district mining recorder to require every person depositing for record a notice of location to make a duplicate copy thereof, which copy said mining recorder shall carefully compare with the original and mark "duplicate," and endorse thereon his name and the date and hour of filing in his office of the original. He shall, at the time of filing the duplicate notice with the original, collect, in addition to his own fee, the fee for the county recorder for recording such duplicate, said fee to be computed at the rate of 50 cents for first folio, and for each additional folio, 20 cents; *provided,* that where more than two locators sign the said notice of location, an additional fee of 10 cents shall be charged for each additional name. He shall immediately deposit the duplicate copy with the county recorder of the county in which the greater part of the said mining district is located for record, or forward the same to him by mail or express, or in such other manner as will insure safe transit and delivery. The fee, computed as hereinbefore described, shall accompany the duplicate. The county recorder shall record said duplicate with the indorsements there-

on for said fee. The record of said duplicate notice in the office of the county recorder shall be considered an original record. Every person neglecting or refusing to comply with any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine not exceeding $300 or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment. '99, p. 28; am'd '09, p. 79.

Fees of district mining recorder, § 2541. Notice to be recorded with county recorder, § 3893.

3899. (1504.) Certified copies to be received in evidence. Copies of notices of location of mining claims, millsites, and tunnel sites heretofore recorded in the records of the several mining districts, and copies of the mining rules and regulations in force in the several mining districts, in like manner recorded, heretofore duly certified by the mining recorder, shall be receivable in all tribunals and before all officers of this state as prima facie evidence. R. S. '98, § 1503; '99, p. 28.

District recorder to make certified copies, § 3903.

3900. (1505.) Id. By county recorder. Where books, records, and documents pertaining to the office of district mining recorder have been or shall hereafter be deposited in the office of any county recorder of this state, such county recorder is authorized to make and certify copies therefrom, and such certified copies shall be receivable in all tribunals and before all officers of this state in the same manner and to the same effect as if such records had been originally filed or made in the office of the county recorder. R. S. '98, § 1504; '99, p. 28.

County recorder to receive records, § 3904.

3901. (1506.) County recorder to record rules. Certified copies. It shall be the duty of each county recorder to record the mining rules and regulations of the several mining districts in his county without fee, and certified copies of such records shall be received in all tribunals and before all officers of this state as prima facie evidence of such rules and regulations, and it shall be his duty to record, index, and abstract all mining location notices presented for record, for a fee not to exceed seventy-five cents for each notice, and to file and index all affidavits of labor presented for filing affecting one mining claim, for a fee not to exceed twenty-five cents; *provided,* that when an affidavit of labor contains the name of more than one mining claim, an additional fee of ten cents shall be charged for each additional claim named therein. R. S. '98, § 1501; '99, p. 28.

Notice of location to be recorded for 75c, § 3895.

3902. (1506x.) Recorder of mining district to give bond. The recorder of each mining district shall take the oath of office and give bond with sureties in the penal sum of $1000. Such bond must be approved by the district judge and filed in the office of the county clerk of the county in which the greater part of the said mining district is located. Where the recorder of any mining district appoints a deputy, the recorder and his bondsmen shall be responsible for the official acts of such deputy. '99, p. 29.

3903. (1506x1.) District recorder to make copies. It shall be the duty of the recorder of a mining district, upon request and payment or tender of the fees therefor, to make and deliver to any person requesting the same, duly certified copies of any records in his custody; and for failure so to do, or for receiving larger fees for any such service than those provided, he shall be deemed guilty of a misdemeanor. '99, p. 29.

Notice of location to be recorded for 75c,

3904. (1506x2.) Vacancy. County recorder to receive records. Whenever there is a vacancy in the office of recorder of any mining district, or the person holding such office shall remove from the district, leaving therein no qualified successor in office; or whenever from any cause there is no person in such district authorized to retain the custody and give certified copies of the records, it shall be the duty of the person having custody of the records to deposit the same in the office of the county recorder of the county in which

such mining district or the greater part thereof is situated, and the county recorder shall receive such records, and is hereby authorized to make and certify copies therefrom, and such certified copies shall be received in evidence in all courts and before all officers and tribunals. The production of a certified copy so made shall be, without further proof, evidence that such records were properly in the custody of the county recorder.

R. S. '98, § 1502; '99, p. 29.

Certified copies by county recorder from district recorder's records, § 3900.

Sec. 8, chap. 36, laws 1897, providing that records of mining claims shall be kept by the county recorder, and providing for the transfer and delivery of records kept by district recorders, is not in conflict with Con. art. 6, sec. 23, which requires that "no bill shall be passed containing more than one subject," etc.

Such a law is not in conflict with § 2324, R. S. U. S., authorizing mining districts to make regulations governing the manner of recording, etc.

In re Monk, 16 U. 100; 50 P. 810

CHAPTER 2.

COAL MINES.

3910. (1507.) Appointment of inspector. Term. Removal. Deputy. Salary. Clerk. For the purpose of securing an efficient and thorough inspection of all coal and hydrocarbon mines within the state of Utah, and to provide for an adequate enforcement thereof, the governor shall appoint, by and with the consent of the senate, one mine inspector for coal and hydrocarbon mines. The inspector so appointed shall hold his office for a term of four years from the date of his appointment, and until his successor is appointed and qualified; *provided,* that such inspector may be removed for cause, by the governor. In case of resignation, death, or removal, the vacancy shall be filled by appoinment by the governor for the unexpired term. The state mine inspector of coal and hydrocarbon mines shall have the power, with the consent of the governor and the approval of the state board of examiners, to appoint one deputy mine inspector; the said deputy to possess all the qualifications required of the state mine inspector by § 3912. Said deputy mine inspector shall devote his entire time to the performance of his duties, under the direction of the state mine inspector, and shall receive a salary of $1500 per annum, to be paid each and every month from the unexpended funds of moneys in the state treasury, and necessary traveling expenses incurred in the proper discharge of his official duties, to be paid each and every month from the same fund. The state mine inspector may also, with the consent of the governor, employ one clerk to assist in his office at a salary not to exceed $60 per month, the same to be paid out of the state mine inspector's contingent fund.

Am'd '01. p. 83; '05, p. 221; '11, p. 258; '13, p. 122.

Legislature shall provide for the health and safety of miners, Con. art. 16, sec. 6.

Inspector to examine scales, § 3934.

Fees for inspection, § 2515.

Duties of inspector imposed on industrial com. sub. 9, § 3676.

3911. (1508.) Salary, how paid. Instruments and stationery. The said inspector of coal and hydrocarbon mines shall receive a salary of $2,000 a year and actual necessary traveling expenses incurred in the proper discharge of his official duties, to be paid quarterly by the state treasurer out of any moneys appropriated for that purpose, on the certificate of said inspector of mines showing service rendered, and also on presentation of the certificate of said inspector of coal and hydrocarbon mines showing a statement of all moneys received by him for fees, and the actual amount necessarily expended for actual traveling expenses for the quarter; and on presentation of such certificates the state auditor shall issue his warrant for the amount thereof, to be paid out of any appropriations aforesaid. He is hereby authorized to procure such instruments and stationery from time to time as may be necessary to the proper discharge of his duties under this title, at the expense of the state, which shall be paid by the state treasurer upon accounts duly certified by him and audited by the proper department of state. R. S. '98, §§ 1511, 2050; '01, p. 83; '05, p. 221.

3912. (1509.) Bond. Qualifications of inspector. Before entering upon the discharge of his official duties, the inspector shall give a bond to the state in the sum of $5000 to be approved by the proper officers, conditioned for the faithful performance of his duties. Said bond shall be deposited with the secretary of state. The person so appointed must be a citizen of Utah, and must have attained the age of thirty years. He must have a knowledge of different systems of working coal mines, and he must produce satisfactory evidence to the governor of having had at least five years' practical experience in the coal mines of Utah. He must have had experience in coal mines where noxious and explosive gases are evolved. He must hold the certificate of examination required by law to be held by mine foremen of the state.

R. S. '98, §§ 1508, 1509; '01. p. 83; '05, p. 221; '11, p. 258.

3913. (1510.) Shall give whole time to office. The said inspector shall not act as manager or agent or lessee for any mining or other corporation during his term of office, but shall give his whole time and attention to the duties of his office. R. S. '98, § 1511; '01, p. 84; '05, p. 222.

3914. (1511.) Mine owner to render assistance. Penalty for refusal. Every owner, agent, manager, or lessee of any coal or hydrocarbon mine in this state shall freely admit the inspector or his assistants to such mine on the exhibition of his certificate of appointment, for the purpose of making the examination and inspection provided for in this title, whenever the mine is in active operation, and render any necessary assistance for such inspection; but said inspector or his assistants shall not unnecessarily obstruct the working of said mine. Upon the refusal of the owner, agent, manager, or lessee to admit the inspector or his assistants to such mine, such owner, agent, manager, or lessee shall be subject to a fine of not less than $50 nor more than $500 for each and every such offense. '01, p. 84; '05, p. 222.

3915. (1512.) Mine owners to make maps of workings. The owner, agent, manager, or lessee of any coal or hydrocarbon mine in this state shall make, or cause to be made, an accurate map or plan of the workings of such mine, on a scale of one hundred feet to the inch, which said map shall show all the openings or excavations, shafts, tunnels, slopes, planes, entries, cross-headings, rooms, etc., and show the directions of the air current and also the water system therein, and shall accurately show the boundary lines between said mine and adjoining mines. Such map or plan, or true copy thereof, shall be furnished to the inspector, and one copy shall be kept at such mine for the inspection of the inspector or employes thereof. The owner, agent, manager, or lessee, at least once in every six months, shall place or cause to be placed on the map or plan an accurate showing of all additional excavations which have been made in the mine during the said six months. The several maps or plans of mines in this state which are furnished to the inspector shall be the property of the state, and shall remain in the care of said inspector, and shall be transferred by him to his successor in office; and in no case shall any copy of any of them be made without the consent of the owner, agent, manager, or lessee. If the inspector shall find or have good reasons to believe that any map or plan of any mine made or furnished him, in pursuance of the provisions of this section, is materially inaccurate or imperfect, he is authorized to cause a correct plan or map of said mine to be made at the expense of the owner, agent, manager, or lessee thereof; *provided,* that if the map or plan which was claimed to have been inaccurate shall be found to be practically correct, then the state shall have to pay the expense of making the new map or plan of such mine. All persons operating coal or hydrocarbon mines in this state shall, on or before the 15th day of December of each year, furnish the state mine inspector a statement of the output of each mine, distribution of such product, pounds of powder used, number and nationality of men employed, days worked, number of fatal and non-fatal accidents, from the 1st day of December of the preceding year to November 30 of the present year. Each owner, agent, or lessee

shall, on opening a new mine in this state, and within thirty days thereafter, notify the state mine inspector of same, giving name and address of the person, company, or corporation so opening said mine, together with the location and character of such mine and opening.

R. S. '98, § 1515; '01, p. 84; '05, p. 222; '11, p. 258.

3916. (1513.) Openings for egress. Buildings at entrance. Cages. It shall be unlawful for the owner, operator, or superintendent of any mine to employ any person or persons in such mine for the purpose of working therein, unless there are in connection with every seam or stratum of coal, worked in such mine, not less than two openings or outlets, separated by a stratum of not less than 150 feet at surface and not less than thirty feet at any place, at which openings or outlets safe and distinct means of ingress and egress shall at all times be available for the persons employed in the said mine. The escapements, shafts, or slopes, shall be fitted with safe and available appliances, by which the employes of the mine may readily escape in case an accident occurs deranging the hoisting machinery at the outlets. In slopes used as haulage roads, where the dip or incline is ten degrees or more, there must be provided a separate traveling way, which shall be maintained in a safe condition for travel, and kept free from dangerous gases. No inflammable structure, other than a frame to sustain pulleys or sheaves, shall be erected over the entrance to any mine; and no inflammable structure for the purpose of storing coal shall be erected nearer than 200 feet to any such opening. But this title shall not be construed to prohibit the erection of a fan and its approaches for the purpose of ventilation, nor of a trestle for the transportation of cars from any slope or other opening. All entrances to any place, not in actual course of working, where explosive gas is known to exist, shall be properly fenced across the whole width, so as to prevent all persons from entering the same. Hand rails and sufficient safety catches shall be attached to, and a sufficient cover overhead shall be provided on, every cage used for lowering or hoisting persons in any shaft. The ropes, safety catches, links, and chains shall be carefully examined every day that they are used, by a competent person employed for that purpose by the mine owner, agent, manager, or lessee, and any defect therein found shall be immediately remedied. R. S. '98, §§ 1517, 1521; '01, p. 84; '05, p. 223.

3917. (1514.) Stretchers to be kept. It shall be the duty of every owner, agent, manager, or lessee to keep at the mouth of every mine, or at such other places as may be designated by the mine inspector, stretchers properly constructed for the purpose of carrying away any employe working in and around the mine, who may be injured in and about his employment. R. S. '98, § 1527; '01, p. 85; '05, p. 223.

Other emergency supplies to be kept, § 3945.

3918. (1515.) Pure air for ventilating. Every owner, agent, manager, or lessee of coal or hydrocarbon mines shall provide and maintain a constant and adequate supply of pure air:

1. It shall be unlawful to use a furnace for the purpose of ventilating any mine wherein explosive gases are generated;

2. The minimum quantity of air provided shall not be less than 100 cubic feet per minute for each and every person in every mine, and 300 cubic feet for each and every animal employed therein, and as much more as the circumstances may require;

3. The ventilation current shall be conducted and circulated to the face of each and every working place through the entire mine, in sufficient quantities to dilute, render harmless, and sweep away smoke and noxious or dangerous gases, to such an extent that all working places and traveling roads shall be in a safe condition for working and traveling therein;

4. All worked out or abandoned parts of any mine in operation, so far as practicable, shall be kept free from dangerous bodies of gases or water; and if found impracticable to keep the entire mine free from dangerous ac-

cumulation of standing gases or water, the mine inspector shall be immediately notified;

5. Every mine wherein are employed more than seventy-five persons must be divided into two or more districts; each district shall be provided with a separate split of pure air, and the ventilation shall be so arranged that not more than seventy-five persons shall be employed at the same time in any one current or split of air;

6. All cross-cuts connecting the main inlet and outlet air passage, when it becomes necessary to close them permanently, shall be substantially closed with brick or other suitable material laid in mortar or cement, whenever practicable, but in no case shall said cross-cut stoping be constructed of plank except for temporary purposes;

7. All doors used in assisting or in any way affecting the ventilation shall be so hung and adjusted that they will close automatically; main doors regulating the principal air currents of the mine shall be so placed, in all cases where it is practicable, that when one door is open, another, which has the same effect upon the same current of air, shall be and remain closed;

8. All permanent air bridges shall be built of such material and of such strength as the circumstances may require;

9. The quantities of air in circulation shall be ascertained with an anemometer, or other efficient instrument; such measurement shall be made by the inside foreman or other competent person, at least once every week; a report of these air measurements shall be forwarded to the mine inspector, together with the statement of the number of persons employed in each district, on or before the 12th day of each month, for the preceding month;

10. For the purpose of properly ventilating rooms and entries in coal mines, cross-cuts in rooms shall be not more than 100 nor less than fifty feet apart; and cross-cuts in main entrance shall not, except in cases of urgent necessity, according to the opinion of the state mining inspector, be less than seventy-five feet nor more than 200 feet apart. Am'd '11, p. 260.

3919. (1516.) Water system. Every owner, agent, manager, or lessee of mines within the state of Utah shall provide and maintain a water system for the purpose of conducting water to the face of each and every working place, and throughout the entire open part of the mine, in sufficient quantities for sprinkling purposes to wet down the dust that shall arise and accumulate in and around the mine; *provided,* that in mines or parts of mines where, by reason of the natural wet condition, or the moisture derived from the introduction of steam into the air currents, or both, such sprinkling may not be necessary. And it shall be the duty of the superintendent, mine foreman, and inspector to see to it that this is done. '01, p. 86; '05, p. 225.

3920. (1517.) Props, ties, rails, etc. It shall be the duty of every person, owner, operator, superintendent, or mine foreman to furnish to the miners all props, ties, rails, and timbers necessary for safe mining in coal and hydrocarbon mines, and for the protection of lives of workmen. Such props, ties, rails, and timbers shall be suitably prepared and shall be delivered within 100 feet of the face of the room, or entry, and other working places, free of charge. And whenever underhand stoping is used to extract hydrocarbon ore, an efficient system of timbering approved by the mine inspector shall be enforced. R. S. '98, § 1519; '01, p. 87; '05, p. 225; '11, p. 258.

3921. (1518.) Rules to be observed by owners and employes. The following general rules shall be observed by every mine owner, operator, superintendent, mine foreman, and employe within the state of Utah:

1. Every owner or operator of every mine shall use every reasonable precaution to insure the safety of the workmen in all cases, and shall place the underground workings thereof under the charge and daily supervision of a person who shall be known as "mine foreman," and who must hold a mine foreman's certificate.

2. All accessible parts of abandoned portions of mines in which explosive gases have been found or are known to exist shall be carefully ex-

amined by the mine foreman, or his assistants, at least once in each and every week, and all danger existing therein from such gases shall be removed as soon as possible. A report of each and every examination shall be recorded in a book kept for that purpose, signed by the person making the examination.

3. In all mines known to generate explosive gases, the mine foreman, or fire bosses, shall make a careful examination every morning of all working places and traveling ways, and all other places which might endanger the safety of the workmen, within three hours prior to the time at which the workmen shall enter the mine. Such examination shall be made with the safety lamp. No person except those whose presence is necessary to prepare the mine for the entrance of the workmen shall enter the mine, or any part thereof, until the mine foreman or fire boss of his district shall report to him that his place is in a safe condition. The mine foreman or fire boss making such examination shall record the result of his examination in a book kept for that purpose, which book shall be opened to the inspection of the mine inspector and all employes.

This subdivision applies to a mine in which explosive gases were discovered on one occasion, whether or not they existed in the mine in sufficient quantity to make it unsafe or dangerous, in the opinion of experts. Eleganti v. Standard Coal Co., 50 U. —; 168 P. 266.

4. In any working place approaching any place where there is likely to be an accumulation of explosive gases, no light or fire other than locked safety lamps shall be allowed or used. But, in all hydrocarbon mines only electric storage battery lamps shall be used for lighting purpose; the pattern of such lamps to be approved by the state mine inspector. Whenever such lamps are required in any mine, they shall be the property of the owner or operator, and a competent person shall be appointed for the purpose of examining every such lamp, which examination shall be made immediately before it is taken into the mine for use. He shall clean, lock, and otherwise ascertain if it is safe for use; *provided,* that all fire bosses, or those who inspect the mine for the presence of explosive gases, must also personally examine their own lamps, and be responsible for their safe condition. Any such owner, agent, lessee, or operator of coal or hydrocarbon mines, when working the same in close proximity to an abandoned mine or part of a mine containing water or fire-damp, shall cause bore holes to be kept at least twenty-five feet in advance of the working face and sides of all working places in such mine, known to be approaching old, abandoned, or other mines containing water or fire-damp. Said holes not to be more than twenty-five feet apart, and to a like depth and at an angle of at least twenty-five degrees from the center hole.

5. Any miner or other person having charge of a working place in any mine shall, for his own protection, keep the roof and sides thereof properly secured by timbering or otherwise, so as to prevent such roof and sides from falling and injuring him or his fellow workmen; and he shall not do any work or permit any work to be done under loose rock or dangerous material, except for the purpose of securing the same.

6. No more than ten persons shall be hoisted or lowered at any one time in any shaft or slope. This, however, shall not prohibit the hoisting or lowering of ten or more persons at any one time on slopes where five or more loaded cars are regularly hoisted.

7. No person in a state of intoxication shall be allowed to go into or loiter about the mine.

8. Any miner or other workman who shall discover anything wrong with the ventilating current or with the condition of the roof, sides, timbers, or roadway, or with any other part of the mine in general, such as would lead him to suspect danger to himself or his fellow workmen, or the property of his employer, shall, as soon as possible, report the same to the mine foreman or other person being in charge of that portion of the mine.

9. Any person or persons who shall knowingly or wilfully damage

or, without proper authority, remove or render useless any fencing, means of signaling, apparatus, instrument, or machine, or shall throw open or obstruct any air-way, or open any ventilating door and not leave the same closed, or enter a place in or about a mine against caution, or carry fire, open lights, or matches in places where safety lamps are used, or handle without proper authority, or disturb any machinery or cars, or do any other act or thing whereby the lives or health of persons or the security of property in or about the mine are endangered, shall be deemed guilty of a misdemeanor.

10. Gunpowder or any other explosive shall not be stored in a mine, and a workman shall not have at any time in any place more than one can or box containing six and one-quarter pounds of powder; *provided,* that under special conditions a larger amount may be allowed in a mine for immediate use, when approval of such action is made in writing by the state inspector.

11. Every person who has gunpowder or other explosive in a mine shall keep it in a wooden or metallic box, securely locked, and such box shall be kept at least ten feet from the tracks in all cases where room at such a distance is available.

12. In charging holes for blasting in coal, slate, or rock in any coal or hydrocarbon mine, no iron or steel pointed needles shall be used, and a tight cartridge shall not be rammed into a hole in the coal, slate, or rock with an iron or steel tamping bar, unless the bar is tipped with copper or other soft metal, except where permissible powder is used.

13. The charge of powder or any other explosive in coal, slate, or rock which has missed fire shall not be withdrawn or the hole reopened, except where such holes are tramped with wet wood pulp, and without exception it shall be unlawful to tamp shot holes, for the purpose of blasting coal, with drillings, coal dust, or small pieces of coal. But it shall be the duty of the superintendent, foreman, or lessee to furnish clay or earth tamping, except when wood pulp is used.

14. Before commencing work and also after firing of every blast, the miner working a room or other place in the mine shall enter such room or place to examine and ascertain its conditions, and his assistant shall not go to the face of such room or place until the miner has examined the same and found it to be safe.

15. No person shall be empolyed to blast coal or rock unless the mine foreman is satisfied that such person is qualified by experience to perform the work with ordinary safety, or unless he is placed at work with an experienced miner.

16. Every passageway equipped with mechanical haulage used by persons as a regular traveling way for travel, and also at the same time for transportaion of coal or other material, shall be of sufficient width to permit persons to pass moving cars with safety; but if found impracticable to make any passageway of sufficient width, then holes of ample dimensions, and not more than 150 feet apart, shall be made on one side of said passageway. The said passageway and safety holes shall be kept free from obstructions, and the roof and sides of the same shall be made secure. Safety holes, when necessary, shall also be made at the bottom of all slopes and planes, and kept free from obstruction to enable the footman to escape readily in case of danger.

17. It shall be unlawful for any owner, operator, superintendent, or mine foreman of any mine which generates explosive gases to employ any person who is not competent to understand the regulations of any mine evolving explosive gases.

18. No person or persons shall be permitted to enter any dry gilsonite or elaterite mine with any kind of light other than an electric or other safety lamp.

19. For the purpose of making known the provisions of this chapter to all persons employed in and around mines, the owner and operator of

each and every mine within the state to which this chapter applies shall post in a conspicuous place at or near the entrance of the mine, where they may be conveniently read by all persons employed therein, the foregoing rules, and keep the said rules posted at all times.

20. Whenever the mine inspector discovers, in any mine in which blasting of coal is allowed, during working hours, that the air is becoming vitiated by unnecessary blasting of the coal, he shall have the power to regulate the use of the same, and to designate at what hour of the day blasting may be permitted, except that where coal is shot off the solid without undermining at least two periods for shooting shall be allowed during each working day.

21. It shall be unlawful for any owner, operator, superintendent, mine foreman, or any employe of any mine which generates explosive gases to remove any accumulated body of gases by wafting or brushing. All such bodies of gases must be removed from the mine by approved methods of ventilation. '01, p. 87; '05, p. 225; '11, p. 261; '13, p. 123.

3922. (1519.) Further duties of mine inspector. The duties of the mine inspector, other than those heretofore enumerated, shall be as follows:

1. It shall be the duty of the mine inspector to make a careful and thorough inspection of each coal and hydrocarbon mine operated within the state at least once every three months, and oftener if the condition of the mine requires his attention. He shall make an annual report to the governor, showing the condition of each and every coal and hydrocarbon mine in the state. He shall examine into the conditions as regards the safety of workmen of such mine working, machinery, ventilation, drainage, and the method of lighting and using lights, and into all other matters connected with the working safety of persons in such mine, and give directions providing for the better health and safety of persons employed in or about the same. The owner or operator is hereby required to freely permit such entry, inspection, examination, inquiry, and exit, and to furnish a guide when necessary. The said inspector shall make a record of his visit, noting the time of the inspection and the material circumstances of the same, and shall also notify the owner or operator of the mine by a written report of the condition of the mine at the time of such inspection.

2. If the inspector finds that a mine is not properly worked, or is not furnished with proper machinery or appliances for the safety of the miners and all other employes, it shall be his duty to give written notice to the owner or manager of such mine that it is unsafe, and such notice shall specify in what particulars the mine is unsafe, and shall direct the owner or manager thereof to make such improvements as are necessary within a reasonbale period. If the improvements are not made as required in the notice, it shall be unlawful for the owner or manager to operate such mine until such improvements are completed.

3. No explosive oil shall be used or taken into coal or hydrocarbon mines of Utah for lighting purposes, except when used in approved safety lamps, or when used by day men when diluted with a non-explosive animal or vegetable oil. And oil for such purpose shall not be stored or taken into the mines in quantities exceeding five gallons, in tight cans approved by the state coal mine inspector. The oiling or greasing of cars inside of the mines is strictly forbidden unless the place where said oil or grease is used is thoroughly cleaned at least once every day to prevent the accumulation of waste oil or grease on the roads or in the drains at that point, and not more than one barrel of lubricating oil shall be permitted in the mine at any one time. Only a pure animal oil or pure cotton-seed oil, or oils as shall be as free from smoke as pure animal oil or pure cotton-seed oil, shall be used for illuminating purposes in any coal or hydrocarbon mine, except as above provided. Any person found using explosive or impure oil contrary to this section shall be prosecuted as provided for in § 3926. R. S. '98, §§ 1510, 1512, 1513; '01, p. 89; '05, p. 228.

3923. (1520.) Speaking tubes to be provided. In shaft or slope mines where persons are lowered or hoisted by machinery, a metal speaking tube

or other suitable appliance shall be provided in all cases so that conversation or signaling may be carried on through the same from the top to the bottom of the shaft or slope. Am'd '01, p. 90; '05, p. 229.

3924. (1521.) Inspector to be notified of accident. Inquest. Whenever, by reason of an explosion or any other accident in any coal or hydrocarbon mine or the machinery connected therewith, loss of life or serious personal injury shall occur, it shall be the duty of the person having charge of such mine or colliery to give notice thereof promptly to said mine inspector, and if any person is killed thereby, to the coroner of the county, who shall give due notice of the inquest to be held. If the coroner shall determine to hold an inquest, the inspector shall be allowed to testify, and offer such testimony as he shall deem necessary to thorougly inform the said inquest of the causes of death, and the said inspector shall have authority at any time to appear before such coroner and jury and question or cross-question any witness, and in choosing the jury for the purpose of holding such inquest, it shall be the duty of the coroner to impanel at least two men experienced in coal mines on such jury. It shall be the duty of such inspector, when possible, upon being notified as herein provided, to immediately repair to the scene of the accident and give such directions as may appear necessary to secure the future safety of the men, and he shall proceed to investigate and ascertain the causes of the explosion or accident, and make a record thereof, which he shall file; and to enable him to make the investigation, he shall have the power to compel the attendance of persons to testify, and to administer oaths and affirmations; the cost of such investigation shall be paid by the county in which the accident occurred, in the same manner as the costs of coroners' inquests are paid by law.

R. S. '98, § 1523; '01, p. 90; '05, p. 229.

3925. (1522.) Board of examiners for mining boss. On the petition of the mining inspector, the district court in any county in this state shall, at the first term after March 17, 1905, appoint an examining board for such county, consisting of the state inspector of coal mines, an operator of a coal mine, and a coal miner, who shall be citizens of the United States, and the latter two of which board shall have at least five years of experience in the mines of the state, whose duty it shall be to examine any person applying thereto as to his competency and qualifications to discharge the duties of mining boss; said board of examiners shall meet at the call of the inspector, and they shall grant certificates to all persons whose examination shall disclose their fitness for the duties of mining boss, and such certificate shall be sufficient evidence for the competency and qualifications of the holders for duties of said office; *provided,* that any person who shall have been employed as a miner at least five years in the coal mines of Utah and as a mining boss continuously by the same person, or firm, or corporation, for the period of one year preceding the approval of this title, may be entitled, if in the judgment of the inspector he be qualified, to a certificate without undergoing such examination; but he shall not be employed by any other person, or firm, or corporation without having undergone such examination. The members of the examining board, other than the inspector, shall hold the office for the period of two years from the date of their appointment, and shall receive $4 per day for each day necessarily and actually employed, and actual and necessary traveling expenses, while employed in their official duties, to be paid by the state. Vacancies in the membership of the board shall be filled by the court of the proper county except the vacancy in the office of inspector. Sessions of the examining board shall not exceed three days in each quarter, and for any certificate granted the board shall receive the sum of $1, the same to be paid into the state treasury. No person shall act as fire boss unless granted a certificate of competency by the state inspector of coal mines. After March 17, 1905, no owner, operator, contractor, lessee, or agent shall employ any mining boss or fire boss who does not have the certificate of comptency required. Said certificate shall be posted up in the office of the mine, and if any accident shall

occur in any mine in which a mining boss or a fire boss shall be employed who had no certificate of competency, as required by this chapter, by which any miner shall be killed or injured, he or his estate shall have a right of action against such operator, or owner, lessee, or agent, and shall recover the full damage sustained; in case of death such action to be brought by the administrator of his estate, within three years from the date of accident, the proceeds recovered to be divided among the heirs of the deceased according to law.

R. S. '98, § 1526; '01, p. 90; '05, p. 230.

3926. (1524.) Penalties. The neglect or refusal to perform the duties required to be performed by any section of this chapter, or the violation of any of the provisions hereof shall be deemed a misdemeanor, and any person so neglecting or refusing to perform such duty or violating such provisions, shall, upon conviction, be punished by a fine of not less than $100, nor more than $500 for each and every such offense.

R. S. '98, § 1516; '01, p. 91; '05, p. 231.

CHAPTER 3.

WEIGHING COAL AT MINES.

3930. (1529.) Mine owners to provide scales for weighing coal. The owner, agent, or operator of every coal mine in this state, at which the miners are paid by weight, shall provide at such mines suitable and accurate scales of standard manufacture for the weighing of all coal which shall be hoisted or delivered from such mines; *provided,* that when coal is weighed in the miner's car, such car shall be brought to a standstill on the scales before the weight is taken.

Inspector to examine scales, § 3934.
Carrier must not charge for excess weight, § 1250-1252.
Weight to be noted in bill of lading, § 3935.
Buyer has right to examine before acceptance, § 5156.
Sale under false name prohibited, § 8354.

3931. (1530.) Weigher to be sworn. Record of coal mined. The owner, agent, or operator of such mine shall require the person authorized to weigh the coal delivered from said mine to be sworn before some person having authority to administer an oath, to keep the scales correctly balanced, to accurately weigh and to correctly record the gross or screened weight to the nearest ten pounds of each miner's car of coal delivered from such mine, and such oath shall be kept conspicuously posted at the place of weighing. The record of the coal mined by each miner shall be kept separate, and shall be opened to his inspection at all reasonable hours, and also for the inspection of all other persons pecuniarily interested in such mine.

3932. (1531.) Miners may furnish check-weighman. Duties and powers. In all coal mines in this state the miners empolyed and working therein may furnish a competent check-weighman at their own expense, who shall at all proper times have full right of access and examination of such scales, machinery, or apparatus, and of seeing all measures, and weights of coal mined and accounts kept of the same; *provided,* that not more than one person on behalf of the miners collectively shall have such right of access, examination, and inspection of scales, measures, and accounts at the same time, and that such persons shall make no unnecessary interference with the use of such scales, machinery, or apparatus. The agent of the miners as aforesaid shall, before entering upon his duties, make and subscribe to an oath before some officer duly authorized to administer oaths, that he is duly qualified and will faithfully discharge the duties of check-weighman. Such oath shall be kept conspicuously posted at the place of weighing.

3933. (1532.) Fraudulent weighing a misdemeanor. Any person, company, or firm having or using any scale or scales for the purpose of weighing the output of coal at mines so arranged or constructed that fraudulent weighing may be done thereby, or who shall knowingly resort to or employ any

means whatsoever by reason of which such coal is not correctly weighed or reported in accordance with the provisions of this chapter; or any weighman or check-weighman who shall fraudulently weigh or record the weights of such coal, or connive at or consent to such fraudulent weighing, shall be deemed guilty of a misdemeanor.

3934. (1534.) Coal mine inspector to examine scales. It shall be the duty of the coal mine inspector, in addition to his other duties, to examine all scales used at any coal mine in the state for the purpose of weighing coal taken out of such mine; and on inspection, if found incorrect, he shall notify the owner or agent of any such mine that such scales are incorrect; and after such notice it shall be unlawful for any owner or agent to use or suffer the same to be used, until such scales are so fixed that the same will give the true and correct weight. Any person violating the provisions of this section shall be deemed guilty of a misdemeanor.

3935. Car to be weighed before and after loading. Weighbill to show both weights. Penalty. It is hereby made the duty of all persons or corporations engaged in the mining or shipping of coal from any mine or point within the state of Utah to weigh each empty car before it is loaded and to note the weight thereof upon the bill of lading, and to weigh each car after the same is loaded and to note the weight thereof upon the bill of lading or weighbill of the same. Any person or corporation violating the provisions of this section shall be guilty of a misdemeanor. '13, p. 188.

CHAPTER 4.

TRESPASSES.

3937. (1535.) Interfering with notices, stakes, persons in possession, or records. Any person or persons who shall wilfully or maliciously tear down or deface a notice posted on a mining claim, or take up or destroy any stake or monument marking any such claim, or interfere with any person lawfully in possession of such claim, or who shall alter, erase, deface, or destroy any record kept by a mining recorder, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than $25, nor more than $100, or by imprisonment for not less than ten days, nor more than six months, or by both such fine and imprisonment. Justices of the peace shall have jurisdiction of such offenses.

Malicious injury to property, § 8390. Defacing U. S. Monuments, § 8396.

3938. (1536.) Wrongful taking of ores. Damages. Any person wrongfully entering upon any mine or mining claim, and carrying away ores therefrom, or wrongfully extracting and selling ores from any mine, shall be liable to the owner or owners of such ore for three times the value thereof; and should the plaintiff file his affidavit that the defendant did unlawfully take ores, the defendant may be arrested and held to bail, as in cases for the recovery of the possession of personal property unjustly detained.

CHAPTER 5.

FENCING SHAFTS, ETC.

3939. (1538.) Inclosing shaft. Any person that has sunk or shall sink a shaft or well on the public domain, or commons, for any purpose, shall inclose such shaft or well with a substantial curb or fence which shall be at least four and a half feet high.

3940. (1539.) Id. Pits. Slack coal burning. The owner, lessee, or agent of any mine, who, by working such mine, has caused, or may hereafter

cause, the surface on the public domain, commons, highway, or other lands to cave in and form a pit in which persons or animals are likely to fall, shall cause such cave or sink to be filled up, or to be securely fenced with a good, lawful fence; and if he has heaped or piled or shall hereafter heap or pile, slack coal on the surface, and such slack coal shall take fire and endanger the life or safety of any person or animal, he shall cause the fire to be extinguished or the burning coal to be inclosed with a sufficient fence.

3941. (1540.) Penalty. Any person failing to comply with the provisions of this chapter shall be deemed guilty of a misdemeanor, and shall be liable for all damages.

CHAPTER 6.

FIRE PROTECTION.

3942. (1540x.) Certain mines to have fire protection. All mines having but one exit, and the same covered with the building containing the mechanical plant, furnace room, or blacksmith shop, shall have fire protection. Where steam is used, hose of sufficient length to reach the farthest point of the plant shall be attached to feed pump or injector, and the same kept ready for immediate use. In mines where water is not available, chemical fire extinguishers or hand grenades shall be kept in convenient places for immediate use, and it shall be the duty of any owner or operator of a mine in the state of Utah to provide fire protection as mentioned in this section, by July 1, 1901. Any person or corporation who shall refuse or neglect to comply with the provisions of this section shall be guilty of a misdemeanor. '01, p. 150.

CHAPTER 7.

SAFETY CAGES.

3943. (1540x1.) Certain shafts to be provided with safety cages. It is unlawful for any person or corporation to sink any vertical shaft, where mining cages are used, to a greater depth than 200 feet, unless the shaft is provided with an iron bonneted safety cage to be used in lowering and hoisting employes, or any other person. The safety apparatus, whether consisting of eccentrics, springs, or other device, must be securely fastened to the cage, and of sufficient strength to hold the cage loaded at any depth to which the shaft may be sunk. The iron bonnet must be made of boiler sheet iron of good quality, at least three-sixteenths of an inch in thickness, and must cover the top of the cage in such manner as to afford the greatest protection to life and limb from any debris or anything falling down the shaft. Any violation of this section is punishable by a fine of not less than $200 nor more than $500, the same to be paid into the county treasury of the county in which the case is tried. '01, p. 151.

CHAPTER 8.

STORAGE OF POWDER IN MINES.

3944. (1540x2.) Storage of powder at metalliferous mines. It shall be unlawful for any mining company, corporation, or individual mine owner employing more than ten men at any one time, to have stored at any shaft house, or covering over any adit, incline, or tunnel, connected with a metalliferous mine or within the underground workings of any such mine, stopes,

or drifts, at any one time, more than enough powder or other high explosive to do the work for each twenty-four hours. Any violation of this section shall be punished by a fine of not less than $100, nor more than $1000. '03, p. 8.

CHAPTER 9.

HOSPITAL SUPPLIES AT MINES.

3945. (1540x3.) Supplies and medicines to be accessible. At all mines in the state of Utah where ten or more men are employed, it shall be the duty of the operator or owners thereof to keep readily accessible a properly constructed stretcher, a woolen blanket, a water-proof blanket and a supply of linseed oil, antiseptic gauze, carbolated vaseline, sponges, soap, liniment, carbolic acid, rubber bandages, suitable towels and wash basins, all for the comfort and treatment of anyone injured in such mine. '07, p. 34.

Stretchers to be kept at all mines, § 3917.

3946. (1540x4.) Penalty. Any wilful neglect, refusal, or failure to do the things required to be done by the preceding section, or any attempt to obstruct or interfere with the complying with the provisions of this chapter, shall be deemed a misdemeanor, punishable by a fine in any sum less than $300, or by imprisonment in the county jail not to exceed six months, or by both such fine and imprisonment. '07, p. 34.

TITLE 67.

MINORS.

3955. (1541.) Period of minority, males and females. The period of minority extends in males to the age of twenty-one years; and in females to that of eighteen years; but all minors obtain their majority by marriage.

Guardianship terminated by marriage, § 7811.

3956. (1542.) Minors' contracts. Disaffirmance. A minor is bound not only by contracts for necessaries but also by his other contracts, unless he disaffirms them before or within a reasonable time after he attains his majority and restores to the other party all money or property received by him by virtue of said contract and remaining within his control at any time after attaining his majority.

Minor may keep bank account, § 987.
Statute of limitations, §§ 6462, 6463, 6480.
May draw bank dividends and deposits, §§ 987, 1073.
As dependents under industrial commission act, §§ (sub. 2), 3132, 3118, 3141.
Employment of children, §§ 1860-1873.
Under 16 cannot operate motor vehicle, § 3972.
The rule that an infant is bound by his contracts unless he disaffirms them within a reasonable time after his majority applies only to such contracts as are beneficial to the infant.
Groesbeck v. Bell, 1 U. 338.

In determining what is a "reasonable time" within which an infant must disaffirm a contract, the jury can take into consideration the nature of the contract and the situation of the parties. No particular manner of disaffirmance is necessary.
Id.
Persons cannot disaffirm a parol partition of their father's land made during their minority, if, after attaining majority, they retain, control, and sell parts allotted to them.
Whittemore v. Cope, 11 U. 344; 40 P. 256.

3957. (1543.) Id. No contract can be thus disaffirmed in cases where on account of the minor's own misrepresentations as to his majority, or from his having engaged in business as adult, the other party had good reason to believe the minor capable of contracting.

3958. (1544.) Payment for personal services. When a contract for the personal services of a minor has been made with him alone, and those services are afterward performed, payment made therefor to such minor in accordance with the terms of the contract is a full satisfaction for those services, and the parent or guardian cannot recover therefor a second time.

TITLE 68.

MOTHERS.

PUBLIC SUPPORT OF DEPENDENT MOTHERS.

('13, p. 153.)

3960. County commissioners to provide funds. Limit. Proviso. It shall be the duty of the county commissioners of each county in this state, and they are hereby authorized and empowered to provide funds in an amount to meet the purposes of this title, but not exceeding in any one year the sum of $10,000; *provided,* that in counties containing a population of 100,000 or more the amount of such funds shall be $20,000, such funds to be expended for the partial support of mothers who are dependent upon their own efforts for the maintenance of their children. Am'd '15, p. 20.

This act is constitutional.
D. & R. G. R. R. Co. v. Grand County, 50 U. —; 170 P. —.

3961. Maximum allowance. The allowance to each of such mothers shall not exceed $10 a month when she has but one child under the age of fifteen years and if she has more than one child under the age of fifteen years, it shall not exceed the sum of $10 a month for the first child and $5 a month for each of the other children under the age of fifteen years.

3962. Who to fix allowance. Conditions. Such allowance shall be made by the county commissioners, except that in counties having a population of 125,000 or more, the authority, power, and duty of determining upon allowance to be made under the provisions of this title shall devolve upon and be exercised by the juvenile judge of the district in and for such counties. Such allowance shall be made only upon the following conditions:

1. The child or children for whose benefit the allowance is made must be living with the mother of such child or children;
2. The allowance shall be made only when in the absence of such allowance a mother would be required to work regularly away from her home and children, and when by means of such allowance she will be able to remain at home with her children;
3. The mother must, in the judgment of the county commissioners or juvenile court, be a proper person morally, physically, and mentally, for the bringing up of her children;
4. Such allowance shall, in the judgment of the county commissioners or juvenile court, be necessary to save the child or children from neglect;
5. No person shall receive the benefit of this title who shall not have been a resident of the county in which such application is made for at least two years next before the making of such application.

3963. When allowance to cease. Whenever any child shall reach the age of fifteen years, any allowance made the mother of such child for the benefit of such child shall cease. The county commissioners or juvenile court may, in their discretion, at any time before such child reaches the age of fifteen years, discontinue or modify the allowance to any mother and for any child.

3964. Distribution of funds when insufficient. Should the fund herein authorized be sufficient to permit an allowance to only a part of the persons coming within the provisions of this law, the county commissioners or juvenile court shall select those cases in most urgent need of such allowance.

3965. Construction. The provisions of this law shall not apply to any mother who is not dependent upon her own efforts for the maintenance of her children.

3966. Misrepresentation. Penalty. Any person procuring or attempting to procure an allowance for a person not entitled thereto shall be deemed

guilty of a misdemeanor, and upon conviction thereof shall be punished as now provided by law for punishment in case of misdemeanors.

3967. Record. Allowance may be set aside. In each case where an allowance is made to any mother under the provisions of this title, an entry to that effect shall be entered upon the records of the county commissioners or the juvenile court making such allowance, and it shall be the right of any taxpaying citizen at any time to file a motion to set aside such allowance; and on such motion the county commissioners or juvenile court shall hear evidence, and may make a new order granting or refusing such allowance.

3968. Appeal. In each case where an allowance is made or refused to any mother, under the provisions of this title, by the county commissioners or juvenile court, an appeal may be taken from such decision by any taxpaying citizen, or by the applicant for an allowance; such appeal shall be subject to the same provisions of law as in case of appeal from justices courts.

TITLE 69.

MOTOR VEHICLES AND CHAUFFEURS.

('15, p. 103.)

3970. Annual registration. Every owner of a motor vehicle or motorcycle shall, on or before the 1st day of March in each year, or before he shall operate such motor vehicle or motorcycle, register such vehicle in the office of the secretary of state, and obtain a license to operate the same for the ensuing year; and every chauffeur shall likewise register and obtain a license to operate as hereinafter provided. Am'd '17, p. 253.

3971. Definition of terms. The term "motor vehicle" shall apply to all vehicles propelled by power other than muscular power, except road rollers, traction engines, and railroad and railway cars and motor cars running only upon stationary rails or tracks. The term "motorcycle" shall apply to motor vehicles having but two main wheels in contact with the ground upon which the operator sits astride, but a motorcycle may carry a one-wheel attachment and seat for the conveyance of a passenger. The term "chauffeur" shall apply to any person operating a motor vehicle, other than his own, as mechanic, employe, or for hire.

3972. Application for registration. Application for the registration of a motor vehicle or motorcycle shall be made to the secretary of state upon blanks prepared by him for such purposes, and shall be signed by the owner and verified by oath or affirmation. Such application shall contain a statement of the name, place of residence, and address of the applicant, together with a brief description of the vehicle to be registered, its name, and the name of the manufacturer, its factory number, the character of its motive power, the amount of such motive power in figures of horsepower (the same to be determined by the following formula: Diameter of bore multiplied by length of stroke multiplied by number of cylinders divided by two and one-half), and such other additional information as the secretary of state may require. The required fee shall accompany the application.

Am'd '17, p. 253.

3973. Annual fees. Exemptions. The annual fee for the registration of motor vehicles and motorcycles shall be as follows: Three dollars for each motorcycle; $10 for each electric motor vehicle used only for pleasure purposes; $5 for each steam propelled motor vehicle not exceeding fifteen horsepower; $10 for each steam propelled motor vehicle exceeding fifteen horsepower; $10 for each commercial motor vehicle used for carrying passengers for hire; $10 for each non-passenger carrying commercial motor vehicle or truck; $5 for each other motor vehicle not exceeding twenty-five horsepower;

$10 for each other motor vehicle exceeding twenty-five, but not exceeding forty horsepower, and $15 for every other motor vehicle exceeding forty horsepower; *provided,* that every person, firm, association, or corporation engaged in the manufacture or sale of motor vehicles in this state may, instead of registering each such vehicle owned or controlled by him for purposes of exhibition and sale only, make application for a general distinguishing dealers' number upon a blank to be prepared by the secretary of state for such purpose. The fee for such registration and dealers' license number shall be $25 per annum, which fee shall accompany the application; *provided, further,* that no fee shall be charged for the registration of motor ambulances, motor police patrol vehicles, motor fire engines and trucks, or any other motor vehicles owned and used by municipal corporations, by counties, or by the state of Utah; but all such vehicles shall be registered and given a distinctive number, which number shall be displayed in like manner to that provided for all other motor vehicles; and *provided, further,* that whenever a motor vehicle or motorcycle is registered on or after the 1st day of September of any year, the fee for such registration shall be one-half of the amount of the annual registration fee. Am'd '17, p. 253.

3974. Issuance of license. Number plates. Loss of plate. Transfer of ownership. Dealers to report sales and transfers. Upon receipt of the application and the payment of the required fee, the secretary of state shall file the application, register the vehicle, assign to it a distinctive number, and make the same a matter of record in his office; *provided,* that the secretary of state shall preserve in his office for the period of two years all applications for the registration of motor vehicles, motorcycles, and chauffeurs filed therein under the provisions of this title. At the expiration of two years all such applications accumulating in said office during said period that may be considered of no value by the secretary of state may be destroyed. He shall also furnish without further cost a number plate in duplicate, showing thereon the number designated to such vehicle. The figures on the number plate shall be Arabic in character followed by the letter "U," which figures and letters shall be at least four inches high, and the stroke thereof at least one-half inch wide; *provided,* that the number plates used for motorcycles may be of such other size and design as may be practicable. The number plates shall be of uniform series, numbered consecutively beginning with the figure "1," and shall be of a different and distinctive color for each year. They shall be issued in numerical order, and in the order of the applications. In the event of the loss or destruction of one or both number plates, the owner thereof shall, without delay, make an affidavit to the secretary of state, on a blank to be provided for such purpose, setting forth the facts of such loss or destruction and applying for a new number. Upon the filing of such affidavit and application, and the payment of a fee of $1, the secretary of state shall thereupon cancel the applicant's old number and issue him a new number. In case of sale or disposal of motor vehicle or motorcycle, number plates assigned to such motor vehicle or motorcycle must remain thereon, and the owner thereof must immediately notify the secretary of state of such sale or disposal, and the purchaser must make application on a blank to be provided for such purpose for the transfer of such registration to him, and upon the payment of a fee of $1, such transfer will be made a matter of record in the office of the secretary of state. Manufacturers and dealers, having obtained a dealer's license and number, may obtain additional sets in duplicate of the original number plates upon the payment of a fee of $2 for each and every set obtained. It shall be the duty of all such manufacturers and dealers to make a weekly report to the secretary of state, on blanks to be provided for such purpose, of all sales and transfers of ownership of motor vehicles and motorcycles negotiated by them, and to which they were a party. Am'd '17, p. 253.

3975. Number plates to be conspicuously displayed. Every motor vehicle or motorcycle, while in use or operation upon the public streets and

highways, shall at all times display the number plates assigned to it, one on the front and the other on the rear of the vehicle, both to be securely fastened in conspicuous positions so as not to swing, and to be at all times plainly visible. No number plates, other than those furnished by the secretary of state, shall be used.

3976. Brakes. Signals. Lights. Every motor vehicle and motorcycle, while in use or operation upon the public streets or highways shall at all times be provided and equipped with efficient and serviceable brakes, and with a signaling apparatus consisting of a horn, bell, or some other suitable device. It shall likewise be equipped with at least two front lamps throwing strong white lights sufficient to reveal all persons, vehicles, or substantial objects for a distance of at least 150 feet in the direction such vehicle is proceeding, and sufficient side illumination to indicate any person, vehicle, or substantial object ten feet to the side of such vehicle at a point ten feet ahead of such lamps. Said vehicle shall also be equipped with a lamp on the rear on the left side, showing a red light plainly visible in the reverse direction to which the vehicle is proceeding, and such other light so reflected as to clearly reveal the figures on the rear number plate; *provided,* that a motorcycle shall be required to be equipped with one front light only, in place of the two front lights herein required for other motor vehicles. All such lamps or lights shall at all times be kept burning while such vehicle is in use or operation in a public street or highway, during the period of the day from one hour after sunset until one hour before sunrise. It shall be unlawful to use on a vehicle of any kind operated on the public highways of this state any lighting device of over four candlepower equipped with a reflector, unless the same shall be so designed, deflected or arranged that no portion of the beam of reflected light, when measured seventy-five feet or more ahead of the lamps, shall rise above forty-two inches from the level surface on which the vehicle stands under all conditions of load. Spotlights shall not be used except when projecting their rays directly on the ground and at a distance not exceeding thirty feet in front of the vehicle.

'09, p. 237; am'd '17, p. 253.

Applies only to vehicles in use and not to a dead motor car being hauled by another car. Musgrave v. Studebaker Bros., — U. —; 160 P. 116.

3977. Speed to be reasonable and safe. Operator to use caution. No person shall operate a motor vehicle or motorcycle upon any public street or highway at a speed greater than is reasonable and safe, having due regard for the width, grade, character, traffic, and common use of such street or highway; or so as to endanger life, limb, or property in any respect whatever. Upon approaching any bridge, dam, sharp curve, dugway, or deep descent, or in traversing such bridge, dam, curve, dugway, or descent, the operator of a motor vehicle or motorcycle shall at all times have the vehicle under immediate control. Upon approaching or passing any person walking in the roadway or traveled portion of any public street or highway, or any horse or other draft animal being led, ridden, or driven thereon, or upon any bridge, or crossing at an intersection of public streets or highways, the operator of a motor vehicle or motorcycle shall at all times have the same under immediate control. And if such animal shall appear to be frightened, or if the person in charge thereof shall signal by raising his hand or calling, the operator shall immediately stop his vehicle. If traveling in the opposite direction, the operator shall hold his vehicle stationary until such animal shall have had reasonable time to pass by; and if traveling in the same direction, he shall use reasonable caution in order to avoid frightening the animal or causing accident; and in approaching or passing such animal the operator shall not use the exhaust cut-out of his vehicle, or cause any other unnecessary noise. No person operating a motor vehicle or motorcycle upon a public street or highway in this state shall drive the same past any street car, interurban or other passenger train while the same is standing still for the purpose of taking on or letting off passengers to or from such car or train.

3978. Rules of the road. Whenever any operator of a motor vehicle or motorcycle shall meet on a public street or highway any person or persons riding or driving one or more horses, or any other draft animal, or any other vehicle, approaching in the opposite direction, the operator shall turn his vehicle to the right so as to give one-half of the traveled roadway, if practicable, and a fair opportunity to the other to pass by without unnecessary interference; and if traveling in the same direction, he shall pass to the left side of the person or vehicle overtaken, and the person or vehicle overtaken shall give him a fair opportunity to pass; *provided,* that when upon a canyon road or dugway, or upon any roadway bordering upon any precipice, stream, or river, the operator of such motor vehicle or motorcycle shall take the lower side of such canyon road or dugway, or the side nearest to such precipice, stream, or river. The operator of a motor vehicle or motorcycle in motion on any public street or highway shall give due and timely warning, by using his signaling apparatus, to every person riding or driving any horse or horses, or horse drawn or other vehicle, which he may meet or approach; and he shall likewise give due warning and reduce speed upon approaching any sharp curve, dugway, descent, or other dangerous place upon such street or highway.

Rules of the road, § 2844.

A motorist's failure to stop when a team of horses appeared to be frightened was negligence per se.
Beggs v. Clayton, 40 U. 389; 121 P. 7.

3979. Accidents. In case of accident to any person or damage to property upon the public street or highway, due to the operation of a motor vehicle or motorcycle thereon, the operator of such vehicle shall immediately stop and, upon request of the person injured or sustaining damages thereby, or of any other person present, give such person his name and address, and if he is not the owner of such vehicle, then the name and address of the owner thereof.

3980. Chauffeur's license. Application. Fee. Application for a chauffeur's license shall be made to the secretary of state upon blanks prepared by him for such purpose, and shall be signed and verified by oath or affirmation. Such application shall contain a statement of the name and address of the chauffeur, and such other information as the secretary of state may require; and shall be signed and endorsed by at least three responsible owners of motor vehicles and employers of chauffeurs; *provided,* that no such license shall be issued to any person under eighteen years of age. A fee of $2 shall accompany the application; *provided,* that if the application shall be made on or after the 1st day of July of any year, the fee shall be $1.

3981. Secretary of state to issue license. Style and use of badge. Upon receipt of such application and the payment of the required fee, the secretary of state shall file the application, register the same, assign to the applicant a distinctive number, and make the same a matter of record in his office. He shall likewise furnish such chauffeur a badge, which badge shall be evidence of his right to act as a chauffeur until the 31st day of December following. Such badge shall be aluminum or some other suitable metal, oval in form, the greater diameter not to exceed two inches, and there shall be stamped thereon the words "Registered chauffeur No. (here insert the registration number designated), state of Utah." The badges shall be of uniform series, numbered consecutively beginning with the figure "1," shall be of a different and distinctive color for each year, and shall be issued in consecutive order. The chauffeur shall at all times, while operating a motor vehicle upon the public streets and highways, wear his badge pinned to his clothing in a conspicuous place. No registered chauffeur shall voluntarily or otherwise permit any other person to wear his badge; nor shall any person wear a chauffeur's badge belonging to any other person, or a fictitious badge, while operating a motor vehicle upon the public streets and highways.

3982. Who may operate motor vehicles. No person shall operate a motor vehicle or motorcycle upon any public street or highway, whether as owner or operator of such vehicle, if under sixteen years of age, or while

under the influence of intoxicating liquor; and no person shall take, use, or operate any motor vehicle or motorcycle upon the public streets and highways without the permission of the owner thereof.

3983. Motor vehicles owned by non-residents. Motor vehicles owned by non-residents of the state may be used and operated on the public streets and highways for a period of thirty days without having to register and obtain a license so to do; *provided,* that the owner or owners thereof shall have fully complied with the laws requiring the registration of motor vehicles in the state or territory of their residence, and that the registration number and the initial letter of such state or territory shall be displayed and plainly visible on such vehicle or vehicles. In all other respects, however, motor vehicles owned by non-residents of the state, and in use temporarily within the state, shall be subject to the provisions of this title.

3984. Powers and duties of local authorities. Any city or town within the state may make and enforce reasonable ordinances, rules and regulations concerning the speed of motor vehicles and motorcycles within such city or town; *provided,* that no such ordinance, rule, or regulation shall limit the speed of such vehicle to less than the rate of eight miles per hour in crossing streets or highway intersections, or less than the rate of twelve miles per hour in other parts of such city or town; but as a condition to the regulation of speed such city or town must, by signs conspicuously placed at reasonable places, indicate the rate of speed permitted; *provided, further,* that no city or town shall require of any person any registration fee for any motor vehicle or motorcycle; *provided, further,* that all state and county road commissioners, supervisors, and agents shall be special officers with full authority to make arrests for violation of this title. Such officers shall be required to serve in such capacity without additional compensation, but shall not be required to furnish a bond. Am'd '17, p. 253.

3985. Rights of motor vehicles upon the highway. Subject to the provisions of this title, operators of motor vehicles and motorcycles shall have the same rights upon the public streets and highways as the drivers of other vehicles, and shall not be excluded or prohibited from using the streets and highways, except such driveways, speedways, or boulevards as are now or may be expressly set apart by the local authorities of any county, city, or town for the exclusive use of horses and light carriages; *provided,* that when driveways, speedways, and boulevards are set apart for such express purpose, the local authorities shall cause to be posted in conspicuous places at the extremities and intersections thereof legible signs indicating the restrictions imposed.

3986. Directory of vehicles and chauffeurs. The secretary of state shall issue a motor vehicle directory semi-annually, and a supplement thereof or bullletin at least once a month, giving the name and address of the owner or owners of each motor vehicle or motorcycle registered, the name, character, and factory number of the vehicle, and the number issued to it. Such a directory or supplement shall also contain the names and addresses of all licensed chauffeurs, and the respective numbers assigned. The secretary of state shall furnish directories and supplements free of charge to all state officers, local authorities, and peace officers in the state, and shall furnish the same at a nominal fee to all other applicants. Am'd '17, p. 253.

3987. Motor vehicle registration fund established. All fees received and collected under the provisions of this title shall be turned into the state treasury to the credit of a fund to be known as the motor vehicle registration fund; *provided,* that the necessary expense in carrying out the provisions of this title, including clerical services, cost of stationery and stamps, number plates and chauffeurs' badges, blanks and books for receiving and recording registrations, and the printing of directories and supplements thereto shall

be a claim against the motor vehicle registration fund, and when paid shall be charged to said fund. Am'd '17, p. 35.

Fund to be applied to interest on state road bonds, § 2866.

3988. Penalty. Revocation of license. Any person violating any of the provisions of this title shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than $5 nor more than $100, or by imprisonment in the county jail for not less than ten days nor more than three months, or by both such fine and imprisonment. If any such person be convicted the second time for violation of any of the provisions of this title, the secretary of state shall revoke the license of such person.

3989. Complaints and actions. In all complaints or actions for the violation of any of the provisions of this title, the court before whom the case shall be tried shall have jurisdiction and power to render judgment therein, and issue process and mittimus thereon; but the defendant shall have the right to appeal as in all other cases.

3990. Civil actions. Nothing in this title shall be construed to curtail or abridge the right of any person to prosecute a civil action for damage sustained by reason of injury to person or property resulting from the negligent use of the public streets or highways by a motor vehicle or motorcycle, or by its owner, his employe, or by any other operator thereof.

TITLE 70.

NAMES.

CHAPTER 1.

NAMES, CHANGE OF.

4000. (1545.) Change of name of person, city, town, etc. Petition. Any person, city, town, precinct, or school district, desiring to change his or its name, may file a petition therefor in the district court of the county where located, setting forth:

1. The cause for which the change of name is sought;
2. The name proposed;
3. If the petitioner is a person, that he has been a bona fide citizen of the county for the year immediately prior to the filing of the petition; or, if the petitioner is a city, town, precinct, or school district, that two-thirds of the legal voters thereof desire such change of name, and that there is no other city, town, precinct, or school district in this state of the name sought.

4001. (1546.) Hearing. Proof of publication. Order. At any subsequent term, the district court may order the change of name as requested, upon proof in open court of the allegations of the petition, and that there exists proper cause for granting the same, and that thirty days' previous notice of the hearing thereof has been given in a newspaper published or having a general circulation in the county.

4002. (1547.) Effect of change. Such proceedings shall in no manner affect a legal action or proceeding then pending, nor any right, title, or interest whatsoever.

CHAPTER 2.

CONDUCTING BUSINESS UNDER AN ASSUMED NAME.

('13, p. 27.)

4005. Use of assumed name unlawful. Proviso. No person or persons shall hereafter carry on or conduct or transact business in this state under an assumed name, or under any designation, name, or style, corporate, partnership, or otherwise, other than the real name or names of the individual or individuals conducting or transacting such business, unless such person or persons shall file in the office of the clerk of the county in which the principal place of business is, or is to be located, an affidavit setting forth the name under which said business is, or is to be conducted or transacted, and the true or real full name or names of the person or persons owning, conducting, or transacting the same, the location of the principal place of business, with the postoffice address or addresses of said person or persons. Said affidavit shall be executed and sworn to by the person or persons so conducting or intending to conduct said business.

4006. Must file affidavit. Persons now conducting such business under an assumed name, or under any such designation referred to in § 4005, shall file such affidavit as hereinbefore prescribed within thirty days after this chapter shall take effect, and persons hereafter intending to conduct or transact business as aforesaid, and partnerships doing business under a partnership name, when a change has taken place in the members thereof, shall, before commencing this business, file such affidavit in the manner hereinbefore prescribed.

4007. County clerk shall keep index. Fee. The several county clerks of this state shall keep an alphabetical index of all persons filing affidavits provided for herein, and for the indexing and filing of such affidavits they shall receive a fee of $1. A copy of such affidavit duly certified to by the county clerk in whose office the same shall be filed shall be presumptive evidence in all courts of law in this state of the facts therein contained.

4008. Construction. This chapter shall in no way affect or apply to any corporation duly organized under the laws of this state, or any corporation organized under the laws of any other state and lawfully doing business in this state, nor shall this chapter be deemed or construed to prevent the lawful use of a partnership name or designation.

4009. Penalty. Any person or persons carrying on, or conducting or transacting business, as aforesaid, who shall fail to comply with the provisions of this chapter, shall be guilty of a misdemeanor.

CHAPTER 3.

REGISTRATION OF FARM NAMES.

('17, p. 40.)

4010. Farm names recorded. Any owner of a farm in the state of Utah may have the name of his farm, together with a brief description of his lands to which said name applies, recorded in a register kept for the purpose in the office of the state auditor, and the state auditor shall furnish to such land owner a proper certificate setting forth such name and a brief description of said lands. When any name shall have been recorded as the name of any farm in the state, such name shall not be recorded as the name of any other farm in the state of Utah.

4011. Fees. Any person having the name of his farm recorded as provided in this chapter shall first pay to the state auditor a fee of $2, which

fee shall be paid to the state treasurer as other fees are paid to the state treasurer by the state auditor.

4012. Transfer of name. When any owner of a farm, the name of which has been recorded as provided in this chapter, transfers by deed or otherwise the whole of such farm, such transfer may include the registered name thereof; but if the owner shall transfer only a portion of such farm, then in that event, the registered name thereof shall not be transferred to the purchaser unless so stated in the deed of conveyance.

4013. Cancellation by owner. When any owner of a registered farm desires to cancel the registered name thereof, he shall write on the back of the certificate provided for in § 4010 the following: "This name is canceled, and I hereby release all rights thereunder," and shall sign such statement in the presence of a witness and shall file the certificate in the office of the state auditor. For such filing fee the state auditor shall charge 25 cents, which shall be paid to the state treasurer as other fees. The state auditor shall, when such certificate has been filed in his office write on the margin of the record of the register of such name the word "canceled."

4014. Penalty for misuse. It shall be a misdemeanor for any person other than the person in whose name said farm is registered to use such registered name for any other farm.

TITLE 71.

NATURAL GAS.

4020. (1548.) Confining gas in unused well. Any person or corporation in possession as owner, lessee, agent, or manager of any well in which natural gas has been found, shall, unless said gas is being utilized, within three months from the completion of said well, or at any time upon ceasing to use such well, confine the gas in said well until such time as it shall be utilized; *provided,* that this section shall not apply to any well operated as an oil well.

4021. (1549.) Plugging abandoned well. Upon abandoning or ceasing to operate any well sunk in exploring for gas, the person or corporation that sunk the same shall fill up the well with sand or rock sediment to a depth of at least twenty feet above the gas-bearing rock, and drive a round, seasoned wooden plug, at least three feet in length, equal in diameter to the diameter of the well below the casing, to a point at least five feet below the bottom of the casing; and immediately after drawing the casing, shall drive a round, seasoned wooden plug to a point just below where the lower end of the casing rested, which plug shall be at least three feet in length, tapering in form, and of the same diameter at the distance of eighteen inches from the smaller end as the diameter of the hole below the point at which it is to be driven. After the plug has been properly driven there shall be filled on the top of the same, sand or rock sediment to a depth of at least five feet; *provided,* that in case such geological formation shall be encountered in the bore as to make some other method more effective for preventing flooding by water from superposed strata, the state mine inspector may direct what other plan shall be pursued without unreasonable cost to the owner or lessee of the well.

4022. (1550.) Penalties for neglect. Any person or corporation who shall violate any of the provisions of §§ 4020, 4021, shall be liable to a penalty of $200 for each and every violation thereof and to the further penalty of $200 for each thirty days during which such violation shall continue; and all such penalties shall be recovered, with costs of suit, in a civil action or actions, in the name of the state for the use of the county in which the well shall have been opened.

4023. (1551.) Rights of adjacent owner. Whenever any person or corporation shall abandon any gas well, and shall fail to comply with § 4021, any

person or corporation lawfully in possession of lands adjacent to or in the neighborhood of said well may enter upon the land upon which said well is situated and take possession of said well, and plug the same in the manner provided by § 4021, and may maintain a civil action in any court of the state, against all or any of the owners or persons abandoning said well, to recover the costs thereof. This shall be in addition to the penalties provided by § 4022.

4024. (1552.) Right of way for pipe lines. Any person, corporation, or association desirous of obtaining the right of way for a pipe line or lines, or for the location of any gas tank or reservoir, shall be entitled to exercise the right of eminent domain.

Eminent domain generally, §§ 7330-7350.

4025. Duties of owner when drilling well. When any well shall be drilled in this state on lands producing or containing petroleum or natural gas, it shall be the duty of the owner or operator thereof, before drilling said well into the oil or gas bearing sand or strata, to incase such well in such manner as to effectually exclude and prevent all water from reaching said oil or gas-bearing sand or strata. '09, p. 268.

4026. Id. Upon abandonment of well. And it shall be the duty of said owner or operator, before abandoning or ceasing to operate any such well, to securely and effectually plug said well and to fill it up with sand or rock sediment to a depth of at least fifty feet above the top of the oil or gas-bearing sand or strata in such manner as to exclude all water from reaching said oil or gas-bearing sand or strata and also as to prevent any oil or gas escaping therefrom. '09, p. 268.

4027. Penalty. Any person, firm, or corporation violating the provisions of §§ 4025-4026 shall be deemed guilty of a misdemeanor, and shall be sentenced upon conviction thereof to the payment of a fine of not exceeding $1000. '09, p. 268.

TITLE 72.

NEGOTIABLE INSTRUMENTS.

CHAPTER 1.

FORM AND INTERPRETATION.

4030. (1553.) Negotiable instruments, requirements of. An instrument to be negotiable must conform to the following requirements:

1. It must be in writing and signed by the maker or drawer;
2. Must contain an unconditional promise or order to pay a sum certain in money;
3. Must be payable on demand, or at a fixed or determinable future time;
4. Must be payable to the order of specified person or to bearer; and,
5. Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty.

R. S. '98, §§ 1553-1555; '99, p. 122.

This negotiable instruments law, adopted in Utah in 1899, pp. 122-148, in the interest of uniformity of legislation, is in effect in a number of the states.

This title shall be known as the negotiable instruments law, § 4260.

Consideration, §§ 4053-4058, and notes.

Indorsement, suretyship, etc., note to § 4097.

Negotiation, §§ 4059-4079.

Rights of the holder, §§ 4085-4093.

Liabilities of parties, §§ 4094-4103.

Presentment for payment, §§ 4105-4123.

Notice of dishonor, §§ 4125-4154.

Discharge of negotiable instruments, §§ 4155-4161.

Bills of exchange, form, §§ 4165-4170.

Bills of exchange, acceptance, §§ 4171-4181.

Bills of exchange, presentment, §§ 4182-4190.

Bills of exchange, protest, §§ 4191-4199.

Bills of exchange, acceptance for honor, §§ 4200-4209.

Bills of exchange, payment for honor, §§ 4210-4216.

Bills of exchange, in a set, §§ 4217-4222.

Negotiable promissory note defined, § 4223.

Check, presentment, assignment of funds, §§ 4224-4228.
Terms defined, §§ 4230-4232.
Time, computation, etc., §§ 4232, 4233.
Notes, bills, checks, etc., may be made or drawn by telegraph, § 6119.

4031. (1554.) Sum payable is a sum certain. The sum payable is a sum certain within the meaning of this title although it is to be paid:

1. With interest; or
2. By stated instalments; or
3. By stated instalments, with a provision that upon default in payment of any instalment, the whole shall become due; or
4. With exchange, whether at a fixed rate or at the current rate; or
5. With costs of collection or an attorney's fee, in case payment shall not be made at maturity. '99, p. 122.

Provision in a note that "if the interest be not paid as stipulated, the legal holder may declare the principal due and proceed by law to recover both principal and interest," does not destroy negotiability.
Smith v. Williamson, 8 U. 219; 30 P. 753.
The fact that the makers of a promissory note undertake to pay an attorney's fee of ten per cent on the amount collected does not render the note non-negotiable.
Salisbury v. Stewart, 15 U. 308; 49 P. 777.
The stipulation to pay attorney's fees in case of suit binds the maker to pay them as a part of the costs of the remedy, but he cannot be required to pay more than the fees actually charged.
Salisbury v. Stewart, 15 U. 308; 49 P. 777.
A provision in a note for an attorney fee, but leaving blank the amount thereof, amounts to a promise to pay a reasonable sum as an attorney's fee; and a provision for a reasonable attorney's fee does not render the note non-negotiable. Lippincott v. Rich, 22 U. 196; 61 P. 526, having been decided before the enactment of the statute, was susperseded by the statute.
McCornick v. Swem, 36 U. 6; 102 P. 626.
Provision in a note for payment of a reasonable amount as an attorney's fee does not destroy its negotiable character by making the amount to be paid uncertain.
Utah Banking Company v. Newman, 44 U. 194; 138 P. 1146.

4032. (1555.) Unconditional. An unqualified order or promise to pay is unconditional within the meaning of this title, though coupled with:

1. An indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount; or
2. A statement of the transaction which gives rise to the instrument.

But an order or promise to pay out of a particular fund is not unconditional. '99, p. 122.

4033. (1556.) Time payable. An instrument is payable at a determinable future time, within the meaning of this title, which is expressed to be payable:

1. At a fixed period after date or sight; or
2. On or before a fixed or determinable future time specified therein; or
3. On or at a fixed period after the occurrence of a specified event, which is certain to happen, though the time of happening be uncertain. An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect. '99, p. 122.

Time of payment, § 4120.

4034. (1557.) When negotiable and when not. An instrument which contains an order or promise to do any act in addition to the payment of money is not negotiable. But the negotiable character of an instrument otherwise negotiable is not affected by a provision which:

1. Authorizes the sale of collateral securities in case the instrument be not paid at maturity; or
2. Authorizes a confession of judgment if the instrument be not paid at maturity; or
3. Waives the benefit of any law intended for the advantage or protection of obligor; or
4. Gives the holder an election to require something to be done in lieu of payment of money.

But nothing in this section shall validate any provision or stipulation otherwise illegal. R. S. '98, §§ 1556, 1558, 1559; '99, p. 123.

Attorneys fees and negotiability, § 4031.
The stipulation in a note which includes the covenants of a mortgage by which the makers agree to pay taxes on the property, assessment, insurance, and damages for waste, renders the note non-negotiable.
Donaldson v. Grant, 15 U. 231; 49 P. 779.
A warrant of attorney authorizing any attorney to confess judgment against the makers of a promissory note is not recognized by the statutes of Utah, and a judgment entered thereon will be treated as a judgment by confession, and must be treated in strict conformity with the statute.
Utah Nat. Bank v. Sears, 13 U. 172; 44 P. 832.

4035. (1558.) Negotiability, when not affected. The validity and negotiable character of an instrument are not affected by the fact that:

1. It is not dated; or
2. Does not specify the value given, or that any value has been given therefor; or
3. Does not specify the place where it is drawn or the place where it is payable; or
4. Bears a seal; or
5. Designates a particular kind of current money in which payment is to be made.

But nothing in this section shall alter or repeal any statute requiring in certain cases the nature of the consideration to be stated in the instrument.

R. S. '98, § 1557; '99, p. 123.

Time and place of payment in a promissory note are material stipulations in the contract. Bach v. Brown, 17 U. 435; 53 P. 991.

4036. (1559.) Payable on demand. An instrument is payable on demand:

1. Where it is expressed to be payable on demand, or at sight or on presentation; or
2. In which no time for payment is expressed.

Where an instrument is issued, accepted, or endorsed when overdue, it is, as regards the person so issuing, accepting, or indorsing it, payable on demand. R. S. '98, § 1562; '99, p. 123.

4037. (1560.) Payable to order. The instrument is payable to order where it is drawn payable to the order of a specified person or to him or his order. It may be drawn payable to the order of:

1. A payee who is not maker, drawer, or drawee; or
2. The drawer or maker; or
3. The drawee; or
4. Two or more payees pointly; or
5. One or some of several payees; or
6. The holder of an office for the time being.

Where the instrument is payable to order, the payee must be named or otherwise indicated therein with reasonable certainty.

R. S. '98, § 1564; '99, p. 123.

4038. (1561.) Payable to bearer. The instrument is payable to bearer:

1. When it is expressed to be so payable; or
2. When it is payable to a person named therein or bearer; or
3. When it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable; or
4. When the name of the payee does not purport to be the name of any person; or
5. When the only or last indorsement is an indorsement in blank.

R. S. '98, §§ 1564-1566; '99, p. 124.

4039. (1562.) Negotiable instrument, form of. The negotiable instrument need not follow the language of this title, but any terms are sufficient which clearly indicate an intention to conform to the requirements hereof.

'99, p. 124.

4040. (1563.) Date of. Where the instrument or an acceptance or any indorsement therein is dated, such date is deemed prima facie to be the true date of the making, drawing, acceptance, or indorsement, as the case may be. '99, p. 124.

4041. (1564.) Id. The instrument is not invalid for the reason only that it is ante-dated or post-dated; *provided,* that this is not done for an illegal or fraudulent purpose. The person to whom an instrument so dated is delivered acquires the title thereto as of the date of delivery.

R. S. '98, § 1560; '99, p. 124.

4042. (1565.) Id. Where an instrument expressed to be payable at a fixed period after date is issued undated, or where the acceptance of an instrument payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the instrument shall be payable accordingly. The insertion of a wrong date does not avoid the instrument in the hands of a subsequent holder in due course; but as to him, the date so inserted is to be regarded as the true date. '99, p. 124.

4043. (1566.) Filling in blanks. Where an instrument is wanting in any material particular, the person in possession thereof has a prima facie authority to complete it by filling up the blanks therein. And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as a prima facie authority to fill it up as such for any amount. In order, however, that any such instrument when completed may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time. But if any such instrument, after completion, is negotiated to a holder in due course it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time. R. S. '98, § 1584; '99, p. 124.

Material alteration, § 4160.

4044. (1567.) Incomplete instrument not delivered invalid. Where an incomplete instrument has not been delivered it will not, if completed and negotiated without authority, be a valid contract in the hands of any holder, as against any person whose signature was placed thereon before delivery. '99, p. 124.

4045. (1568.) Instrument not complete until delivered. Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting, or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument. But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him, is conclusively presumed. And where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved. '99, p. 125.

Conditional guaranty by several. Not bound unless all sign.
State Bank v. Burton G. Co., 14 U. 420; 48 P. 402.

It may be shown by parol that the note was delivered conditionally, and the condition has not been satisfied.
Martineau v. Hansen, 47 U. 549; 155 P. 432.

4046. (1569.) Instrument ambiguous, how construed. Where the language of the instrument is ambiguous, or there are omissions therein, the following rules of construction apply:

1. Where the sum payable is expressed in words and also in figures and there is a discrepancy between the two, the sum denoted by the words is the sum payable; but if the words are ambiguous or uncertain, reference may be had to the figures to fix the amount;

2. Where the instrument provides for the payment of interest, without specifying the date from which interest is to run, the interest runs from the date of the instrument, and if the instrument is undated, from the issue thereof;

3. Where the instrument is not dated, it will be considered to be dated as of the time it was issued;

4. Where there is conflict between the written and printed provisions of the instrument the written provisions prevail;

5. Where the instrument is so ambiguous that there is doubt whether it is a bill or a note, the holder may treat it as either, at his election;

6. Where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser;

7. Where an instrument containing the words, "I promise to pay," is signed by two or more persons, they are deemed to be jointly and severally liable thereon. '99, p. 125.

4047. (1570.) Signer only liable. No person is liable on the instrument whose signature does not appear thereon, except as herein otherwise expressly provided. But one who signs in a trade or assumed name will be liable to the same extent as if he had signed in his own name. '99, p. 125.

4048. (1571.) Signature by agent. The signature of any party may be made by a duly authorized agent. No particular form of appointment is necessary for this purpose; and the authority of the agent may be established as in other cases of agency. '99, p. 125.

4049. (1572.) Authorized agent not liable. Where the instrument contains, or a person adds to his signature, words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as an agent, or as filling a representative character, without disclosing his principal, does not exempt him from personal liability. '99, p. 126.

Where signers of a promissory note place "president" and "secretary" after their names, having first signed the corporate name, such note will not be regarded as a joint note, unless circumstances unmistakably indicate an intention to sign the note jointly.
Armstrong v. Cache Valley Land and Canal Co., 14 U. 450; 48 P. 690.

4050. (1573.) Signature by procuration. A signature by procuration operates as notice that the agent has but a limited authority to sign, and the principal is bound only in case the agent in so signing acted within the actual limits of his authority. '99, p. 126.

4051. (1574.) Indorsement. The indorsement or assignment of the instrument by a corporation or by an infant passes the property therein, notwithstanding that from want of capacity the corporation or infant may incur no liability thereon. '99, p. 126.

4052. (1575.) Signature forged. Where a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority. '99, p. 126.

A bona fide holder without notice acquires no title to a negotiable instrument under a forged indorsement.
Warren v. Smith, 35 U. 455; 100 P. 1069.
A forged indorsement does not pass title to commercial paper, negotiable only by indorsement, either at common law or under this section, and no right can be acquired under it unless the party against whom the right is asserted is precluded from setting up the forgery.
Simpson v. D. & R. G. R. R. Co., 43 U. 105; 134 P. 883.

CHAPTER 2.

CONSIDERATION.

4053. (1576.) Consideration presumed. Every negotiable instrument is deemed prima facie to have been issued for a valuable consideration, and every person whose signature appears thereon to have become a party thereto for value. R. S. '98, § 1567; '99, p. 126.

Indorsers and sureties, § 4097, and note.
Assumption of mortgage, consideration, note to § 5811.
Cited in: Niles v. U. S. Ozocerite Company, et al., 38 U. 367; 113 P. 1038.
The payment of interest in advance on a note is prima facie evidence of an agreement to extend the time of payment.
Walley v. Des. Bank, 14 U. 305; 47 P. 147.

Agreement for extension of time; time of making; consideration.
Wallace v. Richards, 16 U. 52; 50 P. 804.
A non-negotiable note not under seal does not import a consideration.
Felt v. Judd, 3 U. 414; 4 P. 243.
The holder of a negotiable paper before maturity is presumed to be a holder for value and is not obliged to show that he paid value for it, until under proper pleadings evidence is offered to overcome this presumption.
Voorhees v. Fisher, 9 U. 303; 34 P. 46.
If a party executes a promissory note while he is so intoxicated that he does not know what he is doing, and after becoming sober ratifies the transaction by keeping the consideration which he would receive for the note, he cannot afterwards avoid the note.
Smith v. Williamson, 8 U. 219; 30 P. 753.
When the guaranty of a third person is written on the same paper as the promissory note prior to its delivery, and is a condition of acceptance, such guaranty is supported by the consideration of the note, and need not express a consideration.
Gagan v. Stevens, 4 U. 348; 6 P. 706.
A corporation cannot recover on a note given to its defaulting manager by defendant, where the evidence shows that it was a personal transaction for the accommodation of such manager, without consideration, and there is no evidence to show that its having been given enabled the manager to defraud the company, or assisted him in so doing. (Overruling 5 U. 568.)
Societe Mines v. Mackintosh, 7 U. 35; 24 P. 669.
Makers of a note cannot show a contemporaneous parol agreement, that they signed on the representation of plaintiff's cashier that they would not be called upon to pay it; nor is proof that one maker signed without consideration sufficient to destroy the presumption of consideration arising from the note itself.
First Nat'l Bank v. Foote, 12 U. 157; 42 P. 205.
A partial failure of consideration as between the parties to a negotiable note is not a defect in title, so as to require an indorsee suing thereon to show himself a holder in due course; the burden of showing want of consideration and notice thereof by the indorsee being upon the maker.
Cole Banking Co. v. Sinclair, 34 W. 454; 98 P. 411.
In an action on a note it is not necessary to allege or prove consideration to make out a prima facie case; and where defendant, the cashier of plaintiff's bank, executed a note which, together with a sum advanced by the president, was deposited as a part of the bank's assets to make up the amount of the defalcation; held, that the execution of the note by defendant was supported by sufficient consideration so as to authorize an action thereon by the bank.
Utah Nat'l Bank v. Nelson, 38 U. 169; 111 P. 907.
Production of a note and proof of signature placed the burden on defendant of overcoming prima facie case, but, when defendant produced such evidence, burden is on plaintiff to show by a fair preponderance of all the evidence a legal and valuable consideration.
Hudson v. Moon, et al., 42 U. 377; 130 P. 774.
In an action by a bank, holder of a note given for the price of a piano, evidence held insufficient to support a non-suit on the grounds that the payee made false and fraudulent representations that he was the owner of the piano.
Utah Banking Company v. Oler, 47 U. 407; 154 P. 781.

4054. (1577.) Consideration defined. Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value, and is deemed such whether the instrument is payable on demand or at a future time. '99, p. 126.

Cited in: Felt v. Bush et al., 41 U. 462; 126 P. 688.

4055. (1578.) Holder for value. Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time. '99, p. 126.

Cited in: Felt v. Bush et al., 41 U. 462; 126 P. 688.

4056. (1579.) Lienholder. Where the holder has a lien on the instrument arising either from contract or by implication of law, he is deemed a holder for value to the extent of his lien. '99, p. 126.

An indorsee who receives a note before maturity as collateral for a pre-existing debt, without any other consideration, and without notice of equities or infirmities, is a holder for value, and is protected against payment made to the original payee before maturity, and before the note was indorsed and delivered.
Felt v. Bush et al., 41 U. 462; 126 P. 688.

4057. (1580.) Absence or failure of consideration. Absence or failure of consideration is matter of defense as against any person not a holder in due course, and partial failure of consideration is a defense pro tanto whether the failure is an ascertained and liquidated amount or otherwise. '99, p. 126.

Cited in: Utah Commr. & Savgs. Bank v. Fox et al., 40 U. 205; 120 P. 840.
If plaintiff agreed to look to profits from stock in payment for such stock purchased for himself and defendant in consideration that defendant managed the business, he had no personal claim against defendant, and there was no consideration for a note given by defendant to secure such payment.
Smith v. Brown, 50 U. —; 165 P. 468.

4058. (1581.) Accommodation party. An accommodation party is one who has signed the instrument as maker, drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party. '99, p. 127.

Indorsement, suretyship, etc., note to § 4097.
An accommodation maker of a note is not relieved from liability by an extension of time of payment without his knowledge or consent.
Wolstenholme v. Smith, 34 U. 298; 97 P. 329.
Prior to the enactment of this section the rule was otherwise.
Baskin v. Godbe, 1 U. 28.

Gillett v. Taylor, 14 U. 190; 46 P. 1099.
Clark v. Fisk, 9 U. 94; 33 P. 248.
Bunnell v. Carter, 14 U. 100; 46 P. 755.
Schroeder v. Kinney, 15 U. 462; 49 P. 894.
Burnham v. McCornick, 18 U. 42; 55 P. 77.
Wallace v. Richards, 16 U. 52; 50 P. 804.

CHAPTER 3.

NEGOTIATION.

4059. (1582.) Negotiated, when. An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof; if payable to bearer it is negotiated by delivery; if payable to order it is negotiated by the indorsement of the holder, completed by delivery. '99, p. 127.

The authority of an agent to indorse negotiable paper is to be strictly construed, and will not be implied from a general authority to transact business for the principal unless such power is necessary to the accomplishment of the agency; and such authority could not be based upon prior customary act, where it did not appear that the indorsee ever knew of an instance where the payee had knowingly ratified an unauthorized indorsement by such agent.
Utah Banking Co. v. Newman, 44 U. 194; 138 P. 1146.

4060. (1583.) Indorsement, how made. The indorsement must be written on the instrument itself or upon a paper attached thereto. The signature of the indorser, without additional words, is a sufficient indorsement. R. S. '98, §§ 1568, 1570; '99, p. 127.

4061. (1584.) Must be of entire instrument. The indorsement must be an indorsement of the entire instrument. An indorsement which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the instrument to two or more indorsees severally, does not operate as a negotiation of the instrument. But where the instrument has been paid in part, it may be indorsed as to the residue. '99, p. 127.

4062. (1585.) Indorsement. An indorsement may be either in blank or special; and it may also be either restrictive, or qualified, or conditional. R. S. '98, § 1571; '99, p. 127.

Where the indorsement of a note before delivery is conditional, such conditions, to be binding upon the payee, must be accepted by him, made with notice to him, or acknowledged on his part before or accompanying delivery.
Farmers & Stockgrowers Bank v. Pahvant V. L. Co., 50 U. —; 165 P. 462.

4063. (1586.) Special and blank. A special indorsement specifies the person to whom, or to whose order, the instrument is to be payable; and the indorsement of such indorsee is necessary to the further negotiation of the instrument. An indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer, and may be negotiated by delivery. R. S. '98, §§ 1572, 1573; '99, p. 127.

4064. (1587.) Blank may be converted. The holder may convert a blank indorsement into a special indorsement by writing over the signature of the indorser in blank any contract consistent with the character of the indorsement. R. S. '98, § 1574; '99, p. 127.

4065. (1588.) Restrictive. An indorsement is restrictive which either:

1. Prohibits the further negotiation of the instrument; or
2. Constitutes the indorsee the agent of the indorser; or
3. Vests the title in the indorsee in trust for or to the use of some other person.

But the mere absence of words implying power to negotiate does not make an indorsement restrictive. '99, p. 127.

4066. (1589.) Id. A restrictive indorsement confers upon the indorsee the right:

1. To receive payment of the instrument;
2. To bring any action thereon that the indorser could bring;
3. To transfer his right as such indorsee, where the form of the indorsement authorizes him to do so.

But all subsequent indorsees acquire only the title of the first indorsee under the restrictive indorsement. '99, p. 127.

4067. (1590.) Indorsement qualified. A qualified indorsement constitutes the indorser a mere assignor of the title to the instrument. It may be made by adding to the indorser's signature the words "without recourse" or any words of similar import. Such an instrument does not impair the negotiable character of the indorsement. R. S. '98, §§ 1578, 1579; '99, p. 128.

Indorsement without recourse cannot be regarded as evidence against an indorsee's holdings in good faith. Leavitt v. Thurston, 38 U. 351; 113 P. 77.

4068. (1591.) Instrument conditional. Where an indorsement is conditional, a party required to pay the instrument may disregard the condition, and make payment to the indorsee or his transferee, whether the condition has been fulfilled or not. But any person to whom an indorsement so indorsed is negotiated will hold the same, or the proceeds thereof, subject to the rights of the person indorsing conditionally. '99, p. 128.

4069. (1592.) Payable to bearer indorsed specially. Where an instrument, payable to bearer, is indorsed specially, it may nevertheless be further negotiated by delivery; but the person indorsing specially is liable as indorser to only such holders as make title through his indorsement. '99, p. 128.

4070. (1593.) All payees must indorse. Where an instrument is payable to the order of two or more payees or indorsees who are not partners, all must indorse unless the one indorsing has authority to indorse for the others. '99, p. 128.

4071. (1594.) Indorsement to fiscal officers. Where an instrument is drawn or indorsed to a person as "cashier" or other fiscal officer of a bank or corporation, it is deemed prima facie to be payable to the bank or corporation of which he is such officer; and may be negotiated by either the indorsement of the bank or corporation, or the indorsement of the officer. '99, p. 128.

4072. (1595.) Indorsee's name misspelled. Where the name of a payee or indorsee is wrongly designated or misspelled, he may indorse the instrument as therein described, adding, if he think fit, his proper signature. '99, p. 128.

4073. (1596.) Indorsement in representative capacity. Where any person is under obligation to indorse in a representative capacity, he may indorse in such terms as to negative personal liability. '99, p. 128.

4074. (1597.) Presumption as to date. Except where an indorsement bears date after the maturity of the instrument, every negotiation is deemed prima facie to have been effected before the instrument was overdue. '99, p. 128.

4075. (1598.) Presumption as to place. Except where the contrary appears, every indorsement is presumed prima facie to have been made at the place where the instrument is dated. '99, p. 128.

4076. (1599.) Negotiability continues. An instrument negotiable in its origin continues to be negotiable until it has been restrictively indorsed or discharged by payment or otherwise. '99, p. 129.

4077. (1600.) Holder may strike out unnecessary indorsement. The holder may at any time strike out any indorsement which is not necessary to his title. The indorser whose indorsement is struck out, and all indorsers subsequent to him, are thereby relieved from liability on the instrument. '99, p. 129.

4078. (1601.) Transfer without indorsement. Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferrer had therein, and the transferee acquires, in addition, the right to have the indorsement of the transferer. But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made. '99, p. 129.

A transferee of a note made payable to order, without indorsement, takes it subject to all equities attached to the note, and this although the holder was a bona fide holder for value.
Lebcher v. Lambert, 23 U. 1; 63 P. 628.

4079. (1602.) Indorsed back to prior party. Where an instrument is negotiated back to a prior party, such party may, subject to the provisions of this title, reissue and further negotiate the same. But he is not entitled to enforce payment thereof against any intervening party to whom he was personally liable. '99, p. 129.

CHAPTER 4.

RIGHTS OF THE HOLDER.

4085. (1603.) Holder may sue. The holder of a negotiable instrument may sue thereon in his own name; and payment to him in due course discharges the instrument. '99, p. 129.

4086. (1604.) Holder defined. A holder in due course is a holder who has taken the instrument under the following conditions:

1. That the instrument is complete and regular upon its face;
2. That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact;
3. That he took it in good faith and for value;
4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.

R. S. '98, § 1582; '99, p. 129.

Maker will be bound by notice of assignment of non-negotiable note.
Johnson v. Hibbard, 27 U. 342; 75 P. 737.
Reece v. Knott, 3 U. 451; 24 P. 757.
Leavitt v. Thurston, 38 U. 351; 113 P. 77.

An indorsee of a note has, on proof of defective title of the indorser, the burden of showing that he took the note in good faith for value, without notice, but notice received after a check has been delivered in payment of the note, but before payment thereof, is too late.
Miller v. Marks, 46 U. 257; 148 P. 412.

An assignee before maturity of a note signed by one as maker, and by another to enable the first maker to borrow money to apply on his indebtedness to the assignee, and who was credited by the assignee for the full amount of the note immediately upon its delivery, was a holder for value.
Helper State Bank v. Jackson, 47 U. 430; 160 P. 287.

A pledgee accepting an unmatured note as collateral security is a holder in due course.
Inter-State Trust Co. v. Headlund, 50 U. —; 171 P. 515.

4087. (1605.) On demand instrument. Where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course. '99, p. 129.

4088. (1606.) Notice of defect. When the transferee receives notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him. '99, p. 129.

This section is intended merely to limit the indorsee's recovery to the amount he had advanced before obtaining notice of some infirmity, and not to affect his fundamental relation to the debtor.
Felt v. Bush, 41 U. 462; 126 P. 688.

4089. (1607.) Defective title. The title of a person who negotiates an instrument is defective within the meaning of this title when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.

'99, p. 129.

A partial failure of consideration as between parties is not a defect in title so as to require an indorsee suing thereon to show himself the holder in due course.
Cole Banking Co. v. Sinclair, 34 U. 454; 98 P. 411.

Where defendant by his answer admitted the execution and delivery of note and its non-payment, but defended on the ground of false representation, he was properly permitted to open and close.
Ogden Val. Trout and Resort Co. v. Lewis, 41 U. 183; 125 P. 687.

4090. (1608.) Notice of defect, what is. To constitute a notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of

the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith. '99, p. 130.

4091. (1609.) Holder in due course, rights of. A holder in due course holds the instrument free from any defect of title of prior parties and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon. R. S. 98, § 1583; '99, p. 30.

Where the presumption that the holder of a note was an indorsee before maturity for value and in good faith was not overcome, the defense of failure of consideration was properly rejected.
McCornick v. Swem, 36 U. 6; 102 P. 626.

4092. (1610.) Holder not in due course. In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable. But a holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter. '99, p. 130.

4093. (1611.) Holder in due course presumed. Every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course. But the last mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title. '99, p. 130.

Where a plaintiff proved that a check was stolen from him, the burden is shifted to defendant, an indorsee, to prove that he or someone under whom he claimed acquired title as a holder in due course.
Warren v. Smith, 35 U. 455; 100 P. 1069.

When it appears that a note was obtained by fraud, burden is on the holder suing thereon to show that he acquired title as a holder in due course; this burden does not shift, and must be maintained by a preponderance of the evidence.
Leavitt v. Thurston, 38 U. 351; 113 P. 77.

The presumption that the payee was the legal owner of the indorsed note was not affected by the fact that her father had possession thereof and delivered it to another before his death.
Escamilla v. Pingree, 44 U. 421; 141 P. 103.

The burden of showing failure of consideration and notice thereof by the indorsee is upon the maker.
Cole Banking Co. v. Sinclair, 34 U. 454; 98 P. 411.

CHAPTER 5.

LIABILITIES OF PARTIES.

4094. (1612.) Maker, liability of. The maker of a negotiable instrument by making it engages that he will pay it according to its tenor; and admits the existence of the payee and his then capacity to indorse. '99, p. 130.

4095. (1613.) Drawer, liability of. The drawer by drawing the instrument admits the existence of the payee and his then capacity to indorse; and engages that on due presentment the instrument will be accepted or paid, or both, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it. But the drawer may insert in the instrument an express stipulation negativing or limiting his own liability to the holder. '99, p. 130.

4096. (1614.) Acceptor, liability of. The acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance; and admits:

1. The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument; and
2. The existence of the payee and his then capacity to indorse.

R. S. '98, § 1630; '99, p. 130.

4097. (1615.) Indorser, who is. A person placing his signature upon an instrument, otherwise than as maker, drawer, or acceptor, is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity. R. S. '98, § 1568; '99, p. 131.

Consideration generally, § 4053, and note.
Statute of frauds, §§ 5811-5828, and notes.
Accommodation party, § 4058.

INDORSERS AND SURETIES:

Concealment of material fact releases sureties.

Jungk v. Holbrook, 15 U. 198; 49 P. 305. See same case, 9 U. 49; 33 P. 236. Id., 12 U. 209; 42 P. 292.

Indorser released by failure to give notice.

Burnham v. McCornick, 18 U. 42; 55 P. 77.

A person who signs a note as maker, but is in fact a surety, will be considered as a principal with respect to all who have no notice of the suretyship; but where such fact was known to plaintiff before equities attached, such maker may prove the same by parol evidence.

Gillett v. Taylor, 14 U. 190; 46 P. 1099.

Flint v. Nelson, 10 U. 261; 37 P. 479; affirmed 166 U. S. 276.

One or more persons may sign a note as guarantors, and deliver it to the payee with the agreement that they shall not be bound unless other persons named shall also sign, and if such persons do not sign, that those signing shall not be held.

State Bank of Utah v. Burton-Gardner Co., 14 U. 420; 48 P. 402.

But see Flint v. Nelson, 10 U. 261; 37 P. 479; affirmed 166 U. S. 276.

Where a canal company gave its note to a bank guaranteed by two of its officers, who were also officers of the banking corporation, which note was subsequently replaced by a second note and collateral security, which second note, five days after its execution, was guaranteed without consideration by said officers; held, that such guaranty is not binding, having been without consideration.

Armstrong v. Cache Valley Land and Canal Co., 14 U. 450; 48 P. 690.

R., in a separate answer to an action upon a promissory note, stated that his co-defendant, who held the note for sale, had promised him to erase his name before selling the note, and that plaintiff, to whom same was transferred, accepted it with knowledge of such agreement, but by mistake or inadvertence, the indorsement was not erased; held, that these facts constituted a good defense to an action against R.

Gregg v. Groesbeck, 11 U. 310; 40 P. 202.

Notice of acceptance not necessary; notice of default impliedly waived.

Wells, Fargo & Co. v. Davis, 2 U. 411; affirmed 104 U. S. 159.

An indoser holding other notes and mortgages as securities from the maker of the note may transfer such securities to the payee, who may proceed to recover upon the securities before suing upon the note indorsed.

Wells, Fargo & Co. v. Smith, 2 U. 39.

A guarantor liable on note only after a regular prosecution against the maker thereof and the use of due and reasonable diligence on the part of the plaintiff to collect the same from the maker by due course of law.

Anderson v. Stevens, 2 U. 538.

Where the relation of principal and surety exists between two joint makers of a promissory note, the surety to whom the note has been assigned by blank indorsement cannot, as an indorsee, sue his principal. His remedy is for money paid to the use of his principal.

Miller v. Zeigler, 3 U. 17; 5 P. 518.

But see Jennings v. Pratt, 19 U. 129; 56 P. 951.

4098. (1616.) Liability of. Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser in accordance with the following rules:

1. If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties;

2. If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer;

3. If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee. R. S. '98, § 1577; '99, p. 131.

4099. (1617.) Person negotiating by delivery, liability of. Every person negotiating an instrument by delivery or by a qualified indorsement warrants:

1. That the instrument is genuine and in all respects what it purports to be;

2. That he has a good title to it;

3. That all prior parties had capacity to contract;

4. That he has no knowledge of any fact which would impair the validity of the instrument or render it valueless.

But when the negotiation is by delivery only, the warranty extends in favor of no holder other than the immediate transferee.

The provisions of sub. 3 of this section do not apply to persons negotiating public or corporate securities, other than bills and notes. '99, p. 131.

4100. (1618.) Indorser, liability of. Every indorser who indorses without qualification warrants to all subsequent holders in due course:

1. The matters and things mentioned in subs. 1-3 of the next preceding section; and

2. That the instrument is at the time of his indorsement valid and subsisting.

And, in addition, he engages that, on due presentment, it shall be accepted, or paid, or both, as the case may be, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it. R. S. '98, § 1576; '99, p. 131.

4101. (1619.) Id. Where a person places his indorsement on an instrument negotiable by delivery, he incurs all the liabilities of an indorser. '99, p. 131.

4102. (1620.) Indorsers liable in order. As respects one another, indorsers are liable prima facie in the order in which they indorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise. Joint payees or joint indorsers who indorse are deemed to indorse jointly and severally. '99, p. 132.

4103. (1621.) Broker's liability. Where a broker or other agent negotiates an instrument without indorsement, he incurs all the liabilities prescribed by § 4099, unless he discloses the name of his principal, and the fact that he is acting only as agent. '99, p. 132.

CHAPTER 6.

PRESENTMENT FOR PAYMENT.

4105. (1622.) Presentment. Presentment for payment is not necessary in order to charge the person primarily liable on the instrument; but if the instrument is, by its terms, payable at a special place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part. But except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers. R. S. '98, § 1585; '99, p. 132.

4106. (1623.) When made. Where the instrument is not payable on demand, presentment must be made on the day it falls due. Where it is payable on demand, presentment must be made within a reasonable time after its issue, except that in the case of a bill of exchange presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof. R. S. '98, § 1586; '99, p. 132.

4107. (1624.) How made. Presentation for payment, to be sufficient, must be made:

1. By the holder, or by some person authorized to receive payment on his behalf;
2. At a reasonable hour on a business day;
3. At a proper place as herein defined;
4. To the person primarily liable on the instrument, or if he is absent or inaccessible, to any person found at the place where the presentment is made. R. S. '98, § 1586; '99, p. 132.

4108. (1625.) Proper place. Presentment for payment is made at the proper place:

1. Where a place of payment is specified in the instrument and it is there presented;
2. Where no place of payment is specified but the address of the person to make payment is given in the instrument and it is there presented;
3. Where no place of payment is specified and no address is given and the instrument is presented at the usual place of business or residence of the person to make payment;
4. In any other case if presented to the person to make payment wherever he can be found. or if presented at his last known place of business or residence. R. S. '98, § 1586; '99, p. 132.

Under § 1563, R. S. 1898, a note dated at Salt Lake City, but specifying no place of payment, the maker of which resides in Salt Lake City at the date of payment, is payable there.

Overland M. Co. v. McMaster, 19 U. 177; 56 P. 977.

Where a promissory note is executed and delivered in one county, made payable in another, and a failure of payment occurs, the cause of action arises in the county in which the instrument is made payable.

Bach v. Brown, 17 U. 435; 53 P. 991.

Where a promissory note is made payable at a certain place, the maker, in order to avoid costs and interest, must deposit or make a valid tender of the full amount of the note and interest at that place, though the note is not there.

McCauley v. Leavitt, 10 U. 91; 37 P. 164.

4109. (1626.) Instrument must be exhibited. The instrument must be exhibited to the person from whom payment is demanded, and when it is paid must be delivered up to the party paying it. R. S. '98, § 1592; '99, p. 133.

4110. (1627.) Presentment at bank. Where the instrument is payable at a bank, presentment for payment must be made during banking hours, unless the person to make payment has no funds there to meet it any time during the day, in which case presentment at any hour before the bank is closed on that day is sufficient. '99, p. 133.

4111. (1628.) Presentment where maker is dead. Where the person primarily liable on the instrument is dead, and no place of payment is specified, presentment for payment must be made to his personal representative, if such there be, and if, with the exercise of reasonable diligence, he can be found. '99, p. 133.

4112. (1629.) Presentment to partners. Where the persons primarily liable on the instrument are liable as partners, and no place of payment is specified, presentment for payment may be made to any one of them, even though there has been a dissolution of the firm. '99, p. 133.

4113. (1630.) Presentment to several persons. Where there are several persons, not partners, primarily liable on the instrument, and no place of payment is specified, presentment must be made to them all. '99, p. 133.

4114. (1631.) Presentment, when not required. Presentment for payment is not required in order to charge the drawer where he has no right to expect or require that the drawee or acceptor will pay the instrument. '99, p. 133.

4115. (1632.) Id. Presentment for payment is not required in order to charge an indorser where the instrument was made or accepted for his accommodation, and he has no reason to expect that the instrument will be paid if presented. '99, p. 133.

4116. (1633.) Delay in making, when excused. Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, presentment must be made with reasonable diligence. R. S. '98, § 1607; '99, p. 133.

The question of the reasonableness of delay in presenting a promissory note for payment is a question of law for the court. Mere delay in presenting a note indorsed when overdue does not exonerate any party thereto by laws of Utah, 1882, § 87.
Durnell v. Snowden, 5 U. 216; 14 P. 334.

4117. (1634.) When dispensed with. Presentment for payment is dispensed with:

1. When, after the exercise of reasonable diligence, presentment as required by this title cannot be made;
2. Where the drawee is a fictitious person;
3. By waiver of presentment, express or implied.

R. S. '98, § 1586; '99, p. 133.

4118. (1635.) Instrument dishonored, when. The instrument is dishonored by non-payment when:

1. It is duly presented for payment and payment is refused or cannot be obtained; or
2. Presentment is excused and the instrument is overdue and unpaid.

R. S. '98, § 1593; '99, p. 133.

4119. (1636.) Recourse to parties secondarily liable. Subject to the provisions of this title, when the instrument is dishonored by non-payment, an immediate right of recourse to all parties secondarily liable thereon accrues to the holder. '99, p. 134.

4120. (1637.) Time of payment. Every negotiable instrument is payable at the time fixed therein without grace. When the day of maturity falls upon Sunday, or a holiday, the instrument is payable on the next succeeding business day. Instruments falling due on Saturday are to be presented for payment on the next succeeding business day, except that instruments payable

on demand may, at the option of the holder, be presented for payment before twelve o'clock noon on Saturday when that entire day is not a holiday. R. S. '98, §§ 1587, 1611; '99, p. 134.

Time payable, § 4033.
A note became due Aug. 3, 1884, and interest was to be paid monthly, and if not paid the whole should become due; the date of payment of principal was extended to Aug. 3, 1885, and other conditions of the note remained the same; held, that if interest was not paid as provided in note, the whole of said note became immediately due and payable.
Kelly v. Kershaw, 5 U. 295; 14 P. 804.

Where a debtor in failing circumstances pays a note not yet due to a bank from money on deposit therein, under threat of attachment proceedings if the note is not paid, such payment is voluntary and not made under duress.
Flack v. National Bank of Commerce, 8 U. 193; 30 P. 746.

4121. (1638.) Id. Where the instrument is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run, and by including the date of payment. R. S. '98, § 1591; '99, p. 134.

4122. (1639.) Instrument made payable at a bank, effect of. Where the instrument is made payable at a bank, it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon '99, p. 134.

4123. (1640.) Payment in due course. Payment is made in due course when it is made at or after the maturity of the instrument to the holder thereof in good faith and without notice that his title is defective. '99, p. 134.

CHAPTER 7.

NOTICE OF DISHONOR.

4125. (1641.) Notice to whom given. Except as herein otherwise provided, when a negotiable instrument has been dishonored by non-acceptance or non-payment, notice of dishonor must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given is discharged. '99, p. 134.

When a demand note of a corporation is presented and payment demanded of the principal, and no protest is made nor any notice of dishonor served on indorser, and no evidence of a waiver of such notice, the indorser is released.
Burnham v. McCornick, 18 U. 24; 55 P. 77.

4126. (1642.) By whom given. The notice may be given by or on behalf of the holder, or by or on behalf of any party to the instrument who might be compelled to pay it to the holder, and who, upon taking it up, would have a right to reimbursement from the party to whom the notice is given. R. S. '98, § 1594; '99, p. 134.

4127. (1643.) Id. Notice of dishonor may be given by an agent either in his own name or in the name of any party entitled to give notice, whether that party be his principal or not. '99, p. 134.

4128. (1644.) Effect of. Where notice is given by or on behalf of the holder, it inures for the benefit of all subsequent holders and all prior parties who have a right of recourse against the party to whom it is given. '99, p. 134.

4129. (1645.) Id. Where notice is given by or on behalf of a party entitled to give notice, it inures for the benefit of the holder and all parties subsequent to the party to whom notice is given. R. S. '98, § 1603; '99, p. 134.

4130. (1646.) Dishonored in the hands of an agent. Notice, how given. Where the instrument has been dishonored in the hands of an agent, he may either himself give notice to the parties liable thereon, or he may give notice to his principal. If he give notice to his principal, he must do so within the same time as if he were the holder, and the principal upon the receipt of such notice has himself the same time for giving notice as if the agent had been an independent holder. R. S. '98, § 1601; '99, p. 135.

4131. (1647.) Defective notice, how cured. A written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the instrument does not vitiate the notice unless the party to whom the notice is given is in fact misled thereby. '99, p. 135.

4132. (1648.) Notice, form of, and how served. The notice may be in writing or merely oral and may be given in any terms which sufficiently identify the instrument and indicate that it has been dishonored by non-acceptance or non-payment. It may in all cases be given by delivering it personally or through the mails. R. S. '98, § 1595; '99, p. 135.

4133. (1649.) May be served on principal or agent. Notice of dishonor may be given either to the party himself or to his agent in that behalf. '09, p. 135.

4134. (1650.) When party is dead, how served. When any party is dead, and his death is known to the party giving notice, the notice must be given to a personal representative, if there be one, and if with reasonable diligence, he can be found. If there be no personal representative, notice may be sent to the last residence or last place of business of the deceased. R. S. '98, § 1597; '99, p. 135.

4135. (1651.) When parties are partners. When the parties to be notified are partners, notice to any one partner is notice to the firm even though there has been a dissolution. '99, p. 135.

4136. (1652.) Where parties are joint. Notice to joint parties who are not partners must be given to each of them, unless one of them has authority to receive such notice for the others. '99, p. 135.

4137. (1653.) Where party is bankrupt. Where a party has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, notice may be given either to the party himself or to his trustees or assignee. '99, p. 135.

4138. (1654.) Time of service. Notice may be given as soon as the instrument is dishonored and, unless delay is excused as hereinbefore provided, must be given within the time fixed by this title.

4139. (1655.) Id. Where the person giving and the person to receive notice reside in the same place, notice must be given within the following times:

1. If given at the place of business of the person to receive notice, it must be given before the close of business hours on the day following;
2. If given at his residence, it must be given before the usual hours of rest on the day following;
3. If sent by mail, it must be deposited in the postoffice in time to reach him in the usual course on the day following.

R. S. '98, §§ 1599, 1600; '99, p. 135.

4140. (1656.) Id. Where the person giving and the person to receive notice reside in different places, the notice must be given within the following times:

1. If sent by mail, it must be deposited in the postoffice in time to go by mail the day following the day of dishonor, or if there be no mail at a convenient hour on that day, by the next mail thereafter;
2. If given otherwise than through the postoffice, then within the time that notice would have been received in due course of mail, if it had been deposited in the postoffice within the time specified in the preceding subdivision.

R. S. '98, §§ 1599, 1600; '99, p. 136.

4141. (1657.) Where notice deposited in the postoffice. Where notice of dishonor is duly addressed and deposited in the postoffice, the sender is deemed to have given due notice, notwithstanding any miscarriage in the mails. '99, p. 136.

4142. (1658.) Id. Notice is deemed to have been deposited in the

postoffice when deposited in any branch postoffice or in any letter box under the control of the postoffice department. '99, p. 136.

4143. (1659.) Time for notice of antecedent parties. Where a party receives notice of dishonor, he has, after the receipt of such notice, the same time for giving notice to antecedent parties that the holder has after the dishonor. R. S. '98, § 1602; '99, p. 136.

4144. (1660.) Place of serving notice. Where a party has added an address to his signature, notice of dishonor must be sent to that address; but if he has not given such address, then the notice must be sent as follows:

1. Either to the postoffice nearest to his place of residence, or to the postoffice where he is accustomed to receive his letters; or

2. If he lives in one place, and have his place of business in another, notice may be sent to either place; or

3. If he is sojourning in another place, notice may be sent to the place where he is so sojourning.

But where the notice is actually received by the party within the time specified in this title, it will be sufficient, though not sent in accordance with the requirements of this section. '99, p. 136.

4145. (1661.) Notice of dishonor waived. Notice of dishonor may be waived, either before the time of giving notice has arrived or after the omission to give due notice, and the waiver may be express or implied. '99, p. 136.

4146. (1662.) Waiver in instrument. Where the waiver is embodied in the instrument itself, it is binding upon all parties; but where it is written above the signature of an indorser, it binds him only. '99, p. 136.

4147. (1663.) Waiver of protest, effect of. A waiver of protest, whether in the case of a foreign bill of exchange or other negotiable instrument, is deemed to be a waiver not only of a formal protest, but also of a presentment and notice of dishonor. '99, p. 136.

4148. (1664.) Notice of dishonor dispensed with, when. Notice of dishonor is dispensed with when, after the exercise of reasonable diligence, it cannot be given to or does not reach the parties sought to be charged. R. S. '98, § 1604; '99, p. 137.

4149. (1665.) Delay in giving notice, excused when. Delay in giving notice of dishonor is excused when the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, notice must be given with reasonable diligence. R. S. '98, § 1607; '99, p. 137.

4150. (1665x.) Notice not required of drawer, when. Notice of dishonor is not required to be given to the drawer in any of the following cases:

1 Where the drawer and the drawee are the same person;

2. Where the drawee is a fictitious person or a person not having capacity to contract;

3. Where the drawer is the person to whom the instrument is presented for payment;

4. Where the drawer has no right to expect or require that the drawee or acceptor will honor the instrument;

5. Where the drawer has countermanded payment. '99, p. 137.

An allegation in a suit against the maker of a check sufficiently set out that the payment had been countermanded, where the check was set forth, with indorsement across the face, "pyt. stopped." National Copper Bank v. Davis County Bank, 47 U. 236; 152 P. 1180.

4151. (1665x1.) Notice not required of indorser, when. Notice of dishonor is not required to be given to an indorser in any of the following cases:

1. Where the drawee is a fictitious person or a person not having capacity to contract, and the indorser was aware of the fact at the time he indorsed the instrument;

2. Where the indorser is the person to whom the instrument is presented for payment;

3. Where the instrument was made or accepted for his accommodation. '99, p. 137.

4152. (1665x2.) Notice of dishonor, when excused. Where due notice of dishonor by non-acceptance has been given, notice of a subsequent dishonor by non-payment is not necessary, unless in the meantime the instrument has been accepted. '99, p. 137.

4153. (1665x3.) Id. An omission to give notice of dishonor by non-acceptance does not prejudice the rights of a holder in due course subsequent to the omission. '99, p. 137.

4154. (1665x4.) Protest not required except foreign bills. Where any negotiable instrument has been dishonored it may be protested for non-acceptance or non-payment as the case may be; but protest is not required except in the case of foreign bills of exchange. '99, p. 137.

CHAPTER 8.

DISCHARGE OF NEGOTIABLE INSTRUMENTS.

4155. (1665x5.) Negotiable instrument discharged. A negotiable instrument is discharged:

1. By payment in due course by or on behalf of the principal debtor;
2. By payment in due course by the party accommodated, where the instrument is made or accepted for accommodation;
3. By the intentional cancellation thereof by the holder;
4. By any other act which will discharge a single contract for the payment of money;
5. When the principal debtor becomes the holder of the instrument at or after maturity in his own right. R. S. '98, § 1610; '99, p. 137.

4156. (1665x6.) Persons secondarily liable discharged. A person secondarily liable on the instrument is discharged:

1. By any act which discharges the instrument;
2. By the intentional cancellation of his signature by the holder;
3. By the discharge of a prior party;
4. By a valid tender of payment made by a prior party;
5. By a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved;
6. By any agreement binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved. '99, p. 138.

An accommodation maker is primarily liable and is not released by the agreement mentioned in sub 6. Wolstenholme v. Smith, 34 U. 298; 97 P. 329.

4157. (1665x7.) Paid by party secondarily liable, effect of. Where the instrument is paid by a party secondarily liable thereon, it is not discharged; but the party so paying it is remitted to his former rights as regards all prior parties, and he may strike out his own and all subsequent indorsements, and again negotiate the instrument, except:

1. Where it is payable to the order of a third person, and has been paid by the drawer; and
2. Where it was made or accepted for accommodation and has been paid by the party accommodated. '99, p. 138.

4158. (1665x8.) Renunciation of right against party, effect of. The holder may expressly renounce his rights against any party to the instrument before, at, or after its maturity. An absolute and unconditional renunciation of his rights against the principal debtor made at or after the maturity of the instrument discharges the instrument. But a renunciation does not affect the rights of a holder in due course without notice. A renunciation must

be in writing, unless the instrument is delivered up to the person primarily liable thereon. '99, p. 138.

4159. (1665x9.) Cancellation by mistake. A cancellation made unintentionally, or under a mistake, or without the authority of the holder, is inoperative; but where an instrument or any signature thereon appears to have been canceled, the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake, or without authority. '99, p. 138.

A payee may recover from the maker the balance due upon a note prematurely canceled by the payee.
Thompson v. Avery, 11 U. 214; 39 P. 829.

4160. (1665x10.) Alteration, effect of. Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, authorized, or assented to the alteration and subsequent indorsers. But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor. '99, p. 138.

The insertion of the word "semi-annually" after the words "interest payable," to make the notes conform to the contract of the parties when executed, is a material alteration, but when made without fraudulent intent and no one was injured thereby, the instrument is not annulled nor the debt extinguished.
McClure v. Little, 15 U. 379; 49 P. 288.
Although a party must have actual knowledge of the alteration of a note before payment to constitute a ratification thereof, where payment is pleaded in the complaint and admitted in the answer, without alleging that it was made without defendant's knowledge or consent, ratification is sufficiently implied.
Farmers & Stockgrowers Bank v. Pahvant V. L. Co., 50 U. —; 165 P. 462.

4161. (1665x11.) Id. Any alteration which changes:

1. The date;
2. The sum payable, either for principal or interest;
3. The time or place of payment;
4. The number or the relations of the parties;
5. The medium or currency in which payment is to be made;

Or which adds a place of payment where no place of payment is specified, or any other change or addition which alters the effect of the instrument in any respect, is a material alteration. '99, p. 139.

CHAPTER 9.

BILLS OF EXCHANGE.

FORM AND INTERPRETATION.

4165. (1665x12.) Bills of exchange. A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to order or to bearer. R. S. '98, § 1612; '99, p. 139.

4166. (1665x13.) Effect of. A bill of itself does not operate as an assignment of the funds in the hands of the drawee available for the payment thereof, and the drawee is not liable on the bill unless and until he accepts the same. '99, p. 139.

4167. (1665x14.) May be addressed to whom. A bill may be addressed to two or more drawees jointly, whether they are partners or not; but not two or more drawees in the alternative or in succession. '99, p. 139.

4168. (1665x15.) Inland bill of exchange. An inland bill of exchange is a bill which is, or on its face purports to be, both drawn and payable within this state. Any other bill is a foreign bill. Unless the contrary appears on the face of the bill, the holder may treat it as an inland bill. '99, p. 139.

4169. (1665x16.) When bill or promissory note. Where in a bill drawer and drawee are the same person, or where the drawee is a fictitious person, or

a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or a promissory note. '99, p. 139.

4170. (1665x17.) Referee in case of need. The drawer of a bill and any indorser may insert thereon the name of a person to whom the holder may resort in case of need, that is to say, in case the bill is dishonored by non-acceptance or non-payment. Such person is called the referee in case of need. It is in the option of the holder to restort to the referee in case of need or not as he may see fit. R. S. '98, § 1613; '99, p. 139.

ACCEPTANCE.

4171. (1665x18.) Acceptance of bill. The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing and signed by the drawee. It must not express that the drawee will perform his promise by any other means than the payment of money. R. S. '98, § 1624; '99 p. 140.

Cited in: National Copper Bank v. Davis County Bank, 47 U. 236; 152 P. 1180.

4172. (1665x19.) To be written on bill. The holder of a bill presenting the same for acceptance may require that the acceptance be written on the bill, and if such request is refused, may treat the bill as dishonored. R. S. '98, § 1625; '99, p. 140.

4173. (1665x20.) Where not written on bill. Where an acceptance is written on a paper other than the bill itself, it does not bind the acceptor except in favor of a person to whom it is shown and who, on the faith thereof, receives the bill for value. R. S. '98, § 1627; '99, p. 140.

4174. (1665x21.) Unconditional promise to accept bill. An unconditional promise in writing to accept a bill before it is drawn is deemed an actual acceptance in favor of every person who, upon the faith thereof, receives the bill for value. R. S. '98, § 1628; '99, p. 140.

4175. (1665x22.) Twenty-four hours given for acceptance. The drawee is allowed twenty-four hours after presentment in which to decide whether or not he will accept the bill; but the acceptance, if given, dates as of the day of presentation. R. S. '98, § 1620; '99, p. 140.

4176. (1665x23.) When acceptance deemed. Where a drawee to whom a bill is delivered for acceptance destroys the same, or refuses within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or non-accepted to the holder, he will be deemed to have accepted the same. R. S. '98, § 1626; '99, p. 140.

4177. (1665x24.) May be accepted, when. A bill may be accepted before it has been signed by the drawer, or while otherwise incomplete, or when it is overdue, or after it has been dishonored by a previous refusal to accept, or by non-payment. But when a bill payable after sight is dishonored by non-acceptance and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of the first presentment. '99, p. 140.

4178. (1665x25.) Acceptance general or qualified. An acceptance is either general or qualified. A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn. '99, p. 140.

4179. (1665x26.) General acceptance. An acceptance to pay at a particular place is a general acceptance unless it expressly states that the bill is to be paid there only and not elsewhere. '99, p. 140.

4180. (1665x27.) Qualified acceptance. An acceptance is qualified, which is:

1. Conditional, that is to say, which makes payment by the acceptor dependent on the fulfillment of a condition therein stated;
2. Partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn;
3. Local, that is to say, an acceptance to pay only at a particular place;

4. Qualified as to time;
5. The acceptance of some one or more of the drawees, but not of all. '99, p. 140.

4181. (1665x28.) Qualified acceptance may be refused. The holder may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance, he may treat the bill as dishonored by non-acceptance. When a qualified acceptance is taken, the drawer and indorsers are discharged from liability on the bill, unless they have expressly or impliedly authorized the holder to take a qualified acceptance, or subsequently assent thereto. When the drawer or an indorser receives notice of a qualified acceptance, he must within a reasonable time express his dissent to the holder, or he will be deemed to have assented thereto. R. S. '98, § 1625; '99, p. 141.

PRESENTMENT FOR ACCEPTANCE

4182. (1665x29.) Presentment for acceptance, when necessary. Presentment for acceptance must be made:

1. Where the bill is payable after sight, or in any other case where presentment for acceptance is necessary in order to fix the maturity of the instrument; or
2. Where the bill expressly stipulates that it shall be presented for acceptance; or
3. Where the bill is drawn payable elsewhere than at the residence or place of business of the drawee.

In no other case is presentment for acceptance necessary in order to render any party to the bill liable. R. S. '98, § 1623; '99, p. 141.

4183. (1665x30.) Within reasonable time. Except as herein otherwise provided, the holder of a bill which is required by the next preceding section to be presented for acceptance must either present it for acceptance or negotiate it within a reasonable time. If he fail to do so, the drawee and all indorsers are discharged. '99, p. 141.

4184. (1665x31.) Presentment before overdue and to whom made. Presentment for acceptance must be made by or on behalf of the holder at a reasonable hour on a business day, and before the bill is overdue, to the drawee or some person authorized to accept or refuse acceptance on his behalf; and:

1. Where a bill is addressed to two or more drawees who are partners, presentment must be made to them all, unless one has authority to accept or refuse acceptance for all, in which case presentment may be made to him only;
2. Where the drawee is dead, presentment may be made to his personal representative;
3. Where the drawee has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, presentment may be made to him or to his trustees or assignee. R. S. '98, § 1620; '99, p. 141.

4185. (1665x32.) Day of presentment. A bill may be presented for acceptance on any day on which negotiable instruments may be presented for payment under the provisions of §§ 4107, 4120. When Saturday is not otherwise a holiday, presentment for acceptance may be made before twelve o'clock noon on that day. '99, p. 142.

4186. (1665x33.) When delay excused. Where the holder of a bill drawn payable elsewhere than at the place of business or the residence of the drawee has not time with the exercise of reasonable diligence to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused, and does not discharge the drawers and indorsers. R. S. '98, § 1641; '99, p. 142.

4187. (1665x34.) Id. Presentment for acceptance is excused and a bill may be treated as dishonored by non-acceptance, in any of the following cases:

1. Where the drawee is dead, or has absconded, or is a fictitious person or a person not having capacity to contract by bill;

2. Where, after the exercise of reasonable diligence, presentment cannot be made;

3. Where, although presentment has been irregular, acceptance has been refused on some ground. R. S. '98, §§ 1640, 1641; '99, p. 142.

4188. (1665x35.) Dishonored by non-acceptance. A bill is dishonored by non-acceptance:

1. When it is duly presented for acceptance and such an acceptance as is prescribed by this title is refused or cannot be obtained; or

2. When presentment for acceptance is executed and the bill is not accepted. R. S. '98, § 1593; '99, p. 142.

4189. (1665x36.) Non-acceptance within time, effect of. Where a bill is duly presented for acceptance and is not accepted within the prescribed time, the person presenting it must treat the bill as dishonored by non-acceptance or he loses the right of recourse against the drawer and indorsers. '99, p. 142.

4190. (1665x37.) Dishonored by non-acceptance, recourse accrues. When a bill is dishonored by non-acceptance, an immediate right of recourse against the drawers and indorsers accrues to the holder, and no presentment for payment is necessary. '99, p. 142.

PROTEST.

4191. (1665x38.) Foreign bill dishonored must be protested. Where a foreign bill appearing on its face to be such is dishonored by non-acceptance, it must be duly protested for non-acceptance, and where such a bill which has not previously been dishonored by non-acceptance is dishonored by non-payment, it must be duly protested for non-payment. If it is not so protested, the drawer and indorsers are discharged. Where a bill does not appear on its face to be a foreign bill, protest thereof in case of dishonor is unnecessary. R. S. '98, § 1644; '99, p. 142.

4192. (1665x39.) Protest, how made. The protest must be annexed to the bill, or must contain a copy thereof, and must be under the hand and seal of the notary making it, and must specify:

1. The time and place of presentment;

2. The fact that presentment was made and the manner thereof;

3. The cause or reason for protesting the bill;

4. The demand made and the answer given, if any, or the fact that the drawee or acceptor could not be found. R. S. '98, § 1646; '99, p. 143.

4193. (1665x40.) Protest, by whom made. Protest may be made by:

1. A notary public; or

2. By any respectable resident of the place where the bill is dishonored, in the presence of two or more credible witnesses. R. S. '98, § 1645; '99, p. 143.

4194. (1665x41.) When made. When a bill is protested, such protest must be made on the day of its dishonor, unless delay is excused as herein provided. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting. R. S. '98, § 1648; '99, p. 143.

4195. (1665x42.) Where made. A bill must be protested at the place where it is dishonored, except that when a bill drawn payable at the place of business or residence of some person other than the drawee has been dishonored by non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable, and no further presentment for payment to, or demand on, the drawee is necessary. R. S. '98, § 1647; '99, p. 143.

4196. (1665x43.) If protested for non-acceptance may also be protested for non-payment. A bill which has been protested for non-acceptance may be subsequently protested for non-payment. '99, p. 143.

4197. (1665x44.) Where acceptor insolvent. Where the acceptor has been adjudged a bankrupt or insolvent, or has made an assignment for the benefit of creditors, before the bill matures, the holder may cause the bill to be protested for better security against the drawer and indorsers. '99, p. 143.

4198. (1665x45.) Protest dispensed with, delay excused, when. Protest is dispensed with by any circumstance which would dispense with notice of dishonor. Delay in noting or protesting is excused when delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, the bill must be noted or protested with reasonable diligence.

R. S. '98, § 1649; '99, p. 143.

4199. (1665x46.) Where bill is lost or destroyed. Where a bill is lost or destroyed or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof. '99, p. 143.

ACCEPTANCE FOR HONOR

4200. (1665x47.) Acceptance for honor. Where a bill of exchange has been protested for dishonor by non-acceptance or protested for better security and is not overdue, any person not being a party already liable thereon may, with the consent of the holder, intervene and accept the bill supra protest for the honor of any party liable thereon or for the honor of the person for whose account the bill is drawn. The acceptance for honor may be for part only of the sum for which the bill is drawn; and where there has been an acceptance for honor for one party, there may be a further acceptance by a different person for the honor of another party.

R. S. '98, §§ 1631, 1632; '99, p. 144.

4201. (1665x48.) How made. An acceptance for honor supra protest must be in writing and indicate that it is an acceptance for honor, and must be signed by the acceptor for honor. R. S. '98, § 1633; '99, p. 144.

4202. (1665x49.) For whom made. Where an acceptance for honor does not expressly state for whose honor it is made, it is deemed to be an acceptance for the honor of the drawer. '99, p. 144.

4203. (1665x50.) Acceptor for honor, to whom liable. The acceptor for honor is liable to the holder and to all parties to the bill subsequent to the party for whose honor he has accepted. '99, p. 144.

4204. (1665x51.) Liability of. The acceptor for honor by such acceptance engages that he will, on due presentment, pay the bill according to the terms of his acceptance, provided it shall not have been paid by the drawee, and provided also, that it shall have been duly presented for payment and protested for non-payment and notice of dishonor given to him. '99, p. 144.

4205. (1665x52.) Bill accepted for honor, maturity of. Where a bill payable after sight is accepted for honor, its maturity is calculated from the date of the noting for non-acceptance and not from the date of the acceptance for honor. '99, p. 144.

4206. (1665x53.) Dishonored bill must be protested. Where a dishonored bill has been accepted for honor supra protest, or contains a reference in case of need, it must be protested for non-payment before it is presented for payment to the acceptor for honor or referee in case of need.

R. S. '98, § 1634; '99, p. 144.

4207. (1665x54.) Presentment for payment to acceptor for honor, how made. Presentment for payment to the acceptor for honor must be made as follows:

1. If it is to be presented in the place where the protest for non-payment was made, it must be presented not later than the day following its maturity;

2. If it is to be presented in some other place than the place where it was protested, then it must be forwarded within the time specified in § 4140.

'99, p. 144.

4208. (1665x55.) Provisions of § 4116 apply, when. The provisions of § 4116 apply where there is delay in making presentment to the acceptor for honor or referee in case of need. '99, p. 144.

4209. (1665x56.) Bill dishonored by acceptor must be protested. When the bill is dishonored by the acceptor for honor it must be protested for non-payment by him. '99, p. 145.

PAYMENT FOR HONOR.

4210. (1665x57.) Payment for honor supra protest. Where a bill has been protested for non-payment, any person may intervene and pay it supra protest for the honor of any person liable thereon or for the honor of the person for whose account it was drawn. R. S. '98, §§ 1631, 1632; '99, p. 145.

4211. (1665x58.) How made. The payment for honor supra protest in order to operate as such, and not as a mere voluntary payment, must be attested by a notarial act of honor, which may be appended to the protest, or form an extension to it. '99, p. 145.

4212. (1665x59.) Id. The notarial act of honor must be founded on a declaration made by the payer for honor, or by his agent in that behalf, declaring his intention to pay the bill for honor, and for whose honor he pays. '99, p. 145.

4213. (1665x60.) Id. Where two or more persons offer to pay a bill for the honor of different parties, the person whose payment will discharge most parties to the bill is to be given the preference. '99, p. 145.

4214. (1665x61.) Who discharged by. Where a bill has been paid for honor, all parties subsequent to the party for whose honor it is paid are discharged, but the payer for honor is subrogated for, and succeeds to, both the rights and duties of the holder as regards the party for whose honor he pays and all parties liable to the latter. '99, p. 145.

4215. (1665x62.) Holder refusing to receive loses right of recourse. Where the holder of a bill refuses to receive payment supra protest, he loses his right of recourse against any party who would have been discharged by such payment. '99, p. 145.

4216. (1665x63.) Payer for honor entitled to bill. The payer for honor, on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonor, is entitled to receive both the bill itself and the protest. '99, p. 145.

BILLS IN A SET.

4217. (1665x64.) Bills in a set. Where a bill is drawn in a set, each part of the set being numbered and containing a reference to the other parts, the whole of the parts constitute one bill. R. S. '98, § 1614; '99, p. 145.

4218. (1665x65.) Where two or more parts of a set are negotiated. Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is, as between such holders, the true owner of the bill. But nothing in this section affects the rights of a person who in due course accepts or pays the part first presented to him. '99, p. 145.

4219. (1665x66.) Id. Liability of holder. Where the holder of a set indorses two or more parts to different persons, he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed, as if such parts were separate bills. '99, p. 146.

4220. (1665x67.) Acceptance, how made. The acceptance may be written on any part, and it must be written on one part only. If the drawee accepts more than one part, and such accepted parts are negotiated to different holders in due course, he is liable on every such part as if it were a separate bill. '99, p. 146.

4221. (1665x68.) Acceptor paying. Liability. When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance

to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereon. '99, p. 146.

4222. (1665x69.) Bills in a set, how discharged. Except as herein otherwise provided, where any one part of a bill drawn in a set is discharged by payment or otherwise, the whole bill is discharged. '99, p. 146.

CHAPTER 10.

PROMISSORY NOTES AND CHECKS.

4223. (1665x70.) Negotiable promissory note defined. A negotiable promissory note, within the meaning of this title, is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand, or at a fixed or determinable future time, a sum certain in money to order or to bearer. Where a note is drawn to the maker's own order, it is not complete until indorsed by him. R. S. '98, § 1658; '99, p. 146.

Negotiable instrument, form, etc., §§ 4030-4052, and notes.
Consideration, § 4053-4058, and notes.
Indorsement and suretyship, note to § 4097.
An order to pay A or bearer in merchandise, signed by one party and drawn upon another, is not a note within the meaning of the act of Feb. 8, 1875, although paid out and used for circulation, and is not subject to the tax imposed by that act.
Z. C. M. I. v. Hollister, 3 U. 292; 3 P. 87; affirmed 111 U. S. 92.

4224. (1665x71.) Check defined. A check is a bill of exchange drawn on a bank payable on demand. Except as herein otherwise provided, the provisions of this title applicable to a bill of exchange payable on demand apply to a check. R. S. '98, § 1663; '99, p. 146.

4225. (1665x72.) Check must be presented, when. A check must be presented for payment within a reasonable time after its issue, or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay. R. S. '98, § 1664; '99, p. 146.

4226. (1665x73.) Check certified. Where a check is certified by the bank on which it is drawn, the certification is equivalent to an acceptance. '99, p. 146.

4227. (1665x74.) Check certified discharges indorsers. Where the holder of a check procures it to be accepted or certified, the drawer and all indorsers are discharged from liability thereon. '99, p. 146.

4228. (1665x75.) Check does not assign funds. A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check. '99, p. 147.

CHAPTER 11.

GENERAL PROVISIONS.

4229. (1665x76.) Title, how known. This title shall be known as the negotiable instruments law. '99, p. 147.

4230. (1665x77.) Terms defined. In this title, unless the context otherwise requires:

"Acceptance" means an acceptance completed by delivery or notification;

"Action" includes counterclaim and set-off;

"Bank" includes any person or association of persons carrying on the business of banking, whether incorporated or not;

"Bearer" means the person in possession of a bill or note which is payable to bearer;

"Bill" means bill of exchange, and "note" means negotiable promissory note;

"Delivery" means transfer of possession, actual or constructive, from one person to another;

"Holder" means the payee or indorsee of a bill or note, who is in possession of it, or the bearer thereof;

"Indorsement" means an indorsement completed by delivery;

"Instrument" means negotiable instrument;

"Issue" means the first delivery of the instrument, complete in form, to a person who takes it as a holder;

"Person" includes a body of persons, whether incorporated or not;

"Value" means valuable consideration;

"Written" includes printed and "writing" includes print. '99, p. 147.

4231. (1665x78.) Person primarily and secondarily liable. The person "primarily" liable on an instrument is the person who, by the terms of the instrument, is absolutely required to pay the same. All other parties are "secondarily" liable. '99, p. 147.

4232. (1665x79.) Reasonable time. In determining what is "reasonable time" or an "unreasonable time," regard is to be had to the nature of the instrument, the usage of trade or business (if any) with respect to such instrument, and the facts of the particular case. '99, p. 147.

4233. (1665x80.) Time, how computed. Where the day, or the last day, for doing any act herein required or permitted to be done falls on Sunday or on a holiday the act may be done on the next succeeding secular or business day. '99, p. 147.

Legal holidays, § 2860.
When last day to perform any act falls on holiday it may be performed on next succeeding business day, §§ 5843, 5844.

4234. (1665x81.) Not retroactive. The provisions of this title do not apply to negotiable instruments made and delivered prior to July 1, 1899. '99, p. 147.

4235. (1665x82.) Law-merchant. In any case not provided for in this title the rules of the law-merchant shall govern. '99, p. 148.

TITLE 73.

NOTARIES PUBLIC AND COMMISSIONERS OF DEEDS.

CHAPTER 1.

NOTARIES PUBLIC.

4250. (1666.) Appointment. Term. The governor may appoint one or more notaries public in each of the counties of this state; whose term of office shall be four years from the date of their commission; *provided,* that no person except a citizen of the United States, over the age of twenty-one years and a bona fide resident of the state of Utah shall be appointed as a notary public. '09, p. 221.

Fees of notaries public, § 2535.
Fees in full compensation, Con. art. 21, sec. 2.
Appointment certified to clerk of district court, §§ 5706, 5707.
May certify to copy chattel mortgage, § 470.
May certify to copy livestock lease, § 130.

4251. (1667.) Oath and bond. Each notary public shall, before entering upon his official duties, take the oath of office and give a bond, with sufficient sureties, to the state of Utah, in the penal sum of $500, conditioned that he will faithfully perform the duties of his office. The bond shall be filed with and approved by the secretary of state.

4252. (1668.) Suit on bond. The commission and oath shall be filed and recorded in the office of the secretary of state. The bond may be sued on by any person injured through the unfaithful performance of such notary's du-

ties; *provided,* that no suit shall be so instituted after three years from the time the cause of such action accrued.

4253. (1669.) Powers. Within the counties for which they are appointed, notaries public are hereby authorized to administer all oaths provided for by law; to acknowledge powers of attorney and all instruments of writing conveying or affecting property in any part of this state, and elsewhere so far as may be lawful; to take affidavits and depositions; to make declarations and protests, and to do all other acts usually done by notaries public in other states and territories.

Take acknowledgment of conveyance of real estate, § 4885.

4254. (1670.) Record of protest. Each notary public shall keep a fair record of all notices of protest made by him, the time and manner in which they have been served, and the names of all the parties to whom they were directed, and the description and amount of the instrument protested; which record shall be competent evidence to legally prove such notices, and, when required and the fees are paid, he shall give a certified copy of any official record or paper in his office.

4255. (1671.) Seal. Every notary public shall have a seal, with which he shall authenticate all his official acts. Said seal must contain the name of the state, of the county in which the notary public is commissioned to act, and the words "Notary Public" or "Notarial Seal," with the surname, and at least the initials of the Christian name, of the notary public.

4256. (1672.) To affix date of expiration of commission. Notaries public in this state shall affix to all acknowledgments, oaths, affirmations, and instruments of every kind taken and certified by them according to law, the date on which their commissions expire. Am'd '07, p. 38.

4257. (1673.) Unlawful certification. Penalty. Any notary public who shall wilfully affix his signature and seal as notary public to any instrument after the expiration of his commission shall be guilty of a misdemeanor.

CHAPTER 2.

COMMISSIONERS OF DEEDS.

4258. (1674.) Appointment. Term. The governor may appoint in each state or territory of the United States except the state of Utah, or in any foreign state, one or more commissioners of deeds, to hold office for the term of four years from and after the date of their commission, but the governor may remove from office any commissioner during the term for which he was appointed.

Cal. Pol. C., § 811.

4259. (1675.) Powers. Every commissioner of deeds has power, within the state for which he was appointed:

1. To administer and certify oaths;
2. To take and certify depositions and affidavits;
3. To take and certify the acknowledgment or proof of powers of attorney, mortgages, transfers, grants, deeds, or other instruments for record; *provided,* that he shall state thereon the date of the expiration of his commission;
4. To provide and keep an official seal, upon which must be engraved his name, the words "Commissioner of Deeds for the State of Utah," and the name of the state for which he is commissioned;
5. To authenticate with his official seal all of his official acts.

Cal. Pol. C., § 812*.

4260. (1676.) Effect of acts. All oaths administered, depositions and affidavits taken, and all acknowledgments and proofs certified by commissioners of deeds have the same force and effect, to all intents and purposes, as if

done and certified in this state by any officer authorized by law to perform such acts.

Cal. Pol. C., § 813.

4261. (1677.) Oath. Before such commissioner can perform any of the duties of his office, he is required to take and subscribe an oath that he will faithfully perform said duties, which oath shall be taken and subscribed before some judge or clerk of a court of record in the state, territory, or foreign country in which the commissioner is to exercise his appointment, and be certified under the hand of the person taking it and the seal of his court.

4262. (1678.) Filing oath. The official oaths of commissioners of deeds, together with the impressions of their official seals, must be filed in the office of the secretary of state within six months after they are taken.

Cal. Pol. C., § 814.

4263. (1679.) Fees. The fees of commissioners of deeds are the same as those prescribed for notaries public.

Cal. Pol. C., § 815. Fees of commissioner in full compensation, Con. art. 21, sec. 2.
Fees of notaries public, § 2535.

4264. (1680.) To be furnished copies of certain laws. The secretary of state must transmit with the commission to the appointee a certified copy of this chapter, and of the section prescribing the fees of notaries public.

Cal. Pol. C., § 817.

4265. (1681.) Commissioners for other states. The commissioners of deeds for other states residing in this state shall file with the secretary of state a certified copy of their commission, together with a statement of their place of residence.

TITLE 74.

NUISANCES.

ABATEMENT OF COMMON NUISANCES.

('13, p. 189.)

4275. Offense defined. Penalty. Abatement. Whoever shall erect, establish, continue, maintain, use, own, or lease any building, erection, or place for the purpose of lewdness, assignation, or prostitution is guilty of a nuisance, and the building, erection, or place, or the ground itself, in or upon which such lewdness, assignation, or prostitution is conducted, permitted, or carried on, continued, or exists, and the furniture, fixtures, musical instruments, and contents are also declared a nuisance, and shall be enjoined and abated as hereinafter provided.

Health and quarantine regulations, § 2735-2742. Under liquor prohibition act, §§ 3350-3353.

4276. Id. Premises to be enjoined. Temporary writ. Whenever a nuisance is kept, maintained, or exists, as defined in this title, the county attorney or any citizen of the county may maintain an action in equity in the name of the state of Utah, upon the relation of such county attorney or citizen, to perpetually enjoin said nuisance, the person or persons conducting or maintaining the same, and the owner or agent of the building or ground upon which said nuisance exists; *provided,* that when the owner or agent is not in the actual possession of the premises he shall have, before an action is brought against him or affecting his real estate, under this title, notice in writing of the existence and nature of the nuisance, and he shall have a reasonable time after the service of said notice in which to abate said nuisance. In such action the court, or a judge in vacation, shall, upon the presentation of a petition therefor alleging that the nuisance complained of exists, allow a temporary writ of injunction without bond, if it shall be made to appear to the satisfaction of the court or judge by evidence in the form of affidavits, depositions, oral tes-

timony, or otherwise, as the complainant may elect, unless the court or judge, by previous order, shall have directed the form and manner in which it shall be presented. Three days' notice in writing shall be given the defendant of the hearing of the application, and if then continued at his instance, the writ as prayed shall be granted as a matter of course. When an injunction has been granted, it shall be binding on the defendant throughout the judicial district in which it was issued, and any violation of the provisions of injunction herein provided shall be a contempt as hereinafter provided.

Action to abate brought by whom, §§ 2737, 72 40.

4277. Trial. Evidence. Prosecution. The action when brought shall be triable at the first term of court, after due and timely notice has been given, and in such action evidence of the general reputation of the place shall be admissible for the purpose of proving the existence of said nuisance. If the complaint is filed by a citizen, it shall not be dismissed except upon a sworn statement made by the complainant and his attorney setting forth the reasons why the action should be dismissed, and the dismissal approved by the county attorney in writing, or in open court. If the court is of the opinion that the action ought not to be dismissed, he may direct the county attorney to prosecute said action to judgment, and if the action is continued more than one term of court, any citizen of the county or the county attorney may be substituted for the complaining party and prosecute said action to judgment. If the action is brought by a citizen and the court finds there was no reasonable ground or cause for said action, the costs may be taxed to such citizen.

4278. Violation of injunction. Penalty. In case of the violation of any injunction granted under the provisions of this title, the court, or in vacation a judge thereof, may summarily try and punish the offender. The proceedings shall be commenced by filing with the clerk of the court an information, under oath, setting out the alleged facts constituting such violation, upon which the court or judge shall cause a warrant to issue, under which the defendant shall be arrested. The trial may be had upon affidavits, or either party may demand the production and oral examination of the witnesses. A party found guilty of contempt under the provisions of this section shall be punished by a fine of not less than $200 nor more than $1000, or by imprisonment in the county jail not less than three nor more than six months, or by both fine and imprisonment.

4279. Judgment. Sale of property. If the existence of the nuisance be established in an action as provided in this title, an order of abatement shall be entered as a part of the judgment in the case, which order shall direct the removal from the building or place of all fixtures, furniture, musical instruments, or movable property used in conducting the nuisance, and shall direct the sale thereof in the manner provided for the sale of chattels under execution, and the effectual closing of the building or place against its use for any purpose, and so keeping it closed for a period of one year, unless sooner released. If any person shall break and enter or use a building, erection, or place so directed to be closed, he shall be punished as for contempt as provided in the preceding section. For removing and selling the movable property, the officer shall be entitled to charge and receive the same fees as he would for levying upon and selling like property on execution, and for closing the premises and keeping them closed, a reasonable sum shall be allowed by the court.

4280. Proceeds of sale to be applied to costs. The proceeds of the sale of the personal property, as provided in the preceding section, shall be applied in payment of the costs of the action and abatement, and the balance, if any, shall be paid to the defendant.

4281. Conditional release of premises to owner. If the owner appears and pays all costs of the proceeding and files a bond with sureties to be approved by the clerk in the full value of the property, to be ascertained by the court, or in vacation by the clerk, auditor, and treasurer of the county, conditioned that he will immediately abate said nuisance and prevent the same

from being established or kept therein within a period of one year thereafter, the court, or in vacation the judge, may, if satisfied of his good faith, order the premises closed under the order of abatement to be delivered to said owner, and said order of abatement canceled so far as the same may relate to said property; and if the proceeding be an action in equity and said bond be given and costs therein paid before judgment and order of abatement, the action shall be thereby abated as to said building only. The release of the property under the provisions of this section shall not release it from any judgment, lien, penalty, or liability to which it may be subject to law.

4282. Penalty. Fines and costs to be a lien upon property. Whenever a permanent injunction issues against any person or persons for maintaining a nuisance as herein provided for, or against any owner or agent of the building kept or used for the maintenance of such nuisance, all parties found guilty of maintaining such nuisance, or assisting to maintain such nuisance by furnishing or letting such building for the maintenance of such nuisance, or otherwise, shall be punished by a fine of not more than $1000, or by imprisonment in the county jail not more than six months, or by both fine and imprisonment. Said money fines and costs of action shall be a perpetual lien upon all property, both personal and real, used for the purpose of maintaining said nuisance, and the payment of said fines shall not relieve the person or persons from any other penalties provided by law. The collection of said fines or lien shall be effected in the same manner as provided for the collection of taxes on real estate.

Sale of real estate for taxes, § 6018.

4283. All acts and parts of acts, in so far as they are in conflict with this title are hereby repealed.

TITLE 75.

NURSES.

REGISTRATION OF TRAINED NURSES.

('17, p. 182.)

4285. Board of examination and registration. Within sixty days after this title takes effect, the governor shall appoint a state board of examination and registration of hospital trained and graduate nurses, consisting of five members.

4286. Qualification of members. Each person so named shall be a trained nurse, at least twenty-three years of age, and a graduate of a training school connected with a hospital of recognized standing. Their successors in office shall be nurses duly registered under the provision of this title.

4287. Terms of office. Three members of said board shall be appointed by the governor to hold office for two years, and two of said members to hold office for the term of four years. At the expiration of the term of each person so appointed, his successor shall be appointed for a term of four years. An office made vacant by resignation, death, or otherwise shall be filled in the same manner as herein provided for the first appointment.

4288. Working organization. Rules and regulations. Seal. Within thirty days after appointment, said board shall assemble and proceed to effect a working organization. There shall be elected from among its members a president, a vice-president, and a secretary, who shall also act as treasurer. These officers shall serve for two years; and biennially thereafter their successors shall be elected to serve for a like period. Three members of the board shall constitute a quorum. The board shall be authorized to make such rules and regulations to govern its proceedings and to carry into effect the provisions of this title as shall be found necessary or convenient. The board shall adopt a seal.

4289. Officers. Duties. Records. Reports. The president shall be chairman of the board and its principal executive officer, with the powers and duties usually incident to such position. The vice-president shall act in the absence of the president. The secretary shall have full charge of all moneys and books of accounts, and all other transactions of the board, and shall be required to keep a record of all meetings of said board, and a register of names of all nurses applying for registration, and those duly registered under the provisions of this title. The nurses' register, books of accounts, and the proceedings of said board shall be kept in the office of the state board of health, and shall be open at all reasonable times for public inspection. The board shall be charged with the duties of enforcing the provisions of this title, and of causing the prosecution of any person violating any of its provisions. An annual report shall be made to the governor, and shall be filed in his office before January 1 of each year.

4290. Meetings. The board shall provide for a regular annual meeting for the transaction of such business as may come before it. Special meetings may be called by the president, or by the secretary on request in writing of any three members of the board. The meetings of said board for the purpose of holding examinations shall be as hereinafter provided.

4291. Compensation. Expenses. Limitations. The board members, with the exception of the secretary, shall receive not to exceed $4 per day for each day or fraction thereof actually engaged in attendance upon meetings of the board, and also for those days spent in going to and from the place of meeting. Said members, with the exception of the secretary, shall also be allowed all necessary traveling expenses incurred in attendance upon said meetings. The salary of the secretary shall be fixed by the board, and shall not exceed $500 per annum. All necessary expenses incurred in carrying out the provisions of this title, including stationery, books of account, office furniture and supplies, costs of prosecution, and other like expenses, shall be borne by the board, and the secretary shall draw vouchers in payment of the same, duly countersigned by the president as hereinafter specified; *provided, however,* that in no event shall the expenditures of said board exceed the revenues.

4292. Fees. Special fund. Disbursements. Upon filing application for examination, each applicant shall pay an examination fee of $10, which shall in no case be returned to the applicant. Nurses applying for registration without examination shall be required to pay a like fee. All fees received by said board shall be paid to the secretary of said board, who shall at the end of each and every month deposit the same with the state treasurer, and the state treasurer shall place the money so received in a special fund, to be known as the fund of the state board of examination and registration of hospital trained and graduate nurses, and shall pay the same out on vouchers issued and signed by the secretary and the president of the board upon warrants drawn by the auditor of the state. All money so received and placed in said fund may be used by said board in paying the salaries and other expenses authorized by this title.

4293. Practicing without certificate prohibited. One hundred and twenty days after said board shall organize and elect its officers as hereinbefore provided, it shall be unlawful for any nurse to practice nursing as a hospital graduate or registered nurse without a certificate from the board hereby created; *provided, however,* that this title shall not be construed to affect or apply to any person nursing the sick as a practical nurse who does not assume to be, or to practice as, a hospital trained graduate or registered nurse.

4294. Time for registration. Qualification of applicants. An applicant for registration who has been a resident of the state of Utah for six months before the 1st of March, 1918, shall be registered without examination, *provided* application for registration be made by said applicant prior to the 1st of March, 1918, and said applicant has been graduated before said date from a

reputable training school for nurses connected with a general hospital; *provided however,* that any student now in training in any hospital training school in the state of Utah, who has previously made application for registration, may have until January 1, 1919, to register. An examination, as hereinafter provided, shall be required of all other applicants. No person shall be eligible for such examination who shall not furnish satisfactory evidence of having been graduated from an accredited training school for nurses, and who has not reached the age of twenty-one years.

4295. Training school. An accredited training school for nurses within the meaning of this title is hereby defined to be a school for the training of nurses attached to, or operated in connection with, a hospital or hospitals, with a minimum capacity of forty beds, giving a general training and a systematic theoretical and practical course of instruction covering a period of at least three years. All applicants for examination must furnish satisfactory evidence of good moral character, and of having complied with the provisions of this title relative to qualifying.

4296. Examinations. It shall be the duty of said board to meet on January 2 and July 1 of each year for the purpose of holding examinations in both theory and practice under the provisions of this title. Said examinations shall cover bacteriology, elementary hygiene, anatomy, physiology, materia medica, dietetics, practical nursing, medical and surgical nursing, obstetrics, nursing of children, and the rules and regulations of the state board of health relating to infectious diseases and quarantine, and other subjects required from time to time. A nurse who has received his certificate according to the provisions of this title shall be styled and known as a registered nurse, and shall be entitled to place the initials R. N. after his name.

4297. Registration of nurses from other states. The board, upon written application, and upon the receipt of $10 registration fee, shall issue a certificate of registration to any applicant who has been duly registered as a nurse under the laws of another state or foreign country having requirements similar to those provided in this title.

4298. Revocation of certificates. Procedure. The board shall have power to revoke any certificate issued in accordance with this title, by unanimous vote of said board, for gross incompetency, dishonesty, habitual intemperance, or any other act or conduct derogatory to morals, or calculated to lower the standard of the profession of nursing; but before any certificate can be revoked the holder shall be entitled to at least thirty days' written notice of the charge against him, and of the time and place of hearing, at which time and place he shall be entitled to present any evidence bearing upon the question which he may have. Such charge shall be set forth fully in a duly verified complaint. Upon revocation of any certificate it shall be the duty of the secretary to strike the name of the holder thereof from the roll of registered nurses, and notice of such revocation shall be sent to the state board of examination and registration of nurses in other states; *provided,* that any nurse whose certificate shall be revoked for any cause may appeal to the district court of the county wherein such revocation shall be made in all respects as is provided by law in civil cases. Should such person prevail in such appeal, all costs of such action shall be assessed against said board.

4299. Inspectors. Qualifications. Fees. The board shall have the power to appoint an inspector of hospitals and training schools for nurses, whose duties shall be outlined by the board. Such appointee may or may not be a member of the board, but in either event must be a hospital trained or graduate and registered nurse. The inspector shall receive not to exceed $5 a day when actually engaged in the service of the board, and also all necessary expenses incurred while in the discharge of his official duties.

4300. Penalty. Any person violating any of the provisions of this title, or making any false representations to the said board, in applying for a certificate, shall be guilty of a misdemeanor, and upon conviction thereof shall

be punished by a fine of not less than $100 nor more than $500, or by imprisonment of not more than thirty days in jail, or by both such fine and imprisonment.

TITLE 76.

OFFICIAL BONDS.

4305. (1682.) Run to whom. When the law directs that a public officer shall give a bond without prescribing to whom it shall run, it shall be made, if he is a state officer, to the state; if a county, precinct, or district officer, to the county; if a municipal officer, to the city or town; and if a school officer, to the school district or to the board of education, as the case may be.

Bonds of state officers, see the title of the office.
Bonds of county and precinct officers, § 1466.
Bonds of city officers, § 603.
Bonds of town officers, § 786x19.
Bonds of school officers, §§ 1782, 1804, 1902.

Under §§ 344 and 347 of the Compiled Laws of 1876, it is the duty of the assessor and collector to give two official bonds, one to the territory and one to the county.
Salt Lake Co. v. Golding, 2 U. 319.

4306. (1682x.) Approval and custody of bonds of state officers. Whenever state officers, officials of state institutions, or other persons are required to give official bonds to the state, such bonds shall be approved by the state board of examiners, and recorded by the secretary of state in a book to be kept for that purpose, and when so recorded the secretary of state shall deliver the originals to the state treasurer, excepting the bond of the state treasurer, and the said treasurer shall become the legal custodian of said bonds. The bond of said treasurer shall remain in the custody of the secretary of state, who shall become the legal custodian of said bond.

'01, p. 36; '05, p. 33.

4307. (1683.) Who secured. The official bond of a public officer, to the state, or to any county, city, town, or other municipal or public corporation, shall be deemed a security to the state, or to such county, city, town, or other municipal or public corporation, as the case may be, and also to all persons severally, for the official delinquencies against which it is intended to provide.

Wash. (1896) § 5088.

4308. (1684.) Who may maintain action on bond. When a public officer, by official misconduct or neglect of duty, shall forfeit his official bond or render his sureties therein liable upon such bond, any person injured by such misconduct or neglect, or who is by law entitled to the benefit of the security, may maintain an action at law thereon in his own name against the officer and his sureties to recover the amount to which he may by reason thereof be entitled.

Wash. (1896) § 5089.
Sureties not liable for wrongful acts not in line of duty. Sureties on an official bond in an action ex contractu are not liable for the wrongful acts of the principal not done in the line of his official duty
Clinton v. Nelson, 2 U. 284.

4309. (1685.) Repeated delinquencies. A judgment in favor of a party for one delinquency does not preclude the same or another party from an action on the same security for another delinquency, except that sureties can be made liable in the aggregate only to the extent of their undertaking.

Iowa, McClain's An. C. (1888) § 4605.

4310. (1686.) Bonds cover duties under subsequent law. Defects. The bonds of all civil officers shall be construed to cover duties required by laws passed subsequent to giving them, and no bond shall be void for failure to comply with the law as to matters of form or substance, but it shall be valid as to all matters contained therein, if it complies substantially with the law.

N. Dak., § 356.

TITLE 77.

OPTOMETRY.

('15, p. 133.)

4315. (1686x.) Unlawful to practice without certificate. It shall be unlawful for any person in the state of Utah to practice or attempt to practice optometry, as hereinafter defined, or to advertise, or hold himself out as qualified to fit or adjust any lenses or lens in any manner or form as an aid or assistance to human eyesight, without first obtaining a certificate to practice optometry, as hereinafter provided.

4316. (1686x1.) Practice of optometry defined. The practice of optometry is the use of any means, artificial or otherwise, except the administration or application of drugs, for ascertaining the refractive and optical condition of the human eye for the purpose of adjusting and fitting lenses thereto, or the fitting or adjusting of lenses thereto.

4317. (1686x2.) Board created. Appointment. Term. Qualifications. There is hereby created a board, consisting of three persons, which shall be styled the Utah state board of examiners in optometry, whose duty it shall be to carry out the purposes and enforce the provisions of this title. Said board shall be appointed by the governor for a term of two years, by and with the consent of the senate. Each member of the board shall be a resident of the state of Utah, and shall have been engaged in the actual practice of optometry in the state for at least five years prior to his appointment. All appointments to fill vacancies caused by death, resignation, or removal shall be made by the governor. The members of said board, before entering upon their duties, shall respectively take and subscribe to the oath required to be taken by state officers, which shall be administered by the secretary of state and filed in his office.

4318. (1686x3.) Id. Organization. Powers. Meetings. Records. Said board shall choose at its first meeting, and annually thereafter, one of its members as president, and one as secretary and treasurer thereof. Each member of the board shall have the power, during his term of office, to administer oaths and take affidavits, certifying thereto under his hand and the seal provided and kept by the board. Said board shall meet at least once in each year at the state capitol, for the purpose of holding an examination, and in addition thereto, whenever and wherever the president or secretary, by order of the president, shall call a meeting. A majority of said board shall constitute a quorum. The secretary shall keep a complete record of the proceedings of the board, which record shall be open to public inspection at all reasonable times.

4319. (1686x4.) Qualifications to practice. Examination. Fee. License certificate. Certificates authorizing the practice of optometry shall be issued, after the passage of this title, only to persons who have reached the age of twenty-one years, are of good moral character, have a preliminary education equivalent to two or more years in a public high school, and also have studied at least three years in the office of a registered optometrist, or have been actually engaged in refraction for three years, or have actually attended and graduated from a recognized school of optometry, and upon a critical examination are found to possess the requisite scholarship in optometry. Upon the presentation of satisfactory evidence, verified by oath, of such qualification, such person may make application for examination for a certificate authorizing him to practice optometry. The application shall be in writing, directed to the secretary of said board of examiners, requesting to be examined in optometry. The application must be filed with the secretary not less than fifteen days before the time of examination, and be accompanied by the sum of $20 for the use and benefit of said board. If the applicant shall successfully pass such examination, he shall have issued to him a certificate signed by the president and secretary of said board, authorizing him to prac-

tice optometry in the state of Utah, upon a further payment of $5 to said secretary, for the use of said board, and he shall receive therewith a certified copy of said certificate. Additional certified copies of said certificate, while it may remain in force, shall be furnished by the board for a fee of 50 cents for each additional copy. All persons successfully passing such examination shall be registered in the board register, which shall be kept by said secretary, as licensed to practice optometry; *provided,* that nothing in this title shall be so construed as to permit or authorize any person or persons, other than the individual holding a certificate, to practice thereunder or by its authority, or under the guise of practicing under the direction of the legal holder thereof.

4320. (1686x6.) Copy of certificate to be filed with county recorder. Forfeiture for failure. Recipients of certificates issued under § 4319, and all other persons holding certificates entitling them to practice optometry at the time of the passage of this title, shall file a certified copy thereof for record with the county recorder of the county in which they desire to practice, and any person traveling from one county to another in this state shall, before engaging in the practice of optometry in such other county, file a certified copy of said certificate for record with the county recorder of said county to which he removes, and pay the recorder thereof for the recording of the same in a book to be kept for that purpose; *provided,* that any failure, neglect, or refusal on the part of any person holding a certificate to practice optometry to present the first certified copy thereof which is required to be recorded, for recording, with the county recorder, as hereinbefore provided, for one month after the issuance of his certificate, shall forfeit the certificate, and the board shall be entitled to a fee of $1 for issuing a certificate in lieu of the one forfeited.

4321. (1686x7.) Certificate to be displayed. Issuance of receipt to customer. Every person holding a certificate to practice optometry in the state of Utah shall display the said certificate in its entirety in a conspicuous place in his office wherein the practice of optometry is conducted. He shall also deliver to each customer or person fitted with glasses by him, in case the work is not done in his permanent office, a receipt which shall contain his signature, the number of his certificate, and his home postoffice address.

4322. (1686x10.) Board may revoke certificate. Proviso. The board shall have power to revoke any certificate to practice optometry granted by it under the provisions of this title whenever it shall appear that the holder thereof has been wilfully guilty of fraud or deceit, either in procuring the same or in his practice, or by advertising optical business or treatment, or giving advice in which untruthful or misleading statements are made, or when it is made to appear to the board that such person is incompetent, or is not of good moral character, or is afflicted with an infectious or contagious disease; *provided,* that before any certificate shall be revoked, the holder thereof shall have written notice of the charge or charges against him, and a day specified in said notice, which shall be at least ten days if served in the county where the hearing is to be held, after the service thereof, otherwise twenty days after service, that he be given a public hearing, and have an opportunity to produce testimony in his behalf, and confront the witnesses against him; *provided, further,* that upon the revocation of any certificate, the holder thereof may appeal said matter to the district court of the county in which the practitioner resides, in the manner as is now or may hereafter be provided for appeals from justice's courts, and such laws are hereby made applicable. The secretary of said board shall send the files and a copy of the minutes in the matter before the board to the clerk of the district court of the county in which the appeal is taken, and such minutes and files shall constitute the records on appeal. The witnesses at all hearings before the board shall testify under oath, and for that purpose may be sworn by any member of the board. The board shall have power to compel the attendance of witnesses and the production of documents at any such hearings. Any person whose

certificate has been revoked may have the same regranted upon satisfactory proof that the disqualification has ceased or his disability removed.

4323. (1686x9.) Annual renewal of license. Fee. Penalty for default. Every registered optometrist who desires to continue the practice of optometry in this state shall annually, on or before the 1st day of April, pay to the secretary of said board the sum of $2 for such year, for which he shall receive a receipt, which shall permit him to practice optometry in all those counties of this state in which a certified copy of his said certificate is on file or of record in accordance with law, unless his said certificate be revoked under the provisions of law. Should any person or persons default in the payment of any such annual fees, his certificate may be revoked by said board upon twenty days' notice of the time and place of considering such revocation. But no license shall be revoked for such non-payment if the person so notified shall pay, before or at the time set for such consideration, his fee and such penalty as may be imposed by said board; *provided,* that said board may impose a penalty of $5 and no more on any one person so notified as a condition of allowing his license to stand.

4324. (1686x8.) Board to receive compensation and mileage. Disposition of receipts. Each member of the board may receive as compensation, out of the funds coming into their possession the sum of $5 for each day actually engaged in the duties of his office, and mileage at the rate of 3 cents per mile for all distances necessarily traveled in going to and returning from meetings of the board. Said expenses shall be paid from the fees, fines, and assessments received by the board under the provisions of this title, upon claim approved by the state board of examiners and the state auditor, and upon the warrant of the state auditor, and the state shall not be liable for any of the fees, salaries, or expenses of said board in excess of the amount received from this source. All moneys received under the provisions of this title shall be paid into the state treasury on the last day of each month, and placed to the credit of the state optometry fund, and are hereby constituted a state optometry fund, which money shall be used for meeting expenses of said board and carrying out the provisions of this title, and the treasurer of said board shall give a surety bond to the state of Utah, the amount of which shall be fixed by the board, and shall be in a sum not less than twice the amount held by said treasurer at any time during the year next preceding the time of fixing such bond, the cost thereof to be paid out of the funds held by the board.

4325. Biennial report. On or before the 1st day of January preceding each biennial session of the legislature, this said board shall make a report of of its proceedings to the governor, which report shall contain an account of all moneys received and disbursed by it pursuant to this title.

4326. (1686x11.) Penalty. Any person who shall violate any of the provisions of this title shall be deemed guilty of a misdemeanor.

4327. (1686x12.) Construction. Provisions not applicable to certain persons. Nothing in this title shall be construed to apply to persons licensed to practice medicine or surgery in this state, nor to persons who sell spectacles, eyeglasses, or lenses, either on prescription from oculists or from duly qualified and licensed optometrists, or as merchandise from permanently located and established places of business, but who neither practice nor profess to practice optometry, or who neither advertise nor hold themselves out as qualified to fit or adjust any lenses or lens as an aid or assistance to human eyesight. '07, p. 87; '15, p. 133.

TITLE 78.

PARDONS, STATE BOARD.

4330. (1686x13.) Reduction of sentence for good behavior. The board of pardons is hereby authorized to extend to each convict sentenced for any period less than life who shall not have been guilty of a breach of the rules of discipline of the prison a reduction of the period of sentence, as hereinafter provided; and when the full term of imprisonment for which such convict shall have been sentenced shall be diminished by his good conduct under the provisions of this title so that his term of imprisonment has thereby expired, the warden shall immediately furnish the board of pardons a certificate stating the length of time his term of imprisonment has been so diminished, and, no objections appearing to the board, the convict shall be released.

R. S. '98, § 2246; '99, p. 56.

Governor, justices of supreme court, and attorney-general constitute board of pardons; powers and duties, Con. art. 7, sec. 12.

May grant privileges for good work on roads. § 5511.

May grant paroles, § 4335.

Connors v. Pratt, 38 U. 260; 112 P. 399.

4331. (1686x14.) Id. The hereinafter specified deductions shall be allowed to convicts for good conduct:

1. From a term of sentence of three months, fifteen days; from a term of six months, thirty days; from a term of one year, two calendar months; thus, a one-year convict shall be entitled to a discharge at the expiration of ten months.

2. If the term be for any time greater than one year, the service for the second year or portion thereof shall begin at the expiration of ten months, which shall stand for a service of one year. On the second year the convict shall be entitled to a deduction of three calendar months; thus, a service of one year and seven months shall be sufficient for a term of two years.

3. The service of a third year, or fraction thereof, shall begin at the expiration of one year and seven months; four calendar months shall be allowed on said third year; thus, a service of two years and three months shall be sufficient for a term of three years.

4. For a term of four years, the service of the fourth, or portion thereof, shall begin at the expiration of two years and three months, and on the fourth year five months shall be allowed; thus, a service of two years and ten months shall be sufficient for a term of four years.

5. In a term of five years, the service of the fifth year, or portion thereof, shall begin at the expiration of two years and ten months, and from the fifth year there shall be a deduction of six calendar months; thus, a service of three years and four months shall be sufficient for a term of five years.

For all time in excess of five years there shall be a deduction of one-half of such time. R. S. '98, § 2247; '99, p. 56.

Statute in force at time of convict's sentence determines reduction to which he is entitled. In re Clawson, 5 U. 358; 15 P. 328.

From a term less than three months, there is no deduction. Ex parte Nokes, 6 U. 106; 21 P. 458.

4332. (1686x15.) Id. In all terms of sentence terminating between those hereinbefore specified, the deduction shall be proportionate.

R. S. '98, § 2248; '99, p. 56.

4333. (1686x16.) Forfeiture of reduction. For a violation of the rules the convict shall be liable to forfeit all his deduction time for the month in which the infraction occurs. If the offense or offenses be aggravated or frequent, the warden or other officer in charge shall have power to punish the offender by depriving him of all or any portion of his deduction time earned previous to the commission of such offense or offenses; *provided,* that any convict who may feel himself aggrieved by the action of the warden or other officer in charge in such cases shall have the right to appeal, in writing, to the board of pardons, which writing shall include a statement of facts and the evidence and reasons of the appellant for considering himself unjustly dealt with. Should the board, upon investigation, deem the complaint of the con-

vict well grounded, it shall credit back to such convict the earned deduction time of which he shall have been deprived. R. S. '98, § 2249; '99, p. 57.

4334. (1686x17.) Habitual criminal, permit to be at liberty, when. When it shall appear to the board that any person sentenced to the state prison as a habitual criminal has reformed, it may issue to him a permit to be at liberty during the remainder of his term of sentence, upon such conditions as it deems best; and it may revoke such permit at any time previous to its expiration. The violation by the holder of a permit, granted as aforesaid, of any of the terms or conditions thereof, or his violation of any of the laws of the state, shall of itself make void the permit. R. S. '98, § 2250; '99, p. 57.

4335. (1686x18.) Prisoners may be paroled. Proviso. The board of pardons is hereby authorized to permit any prisoner who is now or may hereafter be imprisoned in the Utah state prison, or any county jail in this state, to go on parole outside of the prison buildings and other enclosures, or the county jail, as the case may be; *provided,* that a prisoner who is imprisoned for murder in the first degree shall not be permitted to go on parole until he shall have served at least fifteen years' actual time in the state prison. The concurrence of at least four members of the board shall be necessary for the parole of a prisoner. Am'd '13, p. 121.

4336. (1686x19.) Reimprisonment. A prisoner, while on parole, as in this title provided, shall remain in the legal custody and under the control of the warden or the sheriff of the county from which the prisoner was paroled, as the case may be, and the board of pardons, and shall be subject at any time to be taken back within the institution from which he was paroled. Full power to retake and reimprison any convict so upon parole is hereby conferred upon the board, whose written order, certified by its secretary, shall be a sufficient warrant for all officers named therein to return to actual custody any conditionally released or paroled prisoner. It is hereby made the duty of every officer to execute such order the same as an ordinary criminal process. Am'd '13, p. 121.

4337. (1686x20.) Board of pardons to supervise. The board of pardons is hereby empowered to establish rules and regulations providing for the parole of prisoners as in this title provided. The board of corrections and the warden of the state prison, upon the request of the board of pardons, shall, in the case of an application of a prisoner confined in the state prison to go on parole, furnish the board of pardons with a statement of such prisoner's deportment during his imprisonment, and the board of pardons may make any further inquiries as it may deem desirable in regard to the previous history or environment of the prisoner, or as to his probable surroundings if paroled, and all information thus received shall be considered and treated as confidential. The board of corrections and the warden may recommend to the board of pardons the parole of any prisoner confined in the state prison, and subject to parole as in this title provided. '13 p. 121.

The provisions of R. S. '98, § 2251, giving board of corrections power to parole, held void, because in conflict with Con. art. 7, sec. 12, which creates board of pardons. State v. St. Board of Corrections, 16 U. 478; 52 P. 1090.

TITLE 79.

PARK COMMISSIONERS, STATE BOARD.

4341. (1686x21.) Board of park commissioners created. There is hereby created a state board of park commissioners, to consist of the governor and two members to be appointed by the governor, by and with the consent of the senate. A majority of the board shall constitute a quorum and be authorized to transact the business of the board. The governor shall be president, and the board shall elect one of its members secretary of the board. '05, p. 32.

4342. (1686x22.) Term. Compensation. Each of the members shall hold his office for the term of four years, and until his successor shall be appointed and qualified. He shall qualify by taking the constitutional oath of office, and shall receive as compensation the sum of $4 per day for each day actually devoted to the duties of his office. All claims for compensation shall, before being paid, be approved by the state board of examiners. '05, p. 32.

4343. (1686x23.) Powers. Said board shall have full and exclusive power to manage and control any and all lands that the state may acquire for state parks, and to make such rules and regulations as may be necessary to manage and control the same, and to employ such guards and patrolmen as may be necessary to carry out the purposes of this title. '05, p. 32.

4344. (1686x24.) Penalty for damaging park. Any person, persons, or corporation cutting or injuring any timber on any of said lands, or removing it therefrom, or allowing horses, cattle, or sheep to run at large, or to herd or graze the same on any of said park lands, or who shall violate any rule or regulation governing said park without the written consent of the board of park commissioners, shall be deemed guilty of a misdemeanor; *provided,* that nothing in this title shall be construed to hinder campers from using dead timber for camping purposes and from pasturing their work and saddle horses on said lands while actually camping thereon; *provided further,* that all timber taken from said parks and all privileges granted to any person, partnership, or corporation for grazing or other profitable pursuits shall be paid for in such sum or sums as the board may require; *provided also,* that all moneys so received from the granting of such privileges shall be paid into the state treasury. '05, p. 32.

4345. (1686x25.) Title takes effect, when. This title shall be in force and of effect provided only that congress shall grant to the state of Utah, to be used perpetually as a state park, that part of the Uintah Indian reservation known as Strawberry valley, and more particularly described as follows, to wit: Townships 2 and 3 south and ranges 10 and 11 west, and fractional townships 4 south and ranges 10 and 11 west of the Uintah special meridian. '05, p. 33.

4346. (1686x26.) Appropriation. The sum of $2,000, or as much as may be necessary, is hereby appropriated annually for the purpose of carrying out the provisions of this title. '05, p. 32.

TITLE 80.

PARTNERSHIPS, LIMITED.

4350. (1687.) May be formed, when. Conditions. Limited partnerships for the transaction of any mining, mercantile, mechanical, or manufacturing business within this state may be formed by two or more persons upon the terms, with the rights and powers, and subject to the conditions and liabilities herein prescribed; but the provisions of this title shall not be construed to authorize any such partnership for the purpose of banking or effecting insurance.

Cal. Civ. C., § 2477*. Service of process on agent binds partnership, § 6520.
Decisions as to partnership in general not included in this volume.

4351. (1688.) General and special partners' liability. Such partnerships may consist of one or more persons, who shall be called general partners, and who shall be jointly and severally responsible as general partners now are by law, and of one or more persons who shall contribute in actual cash payments or in real or personal property or both, a specific sum as capital to the common stock, and who shall be called special partners, and who shall not be liable for the debts of the copartnership beyond the fund so contributed by him or them to the capital stock.

4352. (1689.) General partners to transact business. General partners only shall be authorized to transact business and sign for the copartnership and to bind the same.

Partners as parties to actions, § 6520, and note.

4353. (1690.) Partnershp certificate. Persons desiring to engage in the formation of such partnership shall make and severally sign a certificate, which shall contain:

1. The name of the firm under which such partnership is to be conducted;
2. The general nature of the business intended to be transacted;
3. The names of all the general and special partners interested therein, distinguishing which are general and which are special partners, and their respective places of residence;
4. The amount of capital in money, or in real or personal property or both, which each special partner shall have contributed to the common stock;
5. The period at which the partnership is to commence and the period at which it shall terminate.

4354. (1691.) Id. Acknowledgment. Such certificate shall be acknowledged by the several persons signing the same before a notary public or other officer authorized by law to take acknowledgment or proof of the execution of conveyances of land, and such acknowledgment or proof shall be made and certified in the same manner as the acknowledgment or proof of conveyances of land may be made or certified.

4355. (1692.) Id. Recording. The certificate so acknowledged and certified shall be filed in the office of the county recorder of the county in which the principal place of business of the partnership shall be situated, and it shall be recorded by such county recorder. In case any such partnership shall have a place of business in more than one county in the state, then a copy of such certificate, certified by the county recorder of the county where the original was filed, shall in like manner be filed and recorded in the office of the county recorder in each county in which such partnership shall have a place of business.

4356. (1693.) Affidavit to be filed with certificate. At the time of filing the original certificate with the evidence of the acknowledgment thereof, an affidavit of one or more of the general partners shall also be filed in the same office, stating that the sums specified in the certificate, or value thereof in real or personal property or both, have been contributed by each of the special partners to the common stock, and actually and in good faith paid into the general fund.

4357. (1694.) When partnership deemed formed. False statement. No such partnership shall be deemed to have been formed until the certificate shall have been made, acknowledged, authenticated, filed, and recorded, and the affidavit shall have been filed. If any false statement be made in such certificate or affidavit, every person interested in such partnership shall be liable as a general partner for its engagements.

4358. (1695.) Publication of terms of partnership. The partners shall immediately publish the terms of the partnership, when recorded as above provided, for at least four consecutive weeks, in a newspaper to be designated by the county recorder of the county in which the record shall be made, and if no newspaper is published in the county, then the same shall be published in a newspaper published within the judicial district in which their business shall be conducted, and if such publication be not made the partnership shall be deemed general. Such publication shall also be made in each county in which a certified copy of the certificate is filed and recorded.

4359. (1696.) Affidavits of publication. An affidavit of the publication of such notice by the printer, publisher, or foreman of the newspaper in which the same shall have been published shall be filed with the county recorder directing the same, and it shall be evidence of the facts therein contained.

4360. (1697.) Renewals. Every renewal or continuance of such partnership beyond the time originally fixed for its duration shall be certified, acknowledged, authenticated, filed and recorded, and an affidavit of a general partner be made and filed, and notice be given in the manner herein required for its original formation. Every such partnership which shall be otherwise renewed or continued shall be deemed a general partnership.

4361. (1698.) Alteration in name of partnership, etc. Every alteration which shall be made in the names of the partners, in the nature of the business, or in the capital or shares thereof, or in any other matter specified in the original certificate, shall be deemed a dissolution of the partnership, and every such partnership which shall in any manner be carried on after any such alteration shall have been made shall be deemed a general partnership, unless renewed as a special partnership according to the provisions of this title.

4362. (1699.) Names of special partners not to be used. The business of the partnership shall be conducted under a name in which the names of the general partners only shall be inserted, and if the name of any special partner shall be so used in such firm, he shall be deemed and held liable as a general partner.

4363. (1700.) Actions. Actions in relation to the business of the partnership may be brought and conducted by and against the general partners in the same manner as if there were no special partner.

4364. (1701.) Special partners not to withdraw capital. Dividends. No part of the sum which any special partner shall have contributed to the capital stock shall be withdrawn by him from the firm, or paid or transferred to him in the shape of dividends, profits, or otherwise, at any time during the continuance of such partnership; but any partner may annually receive such rate of interest on the sum so contributed by him as may be agreed upon in the articles of copartnership, not exceeding twelve per cent per annum; *provided*, that the payment of such interest shall not reduce the original amount of such capital. After the payment of such interest, if any profits shall remain to be divided, a special partner may also receive his portion of such profits.

4365. (1702.) Special partner to restore capital, when. If it shall appear by the payment of interest or profits to any special partner that the original capital has been reduced, the partner receiving the same shall be bound to restore the amount necessary to make good his share of the capital with interest.

4366. (1703.) Special partner not to transact business. A special partner may, from time to time, examine into the condition and progress of the partnership concerns, and may advise as to their management, but shall not engage in nor transact any ordinary business of the partnership. If he shall interfere contrary to this provision, he shall be deemed in law a general partner, and accountable as such.

Cal. Civ. C., § 2490*.

4367. (1704.) General partners to account. The general partners shall be liable to account to each other and to the special partners for their management of the business, as other partners are now liable by law.

Cal. Civ. C., § 2501*.

4368. (1705.) Special partner becomes general by unlawful act. Every special partner who shall violate any provision of § 4366, or who shall concur or assist in any such violation by the partnership, or by any individual partner, shall be liable as a general partner.

4369. (1706.) Special partner not a creditor. In case of the insolvency or bankruptcy of the partnership, no special partner shall, under any circumstances, be allowed to claim as a creditor, until the claims of all the creditors of the partnership shall be satisfied.

4370. (1707.) Dissolution. No dissolution, unless by the consent of

creditors of such partnership, by the acts of the parties, shall take place previous to the time specified in the certificate of its formation or in the certificate of its renewal, until a notice of such dissolution shall have been filed and recorded in the office of the recorder of the county in which the original certificate was recorded, and published once in each week for four consecutive weeks in a newspaper printed in each of the counties, if there be one, where the partnership may have places of business.

TITLE 81.

PAWNBROKERS, SECOND-HAND DEALERS, AND SMALL LOANS.

CHAPTER 1.

PAWNBROKERS AND SECOND-HAND DEALERS.

4375. (1708.) Must keep record. Pawnbrokers and dealers in second-hand goods shall keep records containing a description of all articles received by them, the amounts paid therefor or advanced thereon, a general description of the person from whom received, together with his name and address and the date of the transaction. These records shall at all reasonable times be accessible to any peace officer who demands an inspection thereof, and any further information regarding such transaction that he may require shall be given by the pawnbrokers and second-hand dealers to the best of their ability. In cities of the first and the second class, at the close of each day's business, pawnbrokers shall mail a copy of the records to the sheriff of the county in which they are located. '09, p. 8.

Cities may license, tax, and regulate, § 570x 38.

4376. (1709.) Right to redeem. In all cases in which the article pledged has been forfeited, no sale or other disposition thereof by the pledgee shall be made within the period of three months after the forfeiture of the pledge unless the period of loan is less than three months, in which case the period of redemption shall be six months, during which time the pledgor shall have the first right to redeem such articles at no greater advance than 5 per cent per month on all sums up to and including $50 and 3 per cent per month upon all sums in excess of $50; *provided, however,* that the said pledgee shall in any event be entitled to a minimum charge of $1. A violation of any of the provisions of this chapter shall be a misdemeanor. Am'd '17, p. 122.

CHAPTER 2.

REGULATING THE MAKING OF SMALL LOANS.

('17, p. 116.)

4380. Licenses required. What constitutes a small loan. Except as hereafter provided, every person, firm, corporation, or association engaged or seeking to engage in this state in the business of loaning money in sums of $300 or less shall procure a license to conduct such business from the bank commissioner. When an application for a loan or for an indorsement or guarantee or for the purchase of a note is made by any person within this state, and the money is advanced or the indorsement or guarantee is made or furnished, or the note purchased by any person situated without this state, the transaction shall be deemed a loan made within this state, and such loan and the parties making it shall be subject to the provisions of this chapter. The buying or indorsing of notes or the furnishing of guarantee or security of

amounts of $300 or less for compensations shall be considered to be engaging in the business of making small loans, within the provisions of this chapter. Any person, firm, corporation, or association directly or indirectly engaged or seeking to engage in the business of negotiating or arranging loans or aiding the borrower or lender in procuring or making loans of $300 or less, whether such loans are actually made by such persons or by other parties, shall be deemed to be engaged in the business of making small loans, and shall be subject to the provisions of this chapter.

4381. Powers and duties of bank commissioner. Any person, firm, corporation, or association applying for the same under oath and in the form prescribed by the bank commissioner and paying the sum of $50 may, at the discretion of the bank commissioner, obtain a license for carrying on said business. The said license shall be issued by the bank commissioner and shall expire the 1st day of March next following the date of its issuance, but no abatement of said charges shall be made if licenses are issued for less than one year. Every such license shall be renewed annually on the 1st day of March in each year. No license shall be granted to any corporation unless and until such corporation shall, in writing and in due form, to be first approved by and filed by the bank commissioner, appoint an agent, resident of state of Utah, upon whom all judicial and other process or legal notice directed to such corporation may be served, and in the case of the death, removal from the state, or any legal disability or disqualification of any such agent, service of such process or notice may be made upon the bank commissioner. The said commissioner shall have the power to reject any application for license if he is satisfied that the character and general fitness of the applicant or applicants is not such as to command the confidence of the community and to warrant the conclusion that the business will be honestly transacted in accordance with the intent and purpose of this chapter. The said commissioner may revoke any license if the licensee shall violate any of the provisions of this chapter or fail to comply with any rule or regulation made by said commissioner under authority of § 4389. Whenever for any cause such license is revoked, said commissioner shall not issue another to said licensee until the expiration of at least one year from the date of revocation of such license and not at all if such licensee shall have been convicted of a violation of this chapter under the provisions of § 4387. In addition to said license fee, said licensee shall pay for the examination by said bank commissioner, as hereinafter provided. Every applicant shall execute and file a bond to the state of Utah in the penal sum of $2000, with the commissioner of banking, to be approved by him, for the faithful observance of all laws relating to such business. Said bond shall be executed by a surety company authorized by the laws of Utah to transact business within this state, and said bond shall be renewed and refiled annually not later than the 1st day of March in each year.

4382. Examination. Bonding. Suspension of licenses. Agents. The license shall state fully the name or names of the person or corporation, and of every member of the firm or association other than a corporation, authorized to do business hereunder, and the location of the office or place of business in which the business is to be conducted; and in the case of a corporation shall also state the date and place of its incorporation, the names of its directors for the period for which the license is issued, and the name and address of the agent as provided in § 4381. Such license shall be kept posted in a conspicuous place in the office where the business is transacted. No person, firm, corporation, or association so licensed shall transact or solicit business under any other name or at any other office or place of business than that named in the license. Not more than one office or place of business shall be maintained under the same license, and no loans or advancements shall be made at any other place than that designated in the license. But in case of a removal, the bank commissioner may, on application, indorse thereon a transfer to the new place of business, with the date of transfer,

and from the time of such indorsement the new place so designated shall be deemed the place designated in the license.

4383. Investigation. Costs. The bank commissioner shall, either personally or by the bank examiners appointed under § 973, at least once a year, and oftener if it deems it advisable, investigate the business and affairs of every such licensee, and for that purpose shall have free access to the vaults, books, and papers thereof, and other sources of information with regard to the business of such licensee, and shall ascertain the condition of the business and whether it has been transacted in accordance with law and such rules and regulations as may be prescribed by the bank commissioner pursuant to § 4389. Said commissioner shall have such powers in respect to the persons, firms, corporations, or associations amenable to this chapter as are given to him over the persons, firms, corporations, or associations named in chapter 6, Title 19 (§§ 971 to 1016). The cost of every such examination shall be paid by the licensee so examined and said commissioner may maintain an action for the recovery of such costs in any court of competent jurisdiction. The cost of such examination shall be $10 per day for every day required to make examination. The money shall be turned in to the state treasury to the credit of the general fund. All licensees shall annually, on or before the 20th day of December, submit a report to the bank commissioner in the form of a trial balance of their books at the close of business on the 30th day of November last preceding, and shall specify the different kinds of liabilities and the different kinds of assets, together with such other information as may be called for by said commissioner in accordance with a blank form to be furnished by him.

4384. Interest rates. Statements. Records. Every person, firm, corporation, or association acting under and abiding by the provisions of this chapter shall be allowed to charge on loans or advancements of $300 or less 3 per cent per month or for a fraction of a month on such loans or advancements made by such persons, firms, corporations, or associations, or made in behalf of any person, firm, corporation, or association; *provided, however,* that said 3 per cent shall include, in the aggregate, all fees, charges, bonus, interest, expense, demands, or exactions of any nature whatsoever, except as hereinafter specified, and nothing contained in §§ 3321-3322 shall be construed so as to prevent the grant or permission hereby given to said licensees. No such licensee shall charge or receive of the borrower or borrowers, or any other person, on his, her, or their behalf, a greater rate of interest than 3 per cent per month. Nothing in this chapter contained shall be construed so as to allow or permit the splitting up of transactions for the loan of money into small amounts for the purpose of coming within or securing the benefits of or evading the provisions of this chapter. Such interest shall not be payable in advance and shall be computed on unpaid balances only. No charges, bonus, fees, expense, demands, or exactions of any nature whatsoever, other than interest as above provided, shall be made upon such loans or advancements except upon the actual foreclosure of the security or upon the entry of judgment. Every such licensee shall furnish the borrower at the time the loan is made a statement in the English language showing in clear and distinct terms the amount of the loan, and the date when loaned and when due, the person to whom the loan is made, the name of the lender, and the amount and rate of interest charged, and a copy of any contract entered into between borrower and lender or seller who sells on condition of buying back at a stipulated price. On the back of such statement there shall be printed in English a copy of § 4384. The lender shall give to the borrower a plain and complete receipt for all payments made on account of the loan at the time such payments are made. It shall be the duty of every such licensee doing business in any city of the first or the second class in this state to maintain in his place of business a book or other permanent record in which shall be legibly written in the English language, at the time of each loan, purchase, or sale, a record thereof containing:

1. The date of the transaction;
2. The name of the person or employe conducting the same;
3. The name, age, street and house number, and a general description of the dress, complexion, color of hair, and facial appearance of the person with whom the transaction is had;
4. The name and street and house number of the owner of the property bought or received in pledge;
5 The street and house number of the place from which the property bought or received in pledge was last removed;
6. A description of the property bought or received in pledge, which in the case of watches shall contain the name of the maker and the number of both the works and the case, and in the case of jewelry shall contain a description of all letters and marks inscribed thereon; *provided,* that when the article bought or received is furniture, or contents of any house or room actually inspected on the premises, a general record of the transaction shall be sufficient;
7. The price paid or the amount of the loan;
8. The names and the street and house numbers of all persons accompanying the borrower and witnessing the transaction;
9. The number of any pawn ticket issued thereon.

4385. Assignments require wife's consent. No assignment of or order for wages earned or to be earned in the future to secure a loan or advancement of $300 or less shall be valid, when made by a married man, unless the written consent of his wife to the making thereof is attached thereto; *provided, however,* that where a married man is living separate and apart from his wife for a period of five months prior to the making of said assignment or order, then said consent shall not be required.

4386. Pledges and conditional sales. Except as hereinafter provided, every person, firm, corporation, or association engaged or seeking to engage in whole or in part in the business of loaning money on the security of pledges, deposits, conditional sales of personal property shall be subject to the provisions of this chapter. Every person, firm, corporation, or association engaged or seeking to engage in whole or in part in the business of buying personal property on condition that the seller have the privilege of repurchasing same in the future at a greater sum than the purchase price advanced by the buyer shall be subject to the provisions of this chapter, and the advancement of money upon a sale made under such conditions shall be construed as a loan or advancement within the the meaning of the words "loan or advancement" as used in this chapter. In computing the price at which such article may be repurchased by the seller, all fees, bonuses, charges, interest, expense of sale or purchase required or exacted by the buyer shall be included.

4387. Penalty. The violation of any provision of this chapter shall be a misdemeanor, and if such violation be by a corporation, then such violation shall be a misdemeanor on the part of any person participating therein as a representative or agent of said corporation. Every loan in connection with which such violation shall have occurred shall be absolutely null and void, and the borrower shall be entitled to recover from the lender any or all sums paid or returned on account of or in connection with such loan. Every licensee under this chapter, or his clerk or employe, shall be guilty of a misdemeanor, who shall:

1. Fail to make an entry of any material matter in his book of record kept as provided for in § 4384;
2. Make any false entry therein; or,
3. Falsify, obliterate, destroy, or remove from his place of business such book or record; or,
4. Refuse to allow those entitled to examine his records or books to

inspect the same or furnish such reports as are by this chapter or law required; or,

5. Receive any property from any person under age of twenty-one years, any drunkard, any habitual user of narcotic drugs, any habitual criminal, any person in an intoxicated condition, any known thief or receiver of stolen property, or any known associate of such thief or receiver of stolen property, whether such person be acting in his own behalf or as the agent of another.

4388. Where provisions do not apply. This chapter shall not be held to apply to banks, duly licensed and bonded pawnbrokers, bankers, trust companies, savings banks, building and loan associations, or insurance companies, or to any transaction with banks, bankers, trust companies, savings banks, duly licensed and bonded pawnbrokers, building and loan associations, or insurance companies, nor to any loan made upon real estate security unless said banks, duly licensed and bonded pawnbrokers, bankers, trust companies, savings banks, building and loan associations, or insurance companies shall loan upon the security of salaries either actually earned or to be earned. In case such banks, pawnbrokers, bankers, trust companies, savings banks, building and loan associations, or insurance companies shall procure a license under this chapter, no greater rate of interest shall be charged on loans or advancements of any amount than is allowed by law other than this chapter, except on loans or advancements made on the security of salaries earned or to be earned.

4389. Bank commissioner to make rules and regulations for conduct of business. The enforcement of this chapter shall be entrusted to the bank commissioner, and he is hereby authorized and empowered to make rules and regulations necessary in his judgment for the conduct of such business and the enforcement of this chapter in addition thereto and not inconsistent herewith; *provided,* that nothing contained in this chapter shall be construed to prevent any person from lending money under the provisions of § 3321.

TITLE 82.

PEDDLERS.

4392. (1710x.) Must obtain license. No person, firm, or corporation, as principal or agent, shall peddle out, hawk, or, after shipment to this state, canvass, by going from house to house or from place to place, and sell or offer for sale, by sample, to users or consumers, clocks, agricultural implements, tools or machinery, stoves or ranges, wagons, buggies, carriages, surreys, or other similar vehicles, washing machines, churns, pictures, enlarged pictures, or picture frames, lightning rods, spectacles, jewelry, sewing machines, books or musical instruments, within this state, without previously obtaining a license therefor, as herein provided. '07, p. 124.

Licensing of peddlers by cities, § 570x38; by towns, § 786x6; counties, § 1400x11.

This section and the succeeding section are constitutional except the provision in this section and the succeeding section which refers to goods after being shipped into the state; this provision is in conflict with the federal constitution.

State v. Bayer, 34 U. 257; 97 P. 129.

4393. (1710x1.) Id. No person, firm, or corporation, as principal or agent, shall engage in or conduct, as an itinerant vendor, peddler, hawker, or traveling merchant, the business of peddling, selling, or bartering, or after shipment to this state, canvassing or selling by sample, clocks, agricultural implements, tools or machinery, stoves or ranges, wagons, buggies, carriages, surreys, or other similar vehicles, washing machines, or churns, pictures, enlarged pictures, or picture frames, sewing machines, books, lightning rods, spectacles, jewelry, or musical instruments, within this state, without previously obtaining a license therefor, as herein provided. '07, p. 124.

4394. (1710x2.) Annual license. To whom paid. An annual license tax

of $500 is hereby levied upon each and every of all such itinerant vendors, peddlers, hawkers, or traveling merchants doing business in this state, to canvass or sell by sample to users or consumers, the articles or merchandise hereinbefore mentioned by going from house to house or place to place. Said tax shall be paid to the secretary of state, who shall, upon the payment thereof, issue a license to the person paying the same, permitting such person to carry on said business or occupation, or peddle said articles or merchandise within the state for the period of one year from the date of such payment. '07, p. 125.

4395. (1710x3.) Id. Duties of secretary of state. All licenses issued under this title shall be numbered consecutively, and shall contain the dates of their issuance, and the full names of licensees. The secretary of state shall prepare and have printed blank licenses, bound in book form, with a stub for each license. He shall retain and keep a stub for each license issued, which shall contain the full name and address of the person to whom the license was issued, the date when issued, and the number of the license. '07, p. 125.

4396. (1710x4.) Secretary of state to keep index. Money to be deposited monthly in state treasury. The secretary of state shall also prepare and keep in his office a complete alphabetical index of all persons to whom licenses are issued under this title, which index shall contain the names of the persons, alphabetically arranged, the date of issuance of the license and its number. He shall keep a correct account of all license taxes collected by him under this title, and pay the same into the state treasury at the end of each month, and the same shall be credited to the general fund. '07, p. 125.

4397. (1710x5.) Fee for issuing license. Disposition. The secretary of state shall collect from each person to whom a license is issued under this title the sum of $2, as a fee, which he shall cover into the state treasury as are other fees collected by him. '07, p. 125.

4398. (1710x6.) Penalty. Any person violating any of the provisions of this title shall be deemed guilty of a misdemeanor. '07, p. 125.

4399. (1710x7.) Fines received to be paid to secretary of state. All fines recovered under this title shall be paid by the magistrate receiving the same to the secretary of state, who shall account for the same in the manner as taxes received and collected by him under this title. '07, p. 125.

4400. (1710x8.) Actions to be brought in the name of the state. All actions brought under this title to recover of any person the tax herein imposed shall be brought in the name of the state of Utah. In such action a writ of attachment may be issued against the property of the defendant, without any bond being given on behalf of the plaintiff. '07, p. 125.

4401. (1710x9.) Id. In all actions or prosecutions under this title it need not be alleged in the complaint nor proved by the prosecution that the defendant has not a license as required in this title, but the fact that he has such license may be pleaded as a matter of defense. '07, p. 126.

4402. (1710x10.) To whom not applicable. This title shall not be construed to apply to any person or his agents selling any of said articles of said merchandise at his regularly established, maintained, and fixed place of business within this state. '07, p. 126.

4403. (1710x11.) Not to prevent the imposition and collection of other license or tax. This title shall not be construed to prevent the imposition and collection of any license or other tax, by any county, city, town, or other public or municipal corporation within this state, upon the persons coming within the purview of this title. '07, p. 126.

TITLE 83.

PHARMACY, POISONS AND NARCOTICS.

CHAPTER 1.

REGISTRATION OF PHARMACISTS, ETC.

4405. (1711.) Pharmacists must be registered. It shall be unlawful for any person other than a registered pharmacist to compound or dispense drugs, medicines, or poisons, or to open or conduct any pharmacy for compounding or dispensing drugs, medicines, or poisons, unless such person shall be or shall employ and place in charge of his pharmacy or store a registered pharmacist within the meaning of this title. Every place in which drugs, medicines, or poisons are compounded, retailed, except as hereinafter provided, or dispensed, or physicians' prescriptions compounded, shall be deemed to be a pharmacy or drug store. Am'd '03, p. 41.

4406. (1712.) Who may be registered. No person shall be granted a license as a registered pharmacist until he shall have made written application to the board, setting forth by affidavit that he is the age of twenty-one years or upwards, that he has had at least five years' practical experience where drugs, medicines, and poisons were dispensed and retailed, and prescriptions compounded, of which experience one year must have been had within five years last preceding the date of such application, in a pharmacy or store in the United States of America, under the personal supervision of a licensed pharmacist, and until he shall have paid such license fee as is fixed by said board, not exceeding the sum of $15, and until he shall have passed an examination satisfactory to said board, for the granting of such license, and said applicant shall satisfy said board by said examination that he is possessed of educational qualifications equal to those required to pass the eighth grade of the public schools; *provided, however,* the board may, in its discretion, grant certificates of registration to such persons as shall furnish, with their application, satisfactory proof that they have been duly registered after examination in some other state or territory in the United States, and a certified copy of the standing of the applicant at said examination; *provided,* that such other state or territory shall require a degree of competency equal to that required of applicants in this state. Every applicant for registration as a registered pharmacist under this proviso shall pay to the secretary of the board the sum of $25 at the time of filing the application, and shall also file with his application his photograph and signature.

Am'd '03, p. 41; '09, p. 340; '11, p. 140.

Pharmacist defined, § 3342.

4407. (1714.) Assistant's certificate. It shall be the duty of the board of pharmacy to grant an assistant's certificate to such persons as have had three years' practical experience in drug stores where prescriptions of medical practitioners are compounded, and have passed a satisfactory examination before said board of pharmacy. The holder of said certificate shall have the right to act as clerk or salesman during the temporary absence of the owner or manager thereof. Temporary absence, within the meaning of this title, shall be held to be only those unavoidable absences which may occur during the day's work, not to exceed ten days, and when the registered pharmacist in charge shall be within immediate call, ready and able to assume direct supervision of said pharmacy. No registered assistant shall conduct the pharmacy. Am'd '09, p. 340.

4408. (1715.) Board may refuse registration. Revocation of license. Inspection powers. The board shall have the right to refuse registration to applicants whose examination or credentials do not present evidence of their competency satisfactory to said board. This provision shall also apply to the registration of assistant pharmacists as in this title defined. The said board

of pharmacy shall not permit registration or grant a license to any applicant if satisfied that the safety of the public health will be endangered by reason of the habits or character of said applicant; nor shall it grant an original license or a renewal of any license, nor the registration of any applicant who has been convicted of more than one violation of any state or federal law governing the sale of narcotic drugs or intoxicating liquors; *provided,* that if any person shall have obtained, in the opinion of said board upon a hearing had after giving such person reasonable notice and opportunity to be heard, a license or registration, by misrepresentation or fraud, or shall have become unfit or incompetent by reason of negligence, habits, or other cause to practice as a pharmacist or an assistant pharmacist, said state board of pharmacy shall have the power and it shall be its duty to revoke such license and cancel such registration; and *provided, further,* that if any license shall repeatedly violate any of the provisions of this title, or the rules and requirements established by the said board of pharmacy, it may revoke his license upon evidence satisfactory to it of any such violation, and such action of the board shall be in addition to all other provisions of the law in such cases made and provided. The said board of pharmacy shall have power and authority to employ inspectors of pharmacy, and to inspect during business hours all pharmacies, dispensaries, stores, and places in which drugs or medicines or poisons are compounded, dispensed, or retailed. Am'd '09, p. 240; '15, p. 73.

4409. (1716.) State board of pharmacy. Appointment. Terms. The state board of pharmacy shall consist of five competent pharmacists, each of whom at the date of his appointment shall have had ten years' experience as a dispensing pharmacist and not more than two of whom shall be selected from any one city or town of the state. During the month of January of each year, the Governor shall nominate and, by and with the consent of the senate, appoint one person as a member of said board, and the person so appointed shall hold office for five years and until the appointment of his successor. The governor shall fill all vacancies by appointment, giving due consideration to those recommended by the Utah state pharmaceutical association at its annual meeting. The members of the board now serving shall hold office until January of the year in which their term of office under their present appointment shall expire, and until the appointment of their respective successors. Am'd '09, p. 340.

4410. (1717.) Id. Officers. During the month of April of even numbered years, the board shall meet and organize by electing a president and a secretary from among its members, whose terms of office shall be for two years and until the election of their successors. Am'd '09, p. 340.

4411. (1718.) Id. Duties. It shall be the duty of the board to examine all applications for registration submitted in proper form; to grant certificates of registration to such persons as may be entitled to the same under the provisions of this title; to cause the prosecution of all persons violating its provisions; to report biennially to the governor and annually to the Utah state pharmaceutical association at its annual meeting the condition of pharmacy in this state. Said report shall also furnish a record of the proceedings of the said board, and account for all money received and disbursed pursuant to this title, and shall also contain the names of all pharmacists duly registered. The board shall hold meetings for examination of applicants for registration, and for the transaction of such other business as shall pertain to its duties, at least once in three months, and shall give by publication at least thirty days' public notice of the time of such meetings. It shall have power to make by-laws for the proper performance of its duties. It shall keep a book of registration, in which shall be entered the names and places of business of all persons registered under this title, and all facts placed before the board entitling them to registration. Three members of said board shall constitute a quorum. Am'd '09, p. 340.

4412. (1719.) Fees for registration. Every person applying for regis-

tration as assistant pharmacist shall, before certificate be granted, pay to the secretary of the board the sum of $5, and every applicant for registration as registered pharmacist shall pay the sum of $15. In case of a failure of an applicant upon his or her first application to pass a satisfactory examination before the said board, a second examination shall be granted him or her without further payment of fee, if applied for within six months from the presentation of such first application for examination. All fees paid and fines and forfeitures collected under this title shall be paid into the treasury of the state board of pharmacy for its use. Am'd '11, p. 140.

4413. (1720.) Renewal of registration. Every registered pharmacist or assistant pharmacist, who desires to continue in the pursuit of pharmacy, shall annually, after the expiration of the first year of registration, on or before the 2d day of January of each year, pay to the secretary of the board of pharmacy a renewal fee to be fixed by the board, which shall not exceed $2 for registered pharmacists and $1 for assistant pharmacists, in return for which a renewal registration shall be issued. If any person shall fail or neglect to procure his annual registration as herein specified, notice of such failure having been mailed to his postoffice address, as obtained from the books of the secretary, the board may, after the expiration of one year, deprive him or her of his or her registration. In order for such persons to regain registration, it will be necessary for them to apply and pass the examination as provided in §§ 4406-4407. Am'd '09, p. 340.

4414. (1721.) Compensation and expenses, how paid. Report. The secretary of the state board of pharmacy shall receive a salary, not to exceed $4 per day while actually engaged. He shall also receive his traveling and other expenses incurred in the performance of his official duty. The other members of the board shall receive the sum of $4 for each day actually engaged in such service and all legitimate and necessary expenses incurred in attending the meetings of the board. All moneys received by said board as fees shall be paid into the state treasury at the close of each month, and shall be placed to the credit of the state board of pharmacy. All claims for expenses incurred by the board and for all salaries paid shall be submitted to the state board of examiners, and if approved shall be paid by the warrant of the state auditor out of any moneys on hand in the state treasury to the credit of the state board of pharmacy. But no claims shall be allowed or warrant issued in excess of the amount of fees on hand to the credit of the said board. A detailed report of the fees collected, verified under oath, shall be filed with the state auditor and the state treasurer at the time fees are deposited with the state treasurer. The secretary of the board shall give such bond as the board shall from time to time direct. Am'd '15, p. 24.

4415. (1722.) Acting without registration. Penalties. Any person who is not a registered pharmacist, duly authorized under this title to do business on his own account, who shall keep a pharmacy, store, or shop for dispensing and compounding of physicians' prescriptions, and shall not have in his employment in said pharmacy, store, or shop a registered pharmacist, authorized by the state board to manage a pharmacy, shall, for each and every offense, be liable to a fine of not less than $50 nor more than $250.
Am'd '03, p. 41.

4416. (1723.) Using title unlawfully. Penalty. Any person not registered under this title who shall take, use, or exhibit the title of registered pharmacist, or licentiate in pharmacy, shall be liable to a fine of $100 for each and every such offense; a like penalty shall attach to a licentiate in pharmacy who shall, without authority, take, use, or exhibit the title of registered pharmacist in this state.

4417. (1724.) Penalties, generally. Any proprietor of a pharmacy or the person who shall permit the compounding or dispensing of physicians' prescriptions, except by a registered pharmacist or under the immediate supervision of one, or while continuing in pursuit of pharmacy in this state shall

fail or neglect to procure his annual registration, and any person who shall wilfully make any false representation to procure registration for himself or for another, or who shall violate any other provision of this title shall, for each and every such offense, be liable to a penalty of $100. Am'd '03, p. 42.

4418. (1725.) Proprietors responsible for quality of drugs. The proprietors of all pharmacies shall be held responsible for the quality of all drugs and chemicals sold or dispensed at their respective places of business, except patent and proprietary preparations and articles sold in the original packages of the manufacturer.

Sale of certain patent medicines prohibited, § 4421.

4419. (1726.) Making adulterations or alterations a misdemeanor. Unless otherwise prescribed for or specified by the customer, all pharmaceutical preparations sold or dispensed in a pharmacy, dispensary, store, or place shall be of the standard strength, quality, and purity established by the latest edition of the United States Pharmacopœia and National Formulary. Any person who shall wilfully adulterate or alter, or cause or permit to be adulterated or altered, any drug, medicine, or pharmaceutical preparation, or shall sell or offer for sale any such adulterated or altered article, and any person who shall substitute one material for another, with the intent to defraud or deceive the purchaser, shall be guilty of a misdemeanor. All penalties collected for such violation shall be paid to the said board of pharmacy to be held by it as hereinbefore directed. Am'd '09, p. 340.

4420. (1727.) Selling and labeling poisons. It shall be unlawful for any person to vend, sell, give away, or furnish, either directly or indirectly, any poisons enumerated in schedule A or in §§ 4421-4422, without labeling the package, box, bottle, or paper in which said poison is contained, with the name of the article, the word "poison," and the name and place of business of the person furnishing the same. Said label shall be substantially in the form hereinafter provided. It shall be unlawful to sell or deliver any of the poisons named in schedule A, or any other dangerously poisonous drug, chemical, or medical substance which may from time to time be designated by the state board of pharmacy of Utah, unless on inquiry it is found that the person desiring the same is aware of its poisonous character, and it satisfactorily appears that it is to be used for a legitimate purpose. It shall be unlawful for any person to give a fictitious name or make any false representations to the seller or dealer when buying any of the poisons thus enumerated. Printed notice of all such additions to the schedule of poisons named and provided for in this section, adopted by the board of pharmacy for such poisons, shall be given to all registered pharmacists with the next following renewal of their certificates. It shall be unlawful to sell or deliver any poison included in schedule A, or the additions thereto, without making or causing to be made an entry in a book kept solely for that purpose, stating the date of sale, and the name, address of the purchaser, the name and quantity of the poison sold, the statement by the purchaser of the purpose for which it is required, and the name of the dispenser, who must be a duly registered pharmacist. Said book shall be in form substantially as follows:

Date and hour	Name of purchaser	Residence	Kind and quantity	Purpose of use	Signature of druggist	Signature of purchaser

This book shall always be open for inspection by the proper authorities, and shall be preserved for at least five years after the date of the last entry therein. The label repuired by this title to be placed on all packages of poison shall be printed upon red paper in distinct white letters, or in distinct red letters upon white paper and shall contain the word "poison," the vignette representing the skull and cross-bones, with the antidote distinctly shown, and the name and address of the person or firm selling the same. No poison shall be sold or delivered to any person who is less

than eighteen years of age. When, in the opinion of the state board of pharmacy, it is in the interest of the public health, they are hereby empowered to further restrict or prohibit the retail sale of any poison, by rules not inconsistent with the provisions of this title by them to be adopted, and which rules must be applicable to all persons alike. It shall be the duty of the board, upon request, to furnish any dealer with a list of all articles, preparations, and compounds the sale of which is prohibited or regulated by this title. Wholesale dealers and pharmacists shall affix or cause to be affixed to every bottle, box, parcel, or other enclosure of an original package containing any of the articles named in schedule A, the additions thereto, or in §§ 4421-4422, a suitable label or brand with the word "poison," but they are hereby exempted from the registration of the sale of such articles when sold at wholesale to a registered pharmacist, physician, dentist, or veterinary surgeon duly licensed to practice in the state; *provided,* that the provisions of this title shall not apply to the sale of such upon the prescriptions of practicing physicians, dentists, or veterinary surgeons who are duly licensed to practice in this state. It is hereby made the duty of the county attorney of the county wherein any violation of this title is committed, to conduct all actions and prosecutions for the same, at the request of the board of pharmacy. Any person violating any of the provisions of this title shall be guilty of a misdemeanor, and upon conviction of the same shall be punished by a fine of not less than $30 or more than $100, or by imprisonment for not less than fifteen days, or by both fine and imprisonment. All fines recovered under this title shall be paid by the magistrate receiving the same to the state board of pharmacy.

Schedule A. Arsenic, its compounds and preparations; carbolic acid; chloral hydrate; corrosive sublimate; cyanide of potassium; essential oil of bitter almonds; hydrocyanic acid; opium; oils of croton, rue, savin, tansy, and pennyroyal; phosphorus; strophanthus; strychnine; tartar emetic; aconite, or any poisonous vegetable alkaloids and their salts; ergot, cotton root, and their preparations.

Similar provisions, §§ 4425, 4427, 4431.

4421. Sale of morphine. The sale of morphine is hereby prohibited, unless upon the prescription of a physician, dentist, or veterinary surgeon.

'09, p. 340.

4422. (1727.) Certain drugs that may be sold without registration. Schedule B. The drugs hereinafter named may be sold without registration in the poison book as in this title required; *provided, however,* that in all other respects the requirements of this title as to the sale of poisons must be complied with: Acid muriatic, nitric, oxalic, and sulphuric; bromine; cocculus indicus; conium; cowhage; creosote; solution of formaldehyde or formalin; hyocyamus; Indian hemp; iodine and its tinctures; nitro-glycerine and its preparations; santonine; sugar of lead; sulphate of zinc; cantharides; digitalis; wood alcohol; chloroform; poisonous derivatives of mercury; bichloride mercury tablets; ether; belladonna; nux vomica; veratrum; viride; yellow jessamine, their alkaloids and other preparations.

Am'd '03, p. 42; '09, p. 340.

Omitting to label or mislabeling drugs, etc., penalty, § 8199.

CHAPTER 2.

POISONS AND NARCOTIC DRUGS.

('15, p. 74.)

4425. Unlawful to sell certain poisons without label. False representations. Registry of sales. It shall be unlawful for any person to vend, sell, give away, or furnish, either directly or indirectly, any poisons enumerated in

schedules A and B in § 4431, without labeling the package, box, bottle, or paper in which said poison is contained with the name of the article, the word "poison," and the name and place of business of the person furnishing the same. Said label shall be substantially in the form hereinafter provided. It shall be unlawful to sell or deliver any of the poisons named in schedule A or any other dangerously poisonous drug, chemical, or medicinal substance, which may from time to time be designated by the state board of pharmacy, unless on inquiry it is found that the person desiring the same is aware of its poisonous character, and it satisfactorily appears that it is to be used for a legitimate purpose. It shall be unlawful for any person to give a fictitious name or make any false representations to the seller or dealer when buying any of the poisons thus enumerated; *provided,* that this prohibition shall not apply to an officer or inspector of the state board of pharmacy in the performance of the duties enjoined by law upon said board, or to any person acting under authority of said board in the performance of said duties. Printed notice of all such additions to the schedule of poisons named and provided for in this section, and the antidote adopted by the board of pharmacy for such poison, shall be given to all registered pharmacists with the next following renewal of their certificates. It shall be unlawful to sell or deliver any poison included in schedule A, or the additions thereto, without making or causing to be made an entry in a book kept solely for that purpose, stating the date and hour of sale, and the name, address, and signature of the purchaser, the name and quantity of the poison sold, the statement by the purchaser of the purpose for which it is required, and the name of the dispenser, who must be a duly registered pharmacist; *provided, however,* that said entry shall be made out in full, in ink before said signature of the purchaser is made thereto, and that said entry shall be made by said dispenser himself, and not by any person who is not a duly registered pharmacist or duly registered assistant pharmacist. Said book shall be in form substantially as follows:

Date and hour	Name of purchaser	Residence	Kind and quantity	Purpose of use	Signature of druggist	Signature of purchaser

This book shall always be open for inspection by the proper authorities, and shall be preserved for at least five years after the date of the last entry therein.

Selling and labeling poisons, §§ 4420, 8199.

4426. Form of label. Sale to minors unlawful. The label required by this title to be placed on all packages of poison shall be printed upon red paper in distinct white letters, or in distinct red letters upon white paper, and shall contain the word "poison," the vignette representing the skull and cross-bones, and the name and address of the person or firm selling the same. The name of an antidote, if any there be, for the poison sold shall also be upon the package. No poison shall be sold or delivered to any person who is less than eighteen years of age.

Similar provision, § 4420.

4427. Antidotes to appear on poison labels. Duty of pharmacy board. It shall be the duty of the state board of pharmacy to adopt a schedule of what in their judgment are the most suitable common antidotes for the various poisons usually sold. After the board has adopted the schedule of antidotes as herein provided for, they shall have the same printed and shall forward by mail one copy to each person registered upon their books, and to any other person applying for the same. The particular antidote adopted (and no other) shall appear on the poison label provided for in § 4426, or be attached to the package containing said poison. The board shall have power to revise and amend the list of antidotes from time to time, as to them may seem advisable. The entries in the poison book and the printed or written

matter provided for in this title shall be in the English language; *provided,* that the vendor of said poison may enter the same in any foreign language he may desire, in addition to said entry and label in English.

Similar provision, § 4420.

4428. Restriction of sale. When, in the opinion of the state board of pharmacy, it is in the interest of the public health, they are hereby empowered to further restrict or prohibit the retail sale of any poison, by rules not inconsistent with the provisions of this title by them to be adopted, and which rules must be applicable to all persons alike. It shall be the duty of the board, upon request, to furnish any dealer with a copy of the laws relating to articles, preparations, and compounds the sale of which is prohibited or regulated by this title.

4429. Sale in original packages. Proviso. Wholesale dealers and pharmacists shall affix or cause to be affixed to every bottle, box, parcel, or other enclosure of an original package containing any of the articles named in schedule A, the additions thereto, or in §§ 4432 and 4436, a suitable label or brand with the word "poison," but they are hereby exempted from the registration of the sale of such articles when sold at wholesale to a registered pharmacist, physician, dentist, or veterinary surgeon duly licensed to practice in the state; *provided,* that the provisions of this title shall not apply to the sale of such upon the prescriptions of practicing physicians, dentists, or veterinary surgeons who are duly licensed to practice in this state; and *provided, further,* that wholesale dealers are hereby exempted from the registration of the sales of the articles enumerated in schedule A of § 4431, where such sales are made for assaying, metallurgical, scientific, or industrial uses and purposes.

4430. Enforcement of provisions. Employment of special counsel. The state board of pharmacy shall have power to employ special counsel to assist the county attorney or the district attorney in all actions and prosecutions instituted or prosecuted for the violation of any of the provisions of this title.

4431. Penalty. Schedules defined. Any person violating any of the provisions of §§ 4432-4433 shall, upon conviction, be punished as follows, viz: For the first offense by a fine of not less than $100 and not to exceed $400, or by imprisonment for not less than fifty days and not exceeding one hundred and eighty days, or by both such fine and imprisonment; for the second offense by a fine of not less than $250, and not to exceed $500, or by imprisonment for not less than ninety days and not exceeding six months, or by both such fine and imprisonment; and for the third offense by imprisonment in the state prison for not less than one year and not more than five years. Any person violating any of the provisions of this title, except those contained in §§ 4432-4433, shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine in a sum not less than $30, nor more than $200, or by imprisonment for not less than thirty days and not more than fifty days, or by both such fine and imprisonment. All moneys, forfeited bail, or fines received under the operation of this title shall be paid by the magistrate receiving the same, 75 per cent to the state board of pharmacy, and 25 per cent to the city treasurer of the city, if incorporated, otherwise to the county treasurer of the county in which the prosecution is conducted.

The following is schedule A referred to in § 4425, viz.: Schedule A. Arsenic, its compounds and preparations; corrosive sublimate and other poisonous derivatives of mercury; corrosive sublimate tablets; antiseptic tablets containing corrosive sublimate; cyanide of potassium; strychnine; hydrocyanic acid; oils of croton, rue, tansy, pennyroyal, savin; ergot and cotton-root and their preparations; phosphorus and its poisonous derivatives and compounds; compound solution of cresol; lysol; strophanthus or its preparations; aconite, belladonna, nux vomica, veratrum viride, their preparations, alkaloids, or derivatives, and poisons containing any of the poisons enumerated in this schedule.

The following is schedule B: Hydrochloric or muriatic acid; nitric acid; oxalic acid; sulphuric acid; bromine; chloroform; cowhage; creosote; ether; solution of formaldehyde or formalin; cantharides, cocculus indicus, all their preparations; iodine, or its tinctures; tartar emetic and other poisonous derivatives of antimony; sugar of lead; sulphate of zinc, and wood alcohol.
Similar provisions, § 4420, 4422.

4432. Possession and use of narcotic drugs. Dispensing at retail and wholesale. Prescription by physicians, dentists, and veterinarians.. Exceptions. It shall be unlawful for any person, firm, or corporation to sell, furnish, or give away, or offer to sell, furnish, or give away, or to have in possession, any cocaine, opium, morphine, codeine, heroin, peyote (mescal button), alpha eucaine, beta eucaine, nova caine, flowering tops and leaves, extracts, tinctures, and other narcotic preparations of hemp or loco weed (cannabis sativa, Indian hemp), or chloral hydrate, or any of the salts, derivatives, or compounds of the foregoing substances, or any preparation or compound containing any of the foregoing substances, or their salts, derivatives, or compounds, excepting upon the written order or prescription of a physician, dentist, or veterinary surgeon licensed to practice in this state, which order or prescription shall be dated and shall contain the name of the person for whom prescribed, written in by the person writing said prescription; or if ordered by a veterianry surgeon it shall state the kind of animal for which ordered and shall be signed by the person giving the prescription or order; *provided, however,* that this exception shall not apply to anhalonium or peyote, the use whereof in any form whatsoever being hereby positively prohibited; and it is hereby further provided, that it shall be unlawful for any person, association, or corporation to carry or cause to be carried into or within this state any of said anhalonium or peyote, or any compound, manufacture, derivative, or preparation thereof. Such order or prescription shall be permanently retained on file by the person, firm, or corporation compounding or dispensing the articles ordered or prescribed, and no order or prescription shall be refilled. All such orders or prescriptions, after filing, shall be open to public inspection and shall be preserved for at least three years. The foregoing provisions of this section shall not apply to sales at wholesale by jobbers, wholesalers, and manufacturers to registered drug stores or pharmacies, or to registered pharmacists, or to licensed physicians, nor to the sale at retail by registered pharmacists to physicians, dentists, or veterinary surgeons duly licensed to practice. All wholesale jobbers, wholesalers, or manufacturers shall, before delivery of any of the articles in this section enumerated, make or cause to be made, in a book kept for that purpose only, an entry of the sale of any such articles stating the date of such sale, and the quantity and the name of the article, and the form in which sold, the true name and true address of the purchaser, the name of the person by whom such entry or sale was made, also a statement showing how delivery was had, whether personally or by mail, express or by freight, which book shall always be open for inspection by any peace officer or any member of the board of pharmacy, or any inspector authorized by said board, and which book shall be preserved at least five years from the date of the last entry therein. The taking of any order, or making of any contract or agreement, by any traveling representative, or any employe, or any person, firm, or corporation for future delivery in this state of any of the articles or drugs mentioned in this section shall be deemed a sale of said articles or drugs by such traveling representative or employe, within the meaning of the provisions of this title, and all such orders, contracts, or agreements shall be recorded in the same book and in the same manner as in this section provided for the recording of sales by wholesale jobbers, wholesalers, or manufacturers. It shall be unlawful for any practitioner of medicine, dentistry, or veterinary medicine to furnish to or prescribe for the use of any habitual user of cocaine, opium, morphine, codeine, heroin, peyote, or chloral hydrate, or any salt, derivative, or compound containing any of the foregoing substances, except that a duly licensed physician may prescribe any of such drugs as he may deem necessary in the treatment

of a patient who may be an habitual user of any of such drugs, whom such physician has taken in good faith under his professional care. It shall be unlawful for any practitioner of medicine or dentistry to prescribe any of the foregoing drugs for any person not under his treatment in the regular practice of his profession, or for any veterinary surgeon to prescribe any of the foregoing drugs for the use of any human being. The above provisions of this section shall not apply to preparations or remedies sold or dispensed by a registered pharmacist, without a physician's prescription, which preparations or remedies contain not more than two grains of opium, or one-fourth grain of morphine, or one grain of codeine, or one-eighth grain of heroin, or one-half grain extract cannabis indica, or ten grains chloral hydrate, in one fluid ounce, or, if a solid preparation, in one ounce, avoirdupois; or to liniments, ointments, or other preparations which are prepared for external use only, except liniments, ointments, and other preparations which contain cocaine or any of its salts, or alpha or beta eucaine or any of their salts or any synthetic substitute for them; *provided,* that such remedies and preparations are sold, distributed, given away, dispensed, or possessed as medicines and not for the purpose of evading the intentions and provisions of this title.

Am'd '17, p. 32.

Limitations as to alcohol in prescriptions, § 3370. Penalty for substitutions or deviations, § 8199.

4433. Possession of certain pipes and preparations unlawful. Penalty. The possession of a pipe or pipes, or other contrivances used for smoking opium (commonly known as opium pipes) or the usual attachment or attachments thereof, or extracts, tinctures, or other narcotic preparations of hemp, or loco-weed, their preparations or compounds (except corn remedies containing not more than fifteen grains of the extract or fluid extract of hemp to the ounce, mixed with not less than five times its weight of salicylic acid combined with collodion), is hereby made a misdemeanor, and upon conviction thereof shall be punishable by the penalties prescribed in § 4431.

4434. Search and seizure. Disposition of instruments and narcotics confiscated. All narcotic drugs specified in § 4432 and also all pipes used for smoking opium (commonly known as opium pipes) or the usual attachments thereto, or extracts, tinctures, or other narcotic preparations of hemp, or loc-weed, their preparations or compounds (except corn remedies containing not more than fifteen grains of the extract or fluid extract of hemp to the ounce, mixed with not less than five times its weight of salicylic acid combined with collodion), may be seized by any peace officer, and in aid of such seizure a search warrant or search warrants may be issued in the manner and form prescribed in chapter 56, title 120 of the code of criminal procedure (§§ 9368-9389). All such narcotic drugs, pipes used for smoking opium (commonly known as opium pipes), or the usual attachments thereto, and all such hemp seized under the provisions of this title shall be ordered destroyed by the judge of the court in which final conviction was had. Said order of destruction shall contain the name of the party charged with the duty of destruction as herein reqiured; *provided, however,* that the judge shall turn all such evidence over to the state board of pharmacy for such destruction; and *provided, further,* that the board of pharmacy may dispose of all narcotics now on hand or hereafter coming into their possession (other than smoking opium), either by gift to the medical director of Utah state prisons or state hospitals or by sale to wholesale druggists, the funds received from such sales to be applied by the board of pharmacy to the carrying out of the provisions of this title or of the title creating such Utah state board of pharmacy.

4435. License of pharmacist may be revoked, when. Restoration. The board may revoke the registration and license of any registered pharmacist or assistant pharmacist upon conviction of the second offense for violating any of the provisions of §§ 4432, 4433, and in such case said registration shall not be restored before the period of one year from the date of said revocation.

4436. Carbolic acid. Quantity of sale restricted. Proviso. The sale or furnishing of carbolic acid (phenol) in quantities of less than one pound is prohibited unless upon the prescription of a physician, dentist, or veterinary surgeon duly licensed to practice in this state, but this prohibition shall not apply to solutions of carbolic acid (phenol) containing not over 10 per cent of the carbolic acid (phenol) and not less than 10 per cent of ethyl alcohol. All sales of carbolic acid (phenol) thus diluted so as to contain no more than 10 per cent of carbolic acid (phenol) may be made under the same conditions as the drugs enumerated in schedule B, as found in § 4431, but sales of carbolic acid (phenol) containing more than 10 per cent of said acid shall be registered subject to the same regulations as the poisons enumerated in schedule A, as found in § 4431.

TITLE 85.

PHYSICIANS AND SURGEONS.

4440. (1728.) Board created. Qualification of members. Appointment. Vacancies. Disposition of fees. There is hereby created a state board of medical examiners, which shall have power to sue and be sued in its official name, the board of medical examiners of the state of Utah. Said board shall consist of ten members; the attorney-general shall be ex officio one of such members. The governor, by and with the consent of the senate, shall appoint the other nine members, who shall be representatives of the various recognized schools of medicine, and each of whom shall be at the time of his appointment a licensed graduate practitioner of medicine in this state. At the regular session of the legislature in 1911, such nine members shall be so appointed, three of whom shall be appointed for the term of six years, and three for the term of four years, and three for the term of two years, and at each regular session of the legislature hereafter there shall be in like manner appointed three of such members for the full term of six years. Each person so appointed shall so qualify by taking an oath before a judge of the district court that he is a graduate of a legally chartered medical school and in good standing, and that he will faithfully perform the duties of his office; and thereupon he shall hold his office until his successor is appointed and qualified. Vacancies in the board shall be filled by appointment by the governor within one month from the time the vacancy shall occur, and such appointee shall serve until the next ensuing session of the legislature. Said board shall have power to employ legal counsel and clerical assistance, and all moneys received as fees under this title shall be covered into the state treasury at the close of each and every month, and shall be placed to the credit of the state board of medical examiners; that all claims for expenses incurred by said board in the performance of its duties either in the employment of legal counsel or clerical assistance or in any manner whatsoever shall be submitted to the state board of examiners, which, if approved, shall be ordered paid out of the moneys to the credit of the state board of medical examiners in the office of the state treasurer; *provided, however,* that no warrant shall be issued unless funds are available to pay the same. Report of fees shall be made, accompanied by a statement verified on oath that the report is true, complete, and in detail of all fees collected for the month by this department. Said board of medical examiners shall be deemed a continuation of the present existing board of medical examiners of the state of Utah in all respects whatsoever. Am'd '07, p. 94; '11, p. 131; '15, p. 21.

Where the law provides for collecting of fees by medical board, without specifying disposition to be made, such fees may be used for payment of ordinary expenses.
People v. Hasbrouck, 11 U. 291; 39 P. 918.

4441. (1729.) Organization. Powers and duties. Certificate. Said board shall organize immediately after its appointment by selecting from its

members a president, vice-president, secretary, and treasurer. Six members of the board shall constitute a quorum. The board shall have a seal with which it shall attest its official acts. Any member of the board shall have authority to administer oaths, and the board shall have authority to take testimony in all matters relating to the duties of the board. The board shall have power to examine any person of good moral character who furnishes satisfactory proof of having received a degree or diploma from a legally chartered medical college, the requirements whereof shall include the following subjects as required by the board at the present time, namely: Histology, anatomy, physiology, chemistry, toxicology, urinalysis, therapeutics, bacteriology, pathology, theory and practice of medicine, or osteopathy, surgery, obstetrics, materia medica or osteopathic therapeutics, gynecology, pediatrics, dermatology, hygiene, medical jurisprudence, ophthalmology, otology, rhinology, laryngology. The foregoing showing an aggregate of 3500 hours, and any legally chartered school having the foregoing requirements shall be deemed a recognized school of medicine. Said applicant shall present a certificate from a high school of the first grade or its equivalent, and shall have furnished evidence of at least two units work in Latin and German. After the year 1916 the applicant shall furnish, in addition to the above, one year of college work, and if upon examination of such person, the board is satisfied with his educational attainments, and that the applicant is qualified to practice medicine and surgery, then the board shall issue a certificate to such person so qualified and examined. The board shall issue two forms of certificates or licenses; one for persons holding such degree or diploma who have been examined and favorably passed upon by the board; and another for persons desiring to practice obstetrics under the provisions of § 4452. Certificates shall be signed by all members of the board granting them.

R. S. '98, §§ 1729, 1740; '07, p. 95; am'd '11, p. 131.

The prohibitions of the United States constitution against state legislation abridging the privileges of citizens are not violated by act March 10, 1892, applicable alike to citizens of Utah and of other states and territories, which authorizes the licensing, without examination, of medical graduates who were, but not those who were not, in actual practice at its passage, and also of persons who had practiced for ten years in the territory before the taking effect of the act, upon passing an examination, although without a diploma, while requiring others to have a diploma besides passing an examination.

People v. Hasbrouck, 11 U. 291; 39 P. 918.

Nor is such act, in authorizing the board to ascertain and determine the qualifications of applicants to practice medicine, unconstitutional, as conferring judicial power on the board.

Id.

4442. (1730.) Fee. The fee for the examination provided for in the last preceding section shall be $25 which shall be paid to the secretary of said board at the time of making the application for examination.

'07, p. 96; am'd '11, p. 132.

4443. (1731.) Non-graduate practitioners. No non-graduate licensed under the provisions of the acts of the territorial legislature shall in any way advertise as a doctor, physician, or surgeon, but shall, if he advertises at all, do so as a licensed non-graduate practitioner of medicine. The secretary of the board shall enter, without fee, upon the register to be kept by him the names of all persons to whom certificates are issued as physicians and surgeons. Am'd '07, p. 96.

4444. (1732.) Certificate to be recorded. Every person holding a certificate from the said board shall have it recorded in the office of the recorder of the county in which he resides, within three months from its date, and the date of record shall be indorsed thereon. Until such certificate is recorded as herein provided, the holder thereof shall not exercise any of the privileges conferred therein to practice medicine. Any person removing to another county to practice medicine shall record the certificate in like manner in the county to which he removes, and the holder of the certificate shall pay the recorder the usual fees for recording such certificates. Am'd '07, p. 96.

4445. (1733.) Duty of county recorder. The county recorder shall keep in a book provided for that purpose a complete list of certificates recorded by him, with the date of the issue of the certificate, and, if the certificate be based

upon a degree and examination, the name of the medical college conferring the degree, and the date thereof. Am'd '07, p. 96.

4446. (1734.) Refusal to grant certificate. Witnesses. Contempt. Examination may be wholly or partly in writing. Said board must refuse a certificate to any applicant not of good moral character or who has been guilty of unprofessional conduct as defined in this title. But before such refusal, the applicant must be cited by citation signed by the secretary of the board and with its seal. No citation shall be issued except upon sworn complaint filed with the secretary of the board and setting forth such particular acts constituting such immorality or unprofessional conduct. On the filing of such complaint, the secretary must forthwith issue a citation and make same returnable at the next regular session of said board occuring at least thirty days next after the filing of the complaint. Such citation shall notify the applicant of the time and place when and where the matter of such immorality or such unprofessional conduct shall be heard, the particular immorality or unprofessional conduct with which the applicant is charged, and that the applicant shall file his written answer under oath within twenty days next after the service on him of such citation, or default will be taken against him and his application for a certificate refused. The attendance of witnesses to such hearing may be compelled by subpœna issued by the secretary of the board under its seal, and said secretary shall in no case refuse to issue any such subpœna upon a fee of 20 cents being paid him for each subpœna by the defendant. Said citation and subpœnas, and all the provisions of the statutes of this state then in force relating to subpœnas, are hereby made applicable to the subpœnas provided for herein. In case of the refusal of a witness properly served with subpœna to attend before said board, such refusal may be certified by the secretary of said board to the district court of the county in which service was had, and said court shall thereupon issue a subpœna to said witness to appear before it, and in case of further refusal on the part of said witness, the court shall then cite said witness or witnesses to appear before it and show cause why he should not be punished for contempt, and if the court finds upon hearing that said witness has wilfully disobeyed the mandate of the court, it shall then proceed to impose such penalties as are provided for in cases of contempt of court.

'07, p. 96; am'd '11, p. 132.

4447. (1735.) Revocation of certificate. Whenever any licensed practitioner of medicine or surgery or obstetric physician is guilty of unprofessional conduct, as the same is defined in this title, then the license or certificate of such person shall be revoked or canceled in the manner hereinafter provided by the district court of the county where the holder of such certificate or license practiced at the time of such unprofessional conduct. Proceedings for such cancellation or revocation shall be brought and conducted in the manner provided by law for proceedings in civil cases except as in this title provided. The trial in such proceeding shall be before the court without a jury unless the court shall call an advisory jury. The board of medical examiners of the state of Utah shall be plaintiff, and the person charged shall be defendant in any such proceedings. The complaint in such proceedings shall be in writing verified by oath of one of the members of the board, or any person having knowledge of the facts constituting the unprofessional conduct, and shall pray a decree of the court canceling and revoking the certificate or license of the defendant and an injunction perpetually enjoining him from practicing medicine or surgery in this state. When, after trial, the defendant is found guilty as charged, or when, upon his default, which may be entered as in other civil cases; *provided,* that the facts stated in the complaint constitute unprofessional conduct as defined in this title, then in either such case the court must decree a cancellation or revocation of the certificate or license of the defendent and must enjoin him from practicing medicine or surgery in the state. Upon the entry of such judgment or decree it shall be the duty of the secretary of the said board to file

a certified copy of said judgment and decree with the county recorder of the counties in which the certificate of the defendant is recorded, and said recorder must thereupon write on the margin of the copy of said certificate of said defendant the following:

"This certificate was revoked and canceled by a decree of the district court of ..... county, Utah, on the ..... day of .....," giving the day, month, and year of such revocation by said court, together with the county wherein said decree was made and entered by said district court. No certificate shall be revoked for unprofessional conduct under this section unless the accused has been guilty thereof within two years next preceding the time of the filing of the complaint charging him with such unprofessional conduct. R. S. '98, § 1734; '07, p. 97; am'd '11, p. 134.

For prescribing alcohol, § 3371.

4448. (1736.) "Unprofessional conduct" defined. The words "unprofessional conduct," as used in this title, are hereby defined to mean any of the following acts, to wit:

1. Offering or attempting to procure or aid or abet in procuring a criminal abortion;
2. The procuring or aiding or abetting in procuring a criminal abortion;
3. The obtaining of any fee on the assurance that a manifestly incurable disease can be permanently cured;
4. The wilful betrayal of a professional secret;
5. Any advertising naming diseases of or in relation to the diagnosis or treatment of, or medicine for any abnormal or diseased condition of, or pertaining to the organs of generation;
6. All advertising of medicine or of any means whereby the monthly period of women can be regulated or the menses re-established if suppressed;
7. Conviction of any offense involving moral turpitude;
8. Habitual intemperance or gross immorality;
9. Lending his name to be used as a physician or surgeon by another person who is not a physician or surgeon;
10. Street advertising, soliciting, or other public peddling or selling of medical or surgical remedies or appliance in person or by proxy;
11. Prescribing any intoxicating liquors to be used as a beverage;
12. Prescribing morphine or cocaine or other narcotic with intent that the same shall be used otherwise than medicinally or with intent to evade any law in relation to the sale, use, or disposition of such drugs;
13. Wilful violation of the law in regard to the registration of births and deaths and the reporting of infectious diseases. '07, p. 97; am'd '11, p. 134.

Limitations on prescriptions of alcohol, § 3370, of narcotics, § 4432.

4449. (1737.) Practicing medicine contrary to law. Any person practicing medicine, surgery, or obstetrics within the state contrary to law may, at the instance of the board herein created appearing as plaintiff in the district court, be enjoined by said court from practicing medicine, surgery, or obstetrics in this state until such person shall have been by said board lawfully admitted to practice. The proceedings in said district court shall be the same, as near as may be, as hereinbefore provided in this title in case of revocation or cancellation of licenses or certificates. '07, p. 99.

The district court has jurisdiction on complaint of the medical examiners to grant injunction against a chiropractor practicing medicine. Board of M. Ex. v. Freenor, 47 U. 430; 154 P. 941.

4450. (1738.) Practicing medicine defined. Any person shall be regarded as practicing medicine within the meaning of this title, who shall diagnose, treat, operate upon, or prescribe or advise for, any physical or mental ailment or any abnormal mental or physical condition of another, after having received or with the intent to receive therefor, either directly or indirectly, any fee, gift, compensation, or other pecuniary benefit, reward, or consideration; or who shall hold himself out by means of signs, cards, advertisements, or otherwise as a physician or surgeon; *provided,* that nothing in this title shall be construed to prohibit gratuitous services in

cases of emergency or the sale or administration of proprietary or domestic family remedies or the sale of appliances, nor to prevent medical officers of the United States from the discharge of their official duties; nor shall anything in this title be construed to apply to those who heal only by spiritual means without pretending to have a knowledge of the science of medicine; nor to prohibit visiting physicians in the act of consultation.

R. S. '98, § 1735; '07, p. 99; am'd '11, p. 135.

This act does not prohibit the business of an ordinary masseur, but prohibits one from treating diseases who has not the regular qualifications.

Board of M. Ex. v. Terrill, 48 U. 647; 161 P. 451.

An information in the language of this section is sufficient.

State v. Erickson, 47 U. 452; 154 P. 948.

The court should have instructed on the meaning of the phrase "domestic family remedies."

State v. Yee Foo Lun, 45 U. 531; 147 P. 488.

One who diagnosed the symptoms of his patients, and thereafter treated them, for compensation, by readjusting the displaced vertebrae, with his bare hands, practiced medicine.

Board of M. Ex. v. Freenor, 47 U. 430; 154 P. 941.

4451. (1739.) Penalty. Any person practicing medicine, surgery, or obstetrics within this state without holding a lawful certificate or license, or otherwise contrary to the provisions of this title, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than $100 nor more than $500, or by imprisonment for a term of not less than 60 days nor more than 180 days, or by both such fine and imprisonment.

R. S. '98, § 1736; '07, p. 99.

4452. (1740.) Obstetrics. Examination. Fee. Persons desiring to practice obstetrics in this state shall be entitled to a license upon passing a satisfactory examination by the board of medical examiners and paying to the treasurer thereof a fee of $15; *provided, however,* that this section shall not be construed to prevent physicians holding a certificate from practicing obstetrics, or to prohibit such services or the acceptance of a fee in the case of emergency or persons practicing obstetrics in communities where there are no licensed practitioners.

R. S. '98, § 1737; '07, p. 99; am'd '11, p. 135.

4453. (1741.) Meetings of board. The board of medical examiners shall meet on the first Monday in January, April, July, and October, of each year, at ten o'clock a. m., and such other times as the president of the board shall deem necessary. The place of meeting shall be at the state capital.

R. S. '98, § 1738; '07, p. 100.

4454. (1742.) Removal of members of board. Any member of said board may be removed for misconduct in office by a two-thirds vote of all the members of the board, but no member shall be removed until after he has been given a trial before said board. R. S. '98, § 1739; '07, p. 100.

4455. (1742x.) Examination may be waived, when. Said board may, in its discretion accept and register, upon the payment of the registration fee of $75, without examination of an applicant, any certificate which shall have been issued to him by the board of the district of Columbia, or any state or territorial board for the licensing of practitioners of medicine, surgery, within the meaning of this title, the requirements of which shall at the time of issuing be not less than those of this state; and *provided, further,* that the provisions in this section contained shall be held to apply only to such of said examining boards of such states and territories as accept and register the certificates granted by this board without examination by said board of the one holding such certificate. If for any reason the said applicant is denied such license, $50 of the said $75 shall be returned to said applicant. '07, p. 100; '11, p. 135.

The title to chap. 93, '11 does not purport to amend § 1742 or § 1742x (4454 and 4455); in the body of the act, § 1742x (4455) is amended but it is given the number 1742.

4456. (1742x1.) Osteopathy. Certificate. Nothing in this title shall be deemed to require persons now holding certificates from the territorial or state board of medical examiners to make application for license, and any person who is now practicing osteopathy in the state of Utah, who holds a degree or diploma from a regularly chartered college of osteopathy, whose require-

ments are not less than those prescribed by the associated colleges of osteopathy for that year, upon presenting his diploma to said state board of medical examiners within sixty days after March 14, 1907, shall be entitled to receive a certificate or license to practice medicine and surgery in this state. Said certificate shall be registered and recorded as hereinbefore provided for the registering and recording of other certificates issued by said board. '07, p. 100.

4457. (1742x2.) Contempts. Contempts under this title will be governed and controlled in the manner provided by the general law relating thereto now in force in this state. '07, p. 101.

Procedure in case of contempts, §§ 7072, 70 73.

TITLE 86.

POLL TAX.

('09, p. 281.)

4465. (1743.) Road poll tax. Two dollars lawful money is an annual road poll tax upon every man over twenty-one and under fifty years of age, not physically incapacitated to work and not exempted by law. Within incorporated cities or towns, said road poll tax may be collected and expended under such regulations as may be by the city ordinance prescribed in road improvements. All road poll tax, except such as is collected by incorporated cities or towns, shall be paid into the county treasury, and shall be expended under the direction and pursuant to the order of the board of county commissioners of the county, in making and improving roads.

This title is constitutional.
Salt Lake City v. Wilson, 46 U. 60; 148 P. 1104.

4466. (1744.) Id. Notice, when payable, transients. The county road commissioner shall, prior to the 1st day of April of each and every year, give written notice to every person in the county subject to the payment of road poll tax that said tax is due and payable on or before the third Monday of April of each year; and all persons so notified must pay the said road poll tax to the county treasurer on or before the date when due. The county treasurer shall issue a receipt to each person upon payment of said tax. All persons moving into the county after April 1 of each and every year, who shall be subject to the payment of said tax, must, upon receiving written notice from the county road commissioner that said tax is due, pay the same to the county treasurer within ten days after such notification; *provided,* that said road poll tax shall become due and payable on demand to the county road commissioner in cases of transients or non-residents of the county at the discretion of said county road commissioner. Am'd '01, p. 13.

Duties of road commissioners concerning poll tax, § 2823.

Using or giving false receipt a crime, § 8242.

4467. (1745.) Id. Failure to pay. Any person subject to the payment of said road poll tax, who shall fail to pay the same as provided in § 4466, shall be delinquent, and the county road commissioner shall proceed to collect the same by an action in the name of the county, and no property or wages belonging to such person shall be exempt from execution therefor.

A suit by a city to collect a poll tax is an action of debt over which justices of the peace have jurisdiction, and a city justice is entitled to receive the fees prescribed by § 2527.
Timmony v. S. L. City, 28 U. 302; 78 P. 799.

4468. Id. Road commissioner to furnish county treasurer with list of names. The county road commissioner shall furnish the county treasurer with a list of the names and addresses of each and every person subject to the payment of the said road poll tax on or before the 1st day of April of each and every year and also the name and address of each person notified after the 1st of April, as soon as such notification is given.

4469. Exemptions. Any member of any regular volunteer unpaid fire

company, at present organized or that may hereafter be organized as provided by the ordinance of any city in the state of Utah, who has been or may hereafter continue in the service in said company, is hereby exempted from the payment of road poll tax during the time of such service. The secretary of said fire company shall issue to each member thereof a certificate giving name, age, and term of service, whether active or retired, properly signed by the officers of said company, which certificate shall, upon presentation to the county treasurer be a proper authority for said treasurer to issue a receipt for the current year to the person presenting the same. Every honorably discharged soldier and sailor of the United States army or navy, who served during the Spanish-American war or subsequent Philippine insurrection, shall be exempt from road poll tax; and every officer, non-commissioned officer, musician, and private of the national guard of Utah shall be exempt from road poll tax during the time he shall hold a commission as officer or be enrolled as an enlisted man in the national guard of Utah. The captain of any company of the national guard of Utah shall furnish to any county commissioners, on request, the names of the officers, musicians, and privates of his company. Am'd '11, p. 56.

Member national guard exempt, § 3872.

TITLE 87.

POOLS AND TRUSTS.

CHAPTER 1.

GENERAL PROVISIONS.

4475. (1752.) Unlawful combination. Any combination by persons having for its object or effect the controlling of the prices of any professional services, any products of the soil, any article of manufacture or commerce or the cost of exchange or transportation, is prohibited and declared unlawful.

Trusts, etc., forbidden, Con. art. 12, sec. 20.

4476. (1753.) Id. Members guilty of conspiracy to defraud. Any person or association of persons who shall create, enter into, become a member of, or a party to, any pool, trust, agreement, combination, confederation, or understanding with any other person or persons, to regulate or fix the price of any article of merchandise or commodity; or shall enter into, become a member of, or a party to, any pool, trust, agreement, contract, combination, or confederation to fix or limit the amount or quantity of any article, commodity, or merchandise to be manufactured, mined, produced, or sold in this state, shall be deemed and adjudged guilty of a conspiracy to defraud, and be subject to punishment as hereinafter provided.

4477. (1754.) Trusts declared unlawful. It shall not be lawful for any corporation to issue or to own trust certificates; or for any corporation, agent, officer, or employe, or the directors or stockholders of any corporation, to enter into any combination, contract, or agreement with any person or persons, the purpose or effect of which combination, contract, or agreement shall be to place the management or control of such combination or combinations, or the manufactured products thereof, in the hand of any trustee or trustees, with the intent to limit or fix the price, or lessen the production and sale of any article of commerce, use, or consumption, or to prevent, restrict, or diminish the manufacture or output of any such article, or to monopolize any part of the trade or commerce within this state.

4478. (1755.) Penalties. Firms and corporations. If a corporation, a company, a firm, or association shall be found guilty of a violation of any pro-

vision of this title, it shall be punished by a fine in any sum not less than $100 nor more than $2,000 for the first offense; and for the second offense, not less than $500 nor more than $5,000; and for the third offense, not less than $5,000 nor more than $10,000; and for every subsequent offense shall be liable to a fine of $15,000.

4479. (1756.) Id. Individuals. Any president, manager, director, or other officer, agent, or receiver of any corporation, company, firm, or association, or any member of any company, firm, or association, or any individual found guilty of a violation of any provision of this title, may be punished by a fine of not less than $100 nor more than $1,000, or by confinement in the county jail not more than one year, or by both, in the discretion of the court before which such conviction may have been had.

4480. (1757.) Unlawful contracts void. Any contract or agreement in violation of any provision of this title shall be absolutely void.

4481. (1758.) Corporate franchise prohibited. Any corporation organized or existing under the laws of this state that shall violate any provision of this title shall thereby forfeit its corporate rights and franchises, and its corporate existence shall thereupon cease and determine.

4482. (1759.) Id. Notice to corporation. It shall be the duty of the secretary of state, upon satisfactory evidence that any corporation or association of persons, incorporated or operating under the laws of this state, has entered into any trust, combination, or association, as mentioned in the preceding provisions of this title, to give notice to such corporation that unless it withdraws from and severs all business connections with said trust, combination, or association, its corporate right and franchise will be revoked at the expiration of thirty days from the date of such notice.

4483. (1760.) Id. Attorney general to bring action, when. At the expiration of thirty days, if such withdrawal or severance be not theretofore made, the secretary of state shall cause a certified statement of the facts to be filed in the office of the attorney general of the state, who shall commence, or direct any county attorney in the state to commence, an action, in any district court of the state of competent jurisdiction, to forfeit and revoke the corporate rights and franchises of such corporation. On the final decision of the same, should the defendant be found guilty of a violation of any of the provisions of this title, the court shall render judgment that the charter, corporate rights, and franchises of such corporation be revoked, and the secretary of state shall thereupon make publication of such revocation in four newspapers in general circulation in four of the largest cities of the state.

4484. (1761.) Guilty person liable for treble damages. In case any person or persons shall do, cause to be done, or permit to be done, any act, matter, or thing in this title prohibited or declared to be unlawful, such person or persons shall be liable to the person or persons injured thereby for treble the amount of damages sustained in consequence of any such violation.

4485. (1762.) "Person" includes "corporation." The words "person" or "persons," whenever used in this title shall be deemed to include corporations, companies, and associations, existing under or authorized by the laws of either the United States, or any of the territories, any state, or any foreign country.

Person includes what, §§ 4497, 5848.

CHAPTER 2.

UNJUST DISCRIMINATION AGAINST NEWSPAPERS.

4490. (1762x.) Discrimination in vending news prohibited. All persons, all associations of persons, and all corporations engaged in the business of buying, gathering, or accumulating information or news for publication,

and vending, supplying, distributing, or disseminating the same for publication, either to their members or otherwise, shall be deemed to be engaged in a business upon which a public interest is ingrafted, and shall make no distinction with respect to newspaper publishers desiring to purchase such news or information for publication. '07, p. 127.

4491. (1762x1.) Unlawful to discriminate. It shall be unlawful for any person, association of persons, or corporations engaged in gathering and furnishing news for publication to make any discrimination or distinction with respect to a person or corporation engaged in publishing a newspaper. '07, p. 127.

4492. (1762x2.) Combinations prohibited. Any combination by persons having for its object or effect the controlling of information or news gathered or accumulated for distribution and publication shall be deemed a trust, and hostile to the public welfare, and is prohibited and declared unlawful. '07, p. 128.

4493. (1762x3.) Associations engaged in gathering news must render impartial service. All persons, associations of persons, and corporations engaged in the business of gathering and disseminating information or news for publication by their members, or stockholders, or otherwise, shall be deemed to be engaged in a business in which the public is interested, and shall furnish such news to any and all newspapers desiring to publish the same at the same price as charged to the members of said association, or corporation, or stockholders of any such corporation, without discrimination between the members or stockholders and such newspapers desiring to publish such information and news; and shall render equal and impartial service to all publishers of newspapers who shall offer to pay a reasonable price therefor. '07, p. 128.

4494. (1762x4.) Certain contracts void. Any contract or agreement in violation of the provisions of this chapter, shall be absolutely void and not enforcible either in law or equity. '07, p. 128.

4495. (1762x5.) How combination proved. In all actions brought under this chapter, it shall be sufficient to prove that a trust or combination as defined herein exists, and that the defendant belonged to it, or acted for or in connection with it, without proving or producing any article of agreement, or any written instrument on which it may have been based, or that it was evidenced by any written instrument at all. The character of the trust or combination alleged may be established by proof of its general reputation as such. '07, p. 128.

4496. (1762x6.) Telephone and telegraph companies' agents. process, how served. All telephone and telegraph companies employed to transmit such information or news shall be deemed to be agents of such persons and corporations, and all legal process may be served by the officers of the law upon such telephone and telegraph companies; and an offer to pay a reasonable price to said telephone or telegraph companies shall be equivalent to an offer to pay the same to the persons or corporations gathering and disseminating such information or news. '07, p. 128.

4497. (1762x7.) Terms defined. The words "person" or "persons," wherever used in this chapter, shall be deemed to include corporations, companies, and associations, existing under or authorized by either the laws of the United States, or of any of the territories, any state, or any foreign state. '07, p. 128.

Person includes what, §§ 4485, 5848.

TITLE 88.

PUBLIC FUNDS.

4500. Collection of interest required on deposits of public funds. Any public officer having public funds in his custody may deposit the same, or

any part thereof, with any bank incorporated under the national banking act and doing business in this state, or with any bank or trust company incorporated under the laws of and engaged in business in this state; *provided,* that he requires such depository to pay interest on all funds so deposited at a rate of not less than 2 per cent per annum, and that he take from such depository collateral security or a good and sufficient surety company bond or a personal bond approved by him and sufficient in amount to fully protect such funds; *provided,* that the cost of any official bonds required to be furnished by any public treasurer shall be paid out of funds in the respective treasuries; *provided,* that the interest received under the provisions of this title by the state treasurer shall be placed in the general fund. '13, p. 205.

The commissioners may not direct the payment of the premium on the bond of an official until an amount of interest sufficient to pay it has been collected and placed in the general fund by the official.
Naylor v. Crabbe, 45 U. 617; 148 P. 359.

TITLE 89.

PUBLICITY AND DEVELOPMENT BOARD.

('17, p. 178.)

4501. Board created. A state publicity and development board consisting of nine members to be appointed by the governor, not more than one from any one organization, club, and society, to serve for a term of one year or at the pleasure of the governor, is hereby created.

4502. Duties and powers. It shall be the duty of the board, on behalf of and in the name of the state, to collect and disseminate information of interest and value to prospective investors and homeseekers, with a view of promoting, fostering, and developing the various interests, industries, and resources of the state. The board shall be empowered to expend such moneys for publicity and development purposes as may be received by the board from state appropriations or from other sources; *provided, however,* that all moneys expended be authorized by a majority of the board.

4503. Organization. It shall be the duty of the board to organize for state publicity and development work. The organization shall consist of a president, vice-president and treasurer, chosen from members of the board. The board shall also be empowered to choose a secretary, who may or may not be a member of the board.

TITLE 90.

PUBLIC SCHOOLS.

CHAPTER 1.

STATE BOARD OF EDUCATION.

4505. (1763.) Membership. Term. Control of public schools. Establishment of libraries and gymnasiums. Secretary. The state board of education shall consist of the state superintendent of public instruction, the president of the University of Utah, the president of the Agricultural College of Utah, and six other persons appointed by the governor by and with the consent of the senate, two each biennium and for six-year terms; except that the first appointments under this chapter shall be classified by the governor as to the length of terms, so as to provide for such future biennial appointments. Appointments to fill vacancies shall be for the unexpired terms. In making such appointments the governor is to be influenced only by consideration of merit and fitness, and the appointments shall be made without reference to residence, occupation, party affiliation, religion, or sex. The governor may remove any member so appointed for immorality, malfeas-

ance in office, incompetency, or continued neglect of duties. The general control and supervision of the public school system is vested in the state board of education. The state board of education shall also promote the establishment of libraries and gymnasiums throughout the state, and shall have power to appoint a secretary, who shall work under the direction of the state superintendent of public instruction. The salary of the secretary shall be fixed by the state board of education and approved by the state board of examiners. The board shall have the power to call to its assistance expert help to promote libraries and gymnasiums whenever needed. The actual and necessary traveling expenses incurred by such help and the salary of the secretary shall be paid from the contingent fund of the state board of education, upon the presentation of properly certified and approved vouchers. '11, p. 94; '15, p. 188.

State board, powers, Con. art. 10, sec. 8.
Public school system includes what, Con. art. 10, sec. 2.
General provisions on education, Con. art. 10.
To insure employees, §§ 3110, 3111, 3119.
Direct expenditure district library fund, § 1525.
Direct work of supervisors agricultural and home economics education, §§ 4541-4544.
Conduct examinations for teachers of county districts of first class, § 4620.
Duties as to high school fund, §§ 4575-4582.
Duties as to differential aid to districts, §§ 4567, 4568.

4506. (1764.) Power to grant diplomas and certificates. The state board of education is hereby authorized and empowered to issue diplomas of two grades, namely, state high school and state grammar, and certificates of one grade, namely, state grammar. It shall also have power to issue temporary certificates of high school grade, good for one year. Am'd '03, p. 156.

4507. (1765.) Granted to whom. State diplomas or state certificates shall be issued only to professional teachers who have reached the age of twenty years, have had two years' successful experience in this state, and exhibit satisfactory evidence of good moral character, and freedom from serious infectious or hereditary disease, and upon critical examination are found to possess the requisite scholarship and culture. Am'd '03, p. 71.

4508. (1766.) Id. Valid where and for what time. These state diplomas and certificates shall be valid in any county, city, town, or school district in the state; the high school diplomas in any department of the public schools; the grammar grade diplomas, in grammar and primary departments; and certificates, in grammar and primary departments; state diplomas shall be good during the lifetime of the holders, and state certificates for a period of five years.

4509. (1767.) Id. Examinations required. Normal certificates. Life diplomas of other states. Ceasing to teach. Candidates for state professional diplomas of high school grade shall be required by examination or other evidence to exhibit a high degree of scholarship in all the following branches, namely: Arithmetic, United States history, reading and elocution, orthography, English grammar, political and physical geography, physiology, algebra, physics, rhetoric, drawing, plane and solid geometry, botany, English literature, general history, civil government, history and science of education, and psychology; and also in any three of the following branches, namely: Chemistry, geology, French, German, Latin, Greek, trigonometry, zoology, biology, and mineralogy. Candidates for state professional diplomas of grammar grade shall be required, by examination or other evidence, to exhibit satisfactory knowledge of all the following subjects, namely: Arithmetic, United States history, reading and elocution, orthography, English grammar, political and physical geography, physiology, nature studies, algebra, physics, rhetoric, drawing, plane geometry, botany, English literature, general history, civil government, the history and science of education, and psychology; *provided,* that:

1. Normal certificates and normal diplomas issued by the University of Utah subsequent to March 10, 1892, and all normal certificates and normal diplomas issued hereafter by the University of Utah shall have the force of state certificates; and the holder of any normal diploma as hereinbefore

specified, after having had two years' successful experience in teaching in this state, shall be entitled to a high school diploma;

2. Holders of normal certificates issued by the University of Utah subsequent to March 10, 1892, and all normal certificates and normal diplomas issued hereafter by the University of Utah; and holders of high school certificates now in force and issued as provided by law by boards of education in cities of the first and second classes, and territorial first grade certificates and state diplomas and certificates now in force, may, at the discretion of the state board of education, be exempt from examination in any and all subjects which were required in the examination for such certificates;

3. Life diplomas issued by state boards in other states and shown to be of equal rank with those issued by the state board of this state may receive equal recognition after the holders acquire two years' successful experience in schools of this state. When countersigned by the state superintendent of public instruction under the direction of the state board, such diploma shall have equal validity with those of corresponding rank issued by the state board;

4. No professional diploma or certificate shall be in force if the holder allow a space of five years to elapse without following some educational pursuit.

Retirement of public school teachers, §§ 4750-4765.
County examinations and certificates, § 4620.
City examinations and certificates, §§ 4684-4694.
Issuance of normal certificates, effect, § 5537.
Appointments to normal scholarships, § 5536.

4510. (1767x.) State board to prepare questions for examination of teachers. The state board of education shall prepare lists of questions to be used by the county superintendents of the several counties of the state in the examination of applicants for teachers' certificates, and shall make such suggestions concerning their use, prescribing rules and regulations as shall tend to secure uniform examinations in the different counties. The board may call to its aid, in the preparation of such questions, such assistance as it may deem proper. '01, p. 96.

4511. (1768.) Board may appoint assistant examiners. The state board of education shall have authority to appoint a sufficient number of assistants of eminent educational ability to conduct examinations, and the necessary expense connected with the holding of such examinations shall be paid out of the state school fund upon vouchers to be approved by the state board of examiners.

4512. (1769.) Board may revoke diplomas for cause. The state board of education is authorized and required to revoke, for immoral or unprofessional conduct or evident unfitness for teaching, state diplomas and state certificates issued under the provisions of this chapter.

4513. (1770.) Compensation and expenses of members of board. Clerical assistance. A statement of actual and necessary traveling expenses of the members of said board, incurred in attending meetings of the board, must be certified to by the state superintendent of public instruction, and be filed with the state board of examiners, who are empowered to allow or reject the same, in whole or in part, in the same manner as in the case of claims for which an appropriation has been made, and the state auditor shall draw his warrant on the state treasurer in favor of the person named therein for the amount allowed. The members of the said state board of education shall receive $4 per day for time actually and necessarily spent in the performance of their duties; *provided,* that no member of the board receiving salary from the state or any subdivision thereof, or from any public institution, shall receive any such per diem. The board may engage necessary clerical assistance, the cost of which shall not exceed $250 annually, and shall be certified to as provided above in this section.

4514. (1771.) Chairman and secretary of board. Record. The state superintendent of public instruction shall be chairman of the state board, and

he shall appoint a member of the board secretary, who shall keep a record of the board's proceedings.

4515. (1772.) Concurrence of majority necessary. A concurrence of a majority of all the members shall be necessary to the validity of an act of the board.

4516. (1773.) Meetings of board. The board shall meet at the call of the chairman, and at least twice each year.

CHAPTER 2.

STATE SUPERINTENDENT.

4517. (1774.) Election of state superintendent. Qualifications, term, oath, and bond. Deputy. There shall be chosen by the qualified electors of the state at the regular state election in the year 1900, and every four years thereafter, a superintendent of public instruction, hereinafter called the state superintendent, who, at the time of his election, shall be a qualified elector, shall have been a resident citizen of the state of Utah for five years next preceding his election, shall have attained the age of thirty years, shall be the holder of a state certificate of the highest grade issued in some state, or shall be a graduate of some reputable university, college, or normal school. He shall reside and hold his office at the seat of government for the term of four years from the first Monday in January following his election, and until his successor is elected and qualified. Before entering upon his duties, he shall take the oath of office and give a bond in the penal sum of $5,000, with not less than two sureties, to be approved, recorded, and filed as provided by law. The state superintendent shall have power to appoint a deputy, who may represent him at teachers' institutes when other business prevents his being in attendance. The actual and necessary traveling expenses of such deputy shall be paid out of the school fund upon proper vouchers for the same being filed with the state board of examiners. Am'd '01, p. 46; '07, p. 39.

Election, qualifications, term, duties, compensation, Con. art. 7.
Superintendent a member of the state board, Con. art. 10, sec. 8.
May appoint a deputy, powers, etc., § 5790.
Salary $1,800 per annum till Jan. 1, 1909, '01, p. 73; after that date $2,400, § 5070.

4518. (1775.) State superintendent charged with administration of school system. Apportionment of money. The state superintendent shall be charged with the administration of the system of public instruction and the general superintendence of the business relating to district schools of the state, and of the school revenue set apart and appropriated for their support, and shall have full power to investigate all matters pertaining to the public schools. It shall be the duty of the state auditor to notify the superintendent of the actual amount of money in the state treasury to the credit of the state district school fund on the 31st day of October and December, and on the 31st day of March of each year. Within ten days after receiving such notification, the superintendent shall apportion said fund among the several counties and cities of the first and second classes in the state under the provisions of this chapter, according to the number of persons between the ages of six and eighteen years residing in such county or city, as shown by the last school census lists of the several counties and cities; and immediately furnish to each county treasurer, to each treasurer of the board of education in cities of the first and second classes, and to the county superintendents, an abstract of such apportionments. He shall also certify such apportionment to the state auditor, and, upon receiving such certificate, the auditor shall forthwith draw his warrant on the state treasurer in favor of the county treasurer of each county, or the treasurer of each city board of education, as the case may be, for the amount due said county or board; *provided,* that:

1. No apportionment shall be made to any county or city until all the reports for the year next preceding, as required by law, have been received from such county or city by the state superintendent;

2. If any district or districts in any county have failed to maintain school for twenty weeks during the year next preceding that in which the apportionment is made, the number of children of school age in such district or districts shall be subtracted from the total school population of the state, and from the school population of the county in which such district or districts are located before making the apportionment; *provided,* that when the failure to maintain school in such district or districts the required length of time is due to quarantine, fire, flood, or other like uncontrollable cause, such failure shall not affect the basis upon which the apportionment is made.

Am'd '07, p. 42.

Public school fund, Con. art. 10, sec. 3.
Annual levy of state school tax, § 5998.
County superintendent to apportion school fund, § 4565.
Apportionment by county auditor, §§ 1560-1562.
School money paid on order, § 4564.
State auditor to report to, § 5717.

4519. (1776.) Seal of state superintendent. Register and forms and regulations for reports. Opinions. Visiting schools, etc. The superintendent shall provide and keep a seal by which his official acts and copies of all papers and documents filed in his office may be authenticated, and when so authenticated said copies shall be received as evdience in all courts of this state equally with, and in like manner as the original. He shall prepare and transmit to the proper officers suitable forms and regulations for making all reports, with the necessary blanks therefor, also school registers, and all necessary instructions for the organization and government of district schools, and the conducting of all necessary proceedings under this title. He shall print and circulate a summary of his opinions and rulings. The cost of such blank forms, school registers, and for the printing of the summary of his opinions and rulings shall be paid out of the state school fund, and the vouchers therefor shall be certified to by the superintendent, and filed with the state board of examiners, who are empowered to allow or reject the same, in whole or in part, in the same manner as in the case of claims for which an appropriation has been made, and the state auditor shall draw his warrant on the state treasurer for the amount allowed in favor of the person to whom said amount is due. He shall visit at least once a year in each county in the state the principal schools and district school boards. He may examine the state auditor's books and records relative to school revenue, and those of other public officials relating to school accounts. He shall meet with school officers, advise with teachers, and lecture to institutes and public assemblies upon topics calculated to promote the interests of education.

4520. (1777.) State superintendent to advise with school officers. Effect of his decisions. He shall advise with county superintendents and with school boards and other school officers upon all matters involving the welfare of the schools. He shall, when requested by superintendents or other school officers, give them written answers to all questions concerning the school law. His decisions shall be held to be correct and final until set aside by a court of competent jurisdiction or by subsequent legislation.

4521. (1778.) Biennial report of state superintendent. On or before the 1st day of January preceding each biennial session of the legislature, the state superintendent shall present to the governor a report of his administration of the system of public instruction. There shall be printed at least 1,000 copies of his report and laws relating to the schools, which shall be distributed under his direction. The superintendent in his report shall furnish a brief exhibit:

1. Of his labors, results of his experience and observations as to the operation of the public school system, and suggestions as to the remedy for imperfections;

2. Of the amount of school revenue and its general condition as to sufficiency or insufficiency;

3. Of such plans as he may have matured for the better organization of the schools, and for the increase and economical expenditure of the school revenue;

4. A full statement of the condition and amount of all funds and property appropriated for educational purposes; the number and grade of schools in each county, and in each city of the first and of the second class, the number of children between the ages of six and eighteen years in each county and in each city of the first and of the second class, with the number of such attending district schools, the average number of children that have attended district schools during the two years previous to July 1st of that year, the number that can read and write, the amount of school money raised by county taxation or otherwise, the amount expended for salaries of teachers and for building schoolhouses;

5. A comparison of the results of the two years then closing with those of the two years preceding, indicating the progress of public instruction, and, as far as can be ascertained, the number and condition of private schools, academies, and colleges in the state. Am'd '05, p. 88.

4522. (1779.) Id. He shall append to his report such information relative to the system of public instruction, the schools, their annual revenues, and such other matters as he may deem proper. He shall include in his report statistical tables compiled from information transmitted to his office, with summaries, averages, and totals appended thereto; also a statement of the annual collection of school revenue, and his apportionment thereof; and when he deems it of sufficient interest, he shall append extracts from the correspondence of school officers, showing either the salutary or defective operation of the system. He shall furnish the United States commissioner of education at Washington such information as that officer may require.

4523. (1780.) Quarterly expense account of state superintendent. Books, etc., to successor. At the end of each month he shall file with the state board of examiners an itemized account of his expenses, verified by his oath. The said board shall examine the same, and, if the account is found to be correct and the expenditures necessary, shall certify the same to the state auditor, who shall issue a warrant to the state treasurer for the amount due on such account, and at the end of each quarter year, for one-fourth of the superintendent's annual salary, and shall charge the same to the state district school fund. At the expiration of his term of office, he shall deliver to his successor all books, records, documents, maps, reports, papers, and other articles pertaining to his office. Am'd '01, p. 18.

4524. (1781.) State superintendent may call convention of county and city superintendents. The state superintendent shall have power to call annually a convention of the county and city superintendents, to assemble at such time and place as he shall deem most convenient, for the discussion of questions pertaining to the supervision and administration of public schools, the laws relating thereto, and such other subjects affecting the welfare and interest of the public schools as shall properly be brought before it. It is hereby made the duty of all county and city superintendents to attend such conventions when called. The actual traveling expenses of county superintendents for attending such conventions shall be allowed by the board of county commissioners, and paid out of the same fund as the salaries of county superintendents. The actual traveling expenses of city superintendents attending such conventions shall be allowed, and paid out of the same fund as salaries of city superintendents. Am'd '05, p. 89.

Superintendent may call text book convention, § 4556.

CHAPTER 3.

SCHOOL SITE OR BUILDING.

4527. (1823.) Election to determine school site or building. Building plans to be submitted to commission. Approval. Employment of architect. Duties. When necessary for the welfare of the schools of the district, or to provide proper school privileges for the children therein, or whenever peti-

tioned so to do by one-fourth of the resident taxpayers of the district, the board shall call a meeting of the qualified voters, as defined in § 1811, Compiled Laws of Utah, 1907, at some convenient time and place by the board, to vote upon the question of selection, purchase, exchange, or sale of school house site, or the erection, removal, purchase, exchange, or sale of a school house, or for payment of teachers' salaries, or for current expenses of maintaining school. The chairman of the board shall be chairman, and the clerk of the board secretary of such meeting. In case either of these officers is not present, his place shall be filled by some one chosen by the voters present Notice, stating the time, place, and purpose of such meeting, shall be posted in three public places in the district by the clerk of the district board, at least twenty days prior to such meeting. If a majority of such voters present at such meeting shall by vote select a school house site, or shall be in favor of the purchase, exchange, or sale of a designated school house site, or of the erection, removal, or sale of a school house, as the case may be, the board shall locate, purchase, exchange, or sell such site, or erect, remove, or sell such school house, as the case may be, in accordance with such vote; *provided,* that it shall require a two-thirds vote to order the removal of a school house; *provided,* that no school house shall hereafter be erected in any school district in this state, not included in cities of the first and the second class, and no addition to a school building, the cost of which school house or addition thereto shall exceed $1000, shall be contracted for or erected until the detailed plans and specifications for the same shall have been submitted to a commission hereinafter provided for, and the approval of said commission indorsed thereon. Such plans and specifications shall show in detail its construction, the heating and ventilating system, and the window lighting of such building.

There is hereby created a commission consisting of the state superintendent of public instruction, the secretary of the state board of health, and the state high school inspector. It shall be the duty of said commission to carry out the provisions of this chapter. The commission shall not approve any plan for the erection of any school building, or addition thereto, unless the same shall provide at least fifteen square feet of floor space to each two hundred cubic feet of air space for each pupil to be accommodated in each study or recitation room therein, and the total area of glass space in windows of each class or recitation room shall not be less than one-sixth of the floor area of such room. And no such plans shall be approved by them unless provision is made therein for assuring at least thirty cubic feet of pure air every minute for each pupil and facilities for exhausting foul or vitiated air therein, same to be positive and independent of atmospheric changes; and all gymasiums and auditoriums hereafter to be constructed shall be well lighted and ventilated, and all cloak rooms shall be well ventilated. Buildings of four or less class rooms may be heated and ventilated with approved school room heaters. No tax voted by a district meeting or other competent authority in any school district shall be levied by the trustees or boards of education until the commission shall certify that the plans and specifications of the same comply with the provisions of this chapter; *provided,* the commission shall report within sixty days after the plans are submitted to it. All school house plans and detail statements shall be submitted in duplicate and be filed and approved as required by this chapter. Buildings of two stories or more shall have the stairs, halls, heating apparatus, and fuel room constructed of fireproof material, and shall have sufficient hall space, and a sufficient number of outward opening doors, stairways, lighting and heating plants and apparatus arranged to facilitate egress in case of fire or accident and afford the requisite and proper accommodations for public protection in such case. The commission hereby created shall serve without compensation, and shall have the authority to employ an architect, who shall receive a compensation not to exceed $8 per diem for actual services rendered, which compensation shall be audited and paid from the state school fund as other accounts are audited and paid, and in addition thereto he shall receive his actual and necessary traveling ex-

penses incurred while in the discharge of his official duties. It shall be his duty to examine all school plans and inspect all school buildings or additions at least once during the erection of such building or additions, or when called upon by the commission, to ascertain if all the provisions of this chapter have been complied with. It shall also be his duty to inspect the school buildings of the state, when called upon, and when he shall find any such buildings to be insanitary or unsafe for occupancy, he shall report the same to the commission. The commission shall thereupon make such recommendations to the boards of education or school trustees for the correction of existing insanitary and unsafe conditions as may be deemed necessary for the protection of the health and safety of the pupils, and it shall be the duty of the said school trustees or boards of education to comply with such recommendations, within a reasonable time thereafter. The said architect member shall also act as an advisory architect whenever called upon by school trustees, and inspect and advise on the heating or ventilating system not operating efficiently in the school; *provided,* said architect shall not represent, directly or indirectly, any building materials or construction firm, association, or corporation, nor shall recommend, prescribe, or advise the use of any particular brand or brands of building materials to be used for and in the construction of buildings provided for. Whenever a school building erected under the provisions of this chapter shall be completed and approved, the commission shall issue a certificate of approval to the trustees or boards of education of the district in which such building is erected. Am'd '09, p. 30; '15, p. 130.

Commission for erection of school building, § 4527.

Qualification of voters, Con. art. 4, sec. 2.

Sec. 1811, Compiled Laws, 1907, was repealed by chap. 78, laws '15, approved March 15, and the same section was referred to as if it were in force in chap. 93, laws '15, approved March 19, in amending § 4527, sec. 1811 is as follows:

1811. Who qualified to vote for tax, bond, etc. Every citizen of the United States of the age of twenty-one years or over, who has been a resident of the state of Utah for one year, of the county four months, and of the school district for sixty days, both immediately preceding the day on which any meeting is held for the purpose of voting on the question of levying a special tax or issuing bonds for any school district, or high school district, or for selecting a schoolhouse site, and who has paid a property tax in said district during the year next preceding, shall be entitled to vote at any such meeting.

CHAPTER 4.

COURSES OF STUDY IN PUBLIC SCHOOLS.

4531. (1837x.) Course of study to be prescribed. Within thirty days after the adoption of text books, the state superintendent of public instruction, the principal of the state normal school, and five school superintendents to be appointed by the state board of education, shall meet and prescribe a course of study for the schools of the state not included in cities of the first and the second class, and shall furnish free of cost to each county or school district, the number of courses of study ordered by the superintendent of schools. '07, p. 55; '13, p. 17.

4532. (1837x1.) No compensation. Expenses. The committee shall serve without compensation; *provided,* that the actual and necessary expenses of the superintendents while attending meetings of the committee shall be paid out of the state superintendent's contingent fund. '07, p. 55; '13, p. 18.

STUDY OF THE HABITS OF BIRDS.

4533. Habits of birds, etc., to be observed in schools. Bird day established. It shall be the duty of the board of education or school board of every school district within this state to cause to be observed in the schools the last Friday in April of each year as bird day, with appropriate lessons and exercises relating to the observation, the study, and the value of birds and other forms of animal life, particularly as aids in the extermination of insects, weeds, and other pests. '13, p. 93.

4534. (1829.) Physiology and hygiene. It shall be the duty of all

boards of education and trustees in charge of schools and educational institutions supported in whole or in part by public funds to make provisions for systematic and regular instruction in physiology and hygiene, including special reference to the effects of stimulants and narcotics upon the human system.

The foregoing and the succeeding section were in the body of chap. 78, laws of '15, declared repealed, but the repeal was not included in the title of the act.

4535. (1829x.) Sanitation and the cause and prevention of disease shall be taught. There shall be established in the normal schools of the state, and and in the public schools, beginning with the eighth grade, a course of instruction upon the subjects of sanitation, and the cause and prevention of disease. It shall be the duty of the state board of education and the state board of health, acting conjointly, to prepare a course of study to carry out the provisions of this section. '07, p. 116.

Control of board of health, § 2755. Compulsory vaccination unlawful, § 2763.

SUPERVISORS OF AGRICULTURAL, INDUSTRIAL, AND HOME ECONOMICS EDUCATION.

('17, p. 394.)

4536. Positions created. There is hereby created the positions of state supervisor of agricultural and industrial education, and state supervisor of home economics education for the high schools and district schools of the state.

4537. Designation of supervisors. Qualification of appointees. The state leader in junior vocational work at the Agricultural College of Utah is hereby made state supervisor of agricultural and industrial education for the high schools and district schools of the state, and the state leader in junior vocational work for girls at the Agricultural College of Utah is hereby made state supervisor of home economics education for the high schools and district schools of the state. The appointees of the state supervisor of agricultural and industrial education and state supervisor of home economics education to hold these positions must be twenty-five years of age or over, must have at least a bachelor of science degree in agricultural or home economics, respectively; and must understand the practical side of agricultural and home economics, and must possess the qualifications prescribed by the state board of education.

4538. Powers and duties of supervisors. Co-operation with state schools. Reports. The supervisors of agricultural and industrial and home economics education shall do their work under the supervision of the state board of education, to systematize the teaching of agriculture and mechanic arts and home economics in the high schools and district schools of the state, suggesting the courses particularly suited to the individual students and to the communities in which the schools are located. They shall visit each county school district in the state at least once each year and make suggestions as to the best methods of teaching the principles underlying agricultural and industrial and home economics work in the school room, and the laboratory work and the practical work to be done by the pupils at home. They shall make recommendations to each county or district superintendent, each principal, and each agricultural and home economics teacher, for the improvement of the agricultural and home economics teaching in each particular school. They must report annually in writing to the state board of education. These supervisors shall co-operate with the Agricultural College of Utah and the state normal school of the University of Utah in all matters pertaining to subject matter and methods underlying their work.

4539. Compensation. The duties of the state supervisors of agricultural and industrial and home economics education for the high schools and district schools of the state shall be performed without additional cost to the state other than the salaries which shall be received for the performance of their duties from the Agricultural College of Utah as leaders of vocational work.

PROMOTION OF VOCATIONAL EDUCATION.

('17, p. 424.)

4540. Acceptance of the requirements of the act of congress. The state of Utah hereby accepts §§ 2, 3, and 4, and all the benefits of the act passed by the senate and house of representatives of the United States of America in congress assembled, entitled, "An act to provide for the promotion of vocational education; to provide for co-operation with the states in the promotion of such education in agriculture and the trades and industries; to provide for co-operation with the states in the preparation of teachers of vocational subjects; and to appropriate money and regulate its expenditure," approved February 23, 1917, and will observe and comply with all the requirements of said act.

4541. Administration of the provisions. The state board of education, consisting of five or more persons, is hereby designated as the state board for the purposes of the said act, and it is hereby given all necessary power to cooperate with the federal board for vocational education in the administration of the provisions of the act.

4542. Custodian of funds. The state treasurer is hereby designated as the custodian of all money to be received for said fund by appropriation, both federal and state, and he is hereby named as the official for the disbursement thereof upon orders authorized by the state board.

4543. Fund designated. For the purpose of carrying into effect the provisions of this chapter, there is hereby created and set apart a special fund to be known as the federal vocational education fund of Utah.

KINDERGARTENS.

4544. (1966.) Board may maintain kindergartens. Teachers. School boards may establish and maintain kindergartens in their several districts, open to children resident therein between the ages of four and six years. The cost thereof may be paid in whole or in part out of the school funds of the district. Kindergartens established under the provisions of this section shall be subject to the control of the school boards of the respective districts in which they are maintained. Teachers for said schools, unless holding a certificate of efficiency in kindergarten work granted by the State Normal School, shall be required to sustain a special examination relating to the principles and practice of the kindergarten, such examination to be conducted under the direction of the state board of education.

Kindergarten schools part of public school system, Con. art. 10, sec. 2.

4545. (1966x.) Kindergartens provided for. Maintenance. All school districts of a population of 2,000 and upwards shall hereafter establish and maintain one or more kindergartens in said school district, open to children resident therein between the ages of four and six years. Said kindergartens must be established within four years after March 16, 1903. The cost of maintaining such kindergartens shall come out of the district school fund of the respective districts. '03, p. 139.

CHAPTER 5.

EXAMINATION OF SCHOOL CHILDREN FOR DEFECTIVE SIGHT, ETC.

('11, p. 285.)

4546. Duty of teacher. It shall be the duty of every teacher engaged in teaching in the public schools of the state, separately and carefully, to test and examine every child under his jurisdiction to ascertain if such child is suffering from defective sight or hearing, or diseased teeth, or breathes through its mouth. If such test determines that any child has such defect,

it shall be the duty of the teacher to notify, in writing, the parent of the child of such defect and explain to such parent the necessity of medical attendance for such child.

4547. State board of health to prescribe rules. The state board of health shall prescribe rules for making such tests, and shall furnish to boards of education and boards of trustees of school districts rules of instruction, test cards, blanks, and other useful appliances for the carrying out of the purposes of this chapter.

4548. When tests shall be made. During the first month of each school year, after the opening of school, teachers must make the tests required by this chapter upon the children then in attendance at school; and thereafter, as children enter school during the year, such tests must be made immediately upon their entrance.

4549. Duty of boards of education. It shall be the duty of the boards of education and boards of trustees of the several school districts of the state to enforce the provisions of this chapter.

4550. May employ physicians. The board of education or board of trustees of any school district may employ regularly licensed physicians to make the tests required by § 4546, and when such tests are made by a physician, the teacher shall not be required to make the tests provided for in § 4546.

CHAPTER 6.

CIVIC CENTERS.

('17, p. 420.)

4551. Designation. Purpose. Proviso. There is hereby established a civic center at each and every public school house within the state of Utah, where the citizens of the respective school districts within the state of Utah may engage in supervised recreational activities, and where they may meet and discuss, from time to time, as they may desire, any and all subjects and questions which, in their jugment, may appertain to the educational, political, economic, artistic, and moral interests of the citizens of the respective communities in which they may reside; *provided,* that such use of said public schoolhouses and grounds for said meetings shall in no wise interfere with such use and occupancy of said public schoolhouses and grounds as is now or hereafter may be required for the purposes of said public schools of the state of Utah.

4552. Payment of incidental expenses provided. Lighting, heating, janitor service, and the services of a special supervising officer when needed, in connection with such use of public school buildings and grounds, as set forth in § 4551, shall be provided for out of the county or special school funds of the respective school districts in the same manner and by the same authority as such similar services are now provided for. Such use of the said schoolhouses, property, and grounds shall be granted free; *provided,* that in case of entertainments where an admission fee is charged, a charge may be made for the use of said schoolhouses, property, and grounds.

4553. Management. Rules. Supervisor. The management, direction, and control of said civic center shall be vested in the board of directors of the school district. Said board of directors shall make all needful rules and regulations for conducting said civic center meetings and for such recreational activities as are provided for in § 4551; and said board of directors may appoint a special supervising officer who shall have charge of the grounds, preserve order, protect the school property, and do all things necessary in the capacity of a peace officer to carry out the provisions and the intents and purposes of this chapter.

4554. Use of schoolhouses subject to discretion of directors. The provisions of this chapter shall not be mandatory upon the board of directors of any school district, in respect to their authority and right to exercise discretionary powers as to refusal of the use of such schoolhouse for any such purpose or purposes; but whenever, in their judgment, it seems inadvisable to permit the use of such schoolhouse for the purpose requested, the board shall have the power and authority to refuse the use of such schoolhouse for any of the purposes mentioned in this chapter.

CHAPTER 7.

TEXT BOOKS.

4555. (1854.) Commission created. Duties. No compensation. Expenses. A state text book commission is hereby created and established to consist of the state superintendent of public instruction, the president of the University of Utah, the president of the Agricultural College of Utah, the principal of the state normal school, and five resident citizens of the state to be appointed by the governor, three of whom shall be superintendents of schools. Each appointed commissioner shall serve during the period of appointment and without compensation, but his actual and necessary expenses incurred in the performance of his official duty, the account for which shall be verified on oath, shall be paid out of the public school fund. The members of this commission, or a majority of them, shall decide what text books shall be adopted for use in the district schools and the high schools of the state, except in cities of the first and the second class, and their use shall be mandatory in all district and high schools of the state, except in cities of the first and the second class. '09, p. 76; '13, p. 43.

Neither legislature nor state board may prescribe text books, Con. art. 10, sec. 9.
Adoption of text books in cities, §§ 4695-4700.
Course of study, § 4528.
The acts required of the convention provided for in this section and §§ 4556, 4560, were not judicial, and a person injured by its determination was entitled to restrain the execution thereof.
Tanner v. Nelson, 25 U. 226; 70 P. 984.

4556. (1855.) Convention, when held; how called; purpose. The state superintendent shall call a convention of the text book commission at least six months prior to the expiration of any contract regulating the supply and the use of text books in the district schools and the high schools throughout the state, except in cities of the first and the second class, and shall give at least sixty days' notice of the time of holding such convention by publication in a newspaper having general circulation in the state. Such notice shall state the subjects upon which text books shall be adopted and that sealed proposals will be received by the state superintendent of schools for furnishing such books, the place where and the day and hour when all proposals will be opened, and that the convention reserves the right to reject any and all proposals. Said convention shall be called for the adoption of text books every five years as herein provided; and any text book so adopted shall not be changed within a period of five years after its adoption, except for a sufficient cause to be decided at a special convention called for that purpose; *provided,* that the contracts entered into in 1907 shall extend until July 1, 1913. Am'd '03, p. 6; '09, p. 76; '13, p. 43.

4557. (1856.) Proposals for text books and awards. At the time and place specified in said notice, the convention shall meet and publicly open and read all the proposals which have been received, and shall make their awards therein within thirty days thereafter.

The failure to literally comply with the provisions of this section is immaterial. Tanner v. Nelson, 25 U. 226; 70 P. 984.

4558. (1857.) Samples and prices. Sealed proposals must be accompanied by sample copies of the books proposed to be furnished, together with a statement of the introductory or exchange price, and of the wholesale and

retail prices at which the publishers agree to furnish each book within the state during the full time for which said books may be adopted.

4559. (1858.) When proposals are unsatisfactory. If no satisfactory proposals are received, the state superintendent of public instruction may advertise anew, and the books in use shall be continued in use until satisfactory proposals shall have been received and accepted. Am'd '03, p. 6.

4560. (1859.) Publishers to enter into contract. The publisher or publishers whose proposals shall be accepted must enter into a written contract with the state superintendent of schools, and shall give a bond with two sufficient sureties in a reasonable sum, to be fixed by the convention, for the faithful performance of such contract.

Objection that convention failed to fix the amount of the bonds not sustainable. Tanner v. Nelson, 25 U. 226; 70 P. 984.

4561. (1860.) School officer or teacher not to act as agent. No school officer or teacher in any district school in this state shall act as agent for any author, publisher, bookseller, or other person to introduce any book, apparatus, furniture, or any article whatever in any district in which such school officer or teacher is officially engaged.

4562. (1861.) Receiving money or bonus from publisher. Penalty. If any member of the state text book commission shall receive from the publisher of any school books or from any other person interested in the sale or introduction of any books, maps, charts, or other school supplies into the public schools in the state, any money or bonus in any manner as an inducement for the recommendation or introduction of any such school book in the schools of the state, such person shall be guilty of a misdemeanor. '09, p. 76.

4563. (1862.) Failure to enforce use of books adopted. Penalty. If the trustees of any district shall refuse or neglect to enforce the use of text books adopted by the convention, such refusal or neglect shall be a misdemeanor on the part of any trustee so refusing or neglecting, and shall be punishable by a fine not exceeding $100 and by removal from office.

CHAPTER 8.

SCHOOL TAXES AND FUNDS.

STATE AND COUNTY TAX.

4564. (1863.) State treasurer to receive and pay over school fund. The state treasurer shall receive and hold as a special fund all public school moneys paid into the state treasury, and pay them over on the warrant of the state auditor, issued upon the order of the state superintendent of public instruction in favor of the county treasurer of each county for the amount due said county, and in favor of the treasurer of each board of education for the amount due such board.

State auditor to report, § 5717. State tax for district schools, § 5998.

STATE SCHOOL FUNDS; APPORTIONMENT.

4565. (1867.) Apportionment and use of school funds. The county superintendent of each county shall, immediately upon receiving the apportionment from the state superintendent, proceed to apportion the state school funds to the several school districts of his county according to the number of school children residing in each district over six and under eighteen years of age, as shall appear from the last enumeration reported to his office. The county superintendent shall apportion the county school funds in like manner, and as soon as practicable after the receipt of the same or any portion thereof; *provided,* that before making such apportionment he shall apportion to cities of the first and of the second class and to county school districts of the first class their proportion per capita of the county school fund, after which he shall set aside so much of said county fund as the board of county commissioners shall order for the payment of the compensation of the county super-

intendent, members of the board of examiners, and the expenses of the county institute, and contingent expenses of the county superintendent's office, and the actual and necessary traveling expenses of the county superintendent while making his official visits, but all warrants drawn by the county superintendent for the disbursement of the fund so set aside shall be approved by the board of county commissioners; *provided, further,* that no part of either of said funds shall be used otherwise than for the payment of teachers, except as provided otherwise in this section. The county superintendent shall file a duplicate of such apportionment with the county auditor.

Am'd '01, p. 43; '09, p. 24.

Apportionment by county auditor, §§ 1560-1562.

State superintendent to apportion school fund, § 4518.

The collection of the county school tax within Salt Lake City and the subtraction of a certain sum therefrom for county school purposes before the fund is distributed, under certain provisions added to the revenue act of 1896 on pp. 489 and 497, are in violation of Con. art. 10, sec. 6, and such provisions, being in conflict therewith, are invalid.

Merrill v. Spencer, 14 U. 273; 46 P. 1096.

SPECIAL TAX FOR SCHOOL SITES, ETC.

4566. (1871.) Special tax for school sites, buildings, etc. Limit. When it is necessary to raise funds to purchase a school site or improve the same, or to purchase, build, rent, repair, or furnish school houses, or redeem outstanding bonds, or for payment of teachers' salaries or for current expenses, a tax may be voted, in any sum not to exceed 6½ mills on the dollar on all taxable property in the district, at a meeting called for that purpose in the manner provided in Chap. 5, Title 66, Compiled Laws of Utah, 1907. When a tax shall have been voted for school purposes at any meeting provided for in aforesaid title and chapter, the trustees shall file with the county superintendent and the county clerk, within ten days after such meeting, a copy of the notice calling such meeting, and a copy of the minutes thereof, which shall be kept on file by the said superintendent and clerk, subject to inspection by any person. Repealed '15, p. 98; amended '15, p. 197.

Chapter 5, Title 66, Compiled Laws 1907, (§§ 1804-1816) was repealed by chap. 78, laws '15, approved March 17; this section was repealed by ch. 78 laws '15 and then amended by chap. 111, laws '15, approved March 22.

In an action to enjoin the carrying out of a contract by the district board of education for the erection of a high school in a particular location, it will be presumed that the board called an election and that the majority of the voters voted for the erection of the high school at that location in accordance with law.

Tooele Bldg. Assoc. v. Tooele High School Dist., 43 U. 362; 134 P. 894.

A corporation which is a taxpayer may sue to restrain the carrying out of an illegal contract by a district board of education for the erection of a high school.

Id.

DIFFERENTIAL AID FOR SCHOOL DISTRICTS.

('17, p. 225.)

4567. Revenue for elementary schools. Reports to boards of education. In any school district of the state where the revenues derived from the state, county, and district school tax levies are insufficient to enable the board of education to employ teachers of the elementary schools for a period of at least thirty-two weeks, and there has been made in said district the maximum district school tax levy, and there has been made in the county in which the district is situated the maximum county school tax levy, and there is not a sufficient amount from the allotment of state and county school funds and from the district school moneys, after all necessary current expenses are paid from the district fund, to pay the elementary teachers of said district an average salary of $600 for the current school year, the board of education shall make report thereof, giving the amount available in such district for the payment of teachers for the school year, together with an itemized account of current expenses, verified under oath, to the state board of education not later than the 15th day of May in such school year. The state board of education shall, by the 15th day of June of such school year, make to the state auditor, the state treasurer, and the state board of examiners report of any school district or districts so reported.

4568. Appropriations. Terms of school. Number and salary of teachers. Distribution of payments. There shall be paid out of any moneys in the

state treasury not otherwise appropriated a sum sufficient to make the amount available for the payment of elementary school teachers in such district or districts average $600 for each elementary school teacher for the school year; *provided,* that not more than $20,000 per annum shall be so available; *provided, further,* that the elementary schools in such district or districts are maintained for at least thirty-two weeks; *provided, further,* that the number of teachers employed in such district or districts shall be subject to the approval of the state board of education; and *provided, further,* that if the $20,000 above designated be not sufficient to meet the claims of all districts, the state board of education shall be authorized to make a pro rata distribution of said fund to the districts entitled to differential aid under the provisions of this chapter.

STATE HIGH SCHOOL TAX.

('11, p. 43.)

4575. State levy for high school purposes. Limit. The state board of equalization is hereby authorized and directed to levy annually, a state tax of not more than two-tenths of one mill on each dollar of valuation of the taxable property in the state, for high school purposes; and the levy and collection of said tax must be performed in the same manner and at the same time as other taxes are levied and collected, and shall be apportioned to the several cities and school districts maintaining high schools as provided by law. Am'd '15, p. 198.

4576. Board of education to be notified. On the first Monday in October of each year, the board of education or school board of any city or school district in which a high school is established shall notify in writing the state board of education of the establishment of such high school and the intention of such city or district to claim the benefits of the high school fund.

4577. Standard to be fixed. The state board of education shall by rule fix the standard upon which, and the period during the year that, high schools in this state shall be maintained in order to obtain any part of the high school fund. Such rule shall be fixed on or before the 1st day of May, 1911; and thereafter if such rule be amended, the amendment shall take effect on the 1st day of July at least one year after the date of its adoption. A copy of such rule or amendment shall be furnished to each city or district establishing high schools immediately after its adoption.

4578. Report of attendance to state board of education. On the last Monday of January of each year the board of education or board of the city or district in which a high school is established and maintained shall report to the state board of education the actual number of students enrolled in such high school, and an estimate of the number of students who will attend such high school for a period of at least twenty weeks during the current school year; which report must be approved by the president or chairman and the clerk of the board. On the second Monday in June of each year the board of education, or board of city or district in which a high school is established and maintained, shall report to the state board of education the actual number of students enrolled who have been in actual attendance in such high school for a period of at least twenty weeks, together with the daily average attendance of the students so enrolled during such school year; which report must be verified under oath by the president or chairman and the clerk of the board. Such report shall also give such additional information as the state board of education may require in order to enable it to determine the standard of the school. Am'd '15, p. 189.

4579. State auditor to report amount of funds on hand. On the last Monday in January and on the second Monday in June of each year the state auditor shall report to the state board of education the amount then on hand in the state high school fund. Am'd '15, p. 189.

4580. Apportionment, how computed. Disbursement. Upon receipt of

the January reports mentioned in § 4578, and upon receipt of the January report of the state auditor as provided in the next preceding section, the state board of education shall apportion to the several cities and school districts maintaining high schools of the standard fixed by the state board of education, 70 per cent of the amount of money then on hand in the state high school fund as shown by the auditor's report; such apportionment shall be made according to the estimated number of students who will be in attendance at each high school during a period of at least twenty weeks, as shown by the January report of the board of education or board of the city or district required to be made by § 4578. The state board of education shall immediately furnish to the treasurer of each school board in cities or districts where any such school is maintained an abstract of such apportionment. The state board of education shall also certify such apportionment to the state auditor, and upon receiving such certificate the state auditor shall forthwith draw his warrant on the state treasurer in favor of the treasurer of the school board for the amount to which said city or district is entitled under such apportionment. Upon receipt of the June reports mentioned in § 4578, and upon receipt of the June report of the state auditor as required in the next preceding section, the state board of education shall make a final apportionment of the amount on hand in the state high school fund, as shown by the auditor's report, to the several cities and school districts maintaining high schools for the required period of time and of the standard fixed by the state board of education. In making such final apportionment the state board of education shall determine the total amount of funds to which each high school is entitled for the entire school year as shown by the number of students who have attended such high school for a period of at least twenty weeks as shown by the June report of the board of education or board of the city district required in § 4578. The state board of education shall then subtract from the total amount to which each school is entitled the amount such school has already received, and it shall thereupon apportion the balance to such school. The state board of education shall immediately furnish to the treasurer of each school board in cities or districts where any such school is maintained an abstract of such final apportionment. The state board of education shall thereupon certify such final apportionment to the state auditor, and upon receiving such certificate the state auditor shall forthwith draw his warrant on the state treasurer in favor of the treasurer of the school board for the amount to which the said city or district is entitled under such final apportionment. '15, p. 189.

4581. Appointment of inspector. The state board of education shall appoint a competent person to inspect at least twice during each school year all high schools claiming any benefits from the high school fund.

4582. Compensation and expenses of inspector. The compensation and traveling expenses of such inspector shall be fixed by the state board of education, subject to the concurrence of the state board of examiners, and shall be paid out of the high school fund upon claims properly verified by the state board of education and approved by the state board of examiners.

HIGH SCHOOL DISTRICT TAX.

4583. Tax levy for high school districts. Limit. If at such elections a majority of the qualified electors shall have voted in favor of the establishment and maintenance of one or more high schools in such district, then the board of education shall establish such high school or schools, and are authorized to levy a tax on all taxable property in the district for the support thereof, in any amount not exceeding two mills on the dollar.

Laws 1911, chap. 31, providing for the creation of high school districts, was repealed by laws of '15, chap. 78, approved March 17, and §§ 11, and 12 of the original act, that is, laws '11, chap. 31, were amended, laws '15, chap. 111, approved March 22, being the above and next section.

4584. Id. Powers of board. Tax not to exceed 3 mills. The board of education shall have the power and authority to purchase and sell school house

sites and improvements thereon; to construct and erect school buildings, and to furnish the same; to establish and maintain high schools at such places as they may be authorized by a vote of the qualified electors of the district; to establish and support school libraries; to purchase all necessary high school apparatus, books, and school supplies; to levy annually upon all the taxable property in the district a tax not exceeding 2 mills on the dollar, or such other or further tax as shall have been authorized by a vote of the qualified electors of the district at an election regularly called; *provided,* that such tax authorized at such election shall not exceed 3 mills on the dollar; to provide for the transportation of such pupils as reside too far from the school to walk thereto; to adopt by-laws and rules for the procedure of the board, to make and enforce all needful rules for the control and maintenance of high schools in the district, or to admit students from other high school districts upon such terms as may be equitable and just.

SCHOOL DISTRICT TAX AND PURPOSES.

4585. (1815.) Levy for school district purposes. Limit. Collection and disbursement. The school district board shall have general charge, direction, and management of the schools of the district, and the care, custody, and control of all property belonging to the district, subject to the provisions of the law. It shall annually, on or before the 1st day of May, prepare a statement and estimate of the amount necessary for the support and maintenance of the schools under its charge for the school year commencing on the 1st day of July next thereafter; also the amount necessary to pay the interest accruing during the year, and not included in any prior estimate, on bonds issued by said board; also the amount of sinking funds necessary to be collected during such year for the payment and redemption of said bonds; and shall forthwith cause the same to be certified by the president and clerk of said board to the board of county commissioners in the county in which the district is situated, and said board of county commissioners, after having extended the valuation of property on the assessment rolls, shall levy such per cent as shall, as nearly as may be, raise the amount required by said school board. Said taxes shall be collected by the county treasurer as other taxes are collected, but without additional compensation for assessing and collecting, and he shall pay to the treasurer of said school board promptly as collected, who shall hold the same subject to the order of the school district board; *provided,* that the tax for the support and maintenance of the schools to defray current expenses and to purchase text books, shall not exceed 4 mills on the dollar of taxable property in said district, and *provided, further,* that the tax for paying of interest on bonds shall not exceed 1 mill on the dollar or that the tax for a sinking fund for the redemption of bonds shall not exceed 1 mill on the dollar of taxable property in said district. It shall have the power to establish and maintain school libraries, which in districts that have no free library or reading room may be open to the public under such regulations as the board may provide. For the purpose of purchasing books and magazines for these school libraries, the board shall set aside annually from the tax herein provided an amount equal to 15 cents per capita for each child in the district between the ages of six and eighteen years, inclusive, the computation being based on the school census at the time when the tax is levied; *provided,* that the library fund thus created shall be expended under the direction of the state board of education for such books and magazines as they shall recommend and under such regulations as they may prescribe; *provided, further,* that this chapter shall apply to all school districts outside of cities of the first and second classes, and to county school districts of the first class. Am'd '09, p. 47; '15, p. 195.

May employ physician, § 4540. School house as civic center, §§ 4551-4554.

TAXES TO PAY JUDGMENT FOR TAXES ILLEGALLY LEVIED.

4586. (1815x.) Trustees may levy tax to pay judgment obtained for taxes illegally collected. When any judgment is obtained in a court of com-

petent jurisdiction against a school district for taxes unlawfully collected for and received by such school district, or when there are no funds for the payment of warrants issued by the trustees of any school district to refund taxes unlawfully collected for and received by such school district, the trustees of any such school district shall, in addition to all other taxes which they are empowered to levy, order to be raised upon the taxable property in such school district a sufficient amount of revenue to pay such judgment and warrants.
'01, p. 132.

CHAPTER 9.

CREATING INDEBTEDNESS.

4590. (1875.) Debt not to exceed current taxes without vote of people. Any school district or any board of education of a city of the first or of the second class may create indebtedness for the maintenance of the schools within such district or city not in excess of the taxes for the current school year; and any such school district or board of education may create indebtedness for the purpose of purchasing school sites and erecting school buildings not in excess of any tax that may have been lawfully imposed for such purposes, and prior to the collection thereof; but no debt in excess of the school taxes for the current year shall be created by any school district in any county, or by the board of education of any city of the first or of the second class in this state, unless the proposition to create such debt shall have been submitted to a vote of such qualified electors as shall have paid a property tax therein during the twelve calendar months next preceding such election, and a majority of those voting thereon shall have voted in favor of incurring such debt. The election provided for in this section shall be held, conducted, and returns made, as provided in § 4709.

Limitation on creating indebtedness, Con. art. 14, sec. 3, 4. §§ 4627-4638.
Bond election in county district of first class, Certification that bonds, warrants, etc., are within the debt limit, §§ 466-469.

4591. (1876.) Additional indebtedness to maintain schools, how authorized. Whenever debts equal to the school taxes for the current year shall have been created by any school district in this state, or by the board of education of any city of the first or of the second class in this state, thereby rendering it necessary to create and incur additional indebtedness in order to maintain and support the schools of any such school district, or the schools controlled by any such board of education, for the current year or any part thereof, then the trustees of any such school district, or any such board of education, as the case may be, may cause the proposition to incur and create such additional indebtedness to be submitted to a vote of such qualified electors as shall have paid a property tax in any such school district or city in the year preceding such election.

City school bonds, election, § 4708.

4592. (1877.) Id. Election in city, how called. Notice. Judges. The election provided for in the preceding section, when held in a city of the first or of the second class, shall be called by publishing a notice, signed by the president and clerk of the board of education, in a newspaper published in the city, for not less than ten days, and by posting said notice at the polling places in each municipal ward of the city for the same length of time next preceding said election. The board of education, before any notice is published or posted, shall appoint three electors in each municipal ward to conduct the elections herein provided for, who shall take and subscribe an oath of office, and who shall make returns thereof to the board, as herein provided. Such notice shall specify:

1. The time and place of holding such election;
2. The names of the judges at each polling place to conduct such election;
3. The hours during which the polls shall remain open;

4. The amount of indebtedness which the board proposes to incur or create, and for what purposes.

4593. (1878.) Id. In other districts. The election provided for in § 4591, when held in any school district other than a city of the first or of the second class, shall be called by publishing a notice, signed by the chairman and clerk of the board of trustees of such district, in a newspaper published in the county in which such district is situated, for not less than ten days, and by posting such notice in three conspicuous places in the district for the same length of time preceding said election; if no newspaper be published in said county, then by such posting of notices only. The board of trustees of such district, before any notice is published or posted, shall appoint three electors to conduct the elections herein provided for, who shall take and subscribe an oath of office, and who shall make returns thereof to the board as herein provided. Such notice shall specify:

1. The time and place of holding such election;
2. The names of the judges of election to conduct such election;
3. The hours during which the polls shall remain open;
4. The amount of indebtedness which the board proposes to incur or create, and for what purposes.

4594. (1879.) Ballot. The ballot used at such election shall be furnished by the board of education or by the trustees, as the case may be, and shall express upon its face the propositions which the board, or the trustees, desire to submit to the taxpayers.

4595. (1880.) Who entitled to vote at such election. Challenges. Every registered voter residing in any ward of any such city, or residing in any school district in which an election is held for the purpose of determining the question of creating and incurring additional indebtedness in such district or city, and which voter shall have paid a property tax in such district or city in the year preceding such election, shall be entitled to vote at any such election. Challenges for cause by any qualified voter shall be allowed on such election, and promptly decided by the judges conducting the same.

4596. (1881.) Canvass of vote. Result. Immediately after the closing of the polls, the persons appointed to conduct the election shall proceed to count and canvass the ballots at such election and make returns thereof to the board of education or the board of trustees, as the case may be, and said board of education, or said trustees, as the case may be, shall, within five days after said election, meet and canvass said returns, and if a majority of the ballots cast at said election are in favor of incurring and creating such additional indebtedness, then the board of education or the trustees, as the case may be, shall cause an entry of that fact to be entered upon the minutes of said board or of said trustees; and thereupon said board of education or said trustees, as the case may be, shall be authorized and directed to incur and create such additional indebtedness as shall be necessary to support and maintain the schools of any such school district or the schools controlled by any such board of education, for the current year or any part thereof, not exceeding the amount mentioned in the notice calling such election.

CHAPTER 10.

COUNTY SCHOOL DISTRICTS OF THE FIRST CLASS.

4597. (1891x.) How county school districts of the first class are constituted. Each county within the state shall constitute a county school district of the first class; *provided,* that existing county school districts of the first class shall continue as such county school districts of the first class, and *provided,* that if in any county there be a school population of 5000 or more and said county is already divided into two or more high school districts, then each of said high school districts shall constitute and is hereby

created a county school district of the first class. Upon the creation of any county school district of the first class, the county commissioners shall designate the name or names by which the same shall be known and shall divide each district into five representative precincts and shall appoint the members of the board of education for such district to serve until their successors are duly elected and shall have qualified; *provided,* that in districts already consolidated the members of the board of education as now constituted shall serve for the term for which they were elected.

Am'd '11, p. 267; '13, p. 184; '15, p. 98.

Schools in cities, §§ 4660-4729.

4598. (1891x1.) Schools therein to be free. Under direction of board. In each district, subject to the provisions of this chapter, the public schools shall be free to all children between the ages of six and eighteen years. All public schools and school property therein shall be under the direction and control of the board of education. '05, p. 129.

4599. (1891x2.) Board of education, how constituted. The board of education of each county school district of the first class shall consist of five members; one to be elected from and by each of the representative precincts within said county school district. The board of county commissioners in which such county school district is located shall, before June 15, 1915, divide the same into five representative precincts for school purposes and at the election in December, 1916, members of the board of education shall be elected in accordance with such redistricting. Am'd '13, p. 184; '15, p. 99.

Division of county into precints, §§ 1400, 1454. Salaries of members of board, § 4609.

ELECTION OF BOARD.

4600. (1891x3.) Members of board, how elected. Must qualify. There shall be elected in the county school districts of the first class, on the first Wednesday in December, 1908, one member of the board from each odd numbered school representative precinct or district for a term of two years, and at the same time one member of the board from each even numbered school representative precinct or district for a term of four years. On the first Wednesday in December, 1910, and every four years thereafter, there shall be elected one member of the board from each odd numbered school representative precinct or district for a term of four years, and on the first Wednesday in December, 1912, and every four years thereafter, one member of the board from each even numbered school representative precinct or district for a term of four years. Where any county school district of the first class exists or may be created, the board of county commissioners shall appoint the members of the board of education, to serve until the next election provided for in this section, and until their successors are duly elected and qualified; *provided,* that where there have been designated three trustees for the entire district, each one being from a school representative precinct, then these are constituted members of the board of education until the next election, and the board of county commissioners shall appoint two other members, one from each unrepresented representative precinct; but where two or more trustees are from one school representative precinct, the board of county commissioners shall designate the member of the board of education. Members of the board of education in a county school district of the first class shall qualify by taking and subscribing the constitutional oath of office, and giving bonds to the district in which they reside in such sum and with such sureties as the board of county commissioners may require and approve, conditioned for the faithful discharge of the duties of their office, the oath of office and bonds to be filed with the county clerk. '05, p. 130; '07, p. 142.

4601. (1891x4.) Must qualify, when. Members of the board of education shall qualify previous to, and take their seats at, the first regular meeting in January next after their election, and shall serve until their successors are duly elected and qualified. '05, p. 130.

4602. (1891x5.) Elections, how conducted. Elections for members of

the board shall be called and conducted, and the canvass of returns shall be made, and the qualification of electors shall be as provided in the general registration and election laws, except as in this section hereinafter provided. There must be at least two voting places in each school representative precinct. It shall not be necessary to file certificates of nomination of candidates, nor to publish a list of nominations. Appointments of judges of election shall be made by the board of education at any convenient time prior to the day of election. The board of education shall furnish the judges of election at every polling place with a sufficient number of plain envelopes for election purposes and shall pay all other lawful and necessary expenses of the election. Such envelopes shall be uniform in size and quality, without any marks, writing, printing, or device upon them; and no other kind shall be used at any election. Every voter shall designate on a single ballot, written or printed, the name of the person or persons voted for, with a pertinent designation of the office to be filled. The ballot shall be folded and placed in one of the envelopes hereinbefore provided for, and shall be delivered to the presiding judge of election, who shall, in the presence of the voter, on the name of the proposed voter being found on the registry list, and on all challenges to such vote being decided in favor of such voter, deposit in the ballot box, without any mark whatever being placed upon such envelope; otherwise the ballot shall be rejected. The board of education shall exercise all such powers relative to school elections in their respective districts as are conferred upon the board of county commissioners in other elections, so far as conformable with this chapter. '05, p. 130.

Registration for school elections, §§ 2112, 2136, 2141. Registration lists for election in county school districts of first class, § 4650.

4603. (1891x6.) Must reside in precinct. Vacancies. Every member of the board of education in county school districts of the first class shall be and remain a resident, qualified, registered voter in the school representative precinct from which he is elected or appointed; and the board of education is hereby required to fill any vacancy that may occur through non-residence or any other cause, until the next election of members of the board; *provided,* that any vacancy occuring previous to the annual election having an unexpired term shall be filled for such unexpired term at the first school election thereafter, and the ballots shall be as follows: "To fill the unexpired term ....." '05, p. 131; '11, p. 267.

4604. (1891x7.) Board must organize. The members appointed or elected as herein provided shall, before entering upon the discharge of their duties, take and subscribe the constitutional oath of office. They shall organize by electing from their number a president and vice-president, whose term of office shall be for two years, and until their successors are elected and qualified. They shall also elect a clerk and a treasurer, who shall be registered voters in the school district, and whose respective terms of office shall be two years, and until their successors are elected and qualified. '05, p. 131.

4605. (1891x8.) Officer may be removed by two-thirds vote. Any officer appointed or elected by the board of education for a specified term, as provided in the next preceding section, may be removed from his office for cause by a vote of two-thirds of the board. '05, p. 131.

4606. (1891x9.) Board may appoint other officers. The board of education shall have power to appoint all other officers that in its judgment may be necessary fully to carry out the provisions of this chapter, for the protection and improvement of school property, and for the promotion of the interests of the schools, and remove the same at pleasure, and may require any such officer to give a bond to the board in such sum as it may prescribe. The oath of office and bond of the clerk shall be filed with the treasurer, and all others shall be filed with the clerk. '05, p. 131.

4607. (1891x10.) Superintendent of schools to be elected. Term. Duties. At the first meeting of the board in June, 1911, and biennially thereafter, a superintendent of schools shall be elected by the board, who at least shall be

the holder of a life diploma of grammar school grade and who shall subscribe the constitutional oath of office, and shall enter upon his duties on the 1st day of July thereafter. His term of office shall be two years, and until his successor shall be elected and qualified; *provided,* that until the date herein stated, the county superintendents of schools shall, as such officers, perform the duties of superintendent of schools in its county school districts of the first class situated in the county of which he is school superintendent. Said superintendent shall attend the convention of school superintendents provided for in § 4524. '05, p. 132; '11, p. 267-8.

No county superintendent in certain cases, § 4649.

4608. (1891x11.) School year. Reports. The school year shall commence on the first day of July annually, and close on the last day of June following. The annual reports of the president, the superintendent, and the several committees shall be presented to the board at or before the first regular meeting in August of each year. '05, p. 132.

4609. (1891x12.) Compensation of members of board. The members of the board of education shall fix the compensation to be received for their services, at a sum not to exceed $300 each per annum, and traveling expenses, not to exceed $100 each per annum; *provided,* that the compensation of members of the board appointed prior to any election of members as named herein shall be fixed by the board of county commissioners. '05, p. 132; '07, p. 40.

4610. (1891x13.) Annual school census. The board of education shall appoint suitable persons for each school representative precinct, who shall act as enumerators for school population for said precinct, and visit every house therein between the 15th and 31st of July of each year, and ascertain and enter upon the lists the name of every person between the ages of six and eighteen years residing in such precinct, and also the name, age, postoffice address, and name of the parent or guardian of every deaf or dumb person over the age of five and under the age of thirty years, too deaf or dumb to receive an education in the public schools. Such enumeration lists shall contain all information required by law, and such other information as the state superintendent and the board of education may require. '05, p. 132.

Annual city school census, § 4674.

4611. (1891x14.) Id. Apportionment of school moneys. The enumeration lists shall be filed with the clerk of the board as soon as completed, and not later than the 10th day of August. Immediately thereafter, the clerk of the board shall make out and forward to the county superintendent, if there be one, to the county auditor, and to the state superintendent, a statement showing the number of children of school age residing in the district, together with all information obtained under the provisions of the next preceding section, and financial and statistical reports for the past school year, containing such items as shall be required by law or by the state superintendent; and thereupon the state superintendent shall allot to such school district a proper pro rata of state school funds subject to allotment, and shall apportion the amount due and certify the same to the board of education of said district; the state superintendent shall also make to county school districts of the first class the apportionment required by § 4518, and furnish to the county treasurer, the county auditor, and the county superintendent, if there be one, in counties where any such county school district of the first class may be situated, an abstract of such apportionment, as in the case of cities of the second class. The county auditor of counties divided into districts of the first class shall apportion to the several school districts in his county, according to the number of school children residing in each district over six and under eighteen years of age, as shall appear from the last enumeration from his office, and shall notify the board of education of each district of the same. He shall also apportion to cities of the first and of the second class in his county their proportion per capita of the county school fund. '05, p. 132.

School fund, §§ 4518, 4565.

4612. (1891x15.) Duties of president of board. It shall be the duty of

the president to preside at all meetings of the board, to appoint all committees, and to sign all warrants ordered by the board of education to be drawn upon the treasurer for school moneys. In case of the absence or disability of the president, his duties shall be performed by the vice-president. '05, p. 133.

4613. (1891x16.) Clerk of board must qualify. Before entering upon the discharge of his duties, the clerk shall give a bond to the board of education of such school district in such sum as said board may prescribe, with good and sufficient sureties, to be approved by the board, conditioned for the faithful performance of his duties, and shall qualify according to law. '05, p. 133.

4614. (1891x17.) Duties of clerk of board. It shall be the duty of the clerk to attend all meetings of the board; to keep an accurate journal of its proceedings, and have the care and custody of the seal, records, and papers not otherwise provided for; to countersign all warrants drawn upon the treasurer by order of the board; to keep an accurate account of all moneys paid to the treasurer on account of said board and from what source received, and all moneys paid on orders drawn on the treasurer by order of said board; and to prepare and submit to the board an annual statement, under oath, of the receipts and disbursements during the year ending June 30th, which statement the board shall cause to be published in a newspaper having general circulation in the county, showing:

1. The amount on hand at the date of the last report;
2. The amount of sinking fund, and how invested;
3. The moneys paid out, to whom, and for what paid;
4. The balance of school moneys on hand;
5. The number, date, and amount on every bond issued and redeemed under the authority herein given, and the amount received and paid therefor.

The clerk shall perform such other duties as the board and its committees may require. He shall receive for his services such compensation as the board may determine. '05, p. 133.

4615. (1891x18.) Treasurer of board must qualify. Duties. The treasurer of the board of education shall subscribe to the constitutional oath of office, and give a bond to the board with sufficient sureties and in such sum as the board may require; said oath and bond to be approved by the board and filed with its clerk. He shall be the custodian of all moneys belonging to the corporation and be responsible upon his bond for all moneys received by him as treasurer. He shall prepare and submit in writing a monthly report of the receipts and disbursements of his office, and pay out school moneys only upon a warrant signed by the president, or, in his absence or disability, by the vice-president, countersigned by the clerk, and shall perform such other duties as the board may require. The treasurer shall receive for his services such amount as the board of education may fix and determine. The board may require the treasurer to keep his office and records in the office of the board. '05, p. 134.

Premium on bond paid, § 4500.
Funds to draw interest and how deposited, § 4500.

4616. (1891x19.) Board a body corporate. Members of board and clerk may administer oaths. The board of education of any such county school district of the first class shall be a body corporate under the name of "The Board of Education of ..... School District" (inserting the proper name), and shall have an official seal conformable to such name, which shall be used by the clerk in the authentication of all matters requiring it. Said board, in the name aforesaid, may sue and be sued; may take, hold, lease, sell, and convey real and personal property, as the interests of the school may require. The members of the board and the clerk thereof shall have the power and authority to administer oaths in proof of claims against said corporation, and no claim or account, except salaries of teachers and janitors, shall be audited or allowed by the board of education unless the correctness of the same shall be verified under oath. '05, p. 134.

GENERAL POWERS OF BOARD.

4617. (1891x20.) Powers of board. The board of education shall have the power and authority to purchase and sell schoolhouse sites and improvements thereon; to construct and erect school buildings and to furnish the same; to establish, locate, and maintain kindergarten schools, common schools, consisting of primary and grammar grades, high schools, and industrial or manual training schools; to establish and support school libraries; to purchase, exchange, repair, and improve the high school apparatus, books, furniture, fixtures, and all other school supplies in said schools. It shall supply and loan to pupils in the several grades and departments of said schools, except the high school, free of charge, all text books and supplies used by the pupils of said schools; it shall have the power to sell to pupils in the several grades and departments of said schools, at cost, all text books and supplies used by the pupils of said schools; to collect all books and apparatus loaned to the pupils of the public schools of any such school district of the first class, or damages for the loss, injury, or destruction of the same; to assign to the State Normal School, for the purpose of illustrating instruction in the practice school connected therewith, a sufficient number of pupils of appropriate grades, and reimburse the State University or State Normal School for the instruction of such pupils at rates per pupil not exceeding the average cost of instruction per pupil in the public schools of the district as ascertained for each year; to do all things needful for the maintenance, prosperity, and success of the schools, and the promotion of education; to adopt by-laws and rules for the procedure of the board of education, and make and enforce all needful rules and regulations for the control and management of the public schools of the district. '05, p. 134.

Duties in order to participate in state high school fund, §§ 4575-4582.
May employ physician, § 4550.
School houses as civic centers, §§ 4551-4554.
Issue employment permits for children, §§ 1860, 1869.

The board has a discretion in determining where school shall be held and in regulating such matters.
Bishop v. Morehouse, 38 U. 234; 112 P. 169.

4618. (1891x21.) Restrictions on sale of school property. No school sites or buildings shall be sold or conveyed by the board of education, except on resolution of the board, duly adopted at a regular or duly called meeting, and not then without the affirmative vote of at least two-thirds of all the members of the board. '05, p. 135.

4619. (1891x22.) Trustees of former districts to convey property to board of education. Upon the appointment or election and qualification of a board of education for any county school district of the first class, the trustees of all school districts formerly existing in said county school district of the first class shall convey and deliver all the school property in said districts to the board of education of said county school district of the first class; and the title of all such property, and all property hereafter acquired for school purposes in said district, shall be conveyed to and vested in said board of education, for the use of the district schools of said district; and all rights, claims, and causes of action to or for said property, or the use or income thereof, or for any conversion, disposition, or withholding thereof, or for any damage or injury thereto, shall at once vest in the board of education of said district, in trust for the use of the district schools of the district, and said board, in the name aforesaid, may bring and maintain actions to recover, protect, and preserve the property and rights of the district schools, and to enforce any contract relating thereto, and in its said name may sue and be sued in any court of law or equity. And all outstanding debts and obligations of any such school district shall be paid by said board of education. '05, p. 135.

4620. (1891x23.) Teachers' examinations. Course of study. Examinations for teachers in county school districts of the first class shall be conducted by the state board of education. Such districts shall follow the state course of study, and shall use the text books adopted by the state text book commission. '05, p. 136; '13, p. 185.

County examinations and certificates, §§ 4506, 4684.

4621. (1891x24.) Board to select member of text book convention. The boards of education of the various county school districts of the first class in a county shall select a person, not a member of the board, to represent them in the convention called by the state superintendent to adopt text books for the state, to act as a member of such convention. '05, p. 136.

Text book convention, §§ 4555-4560.

4622. (1891x25.) School property exempt. All property, real and personal, held by the board of education shall be exempt from general and special taxation, and from all local assessments for any purpose, and shall not be taken in any manner for debt. '05, p. 136.

4623. (1891x26.) Districts to receive their proportion of school taxes. All districts organized under the provisions of this chapter shall receive their pro rata share of any state taxes levied for the support of district schools or any funds that may be realized from any source which, under the operation of law, are required to be divided pro rata for the benefit of children of school age residing in the state. '05, p. 136.

4624. (1891x27.) Levy in county school districts of the first class. Limit. The board of education shall, on or before the 1st day of May of each year, prepare a statement and estimate of the amount necessary for the support and maintenance of the schools under its charge for the school year commencing on the 1st day of July next thereafter, and for the purchase of school sites and the erection of school buildings, also the amount necessary to pay the interest accruing during such year, and not included in any prior estimate, on bonds issued by the said board; also the amount of sinking funds necessary to be collected during such year for the payment and redemption of said bonds; and shall forthwith cause the same to be certified by the president and clerk of said board to the officers charged with the assessment and collection of taxes for general county purposes in the county in which the district is situated, and such officers, after having extended the valuation of property on the assessment rolls, shall levy such per cent as shall, as nearly as may be, raise the amount required by the board; *provided,* that districts of the first class existing at the time of the enactment of this law, and that where districts not existing on the 1st day of May shall come into existence by the second Monday in July in any year, the time of preparing the statement and estimate above named shall be extended to the third Monday in July; and any levy of special tax that may have been made in any district abolished or superseded by the creation of such new district shall be vacated. Said taxes shall be collected by the county treasurer as other taxes are collected, but without additional compensation, for assessing and collecting, and he shall pay to the treasurer of said board, promptly as collected, who shall hold the same subject to the order of the board of education; *provided,* that the tax on all taxable property of the said district for the support and maintenance of schools, the purchase of school sites, and erection of school buildings shall not exceed in any one year, in any district whose assessed valuation is $20,000,000 or more, 4.2 mills on the dollar; and in any district whose assessed valuation is more than $15,000,000 and less than $20,000,000, 4.7 mills on the dollar; in any district whose assessed valuation is more than $10,000,000 and less than $15,000,000, 5.2 mills on the dollar; and in any district whose assessed valuation is more than $5,000,000 and less than $10,000,000, 5.5 mills; and in any district whose assessed valuation is less than $5,000,000, 6 mills on the dollar. '05, p. 136; am'd '11, p. 266; '15, p. 99; '15, p. 194.

School taxes in other districts, § 4525.
State and county tax, §§ 4564.
As amended, this, being the last legislative expression, is controlling over § 1562, and taxes assessed by the board for the separate maintenance of the schools for the succeeding year and to defray interest on the bond, etc., cannot be treated as special taxes, and the school board is not liable to pay any percentage to the county for the cost of assessment and collection.
Board of Education v. Daines, 50 U.—; 166 P. 977.

4625. (1891x28.) County treasurer to pay over taxes. The respective county treasurers shall pay over to the board of education as fast as col-

lected or realized its proportionate amount of delinquent taxes, interest, and costs on all tax sales heretofore or hereafter made. '05, p. 137.

4626. (1891x29.) Special taxes for school buildings and sites. The board of education may, at the annual school election or at a special election, in its discretion, submit to the voters of the district the question of levying a special tax not to exceed 1 per cent of all the taxable property in the district, for one or more years, to buy sites, build and furnish school houses, or improve the school property under its control. If the voters declare in favor of such tax, it shall be levied and collected as other school taxes, and the board of education may apply any money available, raised from taxation, to the building of or the improvement of the school property under its charge. The board of education shall give such reasonable notice of such submission as it may deem proper, and, if submitted at a special election, may follow the procedure so far as applicable for the issuance of bonds; *provided,* all school taxes voted by the board of education, or by a special meeting called for that purpose, shall be computed on the valuation of the county assessment roll for such year, and shall be voted on or before the 1st day of May of any year, and within twenty days thereafter the board shall make certified returns of the per cent of the taxes so voted to the county auditor and the county assessor, who shall acknowledge receipt of the same. The county assessor shall assess for each special tax, at the time and manner provided by law for assessing state and county taxes, and shall give to the district school taxpayers similar notices to those which are required by law to be given the taxpayers of state and county taxes. The officers charged with the collection of special school taxes shall pay over the same to the treasurer of the school district in which the same is collected, making payments of the sums collected at the end of each calendar month. On the 31st day of December, after receiving the tax roll, he shall complete the payment of all district taxes borne upon such roll; *provided, further,* that all school taxes levied and assessed under the provisions of this chapter shall become due and delinquent at the same time and be assessed and collected by the same officers and in the same manner, and shall attach to and become a lien on real and personal property assessed at the same time as state and county taxes. Am'd '15, p. 100.

BOND ELECTION. SALE OF BONDS.

4627. (1891x30.) Special election for bonding district. The board of education may, when in its judgment it is advisable, or shall, when petitioned by a majority of the resident taxpayers of the school district, as appears by the county assessment roll of the last preceding year, call an election in each school representative precinct of the district, and submit to the taxpayers of the district whether bonds of such district shall be issued and sold for the purpose of raising money for purchasing school sites, for building or purchasing one or more schoolhouses, and supplying the same with furniture and necessary apparatus, for improving the grounds, and for the refunding and redemption of all or any portion of any bonds outstanding in any such district. '05, p. 138.

Bond elections generally, §§ 4590-4596.

4628. (1891x31.) Election, how called. The election provided for in the preceding section shall be called by publishing, for not less than ten days, a notice signed by the president and clerk of the board of education, in a newspaper having a general circulation in the school district, and by posting said notice at the polling places in each school representative precinct of the district for the same length of time next preceding said election. The board of education, before any notice is published or posted, shall appoint three electors in each school representative district to conduct the bond election herein provided for, who shall take and subscribe an oath of office, and who shall make returns thereof to the board as herein provided. Such notice shall contain:

1. The time and place of holding the same;

2. The names of the judges at each polling place to conduct the same;
3. The time during which the polls will remain open;
4. The amount and denomination of the bonds, the rate of interest, and the number of years, not exceeding twenty, the whole or any part of said bonds are to run.

In case it shall become necessary in a county school district of the first class to incur additional indebtedness as provided in § 4591, the election therefor shall be called and conducted as prescribed in this section, except that the fourth subdivision required herein in the notice shall specify, instead of the amount and denomination of the bonds, etc., the amount of indebtedness which the board proposes to incur or create, and for what purposes. '05, p. 138.

4629. (1891x32.) Form of ballot. The ballot used at such election shall be furnished by the board of education, and shall express upon its face the questions the board desires to submit to the taxpayers. No informalities in conducting such election shall invalidate the same, if it shall have been otherwise legally conducted. '05, p. 139.

4630. (1891x33.) Qualifications of electors. Every registered voter residing in any school representative district in which any election is held for the purpose of determining the question of issuing bonds for such school district, and who shall have paid a property tax therein in the year preceding such election, shall be entitled to vote at any such election. Challenges for cause by any qualified voter shall be allowed at such election, and promptly decided by the judges conducting the same. '05, p. 139.

4631. (1891x34.) Canvass of votes cast. Returns. Statement to be filed with county clerk. Immediately after the closing of the polls, the persons appointed to conduct the same shall proceed to count and canvass the ballots cast at such election, and make returns thereof to the board of education; and said board shall, within five days after said election, meet and canvass said returns, and if a majority of the ballots cast at said election are in favor of issuing such bonds, then the board shall cause an entry of that fact to be made upon its minutes, and shall immediately file with the clerk of the county in which such school district is situated a certified copy of the order of the board of education, and certified copies of the notices published or posted, calling such election, with an affidavit showing when and where said notices were published or posted, and that they were published or posted as required by law and the order of the board of education. The board shall also file with said clerk a statement showing the approximate number of inhabitants and the value of taxable property in the district; that the amount of bonds proposed to be issued, including existing indebtedness, does not exceed four per cent of the value of taxable property in the district; that the election at which the question of issuing bonds was submitted was lawfully called and held; that all proceedings in relation to the proposed issue of bonds in said district were lawfully conducted, and that such bonds may be lawfully issued; and thereupon said board of education shall be and it is hereby authorized and directed to issue the bonds of such district to the number and amount voted for at such election. The money for the redemption of said bonds, and the payment of the interest thereon as it shall become due, shall be raised by taxation upon the taxable property of said district; *provided,* that the total amount of bonds so issued, including existing indebtedness, shall not exceed four per cent of the taxable property of the district, as shown by the last equalized assessment roll for county purposes. '05, p. 139; '07, p. 84.

4632. (1891x35.) Denomination of bonds. Interest. Time. The denomination of the bonds which may be issued under the provisions of this chapter shall be $50 or some multiple of fifty, not exceeding $1,000, and shall bear interest of not exceeding the rate of five per cent per annum, payable semi-annually or annually, in accordance with interest coupons which shall be attachd to said bonds, and shall be made payable not more than twenty

years from their date. The board of education may reserve the right to redeem such bonds, or any of them, at any time after five years from their issue. Any bonds heretofore authorized by vote of any school district remaining unsold may, in the discretion of the board, be hereafter issued, to bear any rate of interest not exceeding five per cent per annum, payable annually or semi-annually. '05, p. 140.

4633. (1891x36.) Form of bonds. Whenever any bonds are issued under the provisions of this chapter, they shall be engraved, lithographed, or printed on bond paper, and shall state upon their face the date of their issue, the amount of bond, for what purpose issued, also the time and place of payment and rate of interest to be paid. They shall have printed upon the margin the words, "Authorized by act of the legislature of the state of Utah, A. D. 1897, and all supplemental and amendatory acts," and upon the back of each bond shall be printed a certificate, signed by the county clerk, in substantially the following form:

I certify that the within bond is issued in accordance with law, and is within the debt limit permitted by the constitution and laws of the state of Utah, and in accordance with a vote of the taxpayers of ..... school district of ..... county, state of Utah, at an election held on the ..... day of ....., 19....., authorizing bonds to the amount of ..... dollars.

They shall be signed by the president and clerk of the board of education and countersigned by the treasurer thereof, and there shall be entered in a book to be kept by the clerk for that purpose the number, date, and denomination of the bonds sold, and the date when the same shall become due. '05, p. 140.

Certification that bonds are within debt limit, §§ 466-469.

4634. (1891x37.) Board may sell bonds. Whenever any bonds are issued under the provisions of this chapter, the board of education shall have authority to negotiate and sell such bonds to the highest bidder. No contingent bid shall be received, and every bid shall be accompanied by a certified check of five per cent as a forfeit, payable to the order of the board of education. The board may reject any or all bids. The proceeds shall be used exclusively for the purpose for which they are issued. '05, p. 140.

4635. (1891x38.) Bonds, how canceled. Whenever any of the bonds of a school district shall have been redeemed or purchased by the board of education, they shall be canceled by writing or printing in red ink across each bond and coupon the words, "Paid and canceled;" and the date of payment and amount paid shall be entered in the clerk's register against the number of the bond, and the bond and coupons so canceled shall be filed in the office of the clerk of the board and preserved in a book to be kept for that purpose. Any bond or bonds heretofore or hereafter issued by any board of education or school district may be refunded at any time by such board or school district when a lower rate of interest or better terms can be obtained, and the provisions hereof as to elections shall not apply. '05, p. 141.

4636. (1891x39.) Interest and sinking fund. The board of education, in its annual estimate and levy provided for in this chapter, shall include an amount sufficient to pay the interest as the same accrues on all outstanding bonds issued by the board, and also to create a sinking fund of two per cent of the par value of outstanding bonds for the redemption of said bonds, and shall cause a tax to be levied and collected as provided for in this chapter, and such money shall remain a specific fund, and shall not be appropriated or used for any other purpose than is hereinafter provided. '05, p. 141.

4637. (1891x40.) Investment of sinking fund. The moneys levied and collected for creating a sinking fund for the redemption of the bonds issued by the board of education shall be used as follows: After retaining an amount sufficient to pay the principal of the bonds maturing during the year, the board shall, with the surplus of the sinking fund, invest the same in bonds of the state of Utah, or of any school district, town, city, or county thereof, or of the United States, on the best terms to be obtained, until such time as it may

be needed to purchase any outstanding bonds that may be offered, or until the maturity of any such bonds. '05, p. 141.

Sinking funds may be invested, § 5200.

4638. (1891x41.) Bonds a lien on property of district. Bonds issued under the provisions of this chapter shall be a lien upon the taxable property of the school district issuing them, and when the board of education neglects or refuses to levy a tax in accordance with law to meet the outstanding bonds or the interest thereon, the board of county commissioners of the county within which such district is situated shall levy such tax and apply the money thus collected to the payment of such bonds and the interest due thereon. '05, p. 141.

BUILDING SCHOOLHOUSES.

4639. (1891x42.) Board shall advertise for bids for building schoolhouses. Whenever any schoolhouse is to be built, the board of education shall advertise for at least ten days in some newspaper published in the county for sealed proposals for building such schoolhouse in accordance with the plans and specifications, which shall be furnished by the board of education at its office or at the office of the architect, stating in such advertisement or notice the place where, and the day and hour when, all proposals will be opened, and reserving the right to reject any and all proposals, and shall require a certified check of not less than five per cent of the amount of the bid to accompany the same, which check shall be made payable to the order of the board of education, and the check of the successful bidder shall be forfeited in case he fails or refuses to enter into the contract and furnish the bond required. At the time and place specified in said notice, the board shall meet and publicly open and read all the proposals which have been received, and, if satisfactory bids have been received, shall award the contract to the lowest responsible bidder, and shall require of such bidder or contractor a bond in one-half the amount of the contract, conditioned that he will properly perform its conditions in a faithful manner and in accordance with its provisions. In case none of the proposals are satisfactory, all shall be rejected, and said board shall advertise anew in the same manner as before. It may require in the contract to be executed that at least twenty per cent of the contract price may be withheld until the building is completed and accepted by the board. But if, after twice advertising as provided herein, no satisfactory bid is received, the board may proceed under its own direction to erect the building required, or in case of a building not exceeding $5,000 in cost, if no satisfactory bid is received at the first notice, the board may proceed with the construction as it may determine; *provided,* that no member of the board of education shall be financially interested in the contract, directly or indirectly, in the erection of any school building. '05, p. 142.

Contractors must give bond, §§ 3753, 3754.

This section does not apply after the contract has been entered into and the bond furnished, and after the board of education had entered into the contract it will be presumed that the bond was required of and furnished by the contractor in accordance with the statute. Tooele Bldg. Assoc. v. Tooele High School Dist., 43 U. 372; 134 P. 894.

PARENTAL SCHOOLS AND TRUANTS.

4640. (1891x43.) Parental schools. The board of education of any county school district of the first class, or the board of education of any two or more such districts, under a contract to be approved by each of such boards, may provide for the establishment and maintenance of parental schools, and for the support and education of the inmates thereof, conformably with the provisions of this chapter. '05, p. 142.

Parental schools in cities, §§ 4721-4729. Detention schools, §§ 1875-1881.

4641. (1891x44.) Truants may be committed to parental schools. Any child, between the ages of eight and fourteen years, residing within the district or districts maintaining such a school, adjudged guilty of being a habitual truant, or of wandering about in the streets and public places of said district or districts without lawful employment or business, may be committed to

the parental school provided for the purpose, for a term not exceeding beyond the age of fourteen years. '05, p. 142.

4642. (1891x45.) Truant may be released. Any child committed as provided in the next preceding section may be released from confinement at such school, either conditionally or absolutely, before the expiration of the term of commitment, in accordance with the by-laws established by the board or boards of education maintaining the same. '05, p. 143.

4643. (1891x46.) Neglected children may be committed to parental school. Children under sixteen years of age who, by reason of neglect, crime, drunkenness, or other vices of parents, or by reason of orphanage, are suffered to grow up without salutary parental control and education, or in circumstances encouraging them to lead idle and dissolute lives, may be committed to the proper parental school for a term not extending beyond the age of sixteen years. '05, p. 143.

4644. (1891x47.) How discharged. When the parents of a child committed under the next preceding section have reformed and are leading orderly and industrious lives, and are in a condition to exercise salutary control over such child, and to provide him with proper education and employment; or when, said parents being dead, any person offers to make such suitable provisions for the care, nurture, and education of such child as will conduce to the public welfare, the board of education may discharge him to the parents or such other person. '05, p. 143.

4645. (1891x48.) District court has jurisdiction. The district courts of the several counties shall have jurisdiction within their respective counties to enforce the provisions of this chapter, upon such notice to the parents or guardians of the children whom it is proposed to commit to parental schools as the court may deem just and proper. '05, p. 143.

4646. (1891x49.) Parents pay cost of children in parental school. Any board or boards of education maintaining a parental school in accordance with § 4640 shall estimate and determine, as near as may be, the average actual expense per month of keeping and taking care of the boys and girls who may be committed to the parental school, and the average cost of keeping such boys and girls shall be wholly paid by the parent or guardian of each boy or girl committed to the school, unless for good cause said board or boards of education shall otherwise order and direct. The board of education of the district in which the parent or guardian of any such committed boy or girl resides may bring suit to enforce this provision. '05, p. 143.

4647. (1891x50.) Other children may be received in parental school. On the tender of a payment which will meet all costs of support at the parental school, the board or boards of education maintaining such school may receive into it on equal terms boys or girls whose residence is in the state outside the district or districts to which the school belongs. '05, p. 143.

4648. (1891x51.) Truant officer. The board of education of each county school district of the first class may appoint and fix the compensation of a truant officer, whose duty it shall be to make complaints and arrests in cases contemplated by this chapter, and to serve legal process issued by courts in pursuance hereof. The sheriff of the county shall make such truant officer a deputy sheriff to serve without pay, so far as the sheriff's office is concerned. '05, p. 143.

Duty under employment of children act, § 1864.

WHEN NO COUNTY SUPERINTENDENT.

4649. (1891x52.) County superintendent's office vacant in certain cases. When a county of the first class is so organized as to school districts that there are no such districts therein, other than those of cities of the first or of the second class and county school districts of the first class, on the first Monday in August of any year in which there is a general election for county officers, then no county superintendent of schools shall be elected for such

county at that election, and the office shall become and remain vacant for the succeeding term or terms, as the case may be, except that in the event of there being no election for county superintendent of schools in the year 1906, the present incumbent shall hold office till the 1st day of July, 1907; but the board of county commissioners shall fix the salaries therefor, as required by law, to be distributed pro rata among school superintendents in county school districts of the first class, as provided in § 4624, as compensation for services in whole or in part, as such compensation may be fixed by the board of education of the district, no other compensatoin than that fixed by the board of county commissioners to come out of the general school fund of the county. Where there is no county superintendent of schools under the foregoing provision, then the county auditor shall make to the school districts in the county the apportionment of school funds provided for in § 4565, and the county treasurer shall pay such apportioned funds to the school district treasurers upon the warrants of the county auditor, who shall make report thereof to the board of county commissioners, and to the state superintendent, as provided by law. When there is no county superintendent, the board of county commissioners shall arrange the county teachers' institutes and designate the school district superintendent in the county which shall take charge thereof. '05, p. 144.

REGISTRATION LISTS.

4650. (1891x53.) Registration lists to be furnished. It shall be the duty of the county clerk to furnish to boards of education in county school districts of the first class, at least five days previous to the day of election for members of the said board, a certified copy of the registration list, showing the names of all registered voters residing in the election district covered by such school districts. '05, p. 144.

Registration for school elections, §§ 2112, 2136, 2141.

4651. (1828.) Records and reports of board. Compensation. It shall be the duty of the district board to keep an accurate journal of its proceedings, an account of all moneys paid to the treasurer and of all moneys paid on orders drawn on the treasurer, and prepare and cause to be presented to the voters at the regular annual meeting held on the second Monday in July of each year, a statement, under oath, showing:

1. The moneys on hand at the date of the last annual report, the moneys received by the treasurer since such report and from what sources received;
2. The amount of sinking fund and how invested;
3. The amounts paid out, to whom and for what paid;
4. The balance of school money in the hands of the treasurer.
5. The number, date, and amount of every bond issued or redeemed under the authority given in this title, and the amount received or paid therefor, to which statement shall be added a report showing the management and condition of the schools in the district during the preceding year.

A copy of such statement and report, together with such other reports as may be required by the state superintendent, and for which blank forms have been provided, shall, on or before the 15th day of July of each year, be filed with the county superintendent. They shall also present, with their statement to the superintendent, vouchers for all moneys paid out; *provided*, that trustees shall each receive such compensation for their services as may be voted at such meeting.

Section 4651 was repealed in the body of chap. 78, laws 15, but the repeal was not included in the title. The whole chapter which included this section was repealed and, query, to what is this section applicable?

CHAPTER 11.

SCHOOLS IN CITIES.

BOARD OF EDUCATION.

4660. (1892.) This chapter applicable to cities of the first and of the second class. Control. All cities of the first and of the second class shall be governed by the provisions of this chapter. The public school system therein shall be controlled by the board of education of such cities, separate and apart from the counties in which the cities are located.

County school districts of first class, §§ 4597-4650.

Separate maintenance and control, Con. art. 10, sec. 6.

4661. (1893.) Each city a school district. Control. Each city subject to the provisions of this chapter, and all territory which shall hereafter be added thereto, shall constitute one school district, and public schools therein shall be free to all residents thereof between the ages of six and eighteen years of age, and of children within the required age whose father, mother, or guardian is a taxpayer within said district. All public schools and property therein shall be under the direction and control of the board of education.

4662. (1894.) Membership of board of education. The board of education of cities of the first class shall consist of ten members, two to be elected from and by each municipal ward; and, of cities of the second class, shall consist of five members, one to be elected from and by each municipal ward.

4663. (1895.) Election of members of board in cities of the first class. There shall be elected in cities of the first class, on the first Wednesday of December, 1897, two members of the board from each municipal ward, one for the term of one year, and one for the term of three years; and in 1898, and biennially thereafter, on the first Wednesday of December, one member from each municipal ward for the term of four years.

4664. (1896.) Election of members of board in cities of the second class. There shall be elected in cities of the second class, on the first Wednesday of December, 1916, one member of the board of education from the first municipal ward for a term of one year; one member from the second municipal ward for a term of two years; one member from the third municipal ward for a term of three years; one member from the fourth municipal ward for a term of four years; one member from the fifth municipal ward for a term of five years, and thereafter there shall be elected annually on the first Wednesday in December for the term of five years, a member from the ward in which the term of a member expires. Am'd '13, p. 38.

4665. (1897.) When term shall begin. Members of the board of education shall qualify previous to, and take their seats at, the first regular meeting in January next after their election, and shall serve until their successors are duly elected and qualified.

4666. (1898.) Conduct of elections for members of board of education. Elections for members of the board shall be called and conducted, and the canvass of returns shall be made, and the qualification of electors shall be as provided in the general registration and election laws, except as in this section hereafter provided. There must be at least one voting place in each municipal ward. It shall not be necessary to file certificates of nomination of candidates, nor to publish a list of nominations. Appointments of judges of election shall be made by the board of education at any convenient time prior to the day of election. The board of education shall furnish the judges of election at every polling place with a sufficient number of plain envelopes for election purposes, and shall pay all other lawful and necessary expenses of the election. Such envelopes shall be uniform in size and quality, without any marks, writing, printing, or device upon them; and no other kind shall be used at any election. Every voter shall designate on a single ballot, written or printed, the name of the person or persons voted for, with a pertinent designation of the office to be

filled. The ballot shall be folded and placed in one of the envelopes hereinbefore provided for, and shall be delivered to the presiding judge of election, who shall, in the presence of the voter, on the name of the proposed voter being found on the registry list, and on all challenges to such vote being decided in favor of such voter, deposit it in the ballot box, without any mark whatever being placed on such envelope; otherwise the ballot shall be rejected. The board of education shall exercise all such powers relative to school elections in their respective cities as are conferred upon the board of county commissioners in other elections, so far as conformable with this title.

Elections generally, §§ 2100-2424. Registration for school elections, §§ 2112, School elections generally, § 4602. 2136, 2141.

4667. (1899.) Qualification of members of board. Vacancy. Every member of the board of education in cities of the first and of the second class shall be and remain a resident, qualified, registered voter in the municipal ward from which he is elected, and the board of education is hereby required to fill any vacancy that may occur through non-residence or any other cause, until the next election of members of the board; and, in case the board of education, shall, for a period of thirty days after such vacancy shall occur, fail to agree upon the election of a member to fill such vacancy, then the mayor of the city, by and with the consent of the city council, shall fill such vacancy until the next election; *provided,* that any vacancy occurring previous to the annual election having an unexpired term shall be filled for such unexpired term at the first school election thereafter, and the ballots shall be as follows: "To fill the unexpired term ....." Am'd '07, p. 202.

ORGANIZATION OF THE BOARD.

4668. (1900.) Officers. Oath. The members elected as herein provided shall, before entering upon the discharge of their duties, take and subscribe the oath of office. In cities of the first class they shall organize by electing from their number a president and a vice-president, whose term of office shall be for two years, and until their successors are elected and qualified. In cities of the second class the member having one year to serve shall be ex officio president and the member having two years to serve shall be ex officio vice-president. They shall also elect a clerk and a treasurer, who shall be registered voters in the school district, and whose respective terms of office shall be two years, and until their successors are elected and qualified. Am'd '13, p. 39.

Issue employment permits for children, §§ 1860-1869.

4669. (1901.) Removal of officers. Any officer appointed or elected by the board of education for a specified term may be removed from his office for cause by the vote of two-thirds of the board.

4670. (1902.) Board may appoint necessary officers. The board of education shall have power to appoint all other officers that in its judgment may be necessary fully to carry out the provisions of this chapter, for the protection and improvement of school property, and for the promotion of the interests of the schools, and remove the same at pleasure, and may require any such officer to give bonds to the board in such sum as it may prescribe. The oath of office and bond of the clerk shall be filed with the treasurer, and all others shall be filed with the clerk.

4671. (1903.) Election of superintendent. Oath and bond. At the first meeting of the board in June, 1898, and biennially thereafter, a superintendent of schools shall be elected, who shall subscribe an oath of office, and shall enter upon his duties on the 1st day of July thereafter. His term of office shall be two years, and until his successor shall be elected and qualified.

Issue employment permits for children, § 1860-1869.

4672. (1904.) School year. Reports. The school year shall commence on the first day of July annually, and close on the last day of June following. The annual reports of the president, the superintendent, and the several committees shall be presented to the board at or before the first regular meeting in August of each year.

4673. (1905.) Compensation of members. Penalty. The members of the board of education shall fix the compensation to be received for their services, at a sum not to exceed $100 per annum. No member of the board of education shall take any contract, receive appointment, or perform labor for which he shall receive payment from the school funds or in any way receive compensation other than the salary herein provided. Any violation of the provisions of this section shall be deemed a misdemeanor. Am'd '05, p. 39.

4674. (1906.) Annual school census. The board of education shall appoint suitable persons for each ward, who shall act as enumerators for school population for said ward, and visit every house therein between the 15th and 31st days of July of each year, and ascertain and enter upon the lists the name of every person between the ages of six and eighteen years residing in such ward, and also the name, age, postoffice address, and name of the parent or guardian of every deaf or dumb person over the age of five and under the age of thirty years, too deaf or dumb to receive an education in the public schools. Such enumeration lists shall contain all information required by law and such other information as the state superintendent and the board of education may require.

Annual school census, § 4610.

4675. (1907.) Id. Report to state superintendent. Allotment of school funds. The enumeration lists shall be filed with the clerk of the board as soon as completed, and not later than the 10th day of August. Immediately thereafter, the clerk of the board shall make out and forward to the state superintendent a statement showing the number of children of school age residing in the district, together with all information obtained under the provisions of the next preceding section, and financial and statistical reports for the past school year, containing such items as shall be required by law or by the state superintendent; and thereupon the state superintendent shall allot to such city or school district a proper pro rata of school funds subject to allotment, and shall apportion the amount due and certify the same to the board of education of said city.

Apportionment by state superintendent, § 4518.

DUTIES OF PRESIDENT.

4676. (1908.) Duties of president defined. Vice-president. It shall be the duty of the president to preside at all meetings of the board, to appoint all committees, and to sign all warrants ordered by the board of education to be drawn upon the treasurer for school moneys. In case of the absence or disability of the president, his duties shall be performed by the vice-president.

DUTIES OF CLERK.

4677. (1909.) Bond of clerk of board. Before entering upon the discharge of his duties, the clerk shall give a bond to the board of education of such city in such sum as said board may prescribe, with good and sufficient sureties, to be approved by the board, conditioned for the faithful performance of his duties, and shall qualify according to law.

4678. (1910.) Duties and compensation of clerk. It shall be the duty of the clerk to attend all meetings of the board; to keep an accurate journal of its proceedings, and have the care and custody of the seal, records, and papers not otherwise provided for; to countersign all warrants drawn upon the treasurer by order of the board; to keep an accurate account of all moneys paid to the treasurer on account of said board and from what source received, and all moneys paid on orders drawn on the treasurer by order of said board; and to prepare and submit to the board an annual statement, under oath, of the receipts and disbursements during the year ending June 30, which statement the board shall cause to be published in a newspaper having general circulation in said city, showing:

1. The amount on hand at the date of the last report;
2. The amount of sinking fund and how invested;

3. The moneys paid out, and for what paid;
4. The balance of school moneys on hand;
5. The number, date, and amount on every bond issued and redeemed under the authority herein given, and the amount received and paid therefor.

The clerk shall perform such other duties as the board and its committees may require. He shall receive for his services such compensation as the board may determine. Am'd '11, p. 124.

DUTIES OF TREASURER.

4679. (1911.) Duties and compensation of treasurer. The treasurer of the board of education shall subscribe to the oath of office and give a bond to the board with sufficient sureties and in such sum as the board may require; said oath and bond to be approved by the board and filed with its clerk. He shall be the custodian of all moneys belonging to the corporation, and be responsible upon his bond for all moneys received by him as treasurer. He shall prepare and submit in writing a monthly report of the receipts and disbursements of his office, and pay out school moneys only upon a warrant signed by the president, or, in his absence or disability, by the vice-president, countersigned by the clerk, and shall perform such other duties as the board may require. The treasurer shall receive for his services such amount as the board of education may fix and determine. The board may require the treasurer to keep his office and records in the office of the board.

Premium on bond, how paid, § 4500.
Funds to draw interest and where deposited, § 4500.
Treasurer teachers' retirement fund, § 4754.
Requirements for participation in state high school fund, §§ 4575-4582.

POWERS OF THE BOARD.

4680. (1912.) Board of education a body corporate. Powers and duties. The board of education of any such city shall be a body corporate under the name of "The Board of Education of ..... City" (inserting the proper name), and shall have an official seal conformable to such name, which shall be used by the clerk in the authentication of all matters requiring it. And said board, in the name aforesaid, may sue and be sued; may take, hold, lease, sell, and convey real and personal property, as the interests of the schools may require. The members of the board and the clerk thereof shall have the power and authority to administer oaths in proof of claims and accounts against said corporation, and no claim or account, except salaries of teachers and janitors, shall be audited or allowed by the board of education unless the correctness of the same shall be proved under oath.

4681. (1913.) Powers and duties defined. The board of education shall have the power and authority to purchase or sell schoolhouse sites and improvements thereof; to construct and erect school buildings and to furnish the same; to establish; locate, and maintain kindergarten schools, common schools, consisting of primary and grammar grades, high schools, and industrial or manual training schools; to establish and support school libraries; to purchase, exchange, repair, and improve the high school apparatus, books, furniture, fixtures and all other school supplies in said schools. It shall supply and loan to pupils in the several grades and departments of said schools, except the high school, free of charge, all text books and supplies used by the pupils of said schools; it shall have the power to sell to pupils in the several grades and departments of said schools, at cost, all text books and supplies used by the pupils of said schools; to collect all books and apparatus loaned to pupils of the public schools of any such city, or damages for the loss, injury, or destruction of the same; to assign to the State Normal School, for the purpose of instruction in the practice school connected therewith, a sufficient number of pupils of appropriate grades, and reimburse the state university or said normal school for the instruction of such pupils at rates per pupil not exceeding the average cost of instruction for pupils in the public schools of the city as ascertained for each year; to do all things needful for the maintenance, prosperity, and success of the schools, and the promotion of education; to adopt by-laws and rules for procedure of the board of education, and make

and enforce all needful rules and regulations for the control and management of the public schools of the city; *provided,* that said school boards shall purchase all books now remaining in the hands of the merchants of their respective cities, at the introductory exchange price. Am'd '03, p. 159.

Authority to establish high schools, Con. art. 10, sec. 2.
Compulsory attendance of children, §§ 4740-4743.
Control of local boards of health, § 2755.
Insure employees, §§ 3110, 3111, 3119.
Duties as to school houses as civic centers, §§ 4551-4554.
May employ physician, § 4540.
The arbitrary closing of schools on account of epidemic of smallpox does not relieve the board of education of liability for salary of teacher, under contract, for time lost during such period.
McKay v. Barnett, 21 U. 239; 60 P. 1100.

4682. (1914.) Sale of sites and buildings. No school sites or buildings shall be sold or conveyed by the board of education, except on resolution of the board, duly adopted at a regular or duly called meeting, and not then without the affirmative vote of at least two-thirds of all the members of the board.

4683. (1915.) Board has rights and duties of constituent districts. Suits by and against. Upon the election and qualification of a board of education for any city, the trustees of all school districts existing in said city shall convey and deliver all the school property in said districts to the board of education of said city; and the title of all such property, and all property hereafter acquired for school purposes in said city, shall be conveyed to and vested in said board of education, for the use of the district schools of said city; and all rights, claims, and causes of action to or for said property, or the use or income thereof, or for any conversion, disposition, or withholding thereof, or for any damage or injury thereto, shall at once vest in the board of education of said city, in trust for the use of the district schools of the city, and said board, in the name aforesaid, may bring and maintain actions to recover, protect, and preserve the property and rights of the district schools, and to enforce any contract relating thereto, and in its said name may sue and be sued in any court of law or equity. And all outstanding debts and obligations of any such school district shall be paid by such board of education.

BOARD OF EXAMINERS.

4684. (1916.) Board of examiners, how constituted. In each city of the first and of the second class there shall be a board of examiners, consisting of the city superintendent of public schools, or the superintendent-elect, and two or more other members having practical experience as teachers, residents of said city, to be designated associate examiners. The associate examiners shall be elected by the board of education at their first meeting in April annually, and shall hold office for one year, but no candidate for examination as a preliminary to teaching in the public schools shall be an associate examiner.
Am'd '05, p. 111.

4685. (1917.) Chairman of examiners. The city superintendent of public schools, or superintendent-elect, shall be chairman of the board of examiners.

4686. (1918.) Compensation of associate examiners. The associate examiners shall receive such a stated compensation per diem for services actually rendered as may be allowed them by the board of education. The chairman of the board of examiners shall certify to the correctness of claims for services rendered by the associate examiners.

4687. (1919.) Teachers' examinations. Special meetings. Record. The board of examiners shall meet and hold examinations for the granting of teachers' certificates on such occasions only as may be authorized by the board of education. Special meetings, not for the purpose of conducting examinations, may be called by the chairman, when, in his judgment, the same are necessary. A record of the proceedings of the board of examiners shall be kept in the office of its chairman, and at all times be open for the inspection of the board of education; and such portions of it as may concern any candi-

date for a certificate shall be open for the inspection of such candidate or his authorized representative.

State examination and diplomas, §§ 4506-4511.

4688. (1920.) Power of board of examiners. Issue, renewal, and revocation of certificates. The board of examiners shall have power:

1. To adopt rules and regulations, not inconsistent with the laws of the state or the rules of the board of education, for its own government and for the examination of teachers, and to fix standards of proficiency for the granting and renewing of certificates, either heretofore or hereafter issued, subject to the approval of the board of education.

2. To prepare questions on the various subjects prescribed by law, and examine by written or oral examination all candidates for any of the following certificates:

First. A city high school certificate, valid for one year only, unless renewed, and authorizing the holder to teach or serve as principal in any primary, grammar, or high school in such city;

Second. A city grammar certificate, valid for one year only, unless renewed, and authorizing the holder to teach in any primary or grammar school, or serve as principal in any primary school in such city;

Third. A city primary certificate, valid for one year only, unless renewed, and authorizing the holder to teach in any primary school in the city.

The board of examiners shall report the result of all examinations to the board of education, who, through the president and clerk thereof, shall issue to the successful candidates the certificates to which they are entitled.

3. To recommend to the board of education the renewal of the various renewable certificates, in accordance with such regulations as they may adopt, or as may be prescribed by the board of education; whereupon said board of education, through its president and clerk, may renew such certificates from year to year.

4. For immoral and unprofessional conduct, profanity, intemperance, or evident unfitness for teaching, to recommend to the board of education the revocation of any certificate previously granted by said board of education.

5. In case of necessity, to grant, by the chairman of the board of examiners, temporary certificates to teachers of experience of whose ability to pass the regular examination there is no doubt; *provided,* that such temporary certificate shall be valid only until the next regular examination, and under no circumstances shall be issued more than once to the same person.

CERTIFICATES.

4689. (1921.) Qualification of applicant for certificate. No certificate of permission to teach shall be issued to any person not eighteen years of age. No certificate shall be granted to any person whose moral character or habits are known by the board of examination, or by the board of education, to be bad, or who is afflicted with a serious infectious or hereditary disease.

Am'd '03, p. 72.

State diploma, §§ 4707, 4708. Normal certificates, § 4709.

4690. (1922.) Certificates granted only after examination. No certificate shall be granted by the board of education or upon its authority, except to successful candidates in a regular or special examination conducted by the board of examiners in accordance with the provisions of law.

4691. (1923.) Examination for grammar and primary certificates. City primary and city grammar certificates shall be granted only to applicants who are found, upon examination, to have a practical knowledge of pedagogics and school management, and to be proficient in and qualified to teach the following branches, namely: Reading, writing, spelling, English grammar, geography, arithmetic, physiology and hygiene, United States history, and such other English branches as the board of education may prescribe; *provided,* that the examination of applicants for such certificates shall be specially

adapted to discover their fitness to teach all the branches named to pupils of primary or grammar grades respectively.

4692. (1924.) Id. High school certificate. City high school certificates shall be granted only to applicants who pass satisfactorily the examination required for grammar certificates, and, in addition thereto, sustain a satisfactory examination in civil government, physical geography, elementary physics, elementary algebra, botany, and such other branches as the board of education may prescribe.

4693. (1925.) Teachers exempt from examination. Holders of normal diplomas and certificates issued after March 1, 1892, by the University of Utah, and holders of state diplomas or state certificates shall be exempt from all further examinations during the term of validity of such certificates as provided by law. Teachers engaged in the exclusive teaching of music, foreign languages, drawing, penmanship, kindergarten, and physical culture shall be exempt from all examinations except such as pertain to the special departments over which they may preside.

4694. (1926.) Special certificates. Special certificates shall be granted only to applicants who pass satisfactorily an examination in a special or departmental subject (such as music, foreign language, drawing, penmanship, kindergarten, physical culture, etc.), and such other subjects as are calculated to discover applicants' fitness to teach in public schools.

TEXT BOOKS.

4695. (1927.) Board to select text books. In each city of the first and of the second class the board of education shall decide what text books shall be adopted in all public schools of the city, and their use shall be mandatory therein, for the period of five years thereafter.

Neither legislature nor state board may prescribe text books, Con. art. 10, sec. 9.

Text book convention, §§ 4555-4560.

4696. (1928.) Notice to publishers. The board of education shall give notice at least sixty days prior to the expiration of any contract regulating the supply and use of text books in such city, by publication in a newspaper having a general circulation in this state, of its intention to adopt text books for the public schools of the city, calling for bids and terms from publishers of text books for schools, stating approximately the number and kind of books required; that separate and sealed proposals will be received by the board of education for furnishing each kind of book, the place where, and the day and hour when, all proposals will be opened, and that the board reserves the right to reject any and all proposals or any part thereof.

4697. (1929.) Opening bids. At the time and place specified in said notice, the board shall meet and publicly open and read all the proposals which shall have been received, and shall make their decision within thirty days thereafter.

4698. (1930.) Samples and prices on books. Sealed proposals must be accompanied with sample copies of the books proposed to be furnished, together with a statement of the introductory or exchange price, and of a wholesale and a retail price, at which the publisher agrees to furnish each book within the city during the full time that may be required by the board of education.

4699. (1931.) Unsatisfactory proposals. If no satisfactory proposals are received, the board, in its discretion, may advertise anew, and the books in use shall be continued in use until satisfactory proposals shall have been received and accepted.

4700. (1932.) Contract with successful bidders. Bond. The publisher or publishers whose proposals shall be accepted must enter into a written contract with the board of education, and shall give a bond with two sufficient sureties in a reasonable sum, to be fixed by the board, for the faithful performance of such contract.

CITY SCHOOL TAX.

4701. (1933.) School property exempt from taxation and execution. All property, real and personal, held by the board of education shall be exempt from general and special taxation, and from all local assessments for any purpose, and shall not be taken in any manner for debt.

Property exempt from taxation, Con. art. 13, sec. 3.

This section is not in conflict with Con. art. 13, sec. 3, and the word "held" means property owned by the board.

Wey v. S. L. City, 35 U. 504; 101 P. 380.

Lands owned by the board of education are exempt from legal assessments and taxation for construction of a public sewer, and the city could not impose the payment of a reasonable charge before permitting the board to connect with or use the sewer.

B. of Ed. v. McGonagle, 38 U. 280; 112 P. 401.

4702. (1934.) City one taxation district. For purposes of taxation the whole city shall constitute one school district.

4703. (1935.) Distribution of state funds to cities. All cities organized under the provisions of this chapter shall receive their pro rata share of any state taxes levied for the support of district schools, or any funds that may be realized from any source which, under the operation of law, are required to be divided pro rata for the benefit of children of school age residing in the state.

Apportionment by state superintendent, § 4518.

4704. (1936.) Estimate of required revenue. Annual levy. Limit. Collection. The board of education shall, on or before the 1st day of May of each year, prepare a statement and estimate of the amount necessary for the support and maintenance of the schools under its charge for the school year commencing on the 1st day of July next thereafter; also the amount necessary to pay the interest accruing during such year, and not included in any prior estimate, on bonds issued by said board; also the amount of sinking fund necessary to be collected during such year for the payment and redemption of said bonds; and shall forthwith cause the same to be certified by the president and clerk of said board to the officers charged with the assessment and collection of taxes for general county purposes in the county in which the city is situated, and such officers, after having extended the valuation of property on the assessment rolls, shall levy such per cent as shall, as nearly as may be, raise the amount required by the board, which levy shall be uniform on all property within the said city as returned on the assessment roll; and the said county officers are hereby authorized and required to place the same on the tax roll. Said taxes shall be collected by the county treasurer as other taxes are collected, but without additional compensation for assessing and collecting, and he shall pay the same to the treasurer of said board, promptly as collected, who shall hold the same subject to the order of the board of education; *provided,* that the tax for the support and maintenance of such school in cities of the first class shall not exceed in any one year 6½ mills on the dollar upon all taxable property of said city, 2½ mills additional on the dollar in one year to be used exclusively for the purchase of school sites and the erection of school buildings; and in cities of the second class, the tax for the support and maintenance of such schools shall not exceed in any one year 10 mills on the dollar upon all taxable property in said city. Am'd '01, p. 149; '07, p. 101; '15, p. 193-210.

Levy of county and district school tax, §§ 4525, 5993.

Sec. 4704 (1936) as amended, Ch. 111, Laws '15, p. 192, is unconstitutional in so far as it attempts to divide cities of the first and second class into two classes—those who's assessed valuation is over or under $20,000,000.00; therefore the section as amended, by chap. 115, laws '15, p. 210, is in force.

B. of Ed. v. Hunter, 48 U. 373; 159 P. 1019.

While punctuation may be disregarded for the purpose of ascertaining legislative intent, yet as the word "and" is a conjunction implying addition, the conjunction in chap. 111, laws '15, cannot be disregarded so that the limitation on assessed valuation will be construed as applicable only to cities of second class, but it must be taken as applicable to cities of the first class, and hence the section is unconstitutional as to such cities and the limitation prescribed does not apply.

B. of Ed. v. Hanchett, 50 U. —; 167 P. 686.

4705. (1937.) Delinquent taxes to be paid to board. The respective boards of county commissioners shall pay over to the boards of education as fast as collected or realized their proportionate amount of delinquent taxes, interest, and costs on all tax sales heretofore or hereafter made.

Distribution of delinquent taxes, interest, and costs, § 6055.

4706. (1938.) Special election for tax for sites, etc. The board of ed-

ucation may, at the annual school election or at a special election, in its discretion, submit to the voters of the district the question of levying a special tax, for one or more years, to buy sites, build and furnish schoolhouses, or improve the school property under its control. If the voters declare in favor of such tax, it shall be levied and collected as other school taxes, and the board of education may apply any money available, raised from taxation, to the building on or the improving of the school property under its charge.

4707. (1939.) Id. Notice of election. Issuance of bonds. The board of education shall give such reasonable notice of such submission as it may deem proper; and if submitted at a special election, may follow the procedure, so far as applicable, for the issuance of bonds.

CITY SCHOOL BONDS.

4708. (1940.) Bond election. Petition. The board of education may, when in its judgment it is advisable, or shall, when petitioned by a majority of the resident taxpayers of the school district, as appears by the county assessment roll of the last preceding year, call an election in each municipal ward of the city and submit to the taxpayers of the district, whether bonds of such district shall be issued and sold for the purpose of raising money for purchasing school sites, for building or purchasing one or more schoolhouses and supplying the same with furniture and necessary apparatus, for improving the grounds, and for the refunding and redemption of all or any portion of any bonds outstanding in any such district.

Election to incur additional indebtedness, § 4591.

4709. (1941.) Notice and conduct of bond election. The election provided for in the preceding section shall be called by publishing, for not less than ten days, a notice signed by the president and clerk of the board of education, in a newspaper published in the city, and by posting said notice at the polling places in each municipal ward of the city for the same length of time next preceding said meeting. The board of education, before any notice is published or posted, shall appoint three electors in each municipal ward to conduct the elections herein provided for, who shall take and subscribe an oath of office, and who shall make returns thereof to the board as herein provided. Such notice shall contain:

1. The time and place of holding the same;
2. The names of the judges at each polling place to conduct the same;
3. The time during which the polls will remain open;
4. The amount and denomination of the bonds, the rate of interest, and the number of years, not exceeding twenty, the whole or any part of said bonds are to run.

4710. (1942.) Ballot. Informalities in election. The ballot used at such election shall be furnished by the board of education, and shall express upon its face the questions the board desires to submit to the taxpayers. No informalities in conducting such election shall invalidate the same, if it shall have been otherwise legally conducted.

4711. (1943.) Qualifications of voters. Challenges. Every registered voter residing in any ward in which any election is held for the purpose of determining the question of issuing bonds for such school district, and who shall have paid a property tax therein in the year preceding such election, shall be entitled to vote at any such election. Challenges for cause by any qualified voter shall be allowed at such election, and promptly decided by the judges conducting the same.

Registration for school election, § 2136.

4712. (1944.) Canvass of returns. Issue of bonds. Immediately after the closing of the polls, the persons appointed to conduct the same shall proceed to count and canvass the ballots cast at such election, and make returns thereof to the board of education; and said board shall, within five days after said election, meet and canvass said returns, and if a majority of the ballots

cast at said election are in favor of issuing such bonds, then the board shall cause an entry of that fact to be made upon its minutes, and shall, before issuing such bonds, file with the clerk of the county, in which such school district is situated, a certified copy of the order of the board of education, and certified copies of the notices published or posted, calling such election, with an affidavit showing when and where said notices were published or posted, and that they were published or posted as required by the law and the order of the board of education. The board shall also file with said clerk a statement showing the number of inhabitants and the value of taxable property in the district; that the amount of bonds proposed to be issued, including existing indebtedness, does not exceed 3 per cent of the value of taxable property in the district; that the election at which the question of issuing bonds was submitted and lawfully called and held; that all proceedings in relation to the proposed issue of bonds in said district were lawfully conducted, and that such bonds may be lawfully issued; and thereupon said board of education shall be and is hereby authorized and directed to issue the bonds of such district in any amount not exceeding the number and amount voted for at such election. The money for the redemption of said bonds, and the payment of interest thereon as it shall become due, shall be raised by taxation upon the taxable property of said district; *provided,* that the total amount of bonds issued, including existing indebtedness, shall not exceed 3 per cent of the taxable property of the district as shown by the last equalized assessment roll for city purposes, prior to issuing such bonds. No election shall be void because the amount of bonds authorized at such election exceeded the statutory limitation at the time of holding the election, but the bonds may be issued in accordance with such authorization, in any amount within the limitations fixed by law, at the time the bonds are issued.

Am'd '07, p. 200; '09, p. 178.

Limit of indebtedness of school districts, etc., Con. art. 14, sec. 4.

4713. (1945.) Denomination of bonds. Interest. Payment and redemption. The denomination of the bonds which may be issued under the provisions of this chapter shall be $50 or some multiple of fifty, not exceeding $1000, and shall bear interest of not exceeding the rate of 5 per cent per annum, payable semi-annually or annually, in accordance with interest coupons which shall be attached to said bonds, and shall be made payable not more than twenty years from their date. The board of education may reserve the right to redeem such bonds, or any of them, at any time after five years from their issue. Any bonds heretofore authoriezd by vote of any school district, remaining unsold, may, in the discretion of the board, be hereafter issued, to bear any rate of interest not exceeding 5 per cent per annum, payable annually, or semi-annually.

4714. (1946.) Printing of bonds. Authorization. Signing. Whenever any bonds are issued under the provisions of this chapter, they shall be engraved, lithographed, or printed on bond paper, and shall state upon their face the date of their issue, the amount of bond, for what purpose issued, also the time and place of payment and the rate of interest to be paid. They shall have printed upon the margin the words, "Authorized by act of the legislature of the state of Utah, A. D. 1897," and upon the back of each bond shall be printed a certificate, signed by the county clerk, in substantially the following form:

I certify that the within bond is issued in accordance with law, and is within the debt limit permitted by the constitution and laws of the state of Utah and in accordance with a vote of the taxpayares of ..... school district of ..... county, state of Utah, at an election held on the ..... day of ..... 19....., authorizing bonds to the amount of ..... dollars.

They shall be signed by the president and clerk of the board of education, and countersigned by the treasurer thereof, and there shall be entered in a book to be kept by the clerk for that purpose the number, date, and denomination of the bonds sold, and the date when the same shall become due.

Certification that bonds are within debt limit, §§ 466-469.

4715. (1947.) Sale of bonds. Use of proceeds. Whenever any bonds are issued under the provisions of this chapter, the board of education shall have authority to negotiate and sell such bonds to the highest bidder. No contingent bid shall be received, and every bid shall be accompanied by a certified check of five per cent as a forfeit, payable to the order of the board of education. The board may reject any or all bids. The proceeds shall be used exclusively for the purpose for which they are issued.

4716. (1948.) Redemption and cancellation of bonds. Refunding. Whenever any of the bonds of a school district shall have been redeemed or purchased by the board of education, they shall be canceled by writing or printing in red ink across each bond and coupon the words, "Paid and canceled"; and the date of payment and amount paid shall be entered in the clerk's register against the number of the bond, and the bond and coupons so canceled shall be filed in the office of the clerk of the board and preserved in a book to be kept for that purpose. Any bond or bonds heretofore or hereafter issued by any board of education or school district may be refunded at any time by such board or school district when a lower rate of interest or better terms can be obtained, and the provisions hereof as to elections shall not apply.

4717. (1949.) Annual levy for interest and sinking fund. The board of education, in its annual estimate and levy provided for in this chapter, shall include an amount sufficient to pay the interest as the same accrues on all outstanding bonds issued by the board, and also to create a sinking fund of two per cent of the par value of outstanding bonds for the redemption of said bonds, and shall cause a tax to be levied and collected as provided for in this chapter, and such money shall remain a specific fund, and shall not be appropriated or used for any other purpose than is hereinafter provided.

4718. (1950.) Sinking fund, investment of. The moneys levied and collected for creating a sinking fund for the redemption of the bonds issued by the board of education shall be used as follows: After retaining an amount sufficient to pay the principal of the bonds maturing during the year, the board shall, with the surplus of the sinking fund, invest the same in bonds of the state of Utah, or of any school district, town, city, or county thereof, or of the United States, on the best terms to be obtained, until such time as it may be needed to purchase any outstanding bonds that may be offered, or until the maturity of any such bonds.

Sinking fund may be invested, § 5200.

4719. (1951.) Bonds a lien on taxable property. Bonds issued under the provisions of this title shall be a lien upon taxable property of the school district issuing them, and when the board of education neglects or refuses to levy a tax in accordance with law to meet the outstanding bonds or the interest thereon, the board of county commissioners of the county within which such district is situated shall levy such tax and apply the money thus collected to the payment of such bonds and the interest due thereon.

4720. (1952.) Advertisement for bids for construction of buildings. Award. Contract. When board may erect. Whenever any schoolhouse is to be built, the board of education shall advertise for at least ten days in some newspaper published in the city for sealed proposals for building such schoolhouse in accordance with the plans and specifications, which shall be furnished by the board of education at its office or at the office of the architect, stating in such advertisement or notice the place where, and the day and hour when, all proposals will be opened, and reserving the right to reject any and all proposals, and shall require a certified check of not less than five per cent of the amount of the bid to accompany the same, which check shall be made payable to the order of the board of education, and the check of the successful bidder shall be forfeited in case he fails or refuses to enter into the contract and furnish the bond required. At the time and place specified in said notice, the board shall meet and publicly open and read all the proposals which have been received, and if satisfactory bids have been received shall award the contract

to the lowest responsible bidder, and shall require of such bidder or contractor a bond in one-half the amount of the contract, conditioned that he will properly perform its conditions in a faithful manner and in accordance with its provisions. In case none of the proposals are satisfactory, all shall be rejected, and said board shall advertise anew in the same manner as before, and may require in the contract to be executed that at least twenty per cent of the contract price may be withheld until the building is completed and accepted by the board. But if after twice advertising, as provided herein, no satisfactory bid is received, the board may proceed under its own direction to erect the building required, or in case of a building not exceeding $5,000 in cost, if no satisfactory bid is received at the first notice, the board may proceed with the construction as it may determine.

PARENTAL SCHOOLS.

4721. (1953.) Board of education may establish parental schools. The board of education of any city of the first or of the second class, or the boards of education of any two or more such cities, under a contract to be approved by each of such boards, may provide for the establishment and maintenance of parental schools, and for the support and education of the inmates thereof, conformably with the provisions of this chapter.

Parental schools, etc., in county districts of first class, §§ 4640-4648. Detention schools, §§ 1875-1881.

4722. (1954.) Habitual truants to be committed. Any child between the ages of eight and fourteen years, residing within the city or cities maintaining such a school, adjudged guilty of being a habitual truant, or of wandering about in the streets and public places of said city or cities, without lawful employment or business, shall be committed to the parental school provided for the purpose for a term not extending beyond the age of fourteen years.

4723. (1955.) Id. Release. By-laws. Any child committed as provided in the next preceding section may be released from confinement at such school either conditionally or absolutely, before the expiration of the term of commitment, in accordance with the by-laws established by the board or boards of education maintaining the same.

4724. (1956.) Committing children without parental control. Children under sixteen years of age who, by reason of neglect, crime, drunkenness, or other vices of parents, or by reason of orphanage, are suffered to grow up without salutary parental control and education, or in circumstances encouraging them to lead idle and dissolute lives, may be committed to the proper parental school for a term not extending beyond the age of sixteen years.

4725. (1957.) Id. Discharge. When the parents of a child committed under the next preceding section have reformed and are leading orderly and industrious lives, and are in a condition to exercise salutary control over such child, and provide him with proper education and employment; or when, said parents being dead, any person offers to make such suitable provision for the care, nurture, and education of such child as will conduce to the public welfare, the board of education may discharge him to the parents or other such person.

4726. (1958.) District courts have jurisdiction. The district courts of the several counties shall have jurisdiction within their respective counties to enforce the provisions of this chapter, upon such notice to the parents or guardians of the children whom it is proposed to commit to parental schools, as the court may deem just and proper.

4727. (1959.) Expense of parental schools, how paid. Any board or boards of education maintaining a parental school in accordance with § 4721 shall estimate and determine, as near as may be, the average actual expense per month of keeping and taking care of the boys and girls who may be committed to the parental school, and the average cost of keeping such boys and girls shall be wholly paid by the parent or guardian of each boy or girl com-

mitted to the school, unless for good cause said board or boards of education shall otherwise order and direct. The board of education of the city in which the parent or guardian of any such committed boy or girl resides may bring suit to enforce this provision.

4728. (1960.) Admission of pupils from outside of city. On the tender of a payment which will meet all costs of support at the parental school, the board or boards of education maintaining such school may receive into it on equal terms boys or girls whose residence is in the state outside the city or cities to which the school belongs.

4729. (1961.) Truant officer. Compensation. The board of education of each such city may appoint and fix the compensation of a truant officer, whose duty it shall be to make complaints and arrests in cases contemplated by this chapter, and to serve legal process issued by courts in pursuance hereof. The police authorities of the city shall make such truant officer a special policeman.

Duty under employment of children act, § 1865.

CHAPTER 12.

GENERAL PROVISIONS.

COMPULSORY ATTENDANCE.

4740. (1962.) Compulsory attendance at schools. Exceptions. Every parent, guardian, or other person having control of any child between eight and sixteen years of age shall be required to send such child to a public, district, or private school in the district in which he resides, at least twenty weeks in each school year, ten weeks of which shall be consecutive; *provided,* that in cities of the first and of the second class such children shall be required to attend school at least thirty weeks in each school year, ten of which shall be consecutive; *provided,* that in each year such parent, guardian, or other person having control of any child shall be excused from such duty by the school board of the district or the board of education of the city, as the case may be, whenever it be shown to their satisfaction that one of the following reasons exists:

1. That such child is taught at home in the branches prescribed by law for the same length of time as children are required by law to be taught in the district school;

2. That such child has already acquired the branches of learning taught in the district schools;

3. That such child is in such physical or mental condition (which may be certified by a competent physician if required by the board) as to render such attendance inexpedient or impracticable. If no such school is taught the requisite length of time within two and one-half miles of the residence of the child by the nearest road, such attendance shall not be enforced;

4. That such child is attending some public, district, or private school;

5. That the services of such child are necessary to the support of a mother or an invalid father.

The evidence of the existence of any of these reasons for non-attendance must be in each case sufficient to satisfy the superintendent of the county or city in which the child resides; and the superintendent, upon the presentation of such evidence, shall issue a certificate stating that the holder is exempted from attendance during the time therein specified. Am'd '05, p. 112.

4741. (1963.) Penalty. Any such parent, guardian, or other person having control of any child between eight and sixteen years of age, who wilfully fails to comply with the requirements of the next preceding section, shall be guilty of a misdemeanor. Am'd '05, p. 112.

Compulsory education of deaf, dumb, and blind, §§ 5337-5339.

4742. (1964.) Id. Inquiry into violations of school law. It shall be the duty of the president of the board of education of any city, and the chairman of the school trustees of any district, within their respective jurisdictions, to inquire into all cases of misdemeanor defined in this title, and to report the same and the offenders concerned, when known, to the city or county attorney of the city or county within which the offenses shall have been committed, and it is hereby made the duty of either of said officers to proceed immediately to prosecute such offenders.

4743. (1965.) Incorrigible children. Sent to industrial school. All children in the district between the ages of eight and sixteen years who, in defiance of earnest and persistent efforts on the part of their parents or teachers, are habitual truants from school, or while in attendance at school are vicious, immoral, or ungovernable in conduct, shall be deemed incorrigible, and it is the duty of the president of the board of education or the chairman of the board of trustees of each school district to inquire into all cases within his district, and report them to the county attorney acting for such district, whose duty it shall be to prosecute such cases as incorrigibles and fit candidates for the state industrial school.

Parental schools in cities, §§ 4721-4729; in counties, §§ 4640-4648. Detention schools, §§ 1875-1881.

4744. (1965x.) American flag displayed, when. It shall be the duty of the board of education or school trustees of all school districts within the cities and counties of this state to provide each schoolhouse or the grounds thereof with a suitable flag-pole, and to cause the American flag to be displayed thereon during the daylight hours of every legal holiday, February 12th, and flag day of each year. '07, p. 33.

CHAPTER 13.

SCHOOL PROPERTY, ETC., IN TERRITORY ANNEXED TO CITY.

4745. (1965x1.) When annexed to a city of the first, second, or third class. When all the territory of a school district shall become annexed to a city of the first, second, or third class, by the extension of the boundaries of the city, all the school property, including moneys on hand and due to the said district, together with all records and papers belonging to said district, shall be transferred to, and the title vested in, the board of education of such city, and said board of education shall assume and be held responsible for the legitimate floating and bonded indebtedness of said annexed district. '07, p. 54.

Annexing territory to city, § 770.

4746. (1965x2.) Annexation of part of district. When, by the extension of the limits of any city of the first, second, or third class, a part of the territory of an adjacent school district is annexed to such city, it shall be the duty of a board, consisting of the state superintendent of public instruction, the city superintendent of schools, the county superintendent of schools, or, in county school districts of the first class, the district superintendent of schools, to determine the present value of the school property of such district, also all moneys due to, or in the hands of, the district treasurer, and to equitably apportion the amount due the district board, or the board of education of such city, as the case may be. The amount due to the district board, or board of education of such city, when ascertained by the said board, shall, if there be not sufficient funds in the hands of the treasurer to pay such indebtedness, be levied upon the taxable property of that district or corporation found to be in debt, and shall be collected in the same manner as if the same had been authorized by the vote of the district board, or by the board of education of such city, and when collected it shall be paid to the treasurer of that district or board of education of such city to which it is due. The board of education or the district retaining the schoolhouse shall assume the bonded indebtedness incurred in the building and furnishing of such schoolhouse. '07, p. 54.

4747. (1965x3.) Unadjusted claims. All unadjusted claims of cities and school districts arising from such annexation previous to March 14, 1907, shall be adjudged in accordance with the provisions of this chapter. '07, p. 55.

CHAPTER 14.

PUBLIC SCHOOL TEACHERS' RETIREMENT ASSOCIATIONS.

('13, p. 155.)

4750. (1966x1.) Organization. Commission. Upon the written request of a majority of the teachers employed in the public schools of any city of the first or the second class, the board of education of any such city shall authorize the organization of a public school teachers' retirement commission and association. In such petition there shall be designated three persons to serve as members of the retirement commission, who shall serve until the first election after the retirement commission is organized, and until their successors are elected and qualified. Am'd '17, p. 216.

4751. In cities of the first class. Membership of commission. Term. In cities of the first class the said commission shall be composed of seven members; three members to be elected from the retirement association by the members thereof, whose terms shall be for three years; the superintendent of city schools, the clerk of the board of education, and two members to be elected by the board of education from their number, whose terms shall be two years. In all cases the terms of office shall be from the first Monday in February following the election.

4752. Election of members of city commission. In cities of the first class the members of the retirement commission who are chosen by the teachers shall be elected at a meeting called by the superintendent of city schools, who shall cause each teacher who is a member of the association to be notified in writing of the time and place of such election, such notice to be given at least ten days before the election.

4753. (1966x4.) Qualification. Vacancies. The commissioners and officers of the retirement commission shall qualify by taking and subscribing to the oath of office, which shall be filed with the clerk of the board of education. In case of vacancy in the elective membership of said commission, the vacancy shall be filled until the next election by the commission choosing a member from the body that elected the outgoing member. Am'd '17, p. 217.

4754. (1966x5.) Officers. Compensation. Funds. The retirement commission shall organize by electing from their number, a president and a vice-president. The clerk of the board of education shall be clerk of such commission, and the treasurer of the board shall be treasurer of said commission. The commissioners and officers shall serve without compensation. The bond given by the treasurer of the board of education shall be liable for the safe-keeping of the funds of the commission. Am'd '17, p. 217.

4755. (1966x8.) Meetings. Records. Annual report. The retirement commission shall meet at least once each year, and shall keep a record of all its proceedings and a record of all money received and paid out, all of which records shall be open for public inspection. It shall also make an annual financial report showing the moneys received and disbursed, a copy of which report shall be printed and delivered to each member of the association.

4756. (1966x7.) Funds, two classes. The funds of the retirement association shall be of two classes: (a) Permanent, and (b) current fund. The treasurer shall pay out money only on warrants signed by the president and clerk of the commission, and shall have charge, under the direction of the commissioners, of the investment and management of the permanent fund, and such of the current fund as shall not be required to pay benefits,

but such funds shall be invested only in state, county, school district, or municipal bonds.

4757. Membership. Every teacher who, after the taking effect of this chapter, accepts employment under the board of education of a city of the first or the second class in which city a teachers' retirement association has theretofore been organized, shall, by virtue of such employment, become a member of such retirement association, and there shall be incorporated in the contract of employment a stipulation that the teacher agrees to and is bound by all the rules and provisions governing membership in such association. Am'd '17, p. 217.

4758. (1966x10.) Income. Assessments. Deductions. The income of the public school teachers' retirement association shall be from the following sources:

1. All teachers who are members of a teachers' retirement association in cities of the first and the second class shall have deducted from each and every payroll in payment for services, 1 per cent of the face of said payroll, and the amount of such deduction shall be certified to and paid by the clerk of the board of education monthly to the treasurer of the association; *provided,* that an annual salary of $1200 shall be the maximum salary on which dues shall be paid, and if any teacher shall receive a salary in excess of such sum, then the deduction shall be made on $1200 only;

2. All amounts deducted from teachers' salaries on account of absence, not to exceed five days in any one year for a teacher; all deductions belonging to this fund shall be certified to monthly by the clerk of the board of education and paid to the treasurer of the association;

3. All moneys received from donations, legacies, bequests, or otherwise, for or on account of said fund. Am'd '17, p. 217.

4759. (1966x11.) Current and permanent funds. Transfers. The first two sources of income, viz., 1 and 2, shall constitute the current fund, and the third source, viz., 3, shall constitute the permanent fund, unless specifically stipulated for the current fund in the donation, legacy, gift, or bequest. No portion of the permanent fund shall be available for current expenditure, but the interest thereon shall become a part of the current fund. Any part of the current fund which is not used during the school year for the payment of annuities shall be transferred to and become a part of the permanent fund. Am'd '17, p. 217.

4760. (1966x12.) Classification of beneficiaries. Retirements. Annuities. There shall be two classes of beneficiaries, under the retirement fund, viz., class A and class B.

Class A. On the recommendation of the retirement commission the board of education of the city shall have power by a two-thirds vote to retire any member of the association who is mentally or physically incapacitated for the performance of duty; *provided,* said teacher has taught in the city at least fifteen years and his or her term of service shall aggregate thirty years, except as hereinafter provided, whether before or after, or partly before or partly after the passage of this chapter. Each teacher so retired shall be entitled to receive as pension an annuity equal to one-half of the average annual salary drawn by said teacher for the five years preceding retirement, but in case his or her years of teaching shall not aggregate thirty years, but shall aggregate at least twenty years, he or she may be temporarily retired and shall be entitled to such a part of the annuity as his or her years of service are a part of thirty. Any teacher who has been retired under this class and who recovers his or her mental or physical powers sufficiently to teach or earn a livelihood in some other manner, in the opinion of a physician selected by the retirement commission, shall cease to draw an annuity under this classification. If such teacher does not recover before reaching the age of sixty, then he or she shall be transferred to class B.

Class B. Any member of the retirement association who has taught thirty years, one-half of which time has been in the city in which the retire-

ment association is located, and who has reached the age of sixty years, shall, upon his or her request, or upon the recommendation of the retirement commission and a two-thirds vote of the board of education of the city, without option be placed upon the retired list, and shall be entitled to an annuity equal to one-half of the average annual salary of the five years preceding retirement; *provided,* that the maximum annuity paid to any teacher under either class A or class B shall not exceed $600. Am'd '17, p. 218.

4761. (1966x13.) Id. Delinquent dues to be deducted. Transfer or continuance of membership. Any teacher who is retired under the provisions of either class A or B and who at the time of retirement has not paid into the retirement fund a sum equal to 1 per cent of the entire salary received for the previous years of service claimed, not to exceed a maximum of $1200 annually, shall have such an amount deducted from his or her annuity as shall equal the amount still due. This deduction may, in the discretion of the retirement commissioners, be distributed over a period not to exceed three years. Any teacher who is a member of a retirement association in the state of Utah and who accepts employment in a district outside of the bounds of his or her association shall, within thirty days thereafter, elect in which of two ways he or she prefers to continue his or her membership:

1. A transfer of membership, or
2. An absent membership.

If the first mentioned is selected, the clerk of the commission shall fill out on a proper form a report covering the necessary data concerning said teacher, which report, with the one-half of the amount of money paid into the fund by or on account of said teacher, shall be accepted by any commission within the state as the complete record and payment of back dues of such teacher. If the second method is chosen, a teacher may continue his or her membership by voluntarily sending annually to the clerk of the commission the 1 per cent of his or her salary as certified to by the clerk of the board where he or she is employed, not to exceed a maximum of $1200 annually.

4762. (1966x15.) Estate entitled to refund. In case of the death of a member of the retirement association before retirement, leaving relatives dependent upon him or her, the estate of said teacher shall be entitled to a refund of the total amount paid into said fund by said teacher. Or if the estate has not sufficient funds to pay the funeral expenses, then such expenses shall be paid by the retirement commission, not exceeding the amount paid to the association by such teacher.

4763. (1966x16.) Insufficient funds. If at any time the funds of the retirement association are not sufficient to meet the annuities and refunds hereinbefore specified, each annuitant and claimant shall be paid pro rata his or her proportion of the funds that are available.

4764. (1966x17.) Teacher defined. The term "teacher," as used throughout this chapter, shall include superintendents, supervisors, principals, and teachers in the employ of boards of education of cities of the first and the second class. '17, p. 219.

4765. (1966x18.) Rules and by-laws. The retirement commission is empowered to adopt such rules and by-laws for the carrying out of the provisions of this chapter as are in harmony with its intents and purposes.

4766. Repeal. Proviso. Chap. 21 of title 66 of the Compiled Laws of Utah, 1907, is hereby repealed; but all retirement associations and commissions organized under the provisions of said chapter are continued under this chapter.

4767. Proportionate distribution of funds. The state teachers' retirement commission are hereby authorized and directed to distribute to the members of the state teachers' retirement association the funds of such association now on hand after paying all expenses of the association, such distribution to be made to the members in proportion to the amount paid by each. '17, p. 219.

TITLE 91.

PUBLIC UTILITIES COMMISSION.

('17, p. 128.)

CHAPTER 1.

CREATION OF COMMISSION.

4775. Appointment of commissioners. Terms. Organization. There is hereby created a public utilities commission of Utah, and by that name the commission may sue and be sued. The public utilities commission shall consist of three members, who shall be appointed by the governor, by and with the advice and consent of the senate. Immediately after this title shall take effect, the governor shall, by and with the advice and consent of the senate, appoint a member of the commission whose term shall expire on the first Monday in February, 1919; another whose term shall expire on the first Monday in February, 1921; and another whose term shall expire on the first Monday in February, 1923. On the first Monday in February, 1919, and biennially thereafter, there shall be appointed in the same manner, one commissioner for the term of six years from the date of such appointment. Each commissioner appointed shall hold office until his successor is appointed and qualified. The commissioners shall qualify and enter upon their duties within thirty days after their appointment, and shall elect one of their number president of the commission.

The public Utility Commission is an arm of the Legislature, through whom that body acts in matters specified in the act.

S. L. City v. Utah L. & Tr. Co., 51 U. —; 173 P. 556.

4776. Vacancy. Removal. Procedure. Every vacancy in the commission shall be filled for the unexpired term by appointment by the governor, by and with the advice and consent of the senate; *provided,* that if any vacancy occurs while the legislature is not in session the governor shall forthwith make an interim appointment. The governor at any time may remove any commissioner from office for inefficiency, neglect of duty, misconduct or malfeasance in office, for accepting, directly or indirectly, any gift, gratuity, emolument, or employment from any public utility under the jurisdiction of the commission, for voluntarily becoming interested pecuniarily in any such public utility, or for failing to divest himself within a reasonable time of any interest in any such public utility acquired otherwise than voluntarily, or for holding another office under the constitution or laws of this state or of the United States. Before any commissioner may be removed he shall be given a copy of charges made against him, and a time shall be fixed when he may be heard publicly in his own defense, which time shall be not less than ten days thereafter. If the commissioner shall be removed the governor shall file in the office of the secretary of state a complete statement of all charges against such commissioner and of the findings thereon, with a record of the proceedings.

4777. Qualifications. Oath. Bond. Each commissioner, at the time of his appointment and qualification, shall be a resident citizen of the United States and of the state of Utah, and shall be not less than thirty years of age. At no time shall there be more than two of said commissioners members of the same political party. No commissioner shall hold any other office, either under the government of the United States or of this state, or of any municipal corporation within this state; nor shall he engage in any occupation or business inconsistent with his duties as such commissioner; nor shall he hold any official relation to, or be interested in, the bonds, stocks, mortgages, securities, contracts, or earnings of any public utility. Each commissioner, before entering upon the duties of his office, shall take and subscribe to the constitutional oath of office, and in addition thereto shall swear or

affirm that he is not pecuniarily interested, directly or indirectly, in any public utility. Such oath or affirmation shall be filed in the office of the secretary of state. Before entering upon the duties of this office, each commissioner shall give a surety company bond in the sum of $10,000, conditioned for the faithful performance of his duties. The cost of said bond shall be paid by the state.

4778. Quorum. Hearings. Seal. Place of business. Salary. A majority of the commissioners shall constitute a quorum for the transaction of any business, for the performance of any duty, or for the exercise of any power of the commission, and may hold hearings at any time or place within or without the state; and any action taken by a majority of the commission shall be deemed the action of the commission. Any vacancy in the commission shall not impair the right of the remaining commissioners to exercise all the powers of the commission, so long as a majority of such commission remains. Any investigation, inquiry, or hearing which the commission has power to undertake or to hold may be undertaken or held by or before any commissioner. All investigations, inquiries, and hearings of a commissioner shall be deemed the investigations, inquiries, and hearings of the commission; and all findings, orders, or decisions made by a commissioner when approved and confirmed by the commission and filed in its office, shall be deemed the findings, orders, or decisions of the commission, and shall have the same effect as if originally made by the commission. The commission shall adopt and use an official seal with the words "public utilities commission of Utah," and such other designations as the commission may prescribe engraved thereon; by which seal it shall authenticate its acts, orders, and proceedings; and of which seal the courts of this state shall take judicial notice. The office of the commission shall be at the state capital in such rooms in the capitol building, or other public building, as shall be assigned to it, and such office shall be open for business between the hours of 9 a. m. and 5 p. m. each business day in the year; and one or more responsible persons, to be designated by the commission, or by the secretary under the direction of the commission, shall be on duty at such times in immediate charge thereof. Each commissioner shall devote his entire time to the duties of his office, and shall receive an annual salary of $4000, payable in the same manner as the salaries of other state officers.

4779. Appointment, qualification, and salaries of employes. Civil service examinations for applicants. Investigations by attorneys. Duties of secretary. Payment of expenses. Use of common carriers and telegraph and telephone lines. The commission may appoint a secretary at a salary to be fixed by the commission, and may employ such clerks, experts, attorneys, and other subordinates as it shall deem necessary, and shall fix their compensation; the secretary and all employes of the commission to hold office during the pleasure of the commission. The appointment of the secretary of the commission and all clerks, experts, attorneys, and other subordinates and employes of the commission shall be made upon considerations only of the integrity and the competency of the individual to perform the duties of the position to which he is appointed, and regardless of the recommendations of any political party organizations, and regardless of any considerations of political party service by the applicant; *provided,* that the commission shall, with respect to the appointment of any clerks, experts, or other subordinates, make rules and regulations for a civil service examination of each applicant, which rules and regulations shall provide for the appointment of the applicants for position under the commission based upon the merit system. Upon the request of the commission, it shall be the duty of the attorney-general of the state, or of the district attorney of any district in this state, to aid in any investigation, prosecution, hearing, or trial had under the provisions of this title, and to prosecute all necessary actions for the enforcement of this title. The secretary shall take and subscribe to an oath similar to that required of the commissioners. It shall be the duty of the secretary to keep

a full and true record of all the proceedings of the commission, and of all determinations, rulings, and orders made by the commission, or by any of the commissioners, and of the approval and confirmation by the commission of determinations, rulings, or orders made by individual members thereof. The secretary shall be the custodian of the records of the commission, and shall file and preserve at its general office all books, maps, profiles, tariffs, schedules, reports, and documents, and all papers whatsoever filed with it or entrusted to its care, and he shall be responsible to the commission for the custody thereof. Under the direction of the commission, the secretary shall have general charge of its office, superintend its clerical business, conduct its correspondence, give notice of all hearings, determinations, rulings, and orders of the commission, prepare for service such papers and notices as may be required of him by the commission, and perform such other duties as the commission may prescribe. He shall have power and authority to administer oaths in all parts of the state in all proceedings by or before the commissioners, and in all cases or matters pertaining to the duties of his office. The secretary shall have power to designate, from time to time, one of the clerks appointed by the commission to perform the duties of the secretary during his absence, and the clerk so appointed shall possess, for the time designated, the powers of the secretary. The secrteary shall be the disbursing officer of the commission, subject to the approval of the commission, with respect to both requisitions and expenditures, and before entering upon the duties of his office he shall file in the office of the secretary of state a bond executed to the state, by a surety company, in the sum of $10,000, to be approved by the governor, conditioned upon the faithful performance of his official duties. The premium for such bond shall be paid by the state. The commission shall be provided by the state with such offices, equipment, and facilities as may be proper and necessary for the performance of its duties. All necessary expenses shall be audited and paid as other state expenses are audited and paid. The commissioners and secretary, and such clerks, experts, attorneys, and other subordinates as may be employed by it, shall be entitled to receive from the state their necessary traveling expenses while traveling on the business of the commission. The claims for such expenses shall be sworn to by the person incurring the same, and shall be approved by the chairman of the commission and audited and paid in the same manner as other claims against the state are audited and paid. The commissioners and officers and employes of the commission shall, when in the performance of their official duties, have the right to pass, free of charge, on all railroads, cars, and other vehicles of every common carrier, as said term is defined in this title, subject in whole or part to control or regulation by the commission, between points within this state, and such persons shall not be denied the right to travel upon any railroad, car, or other vehicle of such common carrier, whether such railroad, car, or other vehicle be used for the transportation of passengers or of freight, and regardless of its class, and the commissioners and officers and employes of the commission shall, when in the performance of their official duties, have the right to the free use of all telephone and telegraph lines in this state, subject in whole or in part to control or regulation by the commission, between points within this state.

4780. Annual reports. The commission shall make and submit to the governor annual reports containing a full and complete account of the transactions of its office, together with such facts, suggestions, and recommendations as it may deem necessary, which report shall be published as the reports of other departments of the state. The said report shall be made and submitted as soon after December 31 in each year as may be feasible in order to bring the report down to that date.

4781. Prohibitions as to commissioners and employes. Acceptance of gratuities. Recommendations for appointments. No commissioner or person regularly employed by and receiving a salary from the commission shall

accept any gift, gratuity, emolument, or employment from any public utility under the jurisdiction of the commission or any officer, agent, or employe thereof; nor shall any commissioner or person regularly employed by and receiving a salary from the commission, directly or indirectly, solicit, request from, or recommend to any such public utility, or any officer or agent or employe thereof, the appointment of any person to any place or position with such public utility; nor shall any public utility or any officer, agent, attorney, or employe of any public utility, directly or indirectly, solicit, request, or recommend to the governor or to any state senator or to the commission the appointment of any person as commissioner or as secretary of the commission or the appointment of any person to any place or position under the commission.

CHAPTER 2.

DEFINITIONS.

4782. 1. The term "commission," when used in this title, means the public utilities commission of the state of Utah.

2. The term "commissioner," when used in this title, means one of the members of the commission.

3. The term "corporation," when used in this title, includes a corporation, an association, a municipal corporation, and a joint stock company, having any powers or privileges not possessed by individuals or partnerships.

4. The term "municipal corporation," when used in this title, shall include all cities, counties, or towns, or other governmental units created or organized under any general or special law of this state.

5. The term "person," when used in this title, includes an individual, a firm, and a co-partnership.

6. The term "transportation of persons," when used in this title, includes every service in connection with or incidental to the safety, comfort, or convenience of the person transported and the receipt, carriage, and delivery of such person and his baggage.

7. The term "transportation of property," when used in this title, includes every service in connection with or incidental to the transportation of property, including in particular its receipt, delivery, elevation, transfer, switching, carriage, ventilation, refrigeration, icing, dunnage, storage, and handling, and the transmission of credit by express corporations.

8. The term "street railroad," when used in this title, includes every railway, and each and every branch or extension thereof, by whatsoever power operated, being mainly upon, along, above, or below any street, avenue, road, highway, bridge, or public place within any city or town, together with all real estate, fixtures, and personal property of every kind used in connection therewith, owned, controlled, operated, or managed for public use in the transportation of persons or property; but the term "street railroad," when used in this title, shall not include a railway constituting or used as a part of a commercial or interurban railway.

9. The term "street railroad corporation," when used in this title, includes every corporation or person, their lessees, trustees, receivers, or trustees appointed by any court whatsoever, owning, controlling, operating, or managing any street railroad for public service within this state.

10. The term "railroad," when used in this title, includes every commercial, interurban, and other railway, other than a street railway, and each and every branch or extension thereof, by whatsoever power operated, together with all tracks, bridges, trestles, rights of way, subways, tunnels, stations, depots, union depots, yards, grounds, terminals, terminal facilities, structures, and equipment, and all other real estate, fixtures, and personal prop-

erty of every kind used in connection therewith, owned, controlled, operated, or managed for public use in the transportation of persons or property.

11. The term "railroad corporation," when used in this title, includes every corporation or person, their lessees, trustees, receivers, or trustees appointed by any court whatsoever, owning, controlling, operating, or managing any railroad for public service within this state.

12. The term "express corporation," when used in this title, includes every corporation or person, their lessees, trustees, receivers, or trustees appointed by any court whatsoever, engaged in or transacting the business of transporting any freight, merchandise, or other property for public service on the line of any common carrier or stage or auto line within this state.

13. The term "automobile corporation," when used in this title, includes every corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, engaged in, or transacting the business of, transporting passengers or freight, merchandise or other property for compensation, by means of automobiles or motor stages on public streets, roads or highways along established routes within this state.

14. The term "common carrier," when used in this title, includes every railroad corporation; street railroad corporation; automobile corporation; express corporation; dispatch, sleeping car, dining car, drawing room car, freight, freight line, refrigerator, oil, stock, fruit, car loaning, car renting, carloading, and every other car corporation or person, their lessees, trustees, receivers, or trustees appointed by any court whatsoever, operating for public service within this state; and every corporation or person, their lessees, trustees, receivers, or trustees appointed by any court whatsoever engaged in the transportation of persons or property for public service, over regular routes between points within this state.

15. The term "heating plant," as used in this title, includes all real estate, fixtures, machinery, appliances, and personal property controlled, operated, or managed in connection with or to facilitate the production, generation, transmission, delivery, or furnishing of artificial heat.

16. The term "heat corporation," when used in this title, includes every corporation or person, their heirs, lessees, trustees, receivers, or trustees appointed by any court whatsoever owning, controlling, operating, or managing any heating plant for compensation for public use within this state.

17. The term "gas plant," when used in this title, includes all real estate, fixtures, and personal property owned, controlled, operated, or managed in connection with or to facilitate the production, generation, transmission, delivery, or furnishing of gas (natural or manufactured), for light, heat, or power.

18. The term "gas corporation," when used in this title, includes every corporation or person, their lessees, trustees, receivers, or trustees appointed by any court whatsoever owning, controlling, operating, or managing any gas plant for public service within this state, except where gas is made or produced on and distributed by the maker or producer through private property alone for his own use or the use of his tenants and not for sale to others.

19. The term "electric plant," when used in this title, includes all real estate, fixtures, and personal property owned, controlled, operated, or managed in connection with or to facilitate the production, generation, transmission, delivery, or furnishing of electricity for light, heat, or power, and all conduits, ducts, or other devices, materials, apparatus, or property for containing, holding, or carrying conductors used or to be used for the transmission of electricity for light, heat, or power.

20. The term "electrical corporation," when used in this title, includes every corporation or person, their lessees, receivers, or trustees appointed by any court whatsoever owning, controlling, operating, or managing any electric plant, or in anywise furnishing electric power for public use within this state, except where electricity is generated on or distributed by the producer through private property alone, solely for his own use or the use of his tenants and not for sale to others.

21. The term "telephone line," when used in this title, includes all conduits, ducts, poles, wires, cables, instruments, and appliances, and all other real estate, fixtures and personal property owned, controlled, operated, or managed in connection with or to facilitate communication by telephone, whether such communication is had with or without the use of transmission wires.

22. The term "telephone corporation," when used in this title, includes every corporation or person, their lessees or trustees appointed by any court whatsoever owning, controlling, operating, or managing any telephone line for public use within this state.

23. The term "telegraph line," when used in this title, includes all conduits, ducts, poles, wires, cables, instruments, and appliances, and all other real estate, fixtures, and personal property owned, controlled, operated, or managed in connection with or to facilitate communication by telegraph, whether such communication be had with or without the use of transmission wires.

24. The term "telegraph corporation," when used in this title, includes every corporation or person, their lessees, receivers, or trustees appointed by any court whatsoever owning, controlling, operating, or managing any telegraph line for public use within this state.

25. The term "water system," when used in this title, includes all reservoirs, tunnels, shafts, dams, dykes, headgates, pipes, flumes, canals, structures, and appliances, and all other real estate, fixtures, and personal property owned, controlled, operated, or managed in connection with or to facilitate the diversion, development, storage, supply, distribution, sale, furnishing, carriage, apportionment, or measurement of water for power, fire protection, irrigation, reclamation, or manufacturing, or for municipal, domestic, or other beneficial use; *provided,* this shall not apply to private irrigation companies engaged in distributing water only to their stockholders.

26. The term "water corporation," when used in this title, includes very corporation or person, their lessees, trustees, receivers, or trustees appointed by any court whatsoever owning, controlling, operating, or managing any water system for compensation within this state; *provided,* this shall not apply to private irrigation companies engaged only in distributing water to their stockholders.

27. The term "warehouseman," when used in this title, includes every corporation or person, their lessees, trustees, receivers, or trustees appointed by any court whatsoever owning, controlling, operating, or managing any grain elevator, and includes every corporation or person, their lessees, trustees, receivers, or trustees appointed by any court whatsoever owning, controlling, operating, or managing any building or structure in which property is regularly stored for public use within this state, in connection with or to facilitate the transportation of property by a common carrier, or the loading or unloading of the same.

28. The term "public utility," when used in this title, includes every common carrier, gas corporation, automobile corporation, electric corporation, telephone corporation, telegraph corporation, water corporation, heat corporation, and warehouseman where the service is performed for or the commodity delivered to the public or any portion thereof. The term "public or any portion thereof," as herein used means the public generally, or any limited portion of the public including a person, private corporation, municipality, or other political subdivision of the state, to which the service is performed or to which the commodity is delivered, and whenever any common carrier, gas corporation, automobile corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, heat corporation, or warehouseman performs a service or delivers a commodity to the public or any portion thereof for which any compensation or payment whatsoever is received, such common carrier, gas corporation, automobile corporation, electrical corporation, telephone corporation, telegraph corpo-

ration, water corporation, heat corporation, and warehouseman is hereby declared to be a public utility subject to the jurisdiction and regulation of the commission and the provisions of this title. Furthermore, when any person or corporation performs any such service or delivers any such commodity to any public utility herein defined, such person or corporation and each thereof is hereby declared to be a public utility and to be subject to the jurisdiction and regulation of the commission, and to the provisions of this title. Any corporation or person not being engaged in business exclusively as a "public utility," as hereinbefore defined, shall be governed by the provisions of this title in respect only of the "public utility" or "public utilities" owned, controlled, operated, or managed by it or by him, and not in respect of any other business or pursuit.

CHAPTER 3.

DUTIES OF PUBLIC UTILITIES.

4783. Charges to be just. Service adequate. Rules reasonable. 1. All charges made, demanded, or received by any public utility, or by any two or more public utilities, for any product or commodity furnished or to be furnished or any service rendered or to be rendered shall be just and reasonable. Every unjust or unreasonable charge made, demanded, or received for such product or commodity or service is hereby prohibited and declared unlawful.

2. Every public utility shall furnish, provide, and maintain such service, instrumentalities, equipment, and facilities as shall promote the safety, health, comfort, and convenience of its patrons, employes, and the public, and as shall be in all respects adequate, efficient, just and reasonable.

3. All rules and regulations made by a public utility affecting or pertaining to its charges or service to the public shall be just and reasonable.

4784. Schedules and classification by common carriers. Contents, forms and notice. Inspection. Other public utilities to comply. Commission may change form and modify orders. 1. Every common carrier shall file with the commission, and shall print and keep open to public inspection, schedules showing the rates, fares, charges, and classifications for the transportation between termini within this state of persons and property from each point upon its route to all other points upon every other route leased, operated, or controlled by it; and from each point on its route or upon any route leased, operated, or controlled by it to all points upon the route of any other common carrier, whenever a through route and a joint rate shall have been established or ordered between any two such points. If no joint rate over a through route has been established, the schedules of the several carriers in such through route shall show the separately established rates, fares, charges, and classifications applicable to the through transportation. The schedules printed as aforesaid shall plainly state the places between which property and persons will be carried, and shall also contain the classification of passengers or property in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the commission may require to be stated, all privileges or facilities granted or allowed, and all rules or regulations which may in any wise change, affect, or determine any part, or the aggregate of, such rates, fares, charges, and classifications, or the value of the services rendered to the passenger, shipper, or consignee. Subject to such rules and regulations as the commission may prescribe, such schedules shall be plainly printed in large type, and a copy thereof shall be kept by every such carrier readily accessible to and for inspection of the public in every station or office of such carrier where passengers or property are respectively received for transportation, when such station or office is in charge of an agent, and in every station or office of such

carrier where passenger tickets or tickets for sleeping, parlor car, or other train accommodations are sold or bills of lading or waybills or receipts for property are issued. Any or all of such schedules kept as aforesaid shall be immediately produced by such carrier for inspection upon the demand of any person. A notice printed in bold type and stating that such schedules are on file with the agent and open to inspection by any person, and that the agent will assist any person to determine from such schedules any rates, fares, rules, or regulations in force, shall be kept posted by the carrier in two public and conspicuous places in every such station or office. The form of every such schedule shall be prescribed by the commission, and shall conform in the case of common carriers subject to the act of congress entitled "an act to regulate commerce," approved February 4, 1887, and the acts amendatory thereof and supplementary thereto, as nearly as may be, to the form of schedules prescribed to the interstate commerce commission under said act.

2. Under such rules and regulations as the commission may prescribe, every public utility other than a common carrier shall file with the commission within such time and in such form as the commission may designate, and shall print and keep open to public inspection schedules showing all rates, tolls, rentals, charges, and classifications collected or enforced, or to be collected or enforced, together with all rules, regulations, contracts, privileges, and facilities which in any manner affect or relate to rates, tolls, rentals, charges, classifications, or service. Nothing in this section contained shall prevent the commission from approving or fixing rates, tolls, rentals, or charges, from time to time, in excess of or less than those shown by said schedule.

3. The commission shall have power, from time to time, in its discretion, to determine and prescribe by order such changes in the form of the schedules referred to in this section as it may find expedient, and to modify the requirements of any of its orders, rules, or regulations in respect to any matters in this section referred to.

4785. Changes. Notice. Exception. Designation. Unless the commission otherwise orders, no change shall be made by any public utility in any rate, fare, toll, rental, charge, or classification, or in any rule, regulation, or contract relating to or affecting any rate, toll, fare, rental, charge, classification, or service, or in any privilege or facility, except after thirty days' notice to the commission and to the public as herein provided. Such notice shall be given by filing with the commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force, and the time when the change or changes will go into effect. The commission, for good cause shown, may allow changes without requiring thirty days' notice herein provided for, by an order specifying the changes so to be made and the time when they shall take effect, and the manner in which they shall be filed and published. When any change is proposed in any rate, fare, toll, rental, charge, or classification, or in any form of contract or agreement, or in any rule, regulation, or contract relating to or affecting any rate, toll, fare, rental, charge, classification, or service, or in any privilege or facility, attention shall be directed to such change on the schedule filed with the commission, by some character to be designated by the commission, immediately preceding or following the item.

4786. Concurrence in joint tariff charges. The names of the several public utilities which are parties to any joint tariff, rate, fare, toll, contract, classification, or charge shall be specified in the schedule or schedules showing the same. Unless otherwise ordered by the commission, a schedule showing such joint tariff, rate, toll, fare, contract, classification, or charge need be filed with the commission by only one of the parties to it; *provided,* that there is also filed with the commission in such form as the commission may require a concurrence in such joint tariff, rate, toll, fare, contract, classification, or charge by each of the other parties thereto.

4787. Schedules first filed. Variance in other charges, refunds, and free transportation prohibited. Exemptions. Annual lists required. 1. No common carrier subject to the provisions of this title shall engage or participate in the transportation of persons or property between points within this state until its schedules of rates, fares, charges, and classifications shall have been filed and published in accordance with the provisions of this title.

2. No common carrier shall charge, demand, collect, or receive a greater or less or different compensation for the transportation of persons or property, or for any service in connection therewith, than the rates, fares, and charges applicable to such transportation as specified in its schedules filed and in effect at the time; nor shall any such carrier refund or remit in any manner or by any device any portion of the rates, fares, or charges so specified, except upon order of the commission as hereinafter provided, nor extend to any corporation or person any privilege or facility in the transportation of passengers or property except such as are regularly and uniformly extended to all corporations and persons.

3. No common carrier subject to the provisions of this title shall, directly or indirectly, issue, give, or tender any free ticket, free pass, or free or reduced-rate transportation for passengers between points within this state, except to its officers, agents, employes, attorneys, physicians, and surgeons, and members of their families; to ministers of religion, traveling secretaries of railroad men's religious associations, or executive officers, organizers, or agents of railroad employes' mutual benefit associations giving the greater portion of their time to the work of any such association; inmates of hospitals or charitable or eleemosynary institutions, and persons exclusively engaged in charitable or eleemosynary work, and persons and property engaged or employed in educational work or scientific research or in patriotic work, when permitted by the commission; to indigent, destitute, and homeless persons, and to such persons when transported by charitable societies or hospitals, and the necessary agents employed in such transportations; to inmates of the national homes or state homes for disabled volunteer soldiers, and of soldiers' and sailors' homes, including those about to enter and those returning home after discharge, and boards of managers of such homes; to necessary caretakers of livestock, poultry, milk, or fruit; to employes on sleeping cars, express cars, and to linemen of telegraph and telephone corporations; to railway mail service employes, United States internal revenue officers, postoffice inspectors, customs officers and inspectors, and immigration inspectors when traveling in the course of their official duty; to newsboys on trains, baggage agents, witnesses attending any legal investigation in which the carrier is interested, persons injured in accidents or wrecks, and physicians and nurses attending such persons; *provided,* that the term "employes," as used in this section, shall include furloughed, pensioned, and superannuated employes, persons who have become disabled or infirm in the service of any such carrier, ex-employes traveling for the purpose of entering the service of any such carrier, and the remains of persons dying while in the employment of any such carrier; and the term "families," as used in this section, shall include the families of those persons heretofore named in this proviso, and the families of persons killed, and the widows during widowhood, and minor children during minority, of persons who died while in the service of any such carrier; and *provided, further,* that no free ticket, free pass, or free or reduced rate transportation shall be issued, given, or tendered to any officer, agent, or employe of a common carrier who is at the same time a shipper or receiver of freight, unless such officer, agent, or employe devotes substantially his entire time to the service of such carrier; and *provided, further,* that the members of the public utilities commission, their officers and employes, shall be entitled, when in the performance of their official duties, to free transportation over the lines of all common carriers, and to free use of the lines of all telegraph and telephone companies within this state. Nothing in this title contained shall

be construed to prohibit the issue by express corporations of free or reduced-rate transportation for express matter to their officers, agents, employes, attorneys, physicians, and surgeons, and members of their families, or the interchange of free or reduced-rate transportation for passengers or express matter between common carriers, their officers, agents, employes, attorneys, physicians, and surgeons, and members of their families, where such common carriers are subject in whole or in part to the jurisdiction of the commission or of the interstate commerce commission; *provided,* that such express matter be for the personal use of the person to or for whom such free or reduced-rate transportation is granted, or of his family; nor to prohibit the issue of passes or franks by telegraph or telephone corporations to their officers, agents, employes, attorneys, physicians, and surgeons, and members of their families, or the exchange of passes or franks between such telephone and telegraph corporations or between such corporations and such common carriers, for their officers, agents, employes, attorneys, physicians, and surgeons, and members of their families; nor to prohibit free or reduced rate service by other public utilities to its officers, directors, and employes; nor to prevent the carrying out of contracts for free or reduced rate passenger transportation or other public utility service heretofore made founded upon adequate consideration and lawful when made; nor to prevent a common carrier from transporting, storing, or handling, free or at reduced rates, the household goods and personal effects of its employes, or persons entering or leaving its service, and of persons killed or dying while in its service.

4. Every common carrier subject to the provisions of this title may transport, free or at reduced rates, persons or property for the United States, state, county, or municipal governments, or for charitable purposes, or for patriotic purposes, or to provide relief in cases of general epidemic, pestilence, or other calamitous visitation, and property to or from fairs or expositions for exhibit thereat; also contractors and their employes, material, or supplies for use of or engaged in carrying out their contract with said carriers, for construction, operation, or maintenance work, or work incidental thereto, on the line of the issuing carrier, to the extent only that such free or reduced-rate transportation is provided for in the specifications upon which the contract is based and in the contract itself. Common carriers may also enter into contracts with telephone and telegraph corporations for an exchange of service.

5. Every common carrier and every telegraph and telephone corporation shall print and file or cause to be filed with the commission schedules showing all the rates, fares, tolls, rentals, charges, and classifications for the transportation of persons or property or the transmission of messages or conversations between all points within this state, and all points without the state upon every route leased, operated, or controlled by it, and between all points on its route or any route leased, operated, or controlled by it within this state and all points without the state upon the route of any other common carrier or telegraph or telephone corporation, whenever a through rate and joint rate shall have been established between any two such points.

6. Every common carrier shall, on the first Monday in July of each year, and at such other time as may be required by the commission, file with the commission a verified list of all tickets, passes, mileage books, franks, or reduced-rate transportation issued for other than actual bona fide money consideration at full established rates during the preceding year, together with the names of the recipients thereof, the amount received therefor, and the reason for issuing the same. This shall not apply to the sale of tickets at reduced rates open to the public.

4788. Charges shall not vary from schedules. Exceptions. Except as in this section otherwise provided, no public utility shall charge, demand, collect, or receive a greater or less or different compensation for any product or commodity furnished or to be furnished, or for any service rendered or to be rendered, than the rates, tolls, rentals, and charges applicable to such

products or commodity or service as specified in its schedules on file and in effect at the time, nor shall any such public utility refund or remit, directly or indirectly, in any manner or by any device, any portion of the rates, tolls, rentals, and charges so specified, nor extend to any corporation or person any form of contract or agreement, or any rule or regulation, or any facility or privilege except such as are regularly and uniformly extended to all corporations and persons; *provided,* that the commission may by rule or order establish such exceptions from the operation of this prohibition as it may consider just and reasonable as to each public utility.

4789. Preferences and unreasonable difference prohibited. Commission to determine. No public utility shall, as to rates, charges, service, facilities, or in any other respect, make or grant any preference or advantage to any corporation or person, or subject any corporation or person to any prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service. The commission shall have the power to determine any question of fact arising under this section.

4790. When sliding scale permitted. Nothing in this title shall be taken to prohibit a corporation or person engaged in the production, generation, transmission, or furnishing of heat, light, water, or power, or telegraph or telephone service, from establishing a sliding scale of charges; *provided,* that a schedule showing such scale of charges shall first have been filed with the commission and such schedule and the rate set out therein approved by it. Nothing in this title shall be taken to prohibit any such corporation or person from entering into an arrangement for a fixed period for the automatic adjustment of charges for heat, light, water, or power, or telegraph or telephone service, in relation to the dividends to be paid to stockholders of such corporation, or the profit to be realized by such person; *provided,* that a schedule showing the scale of charges under such arrangement shall first have been filed with the commission and such schedule and each rate set out therein approved by it. Nothing in this section shall prevent the commission from revoking its approval at any time and fixing other rates and charges for the product or commodity or service, as authorized by this title.

4791. Interchanges of passengers, property, and messages. 1. Every common carrier shall afford all reasonable, proper, and equal facilities for the prompt and efficient interchange and transfer of passengers, tonnage, and cars, loaded or empty, between the lines owned, operated, controlled, or leased by it and the lines of every other common carrier, and shall make such interchange and transfer promptly without discrimination between shippers, passengers, or carriers either as to compensation charged, service rendered, or facilities afforded. Every railroad corporation shall receive from every other railroad corporation at any point of connection, freight cars of proper standard and in proper condition, and shall haul the same either to destination if the destination be upon a line owned, operated, or controlled by such railroad corporation, or to point of transfer according to route billed, if the destination be upon the line of some other railroad corporation. Nothing in this section contained shall be construed as in anywise limiting or modifying the duty of a common carrier to establish joint rates, fares, and charges for the transportation of passengers and property over the lines owned, operated, controlled, or leased by it and the lines of other common carriers, nor as in any manner limiting or modifying the power of the commission to require the establishment of such joint rates, fares, and charges.

2. Every telephone corporation and telegraph corporation operating in this state shall receive, transmit, and deliver, without discrimination or delay, the conversations and messages of every other telephone or telegraph corporation with whose line a physical connection may have been made.

4792. False billing, fraudulent claims, prohibited. 1. No common carrier, or any officer or agent thereof, or any person acting for or employed

by it, shall, by means of known false billing, classification, weight, weighing, or report of weight, or by any other device or means, assist, suffer, or permit any corporation or person to obtain transportation for any person or property between points within this state at less than the rates and fares then established and in force as shown by the schedules filed and in effect at the time. No person, corporation, or any officer, agent, or employe of a corporation shall, by means of false billing, false or incorrect classification, false weight or weighing, false representation as to contents or substance of a package, or false report or statement of weight, or by any other device or means, whether with or without the consent or connivance of a common carrier or any of its officers, agents, or employes, seek to obtain or obtain such transportation for such property at less than the rates then established and in force therefor.

2. No person or corporation, or any officer, agent, or employe of a corporation, shall knowingly, directly or indirectly, by any false statement or representation as to cost or value, or the nature or extent of an injury, or by the use of any false billing, bill of lading, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, or upon any false, fictitious, or fraudulent statement or entry, obtain or attempt to obtain any allowance, rebate, or payment for damage, in connection with or growing out of the transportation of persons or property, or an agreement to transport such persons or property, whether with or without the consent or connivance of a common carrier or any of its officers, agents, or employes; nor shall any common carrier, or any officer, agent, or employe thereof, knowingly pay or offer to pay any such allowance, rebate, or claim for damage.

4793. Long and short haul as to carriers. Long and short distance as to telephone and telegraph companies. Exceptions. 1. No common carrier subject to the provisions of this title shall charge or receive any greater compensation in the aggregate for transportation of persons or of like kind of property for a shorter than for a longer distance over the same line or route, in the same direction, within this state, the shorter being included within the longer distance, or charge any greater compensation as a through rate than the aggregate of the intermediate rates; but this shall not be construed as authorizing any such common carrier to charge or receive as great a compensation for a shorter as for a longer distance or haul.

2. No telephone or telegraph corporation subject to the provisions of this title shall charge or receive any greater compensation in the aggregate for the transmission of any long distance message or conversation for a shorter than for a longer distance over the same line or route in the same direction, within this state, the shorter being included within the longer distance, or charge any greater compensation for a through service than the aggregate of the intermediate rates or tolls subject to the provisions of this title; but this shall not be construed as authorizing any such telephone or telegraph corporation to charge and receive as great a compensation for a shorter as for a longer distance.

3. Upon application to the commission, a telephone or telegraph corporation may, in special cases, after investigation, be authorized by the commission to charge less for a longer than for a shorter distance service for the transmission of messages or conversations, and the commission may from time to time prescribe the extent to which such telephone or telegraph corporation may be relieved from the operation and requirements of this section.

4794. Connections. Switches and spurs. Proviso. 1. Every railroad corporation, upon the application of any corporation or person being a shipper or receiver or contemplated shipper or receiver of freight for a connection between the railroad of such railroad corporation and any existing or contemplated private track, tracks, or railroad of such corporation or person, shall make such connection and provide such switches and tracks as may be necessary for that purpose, and deliver and receive cars thereover; *provided*, that such connection is reasonably practicable and can be installed and used

without materially increasing the hazard of the operation of the railroad with which such connection is sought, and that the business which may reasonably be expected to be received by such railroad corporation over such connection is sufficient to justify the expense of such connection to such railroad corporation.

2. Under the conditions specified in the proviso in subsection 1 hereof, every railroad corporation, upon the application of any corporation or person being a shipper or receiver or contemplated shipper or receiver of freight, shall construct upon its right of way a spur or spurs for the purpose of receiving and delivering freight thereby, and shall receive and deliver freight thereby.

4795. Public utilities to furnish information and copies of records. Proceedings of commission public. 1. Every public utility shall furnish to the commission in such form and such detail as the commission shall prescribe all tabulations, computations, and all other information required by it to carry into effect any of the provisions of this title, and shall make specific answers to all questions submitted by the commission.

2. Every public utility receiving from the commission any blanks with directions to fill the same shall cause the same to be properly filled out so as to answer fully and correctly each question propounded therein; in case it is unable to answer any question, it shall give a good and sufficient reason for such failure.

3. Whenever required by the commission, every public utility shall deliver to the commission copies of any or all maps, profiles, contracts, agreements, franchises, reports, books, accounts, papers, and records in its possession or in any way relating to its property or affecting its business, and also a complete inventory of all its property in such form as the commission may direct.

4. Hearings or proceedings of the commission or of any commissioner shall be open to the public, and all records of all hearings or proceedings or orders, rules or investigations by the commission or any commissioner shall be at all times open to the public; *provided,* that any information furnished the commission by a public utility or by any officer, agent, or employe of any public utility may be withheld from the public whenever and during such time as the commission may determine that it is for the best interest of the public to withhold such information. Any officer or employe of the commission who, in violation of the provisions of this subsection, divulges any such information, shall be guilty of a misdemeanor.

4796. Yearly and monthly reports of earnings and expenses. Every public utility shall annually furnish to the commission at such time and in such form as the commission may require a report in which the public utility shall specifically answer all questions propounded by the commission upon or concerning which the commission may desire information. The commission shall have authority to require any public utility to file monthly reports of earnings and expenses, and to file periodical or special, or both periodical and special, reports concerning any matter about which the commission is authorized by this title or any other act to inquire or to keep itself informed, or which it is required to enforce. All reports shall be under oath when required by the commission.

4797. Public utilities shall obey orders specified in this title. Every public utility shall obey and comply with each and every requirement of every order, decision, direction, rule, or regulation made or prescribed by the commission in the matters herein specified, or any other matter in any way relating to or affecting its business as a public utility, and shall do everything necessary or proper in order to secure compliance with and observance of every such order, decision, direction, rule or regulation by all of its officers, agents, and employes.

CHAPTER 4.

AUTHORITY OF COMMISSION OVER PUBLIC UTILITIES.

4798. Jurisdiction. The commission is hereby vested with power and jurisdiction to supervise and regulate every public utility in this state, as defined in this title, and to supervise all of the business of every such public utility in this state, and to do all things, whether herein specifically designated, or in addition thereto, which are necessary or convenient in the exercise of such power and jurisdiction.

4799. Investigations by commission. Whenever the commission believes that in order to secure a compliance with the provisions of this title, or with the orders of the commission, or otherwise in the interest of the public, an investigation should be made of any act or omission to act, or of anything accomplished or proposed, or of any schedule, classification, rate, price, charge, fare, toll, rental, rule, regulation, service, facility of any public utility, it shall investigate the same upon its own motion, and may fix a time and place for a hearing thereof, with notice to the public utility concerning which such investigation shall be made, and upon such hearing shall make such findings and orders as shall be just and reasonable with respect to any such matter.

4800. Commission may make classification and fix rates. 1. Whenever the commission shall find after hearing that the rates, fares, tolls, rentals, charges, or classifications, or any of them, demanded, observed, charged, or collected by any public utility for any service or product or commodity, or in connection therewith, including the rates or fares for excursion or commutation tickets, or that the rules, regulations practices, or contracts, or any of them, affecting such rates, fares, tolls, rentals, charges, or classifications, or any of them, are unjust, unreasonable, discriminatory, or preferential, or in anywise in violation of any provisions of law, or that such rates, fares, tolls, rentals, charges, or classifications are insufficient, the commission shall determine the just, reasonable, or sufficient rates, fares, tolls, rentals, charges, classifications, rules, regulations, practices, or contracts to be thereafter observed and in force, and shall fix the same by order as hereinafter provided.

2. The commission shall have power to investigate a single rate, fare, toll, rental, charge, classification, rule, regulation, contract, or practice, or any number thereof, or the entire schedule or schedules of rates, fares, tolls, rentals, charges, classifications, rules, regulations, contracts, and practices, or any number thereof, of any public utility, and to establish, after hearing, new rates, fares, tolls, rentals, charges, classifications, rules, regulations, contracts, or practices, or schedule or schedules, in lieu thereof.

4801. Through routes. Joint rates and division of charges. Whenever the commission shall find, after hearing, that the rates, fares, or charges in force over two or more common carriers between any two points in this state are unjust, unreasonable, or excessive, or that no satisfactory through route or joint rate, fare, or charge exists between such points, or that the public convenience and necessity demand the establishment of a through route and joint rate, fare, or charge between such points, the commission shall order such common carriers to establish such through route, and may establish and fix a joint rate, fare, or charge which will be fair, just, reasonable, and sufficient to be allowed, charged, enforced, demanded, and collected in the future, and the terms and conditions under which such through route shall be operated. The commission may order that freight moving between such points shall be carried by the different common carriers, parties to such through route and joint rate, without being transferred from the originating cars. In case the common carriers do not agree between themselves upon the division of the joint rates, fares, or charges established by the commission over such through routes, the commission shall, after hearing, by supplementary order, establish such division. The commission shall have the

power to establish and fix through routes and joint rates, fares, or charges over common carriers and stage or auto stage lines, and to fix the division of such joint rates, fares, or charges.

4802. Interstate charges and relief. The commission shall have the power, and it shall be the duty of the commission to investigate all existing or proposed interstate rates, fares, tolls, charges, and classifications, and all rules and practices in relation thereto for or in relation to the transportation of persons or property or the transmission of messages or conversations, where any act in relation thereto shall take place within this state; and when the same are, in the opinion of the commission, excessive or discriminatory, or in violation of the act of congress entitled "an act to regulate commerce," approved February 4, 1887, and the acts amendatory thereof and supplementary thereto, or of any other act of congress, or in conflict with the rulings, orders, or regulations of the interstate commerce commission, the commission shall apply by petition or otherwise to the interstate commerce commission or to any court of competent jurisdiction for relief.

4803. Commission may regulate practices, facilities, and methods. Whenever the commission shall find, after hearing, that the rules, regulations, practices, equipment, appliances, facilities, or service of any public utility, or the methods of manufacture, distribution, transmission, storage, or supply employed by it, are unjust, unreasonable, unsafe, improper, inadequate, or insufficient, the commission shall determine the just, reasonable, safe, proper, adequate, or sufficient rules, regulations, practices, equipment, appliances, facilities, service, or methods to be observed, furnished, constructed, enforced, or employed, and shall fix the same by its order, rule, or regulation. The commission shall prescribe, after hearing, rules and regulations for the performance of any service or the furnishing of any commodity of the character furnished or supplied by any public utility, and on proper demand and tender of rates such public utility shall furnish such commodity or render such service within the time and upon the conditions provided in such rules.

The commission may authorize an increase of fares for a municipal utility, even though the utility is acting under a franchise which fixes the rates; and it may nullify a franchise provision providing for the sale of commutation tickets.

Salt Lake City v. Utah L. & Tr. Co., 51 U. —; 173 P. 556.

4804. Extension of improvements and adjustment of costs. Whenever the commission shall find that additions, extensions, repairs, or improvements to or changes in the existing plant, equipment, apparatus, facilities, or other physical property of any public utility or of any two or more public utilities ought reasonably to be made, or that a new structure or structures should be erected to promote the security or convenience of its employes or the public, or in any other way to secure adequate service or facilities, the commission shall make and serve an order directing that such additions, extensions, repairs, improvements, or changes be made or such structure or structures be erected in the manner and within the time specified in said order. If any additions, extensions, repairs, improvements, or changes, or any new structure or structures which the commission has ordered to be erected, require joint action by two or more public utilities, the commission shall notify the said public utilities that such additions, extensions, repairs, improvements, or changes, or new structure or structures have been ordered, and that the same shall be made at their joint cost, whereupon the said public utilities shall have such reasonable time as the commission may grant within which to agree upon the portion or division of cost of such additions, extensions, repairs, improvements, or changes, or new structure or structures, which each shall bear. If at the expiration of such time such public utilities shall fail to file with the commission a statement that an agreement has been made for a division or apportionment of the cost or expense of such additions, extensions, repairs, improvements, or changes, or new structure or structures, the commission shall have authority, after further hearing, to make an order fixing the proportion of such cost or expense to be borne by each public utility and the manner in which the same shall be paid or secured.

4805. Number, time, and stopping places of trains. Whenever the commission shall find, after hearing, that any railroad corporation or street railroad corporation does not run a sufficient number of trains or cars, or possess or operate sufficient motive power, reasonably to accommodate the traffic, passenger or freight, transported by or offered for transportation to it, or does not run its trains or cars with sufficient frequency, or at a reasonable or proper time, having regard to safety, or does not stop the same at proper places, or does not run any train or trains, car or cars, upon a reasonable time schedule for the run, the commission shall have power to make an order directing any such railroad corporation or street railroad corporation to increase the number of its trains or of its cars or its motive power, or to change the time for starting its trains or cars, or to change the time schedule for the run of any train or car, or to change the stopping place or places thereof, or to make any other order that the commission may determine to be reasonably necessary to accommodate and transport the traffic, passenger or freight, transported or offered for transportation.

4806. Physical railroad connections. Adjustment of expense. Whenever the commission shall find that the public convenience and necessity would be subserved by having connections made between the tracks of any two or more railroad or street railroad corporations, so that cars may readily be transferred from one to the other, at any of the points hereinafter in this section specified, the commission may order any two or more such corporations owning, controlling, operating, or managing tracks of the same gauge, to make physical connections at any and all crossings, and at all points where a railroad or street railroad shall begin or terminate or run near to any other railroad or street railroad. After the necessary franchise or permit has been secured from the county, city, or town, the commission may likewise order such physical connection within such county, city, or town, between two or more railroads which enter the limits of the same. The commission shall by order direct whether the expense of the connections referred to in this section shall be borne jointly or otherwise.

4807. Spurs and switching service. 1. Whenever the commission shall find that application has been made by any corporation or person to a railroad corporation for a connection or pur as provided in § 4794, and that the railroad corporation has refused to provide such connection or spur, and that the applicant is entitled to have the same provided for him under the said § 4794, the commission shall make an order requiring the providing of such connection or spur and the maintenance and use of the same upon reasonable terms which the commission shall have the power to prescribe. Whenever such connection or spur has been so provided, any corporation or person shall be entitled to connect with the private track, tracks, or railroad thereby connected with the railroad of the railroad corporation, and to use the same or to use the spur so provided upon payment to the party or parties incurring the primary expense of such private track, tracks, or railroad, or the connection therewith or of such spur, of a reasonable proportion of the cost thereof to be determined by the commission after notice to the interested parties and a hearing thereon; *provided,* that such connection and use can be made without unreasonable interference with the rights of the party or parties incurring such primary expense.

2. The commission shall likewise have the power to require any railroad corporation to switch to private spurs and industrial tracks, upon its own railroad, the cars of a connecting railroad corporation, and to prescribe the terms and compensation for such service.

4808. Telephone and telegraph connections. Joint rates and division. Whenever the commission shall find, after hearing, that a physical connection can reasonably be made between the lines of two or more telephone corporations, or two or more telegraph corporations, whose lines can be made to form a continuous line of communication by the construction and maintenance of suitable connections for the transfer of messages or conversations,

and that public convenience and necessity will be subserved thereby, or shall find that two or more telegraph or telephone corporations have failed to establish joint rates, tolls, or charges for service by or over their said lines, and that joint rates, tolls, or charges ought to be established, the commission may, by its order, require that such connection be made, except where the purpose of such connection is primarily to secure the transmission of local messages or conversations between points within the same city or town, and that conversations be transmitted and messages transferred over such connections under such rules and regulations as the commission may establish and prescribe, through lines and joint rates, tolls, and charges to be made, and to be used, observed, and in force in the future. If such telephone or telegraph corporations do not agree upon the division between themselves of the cost of such physical connection or connections, or the division of the joint rates, tolls, or charges established by the commission over such through lines, the commission shall have authority, after further hearing, to establish such division by supplemental order.

4809. Use by one public utility of the property of another. Costs adjusted. Whenever the commission shall find that public convenience and necessity require the use by one public utility of the conduits, subways, tracks, wires, poles, pipes, or other equipment, or any part thereof, on, over, or under any street or highway, and belonging to another public utility, and that such use will not result in irreparable injury to the owner or other users of such conduits, subways, tracks, wires, poles, pipes, or other equipment, or in any substantial detriment to the service, and that such public utilities have failed to agree upon such use or the terms and conditions or compensation for the same, the commission may by order direct that such use be permitted, and prescribe a reasonable compensation and reasonable terms and conditions for the joint use. If such use be directed, the public utility to whom the use is permitted shall be liable to the owner or other users of such conduits, subways, tracks, wires, poles, pipes, or other equipment for such damage as may result therefrom to the property of such owner or other users thereof.

4810. Safety appliances required. The commission shall have power, by general or special orders, rules, or regulations, or otherwise, to require every public utility to construct, maintain, and operate its line, plant, system, equipment, apparatus, tracks, and premises in such manner as to promote and safeguard the health and safety of its employes, passengers, customers, and the public, and to this end to prescribe, among other things, the installation, use, maintenance, and operation of appropriate safety or other devices or appliances, including interlocking and other protective devices at grade crossings or junctions, and block or other system of signaling, to establish uniform or other standards of construction and equipment, and to require the performance of any other act which the health or safety of its employes, passengers, customers, or the public may demand.

4811. Grade crossings. Regulation. 1. No track or any railroad shall be constructed across a public road, highway, or street at grade, nor shall the track of any railroad corporation be constructed across the track of any other railroad or street railroad corporation at grade, nor shall the track of a street railroad corporation be constructed across the track of a railroad corporation at a grade, without having first secured the permission of the commission; *provided,* that this subsection shall not apply to the replacement of lawfully existing tracks. The commission shall have the right to refuse its permission or to grant it upon such terms and conditions as it may prescribe.

2. The commission shall have the exclusive power to determine and prescribe the manner, including the particular point of crossing, and the terms of installation, operation, maintenance, use, and protection of each crossing of one railroad by another railroad or street railroad, and of a street railroad by a railroad, and of each crossing of a public road or highway by a railroad or street railroad, and of a street by a railroad or vice versa, and to alter or abolish any such crossing, and to require, where in its judgment it would be

practicable, a separation of grades at any such crossing heretofore or hereafter established, and to prescribe the terms upon which such separation shall be made and the proportions in which the expense of the alteration or abolition of such crossings or the separation of such grades shall be divided between the railroad or street railroad corporations affected, or between such corporations and the state, county, municipality, or other public authority in interest.

3. Whenever the commission shall find that public convenience and necessity demands the establishment, creation, or construction of a crossing of a street or highway over, under, or upon the tracks or lines of any public utility, the commission may by order, decision, rule, or decree require the establishment, construction, or creation of such crossing, and said crossing shall thereupon become a public highway and crossing.

This act confers on the commission the exclusive power to prescribe the manner and terms upon which railroad tracks may be constructed, maintained and operated across a public road, highway or street, and the commission must take jurisdiction of an application of a railroad company to cross highways, even though railroad companies have made no application to the local authorities for franchise to cross such highway.

D. & R. G. Co. v. Public Utilities Commission, 51 U. —; 172 P. 479.

4812. Investigation of accidents. The commission shall investigate the cause of all accidents occurring within this state upon the property of any public utility, or directly or indirectly arising from or connected with its maintenance or operation, resulting in loss of life or injury to persons or property, and requiring, in the judgment of the commission, investigation by it, and shall have the power to make such order or recommendation with respect thereto as, in its judgment, may seem just and reasonable; *provided,* that neither the order or recommendation of the commission nor any accident report filed with the commission shall be admitted as evidence in any action for damage based on or arising out of the loss of life or injury to person or property in this section referred to. Every public utility is hereby required to file with the commission, under such rules and regulations as the commission may prescribe, a report of each accident so occurring of such kinds or classes as the commission may from time to time designate.

4813. Regulation of car supply. Demurrage. Service by express, telephone, and telegraph lines. Baggage. 1. The commission shall have power to provide by proper rules and regulations the time within which all railroad corporations shall furnish, after demand therefor, all cars, equipment, and facilities necessary for the handling of freight in carload and less than carload lots, the time within which consignors or persons ordering cars shall load the same, and the time within which consignees or persons to whom freight may be consigned shall unload and discharge the same and receive freight from the freight rooms, and to provide penalties to be paid for failure on the part of the railroad corporation, consignors, and consignees to conform to such rule. And the commission shall have power to limit the number of cars that shall constitute a train operated on any railroad in this state. Charges for demurrage shall be uniform so that the same penalty shall be paid by both shipper or consignee and railroad corporation for an equal number of cars for each day for which demurrage is charged.

2. The commission shall also have power to provide the time within which express packages shall be received, gathered, transported, and delivered at destination, and the limits within which express packages shall be gathered and distributed, and telegraph and telephone messages delivered without extra charge.

3. The commission shall also have power to provide the time within which baggage shall be received, transported, delivered, and stored. The commission shall have power to enforce reasonable regulations for the weighing of cars and freight offered for shipment over any line of railroad, and to test the weights made by any railroad corporation and scales used in weighing freight on cars.

4814. Electric, gas, and water companies. Examination and tests. 1. The commission shall have power, after hearing, to ascertain and fix just and

reasonable standards, classifications, regulations, practices, measurements, or service to be furnished, imposed, observed, and followed by all electrical, gas, and water corporations; to ascertain and fix adequate and serviceable standards for the measurement of quantity, quality, pressure, initial voltage, or other condition pertaining to the supply of the product, commodity, or service furnished or rendered by any such public utility; to prescribe reasonable regulations for the examination and testing of such products, commodity, or service, and for the measurement thereof; to establish reasonable rules, regulations, specifications, and standards to secure the accuracy of all meters and appliances for measurements; and to provide for the examination and testing of any and all appliances used for the measurement of any product, commodity, or service of any such public utility.

2. The commissioners and their officers and employes shall have power to enter upon any premises occupied by any public utility, for the purpose of making the examinations and tests and exercising any of the other powers provided for in this title, and to set up and use on such premises any apparatus and appliances necessary therefor. The agents and employes of such public utility shall have the right to be present at the making of such examinations and tests.

3. Any consumer or user of any product, commodity, or service of a public utility may have any appliance used in the measurement thereof tested, upon paying the fees fixed by the commission. The commission shall establish and fix reasonable fees to be paid for testing such appliances on the request of the consumer or user, the fee to be paid by the consumer or user at the time of his request, but to be paid by the public utility and repaid to the consumer or user if the appliance is found defective or incorrect to the disadvantage of the consumer or user, under such rules and regulations as may be prescribed by the commission.

4815. Valuation of public utilities. The commission shall have power to ascertain the value of the property of every public utility in this state and every fact which, in its judgment, may or does have any bearing on such value. The commission shall have power to make revaluations from time to time, and to ascertain all new construction, extensions, and additions to the property of every public utility.

4816. Keeping accounts not inconsistent with interstate commerce act. Forms prescribed. The commission shall have power to establish a system of accounts to be kept by the public utilities subject to its jurisdiction, or to classify said public utilities, and to establish a system of accounts for each class, and to prescribe the manner in which such accounts shall be kept. It may also, in its discretion, prescribe the forms of accounts, records, and memoranda to be kept by such public utilities, including the accounts, records, and memoranda of the movement of traffic as well as the receipts and expenditures of moneys, and any other forms, records, and memoranda which, in the judgment of the commission, may be necessary to carry out any of the provisions of this title. The system of accounts established by the commission and the forms of accounts, records, and memoranda prescribed by it shall not be inconsistent in the case of corporations subject to the provisions of the act of congress entitled, "an act to regulate commerce," approved February 4, 1887, and the acts amendatory thereof and supplementary thereto, with the system and forms from time to time established for such corporations by the interstate commerce commission, but nothing herein contained shall affect the power of the commission to prescribe forms of accounts, records, and memoranda covering information in addition to that required by the interstate commerce commission. The commission may, after hearing had upon its own motion or upon complaint, prescribe by order the accounts in which particular outlays and receipts shall be entered, charged, or credited. When the commission shall have prescribed the forms of accounts, records, or memoranda to be kept by any public utility corporation, for any of its business, it shall thereafter be unlawful for such public utility to keep any

accounts, records, or memoranda for such business other than those so prescribed, or those prescribed by or under the authority of any other state, or of the United States, excepting such accounts, records, or memoranda as shall be explanatory of and supplemental to the accounts, records, or memoranda prescribed by the commission.

4817. Depreciation fund. The commission shall have power to require any or all public utilities to carry a proper and adequate depreciation account in accordance with such rules, regulations, and forms of account as the commission may prescribe. The commission may, from time to time, ascertain and determine and by order fix the proper and adequate rates of depreciation of the several classes of property of each public utility. Each public utility shall conform its depreciation accounts to the rates so ascertained, determined, and fixed, and shall set aside the money so provided for out of earnings and carry the same in a depreciation fund and expend such fund only for such purposes and under such rules and regulations, both as to original expenditure and subsequent replacement, as the commission may prescribe. The income upon investments of money in such fund shall likewise be carried in such fund.

4818. Restrictions on non-operating utilities. Exercise of rights requested. Procedure. 1. No street railroad corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, heat corporation, automobile corporation, or water corporation shall henceforth establish or begin the construction or operation of a street railroad, or of a line, route, plant, or system, or of any extension of such street railroad, or line, route, plant, or system, without having first obtained from the commission a certificate that the present or future public convenience and necessity require or will require such construction; *provided,* that this section shall not be construed to require any such corporation to secure such certificate for an extension within any city or town within which it shall have heretofore lawfully commenced operations, or for an extension into territory either within or without a city or town contiguous to its street railroad, or line, plant, or system, and not theretofore served by a public utility of like character, or for an extension within or to territory already served by it, necessary in the ordinary course of its business; and *provided, further,* that if any public utility, in constructing or extending its line, plant, or system, shall interfere or be about to interfere with the operation of the line, plant, or system of any other public utility already constructed, the commission, on complaint of the public utility claiming to be injuriously affected, may, after hearing, make such order and prescribe such terms and conditions for the location of the lines, plants, or systems affected as to it may seem just and reasonable.

2. No public utility of a class specified in subsection 1 hereof shall henceforth exercise any right or privilege under any franchise or permit hereafter granted, or under any franchise or permit heretofore granted but not heretofore actually exercised, or the exercise of which has been suspended for more than one year, without first having obtained from the commission a certificate that public convenience and necessity require the exercise of such right or privilege; *provided,* that when the commission shall find, after hearing, that a public utility has heretofore begun actual construction work and is prosecuting such work in good faith, uninterruptedly, and with reasonable diligence in proportion to the magnitude of the undertaking, under any franchise or permit heretofore granted, but not heretofore actually exercised, such public utility may proceed, under such rules and regulations as the commission may prescribe, to the completion of such work, and may, after such completion, exercise such right or privilege; and *provided, further,* that this section shall not be construed to validate any right or privilege now invalid or hereafter becoming invalid under any law of this state.

3. Every applicant for a certificate shall file in the office of the commission such evidence as shall be required by the commission to show that such applicant has received the required consent, franchise, or permit of the proper

county, city, municipal, or other public authority. The commission shall have power, after hearing, to issue said certificate as prayed for, or to refuse to issue the same, or to issue it for the construction of a portion only of the contemplated street railroad, line, plant, or system, or extension thereof, or for the partial exercise only of said right or privilege, and may attach to the exercise of the rights granted by said certificate such terms and conditions as in its judgment the public convenience and necessity may require. If a public utility desires to exercise a right or privilege under a franchise or permit which it contemplates securing, but which has not yet been granted to it, such public utility may apply to the commission for an order preliminary to the issue of the certificate. The commission may thereupon make an order declaring that it will thereafter, upon application, under such rules and regulations as it may prescribe, issue the desired certificate, upon such terms and conditions as it may designate after the public utility has obtained the contemplated franchise or permit. Upon presentation to the commission of evidence satisfactory to it that such franchise or permit has been secured by such public utility, the commission shall thereupon issue such certificate.

4819. Proposed contracts to be submitted to commission. Every public utility when ordered by the commission shall, before entering into any contract for construction work, or for the purchase of new facilities, or with respect to any other expenditures, submit such proposed contract, purchase, or other expenditure to the commission for its approval; and if the commission finds that any such proposed contract, purchase, or other expenditure diverts, directly or indirectly, the funds of such public utility to any of its officers or stockholders or to any corporation in which they are interested, or is not proposed in good faith for the economic benefit of such public utility in any other respect, then the commission shall withhold its approval of any such contract, purchase, or other expenditure, and may order other contracts, purchases, or expenditures in lieu thereof for the legitimate purposes and economic welfare of such public utility.

CHAPTER 5.

PROCEDURE.

4820. Rules of procedure. Informality does not invalidate. All hearings, investigations, and proceedings shall be governed by this title and by rules of practice and procedure to be adopted by the commission, and in the conduct thereof the technical rules of evidence need not be applied. No informality in any hearing, investigation, or proceeding, or in the manner of taking testimony, shall invalidate any order, decision, rule, or regulation made, approved, or confirmed by the commission.

4821. Process. Service. The commission and each commissioner shall have power to issue subpœnas, summons, writs of attachment, warrants of commitment, and all necessary process in proceedings for contempt, in the like manner and to the same extent as courts of record. The process issued by the commission or any commissioner shall extend to all parts of the state, and may be served by any person authorized to serve process of courts of record, or by any person designated for that purpose by the commission or a commissioner. The person executing any such process shall receive such compensation as may be allowed by the commission, not to exceed the fees now prescribed by law for similar services, and such fees shall be paid in the same manner as provided herein for payment of the fees of witnesses.

4822. Oaths. Witness fees. Power of district court. Depositions. Immunity to witness. 1. The commission and each commissioner shall have power to administer oaths, certify to all official acts, and to issue subpœnas for the attendance of witnesses and the production of papers, waybills, books, accounts, documents, and testimony in any inquiry, investigation, hearing, or

proceeding in any part of the state. Each witness who shall appear, by order of the commission or a commissioner, shall receive for his attendance the same fees and mileage allowed by law to a witness in civil cases, which amount shall be paid by the party at whose request such witness is subpœnaed. When any witness who has not been required to attend at the request of any party shall be subpœnaed by the commission, his fees and mileage shall be paid from the funds appropriated for the use of the commission in the same manner as other expenses of the commission are paid. Any witness subpœnaed, except one whose fees and mileage may be paid from the funds of the commission, may, at the time of service, demand the fee to which he is entitled for travel to and from the place at which he is required to appear, and one day's attendance. If such witness demands such fees at the time of service, and they are not at that time paid or tendered, he shall not be required to attend before the commission or commissioner, as directed in the subpœna. All fees or mileage to which any witness is entitled under the provisions of this section may be collected by action therefor instituted by the person to whom such fees are payable. No witness furnished with free transportation shall receive mileage for the distance he may have traveled on such free transportation.

2. The district court in and for the county in which any inquiry, investigation, hearing, or proceeding may be held by the commission or any commissioner shall have the power to compel the attendance of witnesses, the giving of testimony, and the production of papers, including waybills, books, accounts, and documents, as required by any subpœna issued by the commission or any commissioner. The commission or the commissioner before whom the testimony is to be given or produced, in case of the refusal of any witness to attend or testify or produce any papers required by such subpœna, may report to the district court in and for the county in which the proceeding is pending, by petition, setting forth that due notice has been given of the time and place of attendance of said witness, or the production of said papers, and that the witness has been summoned in the manner prescribed in this title, and that the witness has failed and refused to attend or produce the papers required by the subpœna, before the commission or commissioner, in the cause or proceeding named in the notice and subpœna, or has refused to answer questions propounded to him in the course of such proceeding, and ask an order of said court compelling the witness to attend and testify or produce said papers before the commission. The court, upon the petition of the commission or such commissioner, shall enter an order directing the witness to appear before the court at a time and place to be fixed by the court in such order, the time to be not more than ten days from the date of the order, and then and there show cause why he has not attended and testified or produced said papers before the commission. A copy of said order shall be served upon said witness. If it shall appear to the court that said subpœna was regularly issued by the commission or commissioner, the court shall thereupon enter an order that said witness appear before the commission or said commissioner at the time and place fixed in said order, and testify or produce the required papers, and upon failure to obey said order said witness shall be dealt with as for contempt of court. The remedy provided in this subsection is cumulative, and shall not be construed to impair or interfere with the power of the commission or a commissioner to enforce the attendance of witnesses and the production of papers, and to punish for contempt in the same manner and to the same extent as courts of record.

3. The commission or any commissioner or any party may, in any investigation or hearing before the commission, cause the deposition of witnesses residing within or without the state to be taken in the manner prescribed by law for like depositions in civil actions in the district courts of this state, and to that end may compel the attendance of witnesses and the production of books, waybills, documents, papers, and accounts.

4. No person shall be excused from testifying or from producing any

book, waybill, document, paper, or account in any investigatoin or inquiry by or hearing before the commission or any commissioner, when ordered to do so, upon the ground that the testimony or evidence, book, waybill, document, paper, or account required of him may tend to incriminate him or subject him to penalty or forfeiture, but no person shall be prosecuted, punished, or subjected to penalty or forfeiture for or on account of any act, transaction, matter, or thing concerning which he shall, under oath, have testified or produced documentary evidence; *provided,* that no person so testifying shall be exempt from prosecution or punishment for any perjury committed by him in his testimony. Nothing herein contained shall be construed as in any manner giving to any public utility immunity of any kind.

4823. Copies of files admissible in evidence. Written orders of record to serve as notice. 1. Copies of all official documents and orders filed or deposited according to law in the office of the commission, certified by a commissioner or by the secretary or the assistant secretary under the official seal of the commission to be true copies of the originals, shall be evidence in like manner as the originals.

2. Every order, authorization, or certificate issued or approved by the commission under any provision of §§ 4806, 4807, 4808, 4809, 4811, 4818, shall be in writing and entered on the records of the commission. Any such order, authorization, or certificate, or a copy thereof, or a copy of the record of any such order, authorization, or certificate, certified by a commissioner or by the secretary or the assistant secretary under the official seal of the commission to be a true copy of the original order, authorization, certificate, or entry, may be recorded in the office of the recorder of any county in which is located the principal place of business of any public utility affected thereby, or in which is situated any property of any such public utility, and such record shall impart notice of its provisions to all persons. A certificate under the seal of the commission that any such order, authorization, or certificate has not been modified, stayed, suspended or revoked may also be recorded in the same offices, in the same manner and with like effect.

4824. Fees for copies and certificates. The commission shall charge and collect the following fees: For copies of papers and records not required to be certified or otherwise authenticated by the commission, 15 cents for each folio; for certified copies of official documents and orders filed in its office, 20 cents for each folio, and $2 for every certificate under seal affixed thereto; for certifying a copy of any report made by a public utility, $2; for each certified copy of the annual report of the commission, $3; for certified copies of evidence and proceedings before the commission, 15 cents for each folio. No fees shall be charged or collected for copies of papers, records, or official documents furnished to public officers for use in their official capacity, or for the annual reports of the commission in the ordinary course of distribution, but the commission may fix reasonable charges for publications issued under its authority. All fees charged and collected under this section shall be paid, at least once each week, accompanied by a detailed statement thereof, into the treasury of the state to the credit of the funds appropriated for the use of the commission. All expenses of the commission, including salaries of the commissioners, the secretary, and the compensation of all other persons employed by the commission, and all expenses of every kind incurred in the administration of this title, shall be paid from the funds appropriated for the use of the commission, after being approved by the commission upon claims therefor to be duly audited by the proper authority.

4825. Books and accounts of public utility subject to inspection. The commission, each commissioner, and each officer and person employed by the commission shall have the right, at any and all times, to inspect the accounts, books, papers, and documents of any public utility, and the commission, each commissioner, and any officer of the commission or any employe authorized to administer oaths shall have power to examine under oath any officer, agent, or employe of such public utility in relation to the business and affairs of said

public utility; *provided,* that any person other than a commissioner or an officer of the commission demanding such inspection shall produce under the hand and seal of the commission his authority to make such inspection; and *provided, further,* that written record of the testimony or statement so given under oath shall be made and filed with the commission.

4826. Office, books, and accounts to be kept within state, subject to be produced by commission. 1. Each public utility shall have an office in a county of this state in which its property or some portion thereof is located, and shall keep in said office all such books, accounts, papers, and records as shall be required by the commission to be kept within this state. No books, accounts, papers, or records required by the commission to be kept within this state shall be at any time removed from the state except upon such conditions as may be prescribed by the commission.

2. The commission may require, by order served on any public utility in the manner provided herein for the service of orders, the production within this state at such time and place as it may designate of any books, accounts, papers, or records kept by said public utility in any office or place without this state, or at its option, verified copies in lieu thereof, so that an examination thereof may be made by the commission or under its direction.

4827. Complaints, by whom made. Procedure. Service. Hearings. Complaint may be made by the commission of its own motion or by any corporation or person, chamber of commerce, board of trade, or any civic, commercial, mercantile, traffic, agricultural, or manufacturing association or organization, or any body politic or municipal corporation, by petition or complaint in writing, setting forth any act or thing done or omitted to be done by any public utility, including any rule, regulation, or charge heretofore established or fixed by or for any public utility, in violation, or claimed to be in violation, of any provision of law or of any order or rule of the commission; *provided,* that no complaint shall be entertained by the commission, except upon its own motion, as to the reasonableness of any rates or charges of any gas, electrical, water, or telephone corporation, unless the same be signed by the mayor or the president or chairman of the board of trustees or a majority of the council, commission, or other legislative body of the city and county, or city or town, if any, within which the alleged violation occurred, or not less than twenty-five consumers or purchasers, or prospective consumers or purchasers, of such gas, electricity, water, or telephone service. All matters upon which complaint may be founded may be joined in one hearing, and no motion shall be entertained against a complaint for misjoinder of causes of action or grievances or misjoinder or nonjoinder of parties; and in any review by the courts of orders or decisions of the commission the same rule shall apply with regard to the joinder of causes and parties as herein provided. The commission shall not be required to dismiss any complaint because of the absence of direct damage to the complainant. Upon the filing of a complaint, the commission shall cause a copy thereof to be served upon the corporation or person complained of. Service in all hearings, investigations, and proceedings pending before the commission may be made upon any person upon whom a summons may be served in accordance with the provisions of the code of civil procedure of this state, and may be made personally, or by mailing in a sealed envelope, registered, with postage prepaid. No irregularity regarding service shall be a ground of excuse or defense by any public utility. The commission shall fix the time when and place where a hearing will be had upon the complaint and shall serve notice thereof, not less than ten days before the time set for such hearing, unless the commission shall find that public necessity requires that such hearing be held at an earlier date.

4828. Orders on hearing. Service. Record for supreme court. At the time fixed for any hearing before the commission or a commissioner, or the time to which the same may have been continued, the complainant and the corporation or person complained of, and such corporations or persons as the commission may allow to intervene, shall be entitled to be heard and to in-

troduce evidence. The commission shall issue process to enforce the attendance of all necessary witnesses. After the conclusion of the hearing, the commission shall make and file its order, containing its decision. A copy of such order, certified under the seal of the commission, shall be served upon the corporation or person complained of, or his or its attorney. Said order shall, of its own force, take effect and become operative twenty days after the service thereof, except as otherwise provided in such order, and shall continue in force either for a period which may be designated therein or until changed or abrogated by the commission. If any order cannot, in the judgment of the commission, be complied with within twenty days, the commission may grant and prescribe such additional time as in its judgment is reasonably necessary to comply with the order, and may, on application and for good cause shown, extend the time for compliance fixed in its order. A full and complete record of all proceedings had before the commission or any commissioner on any formal hearing had, and all testimony, shall be taken down by a reporter appointed by the commission, and the parties shall be entitled to be heard in person or by attorney. In case of an action to review any order or decision of the commission, a transcript of such testimony, together with all exhibits or copies thereof introduced, and of the pleadings, record, and proceedings in the cause, shall constitute the record of the commission; *provided,* that on review of an order or decision of the commission, the petitioner and the commission may stipulate that a certain question or questions alone and a specified portion only of the evidence shall be certified to the supreme court for its judgment, whereupon such stipulation and the question or questions and the evidence therein specified shall constitute the record on review.

The findings and the opinion filed by the Commission are to be considered together and if together they are sufficient, the objection that the findings are not sufficient is not tenable.
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4829. Complaints by public utilities. Hearings. Any public utility shall have the right to complain to the commission on any of the grounds upon which complaints are allowed to be filed by other parties, including the fairness, reasonableness, or adequateness of any schedule, classification, rate, price, charge, fare, toll, rental, rule, regulation, service, or facility of such public utility, and the same procedure shall be adopted and followed as in other cases except that the complaint may be heard ex parte by the commission or may be served upon any parties designated by the commission.

4830. Charges raised only on showing. Hearings. Suspension of rates. Period when effective. 1. No public utility shall raise any rate, fare, toll, rental, or charge or so alter any classification, contract, practice, rule, or regulation as to result in an increase in any rate, fare, toll, rental, or charge, under any circumstances whatsoever, except upon a showing before the commission and a finding by the commission that such increase is justified.

2. Whenever there shall be filed with the commission any schedule stating an individual or joint rate, fare, toll, rental, charge, classification, contract, practice, rule, or regulation increasing or resulting in an increase in any rate, fare, toll, rental, or charge, the commission shall have power, and it is hereby given authority either upon complaint or upon its own initiative without complaint at once and if it so orders without answer or other formal pleadings by the interested public utility or utilities, but upon reasonable notice, to enter upon a hearing concerning the propriety of such rate, fare, toll, rental, charge, classification, contract, practice, rule, or regulation, and, pending the hearing and the decision thereon, such rate, fare, toll, rental, charge, classification, contract, practice, rule, or regulation shall not go into effect; *provided,* that the period of suspension of such rate, fare, toll, rental, charge, classification, contract, practice, rule, or regulation shall not extend beyond 120 days beyond the time when such rate, fare, toll, rental, charge, classification, contract, practice, rule, or regulation would otherwise go into

effect unless the commission, in its discretion, extends the period of suspension for a further period not exceeding six months. On such hearing the commission shall establish the rates, fares, tolls, rentals, charges, classifications, contracts, practices, rules, or regulations proposed, in whole or in part or others in lieu thereof, which it shall find to be just and reasonable. All such rates, fares, tolls, rentals, charges, classifications, contracts, practices, rules, or regulations not so suspended shall, on the expiration of thirty days from the time of filing the same with the commission, or of such lesser time as the commission may grant, go into effect and be the established and effective rates, fares, tolls, rentals, charges, classifications, contracts, practices, rules, and regulations, subject to the power of the commission, after a hearing had on its own motion or upon complaint as herein provided, to alter or modify the same.

4831. Orders rescinded or amended. The commission may at any time, upon notice to the public utility affected, and after opportunity to be heard as provided in the case of complaints, rescind, alter, or amend any order or decision made by it. Any order rescinding, altering, or amending a prior order or decision shall, when served upon the public utility affected, have the same effect as is herein provided for original orders or decisions.

4832. Final orders not subject to collateral attack. In all collateral actions or proceedings, the orders and decisions of the commission which have become final shall be conclusive.

4833. Rehearings. Relief only by order of commission. After any order or decision has been made by the commission, any party to the action or proceeding, or any stockholder or bondholder or other party pecuniarily interested in the public utility affected, may apply for a rehearing in respect to any matters determined in said action or proceeding, and specified in the application for rehearing, and the commission may grant and hold such rehearing on said matters if, in its judgment, sufficient reason therefor be made to appear. No cause of action arising out of any order or decision of the commission shall accrue in any court to any corporation or person unless such corporation or person shall have made, before the effective date of said order or decision, application to the commission for a rehearing. Such application shall set forth specifically the ground or grounds on which the applicant considers said decision or order to be unlawful. No corporation or person shall in any court urge or rely on any ground not so set forth in said application. Any application for a rehearing made ten days or more before the effective date of the order as to which a rehearing is sought shall be either granted or denied before such effective date, or the order shall stand suspended until such application is granted or denied. Any application for a rehearing made within less than ten days before the effective date of the order as to which a rehearing is sought, and not granted within twenty days, may be taken by the party making the application to be denied, unless the effective date of the order is extended for the period of pendency of the application. If any application for a rehearing be granted without a suspension of the order involved, the commission shall forthwith proceed to hear the matter with all dispatch and shall determine the same within twenty days after final submission, and if such determination is not made within said time, it may be taken by any party to the rehearing that the order involved is affirmed. An application for rehearing shall not excuse any corporation or person from complying with and obeying any order or decision, or any requirement of any order or decision of the commission theretofore made, or operate in any manner to stay or postpone the enforcement thereof, except in such cases and upon such terms as the commission may by order direct. If, after such rehearing and consideration of all the facts, including those arising since the making of the order or decision, the commission shall be of the opinion that the original order or decision or any part

thereof is in any respect unjust and unwarranted, or should be changed, the commission may abrogate, change, or modify the same. An order or decision shall have the same force and effect as an original order or decision, but shall not affect any right or the enforcement of any right arising from or by virtue of the original order or decision unless so ordered by the commission.

4834. No writ of review on findings of fact. Proceedings in supreme court. Writ of mandamus may issue. Within thirty days after the application for a rehearing is denied, or, if the application is granted, then within thirty days after the rendition of the decision on rehearing, the applicant may apply to the supreme court of this state for a writ of certiorari or review (hereinafter referred to as a writ of review) for the purpose of having the lawfulness of the original order or decision or the order or decision on rehearing inquired into and determined. Such writ shall be made returnable not later than thirty days after the date of the issuance thereof, and shall direct the commission to certify its record in the case to the court. On the return day, the cause shall be heard by the supreme court, unless for a good reason shown the same be continued. No new or additional evidence may be introduced in the supreme court, but the cause shall be heard on the record of the commission as certified to by it. The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the constitution of the United States or of the state of Utah. The findings and conclusions of the commissions on questions of fact shall be final and shall not be subject to review. Such questions of fact shall include ultimate facts and the findings and conclusions of the commission on reasonableness and discrimination. The commission and each party to the action or proceeding before the commission shall have the right to appear in the review proceedings. Upon the hearing the supreme court shall enter judgment either affirming or setting aside the order or decision of the commission. The provisions of the code of civil procedure of this state relating to writs of review shall, so far as applicable and not in conflict with the provisions of this title, apply to proceedings instituted in the supreme court under the provisions of this section. No court of this state (except the supreme court to the extent herein specified) shall have jurisdiction to review, reverse, correct, or annul any order or decision of the commission, or to suspend or delay the execution or operation thereof, or to enjoin, restrain, or interfere with the commission in the performance of its official duties; *provided,* that the writ of mandamus shall lie from the supreme court to the commission in all proper cases.

Writ of certiorari; §§ 7376-7386.

The court cannot review the evidence to determine whether or not it is sufficient to justify the findings of the commission, but it may determine whether or not there is any evidence to justify the decision.

Salt Lake City v. Utah L. & Tr. Co., 51 U. —; 173 P. 556.

4835. Order of commission may be suspended. Procedure. Bond. Payment of moneys pending result. Accounts of excess charges. Additional surety. Unclaimed payments forfeited. 1. The pendency of a writ of review shall not of itself stay or suspend the operation of the order or decision of the commission, but during the pendency of such writ the supreme court in its discretion may stay or suspend, in whole or in part, the operation of the commission's order or decision.

2. No order so staying or suspending an order or decision of the commission shall be made by the supreme court otherwise than upon three days' notice and after hearing, and if the order or decision of the commission is suspended, the order suspending the same shall contain a specific finding based upon evidence submitted to the court and identified by reference thereto, that great or irreparable damage would otherwise result to the petitioner and specifying the nature of the damage.

3. In case the order or decision of the commission is stayed or suspended, the order of the court shall not become effective until a suspending

bond shall first have been executed and filed with and approved by the commission (or approved, on review, by the supreme court), payable to the people of the state of Utah, and sufficient in amount and security to insure the prompt payment, by the party petitioning for the review, of all damages caused by the delay in the enforcement of the order or decision of the commission, and of all moneys which any person or corporation may be compelled to pay, pending the review proceedings, for transportation, transmission, product, commodity or service in excess of the charges fixed by the order or decision of the commission, in case said order or decision is sustained. The supreme court, in case it stays or suspends the order or decision of the commission in any matter affecting rates, fares, tolls, rentals, charges, or classifications, shall also by order direct the public utility affected to pay into court, from time to time, there to be impounded until the final decision of the case, or into some bank or trust company paying interest on deposits, under such conditions as the court may prescribe, all sums of money which it may collect from any corporation or person in excess of the sum such corporation or person would have been compelled to pay if the order or decision of the commission had not been stayed or suspended.

4. In case the supreme court stays or suspends any order or decision lowering any rate, fare, toll, rental, charge, or classification, the commission, upon the execution and approval of said suspending bond, shall forthwith require the public utility affected, under penalty of the immediate enforcement of the order or decision of the commission (pending the review and notwithstanding the suspending order), to keep such accounts, verified by oath, as may, in the judgment of the commission, suffice to show the amounts being charged or received by such public utility, pending the review, in excess of the charges allowed by the order or decision of the commission, together with the names and addresses of the corporations or persons to whom overcharges will be refundable in case the charges made by the public utility, pending the review, be not sustained by the supreme court. The court may, from time to time, require said party petitioning for a review to give additional security on or to increase the said suspending bond, whenever in the opinion of the court the same may be necessary to insure the prompt payment of said damages and said overcharges. Upon the final decision by the supreme court, all moneys which the public utility may have collected, pending the appeal in excess of those authorized by such final decision, together with interest, in case the court ordered the deposit of such moneys in a bank or trust company, shall be promptly paid to the corporations or persons entitled thereto, in such manner and through such methods of distribution as may be prescribed by the commission. If any such moneys shall not have been claimed by the corporations or persons entitled thereto within one year from the final decision of the supreme court, the commission shall cause notice to such corporations or persons to be given by publication, once a week for two successive weeks, in a newspaper of general circulation, printed and published in the city and county of Salt Lake, and such other newspaper or newspapers as may be designated by the commission, said notice to state the names of the corporations or persons entitled to such moneys and the amount due each corporation or person. All moneys not claimed within three months after the publication of said notice shall be paid by the public utility, under the direction of the commission, into the state treasury for the benefit of the general fund.

4836. Proceedings in supreme court given preference. Exceptions. All actions and proceedings under this title, and all actions or proceedings to which the commission or the state of Utah may be parties, and in which any question arises under this title, or under or concerning any order or decision of the commission, shall be preferred over all other civil causes except election causes, and shall be heard and determined in preference to all other civil business except election causes, irrespective of position on the calendar. The

same preference shall be granted upon application of the attorney of the commission in any action or proceeding in which he may be allowed to intervene.

4837. Procedure on valuations of public utilities. When record made. For the purpose of ascertaining the matters and things specified in § 4815, concerning the value of the property of public utilities, the commission may cause a hearing or hearings to be held at such time or times and place or places as the commission may designate. Before any hearing is had, the commission shall give the public utility affected thereby at least thirty days' written notice, specifying the time and place of said hearing, and such notice shall be sufficient to authorize the commission to inquire into the matters designated in this section and in said § 4815, but this provision shall not prevent the commission from making any preliminary examination or investigation into the matters herein referred to, or from inquiring into such matters in any other investigation or hearing. All public utilities affected shall be entitled to be heard and to introduce evidence at such hearing or hearings. The commission is empowered to resort to any other source of information available. The evidence introduced at such hearing shall be reduced to writing and certified under the seal of the commission. The commission shall make and file its findings of fact in writing upon all matters concerning which evidence shall have been introduced before it which in its judgment have bearing on the value of the property of the public utility affected. Such findings shall be subject to review by the supreme court of this state in the same manner and within the same time as other orders and decisions of the commission. The findings of the commission so made and filed, when properly certified under the seal of the commission, shall be admissible in evidence in any action, proceeding, or hearing before the commission or any court in which the commission, the state, or any officer, department, or institution thereof, or any county, city and county, municipality, or other body politic and the public utility affected may be interested, whether arising under the provisions of this title or otherwise, and such findings, when so introduced, shall be conclusive evidence of the facts therein stated as of the date therein stated under conditions then existing, and such facts can only be controverted by showing a subsequent change in conditions bearing upon the facts therein determined. The commission may from time to time cause further hearings and investigations to be had for the purpose of making revaluations or ascertaining the value of any betterments, improvements, additions, or extensions made by any public utility subsequent to any prior hearing or investigation, and may examine into all matters which may change, modify, or affect any finding of fact previously made, and may at such time make findings of fact supplementary to those theretofore made. Such hearings shall be had upon the same notice and be conducted in the same manner, and the findings so made shall have the same force and effect as is provided herein for such original notice, hearing, and findings; *provided,* that such findings made at such supplemental hearings or investigations shall be considered in connection with and as a part of the original findings, except in so far as such supplemental findings shall change or modify the findings made at the original hearing or investigation. Whenever, in any proceeding before the commission, any finding or order of the commission is based in whole or in part upon information or evidence acquired or received by any commissioner, or by the commission, other than at a public hearing, notice of which has been given to the public utility or utilities affected thereby, then, at the time such finding or order is made, it shall be the duty of the commissioner or of a member of the board of commissioners to state fully into the record of such proceeding the ultimate facts upon which such order is based.

4838. Reparation. Courts to enforce order. Limitations. 1. When complaint has been made to the commission concerning any rate, fare, toll, rental, or charge for any product or commodity furnished or service performed by any public utility, and the commission has found, after investiga-

tion, that the public utility has charged an excessive or discriminatory amount for such product, commodity, or service in excess of the schedules, rates, and tariffs on file with the commission, or has discriminated under said schedules against the complainant, the commission may order that the public utility make due reparation to the complainant therefor, with interest from the date of collection; *provided,* no discrimination will result from such reparation.

2. If the public utility does not comply with the order for the payment of reparation within the time specified in such order, suit may be instituted in any court of competent jurisdiction to recover the same. All complaints concerning excessive or discriminatory charges shall be filed with the commission within two years from the time the cause of action accrues, and the petition for the enforcement of any order shall be filed in the court within one year from the date of the order of the commission. The remedy in this section provided shall be cumulative and in addition to any other remedy or remedies in this title provided in case of failure of a public utility to obey an order or decision of the commission.

4839. Commission to enforce statute. Attorney-general and district attorney to aid. It is hereby made the duty of the commission to see that the provisions of the constitution and statutes of this state affecing public utilities, the enforcement of which is not specifically vested in some other officer or tribunal, are enforced and obeyed, and that violations thereof are promptly prosecuted and penalties due the state therefor recovered and collected, and to this end it may sue in the name of the state of Utah. Upon the request of the commission, it shall be the duty of the attorney-general, or the district attorney of the proper district and county, to aid in any investigation, hearing, or trial under the provisions of this title, and to institute and prosecute actions or proceedings for the enforcement of the provisions of the constitution and statutes of this state affecting public utilities and for the punishment of all violations thereof.

4840. Liability of public utility for violation of law or orders. Suits for damages. 1. In case any public utility shall do, cause to be done, or permit to be done any act, matter, or thing prohibited, forbidden, or declared to be unlawful, or shall omit to do any act, matter, or thing required to be done, either by the constitution, any law of this state, or any order or decision of the commission, such public utility shall be liable to the persons or corporations affected thereby for all loss, damages, or injury caused thereby or resulting therefrom, and if the court shall find that the act or omission was wilful, the court shall, in addition to the actual damages, award damages for the sake of example and by way of punishment. An action to recover for such loss, damage, or injury may be brought in any court of competent jurisdiction by any corporation or person.

2. No recovery as in this section provided shall in any manner affect a recovery by the state of the penalties in this title provided or the exercise by the commission of its power to punish for contempt.

4841. Right of action by state not waived. Penalties cumulative. 1. This title shall not have the effect to release or waive any right of action by the state, the commission, or any person or corporation for any right, penalty, or forfeiture which may have arisen or accrued or may hereafter arise or accrue under any law of this state.

2. All penalties accruing under this title shall be cumulative of each other, and a suit for the recovery of one penalty shall not be a bar to or affect the recovery of any other penalty or forfeiture, or be a bar to any criminal prosecution against any public utility, or any officer, director, agent, or employe thereof, or any other corporation or person, or be a bar to the exercise by the commission of its power to punish for contempt.

4842. Proceedings to prevent violation of law. Whenever the commission shall be of the opinion that any public utility is failing or omitting, or about to fail or omit, to do anything required of it by law, or by any order, decision, rule, direction, or requirement of the commission, or is doing any-

thing, or about to do anything, or permitting anything, or about to permit anything, to be done contrary to or in violation of law or of any order, decision, rule, direction, or requirement of the commission, it shall direct the commencement of an action or proceeding in the district court in and for the county in which the cause or some part thereof arose, or in which the corporation complained of, if any, has its principal place of business, or in which the person, if any, complained of, resides, in the name of the state, for the purpose of having such violations or threatened violations stopped and prevented, either by mandamus or injunction. The attorney of the commission shall thereupon begin such action or proceeding by petition to such district court, alleging the violation or threatened violation complained of, and praying for appropriate relief by way of mandamus or injunction. It shall thereupon be the duty of the court to specify a time, not exceeding twenty days after the service of the copy of the petition, within which the public utility complained of must answer the petition, and in the meantime said public utility may be restrained. In case of default in answer, or after answer, the court shall immediately inquire into the facts and circumstances of the case. Such corporations or persons as the court may deem necessary or proper to be joined as parties, in order to make its judgment, order, or writ effective, may be joined as parties. The final judgment in any such action or proceeding shall either dismiss the action or proceeding or direct that the writ of mandamus or injunction issue or be made permanent as prayed for in the petition, or in such modified or other form as will afford appropriate relief. Any appeal may be taken to the supreme court from such final judgment in the same manner and with the same effect, subject to the provisions of this title, as appeals are taken from judgments of the district court in other actions for mandamus or injunction.

4843. Penalty for violations of this title. Distinct offenses. 1 Any public utility which violates or fails to comply with any provisions of the constitution of this state or of this title, or which fails, omits, or neglects to obey, observe, or comply with any order, decision, decree, rule, direction, demand, or requirement, or any part or provision thereof, of the commission, in a case in which a penalty has not hereinbefore been provided for such public utility, is subject to a penalty of not less than $500 nor more than $2000 for each and every offense.

2. Every violation of the provisions of this title or of any order, decision, decree, rule, direction, demand, or requirement of the commission, or any part or portion thereof, by any corporation or person is a separate and distinct offense, and in case of a continuing violation each day's continuance thereof shall be and be deemed to be a separate and distinct offense.

3. In construing and enforcing the provisions of this title relating to penalties, the act, omission, or failure of any officer, agent, or employe of any public utility, acting within the scope of his official duties or employment, shall in every case be and be deemed to be the act, omission, or failure of such public utility.

4844. Violations by officers and agents a misdemeanor. Every officer, agent, or employe of any public utility who violates or fails to comply with, or who procures, aids, or abets any violation by any public utility of any provisions of the constitution of this state or of this title, or who fails to obey, observe, or comply with any order, decision, rule, direction, demand, or requirement, or any part or provision thereof, of the commission, or who procures, aids, or abets any public utility in its failure to obey, observe, and comply with any such order, decision, rule, direction, demand, or requirement, or any part or provision thereof, in a case in which a penalty has not hereinbefore been provided for such officer, agent, or employe, is guilty of a misdemeanor, and is punishable by a fine not exceeding $1000, or by imprisonment in a county jail not exceeding one year, or by both such fine and imprisonment.

4845. Violations by other corporations. Every corporation, other than

a public utility, which violates any provision of this title, or which fails to obey, observe, or comply with any order, decision, rule, direction, demand, or requirement, or any part or provision thereof, of the commission, in a case in which a penalty has not hereinbefore been provided for such corporation, is subject to a penalty of not less than $500 nor more than $2000 for each and every offense.

4846. Violations by officers or agents of other corporations. Every person who, either individually, or acting as an officer, agent, or employe of a corporation other than a public utility, violates any provision of this title, or fails to observe, obey, or comply with any order, decision, rule, direction, demand, or requirement, or any part or portion thereof, of the commission, or who procures, aids, or abets any such public utility in its violation of this title, or in its failure to obey, observe, or comply with any such order, decision, rule, direction, demand, or requirement, or any part or portion thereof, in a case in which a penalty has not hereinbefore been provided for such person, is guilty of a misdemeanor, and is punishable by a fine not exceeding $1000, or by imprisonment in a county jail not exceeding one year, or by both such fine and imprisonment.

4847. Recovery of penalties. Procedure. Actions to recover penalties under this title shall be brought in the name of the state of Utah, in the district court in and for the county in which the cause or some part thereof arose, or in which the corporation complained of, if any, has its principal place of business, or in which the person, if any, complained of resides. Such action shall be commenced and prosecuted to final judgment by the attorney of the commission. In any such action, all penalties incurred up to the time of commencing the same may be sued for and recovered. In all such actions, the procedure and rules of evidence shall be the same as in ordinary civil actions, except as otherwise herein provided. All fines and penalties recovered by the state in any such action, together with the costs thereof, shall be paid into the state treasury to the credit of the general fund. Any such action may be compromised or discontinued on application of the commission upon such terms as the court shall approve and order.

4848. Punishment for contempts. Every public utility, corporation, or person which shall fail to observe, obey, or comply with any order, decision, rule, regulation, direction, demand, or requirement, or any part or portion thereof, of the commission or any commissioner, shall be in contempt of the commission, and shall be punishable by the commission for contempt in the same manner and to the same extent as contempt is punished by courts of record. The remedy prescribed in this section shall not be a bar to or affect any other remedy prescribed in this title, but shall be cumulative and in addition to such other remedy or remedies.

4849. Accrued causes not to abate. No cause of action arising under any law of this state shall abate by reason of the passage of this title, whether a suit or action has been instituted thereon at the time of the taking effect of this title or not, but actions may be brought upon such causes in the same manner, under the same terms and conditions, and with the same effect as though this title had not been passed.

4850. Validity of title. If any section, subsection, sentence, clause, or phrase of this title is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this title. The Legislature hereby declares that it would have passed this title, and each section, subsection, sentence, clause, and phrase thereof, irrespective of the fact that any one or more other sections, subsections, sentences, clauses, or phrases be declared unconstitutional.

4851. Application of title. Neither this title nor any provisions thereof, except when specifically so stated, shall apply to or be construed to apply to commerce with foreign nations or commence among the several states of this union, except in so far as the same may be permitted under the provisions of the constitution of the United States and the acts of Congress.

4852. Appropriation. The sum of $50,000, or so much thereof as shall be necessary, is hereby appropriated for the purpose of carrying out the provisions of this title.

4853. Repeal. All acts or parts of acts inconsistent with the provisions of this title are hereby repealed.

TITLE 92.

EMPLOYMENT OF CITIZENS OF THE UNITED STATES ON PUBLIC WORKS.

4865. In employing workmen in or on the construction of public works by the state, county, or municipality, or by persons contracting with the state, county, or municipality, preference shall be given citizens of the United States, or those having declared their intention of becoming citizens. In each contract for the construction of public works the provisions shall be inserted to the effect that if the provisions of this section are not complied with the contract shall be void. '09, p. 179.

TITLE 93.

REAL ESTATE.

CHAPTER 1.

POSSESSORY RIGHTS.

4867. (1967.) Of occupiers of unclaimed public lands. Any person who has inclosed, or may hereafter inclose, a portion or portions of unclaimed government land, or has caused it to be done at his expense; or has purchased, or may hereafter purchase, such inclosure; or has erected, caused to be erected, or purchased any building or other improvement thereon, or may hereafter do so, is hereby declared to be the lawful owner of the claim to the possession of such inclosed land, and the lawful owner of the improvements thereon and thereunto appertaining; and he shall be so deemed and held in all legal proceedings, and in all rights and doings pertaining or relating to the aforesaid property.

Occupying claimants, §§ 5031-5038.

Actual occupancy is necessary to a possessory title, but it may be evidenced by an inclosure and maintained by an agent or tenant.
Hyndman v. Stowe, 9 U. 23; 33 P. 227.

Mere occupancy of public lands, with the construction of improvements thereon, vests no right in the occupier as against the United States or a patentee from it.
Helstrom v. Rodes, 30 U. 122; 83 P. 730.

CHAPTER 2.

CONVEYANCES.

4868. (1968.) "Real estate" defined. The term "real estate," as used in this title, shall be construed as co-extensive in meaning with land, tenements, hereditaments, and mining and land claims.

Construction of terms generally, § 5848.
Decisions on real estate contracts, etc., not having reference to some statutory provision, are not included in this volume.

4869. (1969.) "Conveyance" defined. The term "conveyance," as used in this title, shall be construed to embrace every instrument in writing by which any real estate, or interest in real estate, is created, aliened, mortgaged, incumbered, or assigned, except wills and leases for a term not exceeding one year.

The term "conveyance" embraces every instrument in writing, by which any real estate or interest in real estate, is created, aliened, mortgaged, or assigned, except wills, and leases for a term not exceeding one year.
Donaldson v. Grant, 15 U. 231; 49 P. 779.

4870. (1970.) Word "heirs" unnecessary to pass fee. The term "heirs"

or other technical words of inheritance or succession are not requisite to transfer a fee in real estate.

N. Dak. (1895) § 3527.
Minn. (1894) § 4163.
Wash. (1896) § 2120.
Word "heirs" not necessary to devise a fee, § 6359.
A deed containing the words, "grant, bargain, sell, convey, assign and deliver to the party of the second part," is sufficient to convey a fee simple interest, under provisions of this section, without use of words of inheritance, such as "heirs," etc.
Wilson v. Sullivan, 17 U. 341; 53 P. 994.

4871. (1971.) Conveyance passes fee unless contrary appears. A fee simple title is presumed to be intended to pass by a conveyance of real estate, unless it appears from the conveyance that a lesser estate was intended.

Idaho, § 2927. N. Dak. (1895) § 3545.
Water rights pass with the land, § 3477.

4872. (1972.) Conveyance of greater estate than grantor owns. A conveyance made by an owner of an estate for life or years, purporting to convey a greater estate than he could lawfully transfer, does not work a forfeiture of his estate, but passes to the grantee all the estate which the grantor could lawfully transfer.

Idaho, § 2930. Minn. (1894) § 4164.

4873. (1973.) Tenancy in common. Every interest in real estate granted or devised to two or more persons, in their own right, shall be a tenancy in common, unless expressly declared in the grant or devise to be otherwise.

Similar section, § 6380.

4874. (1974.) Conveyances, etc., of land to be in writing. No estate or interest in real property, other than for leases for a term of not exceeding one year, nor any trust or power over or concerning it, or in any manner relating thereto, can be created, granted, assigned, surrendered, or declared, otherwise, than by act or operation of law, or by a conveyance or other instrument in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same or by his lawful agent thereunto authorized by writing.

See similar section, § 5811, and notes.
Conveyance of farm transfers, farm name, § 4012.
Where a blank deed is signed and acknowledged and a description is later filled in, the instrument is void.
Ut. St. Bldg. & Loan Asso. v. Perkins, 51 U. —; 173 P. —.

4875. (1975.) Acknowledgment and recording, effect of. Every conveyance of real estate, and every instrument of writing, setting forth an agreement to convey any real estate, or whereby any real estate may be affected, to operate as notice to third persons, shall be proved or acknowledged and certified in the manner prescribed by this title and recorded in the office of the recorder of the county in which such real estate is situated, but shall be valid and binding between the parties thereto without such proof, acknowledgment, certification, or record, and to all other persons who have had actual notice.

Similar section, § 4900.
Damages for recorder's neglect, § 1592.
Effect of recording assignment of mortgage, § 2002.
Unrecorded conveyance void as to subsequent purchasers in good faith, § 4903.
Record imparts notice, §§ 1584, 4900.
Certain conveyances validated, §§ 4908-4911.
Conveyances, etc., may be sent by telegraph or telephone, § 6118.
Probate decrees to be recorded, notice, § 7871.
Must be acknowledged to be recorded, § 4899.
Title of purchaser from heir in absence of record of will, § 6391.
Certified copies admissible in evidence, § 7116.

CONSTRUCTIVE NOTICE:

The record title to the premises being in the wife who resides upon the same with her husband, who claims an equitable interest in the property, and the possession of the husband and wife being consistent with the record title, the possession of the husband is not sufficient to put a purchaser upon inquiry as to the husband's equitable interest.
Allen v. Cannon, 8 U. 8; 28 P. 868.

Actual possession and occupancy of real property amounts to actual notice to all the world of the grantee's rights, notwithstanding the provisions of the statute which require every conveyance of real estate, in order to operate as a notice to third persons, to be recorded in the office of the recorder of the county in which such real estate is situated.
Neponset Land and Live Stock Co. v. Dixon, 10 U. 334; 37 P. 573.
Toland v. Corey, 6 U. 392; 24 P. 190.
Ayers v. Jack, 7 U. 249; 26 P. 300.
Stahn v. Hall, 10 U. 400; 37 P. 585.
But where one conveys property and remains in possession and shows another party the premises, without making any claim of interest, such purchaser may rely upon the record.
Shaffer v. Kilpack, 51 U. —; 172 P. —.
The possession by a polygamous wife, who is present at a hotel, acting as a housekeeper under a secret agreement that one-half the property should be hers, is no notice to purchasers of her rights or claim to interest in the property.
Townsend v. Hooper, 2 U. 548; affirmed 109 U. S. 504.
But see Warr v. Honeck, 8 U. 61; 29 P. 1117.
Where possession is relied on as giving constructive notice, it must be open and unambiguous and not liable to be misunderstood or misconstrued; and must have been sufficiently distinct and unequivocal to put the purchaser on his guard.
Id.

Constructive notice exists when the party by any circumstances whatever is put upon inquiry— and records authorized but not required by statute import such notice.

Wells, Fargo & Co. v. Smith, 2 U. 39; affirmed 104 U. S. 428.

A deed recorded in a mortgage record is not constructive notice to innocent purchasers for value.

Drake v. Reggel, 10 U. 376; 37 P. 583.

Under this section and § 4889, where officers of a corporation executed a deed to defendant to secure a loan, but did not make oath that they were officers of the corporation, or that they executed the instrument by authority of the board of directors, the deed was good as against the trustee in bankruptcy of the corporation estate.

Murray v. Beal, 23 U. 548; 65 P. 726.

A sufficient notice to attaching creditors is given, under provisions of this section and §§ 299, 301, by giving such creditors a personal notice of the assignment and mailing to each of them a notice thereof, recording the deed as soon as the property of the assignors is discovered in an adjoining county and the publication of notice to creditors in the county where the assignors reside.

Snyder v. Murdock, 20 U. 407; 59 P. 88.

Where property is conveyed to a person as trustee, and the nature of the trust and its limitations are expressed in the deed, a purchaser is not required to make any further inquiry.

Huffaker v. First Nat. Bk., 51 U. —; 173 P. 903.

4876. (1976.) Private seals unnecessary. Hereafter it shall not be necessary to use private seals on any instrument in writing in this state.

The fact that a deed executed by a private corporation did not have a seal attached did not invalidate the conveyance.

Murray v. Beal, 23 U. 548; 65 P. 726.

4877. (1977.) Powers of attorney, etc. Acknowledgment. Recording. Every power of attorney, or other instrument in writing, containing the power to convey any real estate, as agent or attorney for the owner thereof, or to execute, as agent or attorney for another, any conveyance whereby any real estate is conveyed or may be affected, shall be acknowledged or proved, and certified and recorded, as other conveyances whereby real estate is conveyed or affected are required to be acknowledged or proved and certified and recorded.

Powers of attorney and other instruments may be sent by telegraph or telephone, § 6118.

4878. (1978.) Id. How revoked. No such power of attorney or other instrument certified and recorded in the manner prescribed in the preceding section shall be deemed to be revoked by any act of the party by whom it was executed until the instrument containing such revocation shall be deposited for record in the same office in which the instrument containing the power is recorded, or canceled of record as provided by law.

Plaintiff's grantor, for the consideration of $5, received an irrevocable power of attorney to enter land on soldiers' scrip, with power to grant and convey the same to a purchaser. The maker of the power of attorney forever renounced all right to revoke the same, but before the conveyance of the land to plaintiff, the power of attorney was revoked and the land sold to defendant's grantor; held, that the power of attorney was given for a valuable consideration coupled with an interest, and was irrevocable.

Montague v. McCarroll, 15 U. 318; 49 P. 418.

4879. (1979.) After acquired title inures to prior grantee. If any person shall hereafter convey any real estate by conveyance purporting to convey the same in fee simple absolute, and shall not at the time of such conveyance have the legal estate in such real estate, but shall afterwards acquire the same, the legal estate subsequently acquired shall immediately pass to the grantee, his heirs, successors, or assigns, and such conveyance shall be as valid as if such legal estate had been in the grantor at the time of the conveyance.

One who conveys coal lands, before he has applied to the government to purchase same, conveys a good title thereto, if he subsequently acquires the land.

Ketchum Coal Co. v. Pleasant Valley Coal Co., 50 U. —; 168 P. 86.

4880. (1980.) Claimant not in possession may convey. Any person claiming title to any real estate may, notwithstanding there may be an adverse possession thereof, sell and convey his interest therein in the same manner and with the same effect as if he were in the actual possession thereof.

4881. (1981.) Form of warranty deed. Effect. Conveyances of land may be substantially in the following form:

WARRANTY DEED.

A B, grantor (here insert name or names and place of residence), hereby conveys and warrants to C D, grantee (here insert name or names and place of residence), for the sum of ..... dollars, the following described tract..... of land in ..... county, Utah, (here describe the premises).

Witness the hand of said grantor this ..... day of ....., A. D. 19.....

Such deed, when executed as required by law, shall have the effect of a conveyance in fee simple to the grantee, his heirs, and assigns, of the premises

therein named, together with all the appurtenances, rights and privileges thereto belonging, with covenants from the grantor, his heirs, and personal representatives, that he is lawfully seized of the premises; that he has good right to convey the same; that he guarantees the grantee, his heirs, and assigns in the quiet possession thereof; that the premises are free from all incumbrances; and that the grantor, his heirs, and personal representatives will forever warrant and defend the title thereof in the grantee, his heirs, and assigns, against all lawful claims whatsoever. Any exceptions to such covenants may be briefly inserted in such deed following the description of the land

Water right passes with the land unless reserved, § 3477.

A conveyance of land adjoining a lake conveys the grantor's right to such lands that had or would attach to it by accretion or relictions as an incident to riparian ownership.

Hinckley v. Peay, 22 U. 21; 60 P. 1012.
Poynter v. Chipman, 8 U. 442; 32 P. 690.
Knudson v. Omanson, 10 U. 124; 37 P. 250.

A deed containing the words, "grant, bargain, sell, convey, assign, and deliver to the party of the second part," is sufficient to convey a fee simple interest, without words of inheritance.

Wilson v. Sullivan, 17 U. 341; 53 P. 994.

A deed of general warranty of "quiet and peaceable possession" does not warrant water rights unless they are appurtenant to the land.

George v. Robison, 23 U. 79; 63 P. 819.

Where a wife joined with her husband in a warranty deed to land of which she has no title or estate except interest granted in lieu of dower by § 6406, she is not liable to one other than her immediate grantee, since her covenant is personal, and does not run with the land.

H. T. & C. Co. v. Whitehouse, 47 U. 323; 154 P. 950.

A writing, entitled a deed of conveyance, whereby a husband gave, sold, granted, and demised all his personal and real property to his wife for love and affection, is a deed of conveyance, even though there is language subsequently which might indicate a grant of a power of attorney.

Coltharp v. Coltharp, 48 U. 389; 160 P. 121.

Where a deed granted the use of a passageway "so long as it shall be used as a passageway," the words "so long as" implied a limitation in the grant, and conferred the right to terminate the use on the grantor, since, while a grantee may at any time relinquish his right of passage without consulting the grantor, the grantor's right to terminate it must be expressed in the instrument.

Reese Howell Co. v. Brown, 48 U. 142; 158 P. 684.

A deed in statutory form conveys whatever appurtenances pertain to the land, and parol testimony is permissible to show what is appurtenant.

Wade v. Dorius, 52 U. —; 173 P. 564.
Eglund v. Fayter, 51 U. —; 172 P. 313.

Query: Do Easements pass as appurtenant to land unless they are appurtenant, obvious visible and continuous?

Wade v. Dorius, 52 U. —; 173 P. 564.

A deed to a deceased person or to the estate of a deceased person is void because there is no grantee.

Nielson v. Hamilton, 51 U. —; 173 P. —.

4882. (1982.) Form of quitclaim deed. Effect. Conveyances of land may also be substantially in the following form:

QUITCLAIM DEED.

A B, grantor (here insert name or names and place of residence), hereby quitclaims to C D, grantee (here insert name or names and place of residence), for the sum of ..... dollars, the following described tract..... of land in ..... county, Utah (here describe the premises).

Witness the hand of said grantor this ..... day of ....., A. D. 19.....

And such deed when executed as required by law shall have the effect of a conveyance of all right, title, interest, and estate of the grantor in and to the premises therein described, and all rights, privileges, and appurtenances thereto belonging at the date of such conveyance.

4883. (1983.) Form of mortgage. Effect. A mortgage may be substantially in the following form:

MORTGAGE.

A B, mortgagor (here insert name or names and place of residence) hereby mortgages to C D, mortgagee (here insert name or names and place of residence), for the sum of ..... dollars, the following described tract..... of land in ..... county, Utah (here describe the premises).

This mortgage is given to secure the following indebtedness (here state amounts and form of indebtedness, maturity, rate of interest, by and to whom payable, and where).

The mortgagor agrees to pay all taxes and assessments on said premises, and the sum of ..... dollars attorney's fee in case of foreclosure.

Witness the hand of said mortgagor this ..... day of ....., A. D. 19.....

And when executed as required by law, shall have the effect of a conveyance of the land therein described, together with all the rights, privileges, and appurtenances thereunto belonging, to the mortgagee, his heirs, assigns, and

legal representatives, for the payment of the indebtedness therein set forth, with covenant from the mortgagor that all taxes and assessments levied and assessed upon the land described, during the continuance of the mortgage, shall be paid previous to the day appointed for the sale of such lands for taxes, and may be foreclosed as provided by law and with the same effect, upon any default being made in any of the conditions thereof as to payment of either principal, interest, taxes, or assessments.

Discharge or cancellation of mortgage, §§ 4905-4907.
Foreclosure of mortgages, §§ 7230-7237.
Mortgage given by one partner to secure a note purchasing the other partner's undivided half interest in their property, and which covered an undivided half interest in the partnership property, held to cover the mortgagor's rather than the mortgagee's interest where the mortgagee retained title to his share until the note should be paid.
Wheritt v. Dennis, 48 U. 309; 159 P. 534.

CHAPTER 3.

ACKNOWLEDGMENTS.

4884. (1984.) Real estate conveyances to be acknowledged. Every conveyance in writing, whereby any real estate is conveyed or may be affected, shall be acknowledged or proved and certified in the manner hereinafter provided.

Good as between parties without acknowledgment, § 4875.

4885. (1985.) Who may take acknowledgments. The proof or acknowledgment of every conveyance, whereby any real estate is conveyed or may be affected, shall be taken by some one of the following officers:

1. If acknowledged or proved within this state, by some judge or clerk of a court having a seal, or some notary public, county clerk, or county recorder;

2. If acknowledged or proved without this state and within any state or territory of the United States, by some judge or clerk of any court in the United States, or of any state or territory having a seal, or by a notary public, or by a commissioner appointed by the governor of this state for that purpose;

3. If acknowledged or proved without the United States, by some judge or clerk of any court of any state, kingdom, or empire having a seal, or any notary public therein, or any ambassador, minister, commissioner, or consul of the United States appointed to reside therein.

Justices of the peace forbidden to take acknowledgments of instruments required to be recorded, § 2529.
Notary to affix date of expiration of commission, §§ 4256-4257.

4886. (1986.) Id. By deputy. When any of the officers above mentioned are authorized by law to appoint a deputy, such acknowledgment or proof may be taken by any such deputy in the name of his principal.

4887. (1987.) Certificate of acknowledgment. Every officer who shall take the proof or acknowledgment of any conveyance affecting any real estate shall grant a certificate thereof, and cause such certificate to be indorsed or annexed to such conveyance. Such certificate shall be:

1. When granted by any judge or clerk, under the hand of such judge or clerk, and the seal of the court;

2. When granted by any other officer, under the hand and official seal of such officer.

4888. (1988.) Party must be known or identified. No acknowledgment of any conveyance, whereby any real estate is conveyed or may be affected, shall be taken unless the person offering to make such acknowledgment shall be personally known to the officer taking the same to be the person whose name is subscribed to such conveyance as a party thereto, or shall be proved to be such by the oath or affirmation of a credible witness personally known to the officer taking the acknowledgment.

In the absence of statutory provisions the law does not permit an officer to take the acknowledgment of a stranger without satisfactory proof of his identity.
Deseret Nat. Bank v. Kidman, 25 U. 379; 71 P. 873.

4889. (1989.) Forms of certificates. Individual. Corporate. A certificate of acknowledgment to any instrument in writing affecting the title to any real property in this state may be substantially in the following form:

State of Utah, county of .....

On the ..... day of ....., A. D. 19....., personally appeared before me A B, the signer of the above instrument, who duly acknowledged to me that he executed the same.

The certificate of acknowledgment of an instrument executed by a corporation must be substantially in the following form:

State of Utah, county of .....

On the ..... day of ....., A. D. 19....., personally appeared before me A B, who, being by me duly sworn (or affirmed), did say that he is the president (or other officer or agent, as the case may be) of (naming the corporation), and that said instrument was signed in behalf of said corporation by authority of its by-laws (or by resolution of its board of directors, as the case may be), and said A B acknowledged to me that said corporation executed the same.

Under this section and § 4875, where officers of a corporation executed a deed to defendant, to secure a loan, but did not make oath, etc., the deed was good as against the trustee in bankruptcy of the corporation estate.

Murray v. Beal, 23 U. 548; 65 P. 726.

A certificate of acknowledgment to an instrument made pursuant to § 2958, R. S. Idaho, prescribing the form therefor, should be liberally construed; the section expressly requiring that it be "substantially" in the form therein given.

Deseret Nat. Bank v. Kidman, 25 U. 379; 71 P. 873.

4890. (1990.) Id. Where grantor unknown to officer. When the grantor is unknown to the officer taking the acknowledgment, the certificate shall be substantially in the following form, to wit:

State of Utah, county of .....

On this ..... day of ....., A. D. 19....., personally appeared before me A B, satisfactorily proved to me to be the signor of the above instrument by the oath of C D, a competent and credible witness for that purpose, by me duly sworn, and he, the said A B, acknowledged that he executed the same.

Such certificate when properly executed by an officer authorized to take acknowledgments to instruments in writing affecting the title to real property in this state, and attached to a conveyance in writing, shall be a sufficient acknowledgment and certificate that such conveyance was executed as required by law.

In the absence of statutory authority the law does not permit an officer to take the acknowledgment of a stranger without satisfactory proof of his identity.

Deseret Nat. Bank v. Kidman, 25 U. 379; 71 P. 873.

4891. (1991.) Proof of execution, by whom made. The proof of the execution of any conveyance whereby real estate is conveyed, or may be affected, shall be:

1. By the testimony of a subscribing witness, if there is one; or,
2. When all the subscribing witnesses are dead, or cannot be had, by evidence of the handwriting of the party, and of a subscribing witness, if there is one, given by a credible witness to each signature.

4892. (1992.) Id. Witness must be known or identified. No proof by a subscribing witness shall be taken unless such witness shall be personally known to the officer taking the proof to be the person whose name is subscribed to the conveyance as a witness thereto, or shall be proved to be such by the oath or affirmation of a credible witness personally known to such officer.

4893. (1993.) Id. What must be proven. No certificate of such proof shall be granted, unless such subscribing witness shall prove that the person whose name is subscribed thereto as a party is the person described in, and who executed, the same; that such person executed the conveyance, and that such person subscribed his name thereto as a witness thereof, at the request of the maker of such instrument.

4894. (1994.) Id. Form of certificate. The certificate of such proof shall be substantially in the following form, to wit:

State of Utah, county of .....

On this ..... day of ..... A. D. 19....., before me personally appeared

A B, personally known to me (or satisfactorily proved to me by the oath of C D, a competent and credible witness for that purpose, by me duly sworn) to be the same person whose name is subscribed to the above instrument as a witness thereto, who, being by me duly sworn, deposes and says that he resides in ....., county of ....., and state of Utah; that he was present and saw E F, personally known to him to be the signor of the above instrument as a party thereto, sign and deliver the same, and heard him acknowledge that he executed the same, and that he, the deponent, thereupon signed his name as a subscribing witness thereto, at the request of the said E F.

4895. (1995.) Proof of handwriting, when taken. No proof by evidence of the handwriting of a party, or of the subscribing witness or witnesses, shall be taken, unless the officer taking the same shall be satisfied that all the subscribing witnesses to such conveyance are dead, out of the jurisdiction or cannot be had to prove the execution thereof.

4896. (1996.) Id. Evidence necessary. No certificate of any such proof shall be granted unless a competent and credible witness shall state on oath or affirmation that he personally knew the person whose name is subscribed thereto as a party, well knew his signature, stating his means of knowledge, and believes the name of the party subscribed thereto as a party was subscribed by such person; nor unless a competent and credible witness shall in like manner state that he personally knew the person whose name is subscribed to such conveyance as a witness, well knew his signature, stating his means of knowledge, and believes the name subscribed thereto as a witness was thereto subscribed by such person.

4897. (1997.) Subpœna for witness to prove conveyance. Upon the application of any grantee, in any conveyance required by law to be recorded, or by any person claiming under such grantee, verified under the oath of the applicant, that any witness to such conveyance residing in the county where such application is made refuses to appear and testify touching the execution thereof, and that such conveyance cannot be proved without his evidence, any officer authorized to take the acknowledgment or proof of such conveyance may issue a subpœna requiring such witness to appear before such officer, and testify touching the execution thereof.

4898. (1998.) Id. Penalty for disobedience. Every person who, being served with a subpœna, shall, without reasonable cause, refuse or neglect to appear, or, appearing, shall refuse to answer upon oath touching the matters aforesaid, shall be liable to the party injured for such damages as may be sustained by him on account of such neglect or refusal, and may also be committed to prison by the judge of some court of record, there to remain, without bail, until he shall submit to answer upon oath as aforesaid; but no person shall be required to attend who resides out of the county in which the proof is to be taken, nor unless his reasonable expenses shall have first been tendered to him *provided, however,* that if it shall appear to the satisfaction of the officer so authorized to take such acknowledgment, that such subscribing witness purposely conceals himself, or keeps out of the way, so that he cannot be served with a subpœna, or taken on attachment, after the use of due diligence to that end, or in case of his continued failure or refusal to testify for the space of one hour after his appearance shall have been compelled by process, then said conveyance or other instrument may be proved and admitted to record in the same manner as if such subscribing witness thereto were dead.

CHAPTER 4.

RECORDING CONVEYANCES.

4899. (1999.) Must be acknowleged to be recorded. A certificate of the acknowledgment of any conveyance, or of the proof of the execution

thereof, as provided in this title, signed and certified by the officer taking the same, as provided in this title, shall entitle such conveyance, with the certificate or certificates as aforesaid, to be recorded in the office of the recorder of the county in which the real estate is situated.

Conveyances, etc., sent by telegraph or telephone may be recorded, § 6118.

4900. (2000.) Record imparts notice. Every conveyance or instrument in writing affecting real estate, executed, acknowledged, or proved, and certified in the manner prescribed by this title, and every patent to lands within this state duly executed and verified according to law, and every judgment, order, or decree of any court of record in this state, or a copy thereof, required by law to be recorded in the office of the county recorder, shall, from the time of filing the same with the recorder for record, impart notice to all persons of the contents thereof, and subsequent purchasers, mortgagees, and lienholders shall be deemed to purchase and take with notice.

Similar section and decisions thereon, § 4875, and note.

Unrecorded conveyances, etc., valid as between parties and others having actual notice, § 4875, and note.

Probate decrees to be recorded, notice, § 7871.

Title of purchaser from heir in absence of record of will, § 6391.

Effect of recording assignment of mortgage, § 4903.

Unrecorded conveyance void as to subsequent purchasers in good faith, § 4901.

Acknowledgment, §§ 4884-4891.

Certificate of proof, §§ 4891-4898.

Acknowledgment or certificate of proof entitles conveyance to be recorded, § 4899.

Certain conveyances validated, §§ 4908-4911.

Conveyances, etc., may be sent by telegraph or telephone, § 6118.

Notice imparted by filing in recorder's office, § 1584.

Where a deed was recorded and grantee went into and remained in possession for several years, a presumption of delivery arises. Hatch v. Hatch, 46 U. 218; 148 P. 433.

4901. (2001.) Effect of failure to record. Every conveyance of real estate within this state hereafter made, which shall not be recorded as provided in this title, shall be void as against any subsequent purchaser, in good faith and for a valuable consideration, of the same real estate, or any portion thereof, where his own conveyance shall be first duly recorded.

Effect of actual or constructive notice, § 4875, and note.

The assignee of a mortgage is required to have the assignment recorded in order to give notice to subsequent grantees, mortgagees, and lienholders; and the indorsements and delivery of the note upon which the mortgage is given to the assignee is equivalent to an assignment and the delivery of the mortgage. Donaldson v. Grant, 15 U. 231; 49 P. 779.

Under the laws of Utah in 1872, a junior mortgage taken without notice of a prior mortgage, actual or constructive, and first recorded, is to be preferred in its lien to a mortgage prior in execution but subsequently recorded. Wells, Fargo & Co. v. Smith, 2 U. 39; affirmed 104 U. S. 428.

4902. Copy of instrument may be recorded in another county. Effect. Whenever an original instrument in writing is of record in the office of the county recorder of any county in this state, a copy of such recorded instrument, certified by the county recorder of such county, may be recorded in the office of the county recorder of any other county in this state; and the recording of any such certified copy in the office of the county recorder of such other county, whether done heretofore or hereafter, shall, from and after the date on which this section becomes effective, have the same force and effect as though the said original instrument had been recorded in such other county. '15, p. 83.

4903. (2002.) Record of assignment of mortgage. The recording of an assignment of a mortgage shall not in itself be deemed notice of such assignment to the mortgagor, his heirs, or personal representatives so as to invalidate any payment made by them or either of them to the mortgagee.

Minn. (1894) § 4183.

4904. (2003.) Conveyances executed and acknowledged prior to revised statutes. All conveyances of real estate made before the revised statutes go into effect. and acknowledged or proved according to the laws in force at the time of such making and acknowledgment or proof, have the same force as evidence, and may be recorded in the same manner and with like effect as conveyances executed and acknowledged in pursuance of this title.

Mont. Civ. C., § 1626.

4905. (2004.) Cancellation of mortgage by certificate. A cancellation or discharge of a mortgage or deed of trust may be substantially in the following form:

CERTIFICATE OF DISCHARGE.

This certifies that a (mortgage or deed of trust, as the case may be) from A B to C D, dated ..... A. D. 19....., and recorded in book ..... of ..... on page ....., is hereby canceled and discharged.

.....

Signed in the presence of

.....

Recorder of ..... county.

Recorded ....., A. D. 19....., at ..... m.

....., County Recorder.

Such cancellation or discharge shall be entered in a book kept for that purpose and signed by the mortgagee or trustee, his attorney in fact, executor, administrator, or assigns, in the presence of the recorder or his deputy, who shall subscribe the same as a witness, and such cancellation or discharge shall have the same effect as a deed of release duly acknowledged and recorded.

Where a mortgagor, without any knowledge of the fraud of the mortgagee's attorney in fact, obtains from him a release of the mortgage which had six years to run paying one-half of the mortgage, the release is valid and binding, being supported by an adequate consideration.
Rohwer v. Burrell, 42 U. 510; 134 P. 573.

4906. (2005.) Id. By marginal entry. Any mortgage or deed of trust to secure the payment of a sum of money, or any mechanic's or other lien, or any contract, agreement, or bond for the sale of real estate that has been, or may hereafter be recorded, may be discharged by an entry in the margin of the record thereof, signed by the mortgagee, trustee, or claimant under the lien, or the party or parties in interest under such contract, agreement, or bond, or his or their personal representatives or assignees, stating the satisfaction of the mortgage or deed of trust, in the presence of the recorder or his deputy, who shall subscribe the same as a witness, and such entry shall have the same effect as a deed of release duly acknowledged and recorded.

4907. (2006.) Failure to discharge. Damages. If the mortgagee fail to discharge or release any mortgage after the same has been fully satisfied, he shall be liable to the mortgagor for double the damages resulting from such failure. Or the mortgagor may bring an action against the mortgagee to compel the discharge or release of the mortgage, after the same has been satisfied. And the judgment of the court must be that the mortgagee discharge or release the mortgage and pay the mortgagor the costs of suit, including a reasonable attorney's fee, and all damages resulting from such failure.

Attorney's fee on foreclosure, § 7237.
Provision of this section for attorney's fee to mortgagor in action to compel cancellation is a special law, and unconstitutional.
Openshaw v. Young, 24 U. 427; 68 P. 138.

CHAPTER 5.

VALIDATING CERTAIN CONVEYANCES.

4908. (2007.) Instruments validated. All deeds made and executed prior to January 1, 1913, by the mayors of cities and probate judges of counties in the state or territory of Utah under the law relating to the "rules and regulations under the townsite act" that do not appear to have been signed or executed before any subscribing witness, or that are not subscribed by any witness, as required by any law of the state or territory of Utah existing at the time of making such deed or instrument, are hereby validated and confirmed, and shall have the same force and effect as though they had been originally signed and executed by subscribing witnesses thereto.

Am'd '13, p. 10.

Townsite law, §§ 6121-6140.

4909. (2008.) Deeds executed by city or mayor. Deeds and conveyances executed prior to January 1, 1913, by any city in the state or territory of Utah, in its corporate name, of lands held in trust by the mayor, are hereby

validated and confirmed, and shall have the same force and effect and operation as though they had been executed by the mayor. Am'd '13, p. 10.

Conveyances under townsite law, § 6121-6127.

4910. (2009.) Public deeds improperly acknowledged. All deeds made and executed prior to January 1, 1913, by the probate judges of counties, district judges of the state of Utah, or mayors of cities, or by any city in its corporate name, in the state or territory of Utah, that have been acknowledged before and certified by city recorders or county clerks, shall have the same force and effect, and the record thereof shall impart notice to the same extent as though the acknowledgment had been made, taken, and certified as required by the law in force at the time of such execution and acknowledgment. Am'd '13, p. 10.

4911. (2010.) Notice imparted. All instruments of writing that were, previous to January 1, 1913, copied into the books of record of the office of the county recorders of the several counties of this state shall, after that date, impart to subsequent purchasers and incumbrancers, and to all other persons whomsoever, notice of the contents of all such instruments, so far as and to the extent that the same may be found recorded, copied, or noted in the said books of record, notwithstanding any defect, omission, or informality existing in the execution at the time of acknowledgment, certificate of acknowledgment, recording, or certificate of recording the same; and all such instruments, and the records or authenticated copies of the records thereof, shall be admissible in evidence, notwithstanding such defects or omissions; but nothing herein contained shall be construed to affect any right or title acquired prior to that date by subsequent purchasers, incumbrancers, or assignees. Am'd '01, p. 103; '07, p. 102; '13, p. 10.

This provision is remedial, and applies to pending actions, and a patent is admissible in evidence in an action to quiet title.
Tate v. Rose, 35 U. 229; 99 P. 1003.
Tate v. Shaw, 35 U. 240; 99 P. 1007.

CHAPTER 6.

UNIFORM LAND REGISTRATION ACT.

('17, p. 51.)

PRELIMINARY PROVISIONS.

4920. How chapter may be cited. This chapter may be cited as the uniform land registration act.

4921. Definitions. Words and phrases used in this chapter are to be construed as follows:

1. The words "voluntary transaction" mean all devises and all contractual or other acts or dealings, by any registered owner of any estate or interest in land with reference to such estate or interest, and to any statutory right or exemption claimed therein.
2. The words "involuntary transaction" mean the transmission of registered land or any interest therein by descent, or succession, all equitable rights and claims, judicial proceedings, or statutory liens or charges, the exercise of the right of eminent domain, the lien of delinquent taxes and levies, affecting registered land, or any interest therein.
3. The phrase "writing, instrument, or record," means all transactions, whether voluntary or involuntary, as herein defined.
4. The word "registrar" means the clerk of the court having juridiction of the cause within the county in which the land lies.
5. The word "decree" means judgment, decision, order, or decree.
6. The word "appeal" means writ of error, supersedeas, or appeal.
7. Except where the context requires a different construction, the word "court" means the court having jurisdiction for the settlement, registration, transfer, and assurance of titles to lands in the county where the land lies.

4922. Purposes. For the certain, cheaper, and more speedy settlement, registration, transfer, and assurance of titles to land, there is hereby established a system of land title registration, having the following purposes in detail:

1. To designate courts of land registration;
2. To provide for the appointment and duties of registrars of title;
3. To regulate proceedings to obtain registration of title;
4. To authorize the adjudication of title;
5. To prescribe the nature of certificates of title;
6. To provide for the registration of subsequent dealings with registered titles;
7. To regulate sundry proceedings after registration of title;
8. To determine the legal effects of registration of title;
9. To establish an assurance fund; and
10. To regulate the fees for registration of titles.

COURTS OF LAND REGISTRATION.

4923. Courts of land registration. The district courts throughout the state are hereby constituted or designated courts of land registration for the purpose of the settlement, registration, transfer, and assurance of titles to lands (or any interest therein as hereinafter provided) within their respective jurisdictions.

4924. Id. Jurisdiction. Such courts shall have exclusive original and general jurisdiction, subject to the right of appeal hereinafter allowed:

1. Of all petitions and proceedings for the registration of titles to lands; and
2. Of all transactions affecting registered titles to lands lying within their respective jurisdictions.

4925. Id. Powers. Their powers shall include all the powers necessary in law and equity, for the purpose of enforcing any of the provisions of this chapter.

4926. Id. Sessions. They shall be open as courts of land registration, except on Sundays and legal holidays; and their process as such may be issued at any time, returnable as they may direct.

4927. Mode of trial. The whole matter of law and fact in any case shall be heard and determined by the court; *provided, however,* that, on the motion of any person interested, the court shall direct and frame an issue or issues to be tried by jury.

4928. Proceedings to be in rem. The proceedings under any petition for the registration of land, and all proceedings or transactions in relation to registered land, shall be proceedings in rem against the land, and the decrees of the court and registered transactions shall operate directly on the land, and shall vest and establish title thereto in acccordance with the provisions of this chapter.

4929. Rules of court. The supreme court shall, from time to time, make general rules and forms for procedure, subject to the provisions of this chapter and the general laws, and such rules and forms shall be uniform throughout the state.

4930. Petition for rehearing or appeals. A petition for rehearing or an appeal may be taken, as in other cases, in said court. Said period may not be extended by any disability.

4931. Books and cases for records. Seal. It shall be the duty of the county commissioners of each county in which the office of a registrar of titles may be located to provide appropriate cases and other furniture for the safe and convenient keeping of all the books, documents, and papers in the custody of such registrar, and also an official seal, and all necessary books and such printed blanks and stationery for use in registration in such county as may be ordered by the court.

4932. Court may be held by designated judge. If the judge of the court for any reason shall become disqualified or temporarily incapacitated, the court may be held by any other judge of the district court designated by law.

REGISTRARS AND EXAMINERS OF TITLES.

4933. Clerks to be registrars of title. The county clerks shall be ex officio registrars of title under this chapter.

1. They shall do all things required of them by this chapter, under the direction of their respective courts, and pursuant to rules and regulations established for such courts, and shall be governed by the same general laws as apply to clerks of the district courts, in so far as the same may be applicable.

2. Their official designation under this chapter shall be registrar of title for their respective counties.

3. They shall qualify and give bond in accordance with law for the faithful performance of their duties as such.

4934. Duties and powers of registrars of title. Registrars of title and their deputies shall be authorized and required, under the direction of their respective courts:

1. To issue process and to enter the decree of the court touching lands in their respective counties;

2. To enter and issue certificates of title as provided herein;

3. To affix the seal of the court to such certificates and their duplicates;

4. To make entries and memoranda and perform all acts of registration affecting the title to such lands;

5. To keep a separate account of all moneys with which they may be chargeable under this chapter, and to make a special return thereof in accordance with the general laws and the special provisions of this chapter.

6. And generally to perform such other acts as the court may prescribe.

4935. Examiners of titles. The courts of land registration shall appoint, subject to removal at any time, one or more attorneys at law in their respective counties to be examiners of titles, or the court may, in any case on motion, appoint special examiners. Their duty shall be to search the records and investigate all facts stated in the petition or otherwise brought to their notice in any case referred to them. They shall have the powers of referees and may hear the parties and receive evidence. They shall make report to the court, in the form required by it, with a certificate of their examination of the title and their findings of fact.

PROCEEDINGS TO OBTAIN REGISTRATION.

4936. Petition for registration. Suit for registration of title shall be begun by a petition to the court, by a person or persons claiming, singly or collectively:

1. To own; or

2. To have the power of appointing or disposing of, an estate in fee simple in any land whether subject to liens or not.

4937. Petition by representative. Infants and other persons under disability may sue and defend by guardian or trustee, as the case may be, and corporations by an officer duly authorized, but the person in whose behalf the petition is made shall always be named as petitioner. A non-resident petitioner shall appoint a resident agent upon whom process and notices may be served.

4938. Practice. Except as otherwise provided, the suit shall be subject to the general rules of pleading and practice in district courts.

4939. Signature and oath to petition. The petition and any amendment thereto shall be signed and sworn to by each petitioner or, in the case of a corporation or person under disability, by the person authorized to file the petition.

4940. Contents of petition. The petition shall set forth:

1. A full description of the land, and any improvements thereon, with the description and valuation in its last assessment for general taxes;

2. When, how, and from whom it was acquired;

3. Whether or not it is occupied;

4. An enumeration of all known liens, interests, and claims, adverse or otherwise, vested or contingent, and

5. The full names and addresses, if known, of all persons that may be interested, by marriage or otherwise, including adjoining owners and occupants.

The petition shall be accompanied by a plan made in accordance with the rules of court.

4941. Petition to be filed and docketed. The petition shall be filed with the registrar of titles, and shall be forthwith docketed, numbered, and indexed by him in a book to be known as the land registration docket of his county.

4942. Notice of lis pendens. The registrar shall also forthwith cause to be recorded and indexed in the proper record book of such county a notice, such as is required by law for notice of lis pendens, which shall be filed with the petition, and which shall have the full force and effect of a notice of lis pendens.

Lis pendens generally, §§ 6553-6557.

4943. Memorandum of other papers. A memorandum of all other pleadings and papers filed with said registrar shall in each case be entered upon his registration docket under the proper number as aforesaid, and the papers in the cause, and all writings, instruments, and records filed with him shall be safely kept by him in his office, duly numbered, dated and indexed.

4944. Reference to examiner of titles. Upon the filing of a petition for the registration of any land, the court shall refer the same to one of the examiners of title provided for by the chapter, to examine and report thereon.

4945. Report of examiner. Such report shall include:

1. An abstract of title to the land, and all other evidence that can be reasonably obtained by the examiner;

2. Full extracts from the records to enable the court to decide the questions involved;

3. The names and addresses so far as ascertained of all persons interested in the land, as well as adjoining owners and occupants, showing their several interests, and indicating upon whom and in what manner process should be served or notice given in accordance with the provisions of this chapter

4946. Order of publication in rem. Upon the filing of the report of the examiner of titles, the court shall cause notice thereof to all persons shown therein to be entitled to the same, and "to all whom it may concern," to be published, and to be posted in the county where the land lies, in the same manner and with the same effect as an order of publication in other proceedings in rem, subject, however, to the limitation imposed by § 4930.

4947. Notice by mail. A copy of the order of publication shall in all cases be mailed by registered letter demanding a return, to every person interested named in the petition or in the report of the examiner of titles whose address is given or known.

4948. Notice by posting on land. The court shall also cause an attested copy of said order to be posted in a conspicuous place by the sheriff on each parcel of land included in the petition. It shall require such sheriff to go upon the lands and ascertain and report to court the names and addresses of any person or persons actually occupying the premises under any claim of title.

4949. Notice to state. If the petition involves the determination of any public rights or interests, the court shall cause a copy of the order of

publication to be delivered by the registrar to the proper attorney for the state, county, or city.

4950. Other notice. The court may cause other or further notice to be given in such manner and to such person as it may deem proper. And such personal service of process as is required in equitable actions shall also be made upon residents of the state, not under disability, who are made known to the court before final decree and can be reached by its process, unless such service be waived by appearance or otherwise.

4951. Effect of notice. Notice given under the preceding sections shall be in lieu of personal service of process, except as provided in § 4950, and shall be conclusive and binding on all the world.

4952. Certificate of service. Certificates from the registrar and sheriff, or their deputies, showing the due execution of said order of publication and the mailing and posting of copies thereof, as required by §§ 4946-4949, inclusive, shall be filed among the papers in the cause and be conclusive proof of such service.

4953. Time of hearing. After the expiration of at least fifteen days from the publication and posting of said order of publication as aforesaid, the cause shall be set down for hearing.

4954. Guardian ad litem. And thereupon the court shall appoint a competent attorney at law of the county in which the land lies, as guardian ad litem for all persons under disability, not in being, unascertained, unknown, or out of the state, who may have or appear to have an interest in or claim against the land.

4955. Answer to petition. Any person having any interest in or claim against the land, whether named in the petition and order of publication or not, may appear and file an answer at any time before final decree, unless such person shall have been served personally with notice.

4956. Signature and oath to answer. The answer shall be personally signed and sworn to by the claimant or, in case of a corporation or a person under disability, by the person authorized to file the answer, unless the court, for good cause shown, otherwise direct.

ADJUDICATION OF TITLE.

4957. Action on report of examiner of titles. After the expiration of the time as provided by § 4953, the court may proceed to take such action as may be proper upon the report of the examiner of titles and all other evidence before it with reference to the rights of all persons appearing to have any interest in or claim against the land, and may refer the cause again or require further proof.

4958. Order of survey, etc. While the cause is pending before the examiner of titles, or at any time before final decree, and whenever after initial registration a tract of land is subdivided, the court:

1. May require the land to be surveyed, after due notice to owners of adjoining land, by a competent surveyor appointed by the court;
2. Shall order durable bounds to be set and a plat thereof to be filed among the papers of the suit;
3. Shall enter all necessary decrees for the establishment, declaration, and protection of the right and title of all persons appearing to have any interest in or claim against the land.

4959. Petition may be dismissed. If in any case the petitioner so desires, or if the court is of opinion that the petitioner's title is not and cannot be made proper for registration, the petition may be dismissed without prejudice, on terms to be determined by the court.

4960. Amendments to petition and other pleadings. Amendments to petitions or other pleadings, or the severance thereof, including joinder, substitution of any person or persons, or discontinuance of parties, and the omission or severance of any portion or parcel of the land, may be ordered or

allowed by the court at any time before final decree upon terms that may be just and reasonable; and the court may require facts to be stated in an amended petition in addition to those prescribed by this chapter.

4961. Land may be dealt with, pending registration, subject to decree of the court. The land described in any petition may be dealt with pending registration as if no such petition had been filed.

1. But any instrument admitted to record under the general laws in relation to such land pending action on said petition shall also be docketed and indexed as required by § 4941.

2. And any person who shall acquire any interest in or claim against such land shall at once appear as a petitioner, or answer as a party defendant, in the proceedings for registration, and such interest or claims shall be subject to the decree of the court.

4962. Certificate of taxes paid. No final decree of registration shall be entered until proof is made by certificate from the proper officer that all taxes and levies assessed on said land and then due or delinquent have been paid in full.

4963. Decree of registration is final, quiets title, and binds all the world, subject to appeal. If the court, after final hearing, is of opinion that the petitioner has title proper for registration, a decree of confirmation and registration shall be entered; and every decree of registration entered in accordance with the provisions of this chapter:

1. Shall bind the land and quiet the title thereto, except as herein otherwise provided;

2. Shall be forever binding and conclusive upon all persons, resident or non-resident, including the state, whether mentioned by name in the order of publication or included under the general description, "to all whom it may concern";

3. And shall not be attacked or opened or set aside by reason of the absence, infancy, or other disability of any person affected thereby, nor by any proceeding at law or in equity for rehearing or reversing judgments or decrees, except as herein especially provided.

4964. Form of decree and manner of registration. Every decree of initial registration and subsequent memorial shall be made in convenient form for transcription upon the certificate of title, showing the following items:

1. Name and residence of the owner, and whether married or unmarried, and the name of the consort, if any; if the owner is under disability, the nature thereof, and if an infant, his age; if a corporation, the place of incorporation and its chief office; if a personal representative or trustee, the name of the decedent, or beneficiary.

2. Description of the land as finally determined by the court; the estate of the owner therein; also all the rights and easements appurtenant to said lands; and also a description of all particular estates, easements, liens, or other incumbrances, or rights, to which the land or the owner's estate is subject, showing their relative priorities.

3. Any other matter determined in pursuance of the provisions of this chapter.

4965. Time of taking effect. Such decree or memorial shall take effect upon the land described therein as of the day, hour, and minute it is filed for registration in the office of the proper registrar.

4966. Registrar's memorandum. The registrar shall forthwith record the said decree in the proper book of the court, and shall forthwith enter and properly number, minutely date, and index a memorandum thereof on his land registration docket and in the entry book hereinafter directed to be kept by him, and shall cause to be recorded and indexed a like memorandum in the proper deed book of the county.

CERTIFICATES OF TITLE.

4967. Entry in registry of titles. Said decree or memorial, or so much thereof as may be ordered by the court, shall be copied, numbered, signed, and sealed with the seal of the court by said registrar and registered in the book hereinafter directed to be kept by him, to be known as the register of titles for his county; and when so registered shall constitute the original certificate of title. Subsequent certificates covering the same land shall be in a like form, but shall be designated "transfer certificate No. ..... (the number of the next previous certificate covering the same land), original certificate registered ..... (date, volume, and page of registration)." New and appropriate numbers shall be adopted for any subsequent certificates not covering the whole of said land.

4968. Entry book kept by registrars. Each registrar shall keep an entry book in which he shall enter, in the order of their reception, a memorandum of any writing, instrument, or record filed with him for registration, and shall note in such book the year, month, day, hour, and minute of such filing. Every such writing, instrument, or record shall be numbered. indexed, and indorsed with reference to the entry thereof and securely kept in the office of the registrar. Every such entry shall be minutely dated, numbered, and indexed, and shall refer to the certificate of title hereinafter mentioned, upon which as well as upon its duplicate or duplicates, a memorandum of such entry shall be made.

4969. Register of titles. Book kept by registrar. Each registrar shall also keep a register of titles book, in which, under the direction of the court, he shall:

1. Register, number, and index the original certificates of title and all subsequent certificates of title, and all voluntary or involuntary transactions authorized to be registered under this chapter; and

2. Note thereon, and also upon the duplicate certificate thereof, when originally issued or subsequently presented, the day, hour, and minute of registration in each case in conformity with the dates shown by the entry book.

4970. Certificate of title. Every certificate of title entered in the register of titles as aforesaid, together with the memorials thereon, if any, shall be known as "the certificate of title." Said certificate shall be conclusive evidence of all matters contained therein, except as otherwise provided in this chapter. No erasure, alteration, or amendment of said certificate, or of any memorial thereon, shall be made except by order of the court.

4971. Owner's duplicate certificate. An exact copy of the certificate of title shall be made, except that it shall be conspicuously stamped or marked "owner's duplicate," and shall be delivered to the owner, or his attorney duly appointed, upon his receipt therefor in writing upon said certificate of title attested by the registrar or his deputy.

4972. Certificates of title to be numbered, and memorials thereon to be signed and sealed. All the certificates of title of land in each county shall be numbered consecutively. A separate folium, with appropriate spaces for subsequent memorials, shall be devoted to each title in the register of titles for each county. Every certificate and memorial thereon shall appropriately conform to the requirements of §§ 4964 and 4967 as to particulars of form. Every memorial made upon any certificate of title or duplicate certificate under any provisions of this chapter shall be signed by the registrar and sealed with the seal of the court and minutely dated and numbered in conformity with the date and number shown by the entry book.

REGISTRATION OF TRANSFERS AND OTHER TRANSACTIONS.

4973. Transfers of the whole of any registered estate. Whenever the whole of any registered estate is transferred, the transaction shall be duly noted and registered in accordance with the provisions of this chapter. There-

upon the certificate of title and any duplicate certificate relating to such estate shall be canceled by the registrar of each county in which the land, or any part thereof, lies, if desired by the registered owner, and a new certificate or certificates of title shall be entered in the register of titles for such county, and a duplicate or duplicates thereof issued as the case may require.

4974. Partial transfers. Encumbrances. Leases. If only a portion of such estate is transferred, or in case of an encumbrance or lease for more than one year, the transaction shall be duly noted and registered as aforesaid; and a new certificate of title shall be entered in the register of titles and new owner's duplicate certificate shall be issued for the portion transferred and the portion untransferred, or a beneficiary's duplicate or lessee's duplicate may be issued, as the case may require.

4975. Memorials to be noted. All registered encumbrances, rights, or adverse claims affecting the estate represented thereby shall continue to be noted upon every outstanding certificate of title and duplicate certificate until the same shall have been released or discharged or terminated.

4976. Registration of voluntary transactions. In voluntary transactions, the duplicate certificate of title must be presented along with the writing or instrument filed for registration; and thereupon and not otherwise, the registrar shall be authorized to register the transaction, under the direction of the court, upon proof of payment of all delinquent taxes and levies, if any.

4977. Registration of involuntary transactions. In involuntary transactions, a certificate from the proper state, county, city, or court officer, or certified copy of the order, decree, or judgment of any court of competent jurisdiction, or other appropriate evidence of compliance with the statute in relation to such transaction, when filed in the office of the proper registrar, shall be authority for him to register the transaction under the direction of the court; *provided,* that any writing or instrument for the purpose of transferring, encumbering, or otherwise dealing with equitable interests in registered land may be registered with such effect as it may be entitled to have.

4978. Production of duplicate certificate required. Whenever a duplicate certificate is not presented to the registrar along with any writing, instrument, or record filed for registration under this chapter, he shall forthwith send notice by registered mail to the owner of such duplicate requesting him forthwith to produce the same, in order that a memorial of the transaction may be made thereon; and such production may be required by suitable process of the court, if necessary.

4979. Registration of trusts, conditions, limitations, and other equitable interests and estates. Whenever a writing, instrument, or record is filed for the pupose of tranferring registered land in trust, or upon any equitable condition or limitation expressed therein, or for the purpose of creating or declaring a trust or other equitable interest in such land without transfer, the particulars of the trust, condition, limitation, or other equitable interest shall not be entered on the certificates, but it shall be sufficient to enter in the entry book and upon the certificates a memorial thereof by the terms, "in trust," or "upon condition," or other apt words, and to refer by number to the writing, instrument, or record authorizing or creating the same. And if express power is given to sell, encumber, or deal with the land in any manner, such power shall be noted upon the certificates by the terms, "with power to sell," or "with power to encumber," or by other apt words. And unless express power be given as aforesaid, no subsequent transfer or memorial shall be registered on such certificate except by special order of court.

4980. Registration of estates of decedents. Lands and any estate or interest therein registered under this chapter shall, upon the death of the owner, testate or intestate, go to his personal representative in like manner as personal estate, and shall be subject to the same rules of administration as personalty, except as otherwise provided in this chapter. But nothing herein contained shall alter or affect:

1. The course of ultimate descent under the statute of succession when duly registered;

2. Nor the order in which real and personal assets respectively are now applicable in and towards the payment of funeral and testamentary expenses, debts, or legacies;

3. Nor the liability of real estate to be charged with the payment of debts and legacies.

4981. Powers of personal representatives. Subject to the powers, rights, and duties of administration, the personal representatives of such deceased owner shall hold such real estate as trustees for the persons by law beneficially entitled thereto. But, unless otherwise entitled by law to commissions, shall be entitled to no commissions thereon except in cases of necessary sales in due course of administration. And the heirs at law or beneficiaries aforesaid shall have the power of acquiring a transfer of such estate as if it were personal estate.

4982. Registration of delinquent taxes and levies. It shall be the duty of the treasurer or other collector of taxes or levies of each county, town, or city, not later than five days after delinquency, to file an exact memorandum of the delinquency, if any, of any registered land, for the non-payment of the taxes or levies thereon, including the penalty therefor, in the office of the proper registrar for registration. If any such officer fail to perform said duty, he and his sureties shall be liable for the payment of said taxes and levies, with the penalty and interest thereon.

4983. Registration of sales for delinquent taxes or levies. Whenever any sale of registered land is made for delinquent taxes or levies, it shall be the duty of the treasurer, or other officer making such sale, forthwith to file a memorandum thereof for registration in the office of the proper registrar. Thereupon the registered owner shall be required to produce his duplicate certificate for cancellation, and a new duplicate certificate shall be issued in favor of the purchaser, and the land shall be transferred on the land books to the name of such purchaser, unless such delinquent charges and all penalties and interest thereon be paid in full within ninety days after the date of such sale. But a memorial shall be entered upon the certificate of title, and also upon any such new duplicate certificate, reserving the privilege of redemption in accordance with law.

4984. Registration of redemption. In case of any redemption under the preceding section, a memorial of the fact shall be duly registered; and if a duplicate certificate has been issued to any purchaser, the same shall be canceled and a new duplicate shall be issued to the person who has redeemed.

4985. Registration of final sale, if no redemption. If there be no redemption under said section in accordance with law, it shall be the duty of the treasurer, or other collector of taxes of the county or corporation in which the land lies, to sell the same, at public auction, for cash, having first given reasonable notice of the time and place of sale. The proceeds of sale shall be applied:

1. To the payment of all taxes, then due the state, and all levies then due the county, town, or city, with interest, penalty, and costs;

2. To the payment of all sums paid by any person who purchased at the former tax sale, with interest and the additional sum of $5;

3. To the payment of a commission to the officer making the sale of 5 per cent on the first $300 and 2 per cent on the residue of the proceeds;

4. To the satisfaction of any liens, other than said taxes and levies, registered against said land in the order of their priorities;

5. And the surplus, if any, to the person in whose name the land was previously sold for taxes, subject to redemption, as provided by § 4983, his heirs, personal representatives, or assigns.

A memorial of the sale under this section shall be duly registered, and a new certificate shall be entered and a duplicate issued in favor of the pur-

chaser, in whom title shall be thereby vested as registered owner, in accordance with the provisions of this chapter.

4986. Future interests not affected. Nothing in the preceding section shall be so construed as to affect, or divest, the title of a tenant in reversion or remainder to any real estate which has been returned delinquent and sold on account of the default of the tenant for life in paying the taxes or levies assessed thereon.

SUNDRY PROCEEDINGS AFTER REGISTRATION.

4987. Petitions concerning registered land and caveats and decrees thereon. Any registered owner of any estate or interest in land, or any person, having any claim against registered land arising from any other cause than fraud or forgery since the land was registered, may, within ninety days after the claim or cause of complaint shall have arisen, petition the court for relief in any matter within its jurisdiction; and it shall be the duty of the proper registrar, upon the request of any such person, to register a memorial that such petition has been or will be filed, which memorial shall serve as a caveat and be notice to all persons. And whenever any registrar is in doubt as to the proper registration to be made in any case, or when any person is aggrieved by any act or refusal to act by the registrar, the question may be likewise submitted by petition.

4988. Hearing and decree. After notice to the parties interested, the court shall hear the cause, and, with due regard to the provisions of this chapter, shall enter such decree as justice and equity may require, which shall be registered, and take effect in like manner as the original decree for registration.

4989. Service of notice. Notice in lieu of process under this chapter, or otherwise in relation to registered land, may be served upon any person by registered mail, and the postoffice registry return receipt shall be evidence of such service, and shall be binding, whether such person resides within or without the state; but the court may in any case order different or further service by publication once a week for four successive weeks in some convenient newspaper or otherwise, which shall be likewise binding.

4990. Proceedings upon loss or destruction of duplicate certificate. Whenever a duplicate certificate of title is lost or destroyed, the owner, or his personal representative, may petition the court for the issuance of a new duplicate. Notice of such petition shall be published once a week for four successive weeks, under the direction of the court, in some convenient newspaper. Upon satisfactory proof that said duplicate certificate has been lost or destroyed, the court may direct the issuance of a new duplicate certificate, which shall be appropriately designated and take the place of the original duplicate.

LEGAL EFFECTS OF REGISTRATION OF TITLE.

4991. Effect of registration as notice to subsequent purchasers. Every voluntary or involuntary transaction which, if recorded, filed, or entered in any clerk's office, would affect unregistered land, shall, if duly registered in the office of the proper registrar, and not otherwise, be notice to all persons from the time of such registration, and operate in accordance with law and with the provisions of this chapter upon any registered land in the county of such registrar to which it relates.

4992. Effect of registration upon adverse claims. Every registered owner of any estate or interest in land brought under this chapter shall hold the land free from any and all adverse claims, rights, or encumbrances not noted on the certificate of title, except:

1. Liens, claims, or rights arising or existing under the laws or constitution of the United States which the statutes of this state cannot require to appear of record under registry laws;
2. Taxes and levies assessed thereon but not delinquent;

3. Any lease for a term not exceeding one year under which the land is actually occupied.

4993. Fraud or forgery. The protection of the foregoing section shall not apply to the benefit of a registered owner in cases of fraud or forgery to which he is a party, or in which he is a privy without valuable consideration paid in good faith.

4994. Effect of registration procured through fraud or forgery. Any registration procured through fraud or forgery may be set aside by the court according to the rules of equity; but the rights and title of an innocent intervening registered encumbrancer or purchaser for value and without notice shall not be affected thereby. And in such cases the injured party may pursue all his legal and equitable remedies against the party or parties to such fraud or forgery.

4995. Land to remain forever registered. The obtaining of a decree of registration and the entry of a certificate of title shall be construed as an agreement running with the land, and the same shall forever remain registered land, subject to the provisions of this chapter and all amendments thereof.

4996. No right of adverse possession or prescription. No title to, nor right or interest in, registered land in derogation of that of the registered owner shall be acquired by prescription or adverse possession.

4997. Effect of subsequent dealings with registered land. Except as otherwise specially provided by this chapter, registered land and ownership therein shall be subject to the same rights, burdens, and incidents as unregistered land, and may be dealt with by the owner, and shall be subject to the jurisdiction of the courts in the same manner as if it had not been registered. But registration shall be the only operative act to transfer or affect the title to registered land, and shall date from the time the writing, instrument, or record to be registered is duly filed and entered in the office of the proper registrar. Subject to the provisions of § 4992, no voluntary nor involuntary transaction shall affect the title to registered land until registered in accordance with the requirements of this chapter.

4998. Conflicting claims between registered owners. In case of conflicting claims between registered owners, the right, title, or estate derived from or held under the older certificate of title shall prevail.

ASSURANCE FUND AND FEES FOR REGISTRATION.

4999. Fee for original registration as assurance fund. Upon the filing of the petition for the original registration of any land under this chapter, there shall be paid to the registrar one-tenth of one per cent of the assessed value of such land as an assurance fund, which shall be subject to the trusts and conditions hereinafter declared for the uses and purposes of this chapter.

5000. Payments into state treasury upon trust. All moneys received by the registrars under the preceding section shall be kept in a separate account, and shall be paid into the state treasury upon the special trust and condition that the same shall be set aside by the treasurer in trust as a separate fund for the uses and purposes of this chapter, to be known as the "land registration assurance fund," which said fund is hereby appropriated to the uses and purposes set forth in this chapter.

5001. Funds to be invested. Said moneys, in so far as the same may not be required to satisfy any judgment certified against the assurance fund under § 5004, shall be invested by the treasurer of the state in state bonds in trust for the uses and purposes set forth in this chapter until said fund amounts to the sum of $500,000; but the income, or so much thereof as may be required therefor, may be applied towards the payment of the expenses of the administration of this chapter and the satisfaction of any such judgment. Whenever and so long as the face value of the bonds purchased as aforesaid equals said sum of $500,000, other moneys thereafter coming into

said fund together with any income not required for the purposes aforesaid, shall be transferred from the land registration assurance fund to the general treasury.

5002. Suits against the assurance fund. Any person who had no actual notice of any registration under this chapter by which he may be deprived of any estate or interest in land, and who is without remedy hereunder, may, within two years next after the time at which the right to bring such action shall have first accrued to him or to some person through whom he claims, bring an action against the treasurer of the state in the district court of the county in which such land is located, for the recovery out of the assurance fund of any damages to which he may be entitled by reason of such deprivation. The assurance fund shall be defended in such action and in any appeal by the attorney-general for the state. The measure of damages in such action shall be the value of the property at the time the right to bring such action first accrued, and any judgment rendered therefor shall be paid as hereinafter provided. If any person entitled to bring such action be under the disability of infancy, insanity, imprisonment, or absence from the state in the service of the state or of the United States at the time the right to bring such action first accrued, the same may be brought by him or his privies within two years after the removal of such disability.

5003. Defendants to suits against assurance fund. If such action be brought to recover for loss or damage arising only through the legal operation of this chapter, then the treasurer of the state shall be the sole defendant. But if such action be brought to recover for loss or damage arising on account of any registration made or procured through the fraud or wrongful act of any person not exercising a judicial function, then both the treasurer of the state and such person shall be made parties defendant.

5004. Judgment against the assurance fund. If judgment be rendered for the plaintiff in any such action, execution shall issue against the defendants, if any, other than the treasurer of the state. And if such execution be returned unsatisfied in whole or in part, or if there be no such defendants, then the clerk of the court in which the judgment was rendered shall certify to the state auditor the amount due on account thereof, and the same shall then be paid by said treasurer out of the assurance fund on warrant from said state auditor under the special appropriation hereby made of said fund for that purpose. Any person other than the treasurer of the state against whom any such judgment may have been rendered shall remain liable therefor, or for so much thereof as may be paid out of the assurance fund, and said treasurer may bring suit at any time to enforce the lien of such judgment against such person or his estate for the recovery of any amount, with interest, paid out of the assurance fund as aforesaid.

5005. When assurance fund not liable. The assurance fund shall not, under any circumstances, be liable for any loss, damage, or deprivation occasioned by a breach of trust, whether express, implied, or constructive, on the part of the registered owner of any estate or interest in land.

5006. How judgments shall be satisfied out of assurance fund. If at any time the assurance fund be insufficient to satisfy any judgment certified against it as aforesaid, the unpaid amount shall bear interest and be paid in its order out of any moneys thereafter coming into said fund.

5007. Fees of registrar and other officers of the court. The fees payable under this chapter shall be as follows:

1. To registrars. For docketing, indexing, and filing any original petition and exhibits therewith, and publishing and mailing the notices thereof, the postage required and $3.

For docketing, indexing, and filing any other paper, 50 cents.

For the entry of the original certificate of title and issuing one duplicate certificate, and recording and indexing memorandum, $3.

For each additional duplicate, 50 cents.

For the registration of any writing, instrument, or record, or any memorial, including every act necessary therefor, $1.

2. To examiners of titles. For examining title and making report to the court, one-tenth of one per cent of the value of the land, and postage and $10.

3. To sheriffs. For ascertaining and reporting to court the names and addresses of the persons actually occupying the premises described in any petition, $1.

4. For any service of the registrars, or of any sheriff or surveyor not specially provided for herein, such fee as may be allowed by law for like services in other cases.

5008. Interpretation and construction of chapter. This chapter shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

CHAPTER 7.

PLATS AND SUBDIVISIONS.

5021. (2011.) Owner may plat lands. It shall be lawful for any owner or owners of any land, or any trustee or trustees selected by such owners, to lay out and plat such land into lots, streets, alleys, and public places.

This section applies to land outside, as well that within, incorporated cities and towns. Sowadski v. Salt Lake County, 36 U. 127; 104 P. 111.

5022. (2012.) Map. Whenever any lands are hereafter laid out and platted as mentioned in § 5021, the owner or owners of the same, or any trustee or trustees selected by such owner or owners, shall cause to be made out an accurate map or plat thereof, particularly setting forth and describing:

1. All the parcels of ground so laid out and platted, by their boundaries, course, and extent, and whether they are intended for avenues, streets, lanes, alleys, commons, or other public uses, together with such as may be reserved for public purposes;

2. All lots intended for sale, by numbers and their precise length and width.

5023. (2013.) Id. Approval by legislative authority of city, etc. Such map or plat shall be acknowledged by such owner or owners, or trustee, before some officer authorized by law to take the acknowledgment of conveyances of real estate, and certified by the surveyor making such plat, and, if the land is situated in any city or town, shall be approved by the legislative authority of the city or town in which such land is situated, or by some city or town officer for that purpose designated by resolution or ordinance of said legislative authority, and in the absence of such legislative authority, by the legislative authority of the county in which the town is situated; and if the land is situated outside of any city or town, shall be approved by the board of county commissioners of the county, or by some county officer for that purpose designated by resolution or ordinance of said board; and when so acknowledged, certified, and approved, shall be filed and recorded in the office of the county recorder of the county in which the said lands so platted and laid out are situated.

Approval necessary to recording, § 1581.
Dedication is complete without a formal acceptance by the public authorities. Sowadzki v. Salt Lake County, 36 U. 127; 104 P. 111.

5024. (2014.) Id. Dedication of streets, etc. Such maps and plats, when made, acknowledged, filed, and recorded with the county recorder, shall be a dedication of all such avenues, streets, lanes, alleys, commons, or other public places or blocks, and sufficient to vest the fee of such parcels of land as are therein expressed, named, or intended, for public uses for the inhabitants of such town and for the public for the uses therein named or intended.

Dedication of highways, §§ 2800-2810, and notes.
The fee passes only to the surface, and this only for public use, for all the purposes of a highway, and may be abandoned. Sowadzki v. Salt Lake County, 36 U. 127; 104 P. 111

5025. (2015.) Selling lots before recording map. Penalty. If any person shall sell or offer for sale any lot so platted according to said plat within any town or addition, before the map or plat thereof is made out, acknowledged, filed, and recorded as aforesaid, such person shall forfeit to the county in which such town or addition is located a sum not exceeding $300 for every lot which he shall sell. Such forfeiture shall be recovered in the name of such county in an action brought by the prosecuting attorney thereof.

5026. (2016.) Vacating plat. Any owner or owners of land that has been laid out and platted as hereinbefore provided may, upon application to the city council of the city wherein said land is situated, or to the board of county commissioners of any county wherein said land is contained, have such plat, or any portion thereof, or any street or alley therein contained, vacated, altered, or changed as hereinafter provided.

5027. (2017.) Id. Petition. If it is desired to vacate an entire plat, and the land is situated in any incorporated city, an application in writing signed by all of the owners of the land contained in said plat, and by the owners of land contiguous or adjacent to any street or alley in such plat, shall be made to the city council of the city wherein such land is situated, and in all other cases the application shall be made to the board of county commissioners wherein said land is contained.

5028. (2018.) Id. Hearing. Order. The city council or the board of county commissioners shall, at its next regular meeting after the filing of such application, consider the same, and if the said council or said board be satisfied that neither the public nor any person will be materially injured thereby, it shall order such plat to be vacated as prayed for in the petition, which order shall be recorded in the office of the recorder of the county wherein said land is situated.

5029. (2019.) Vacating portion of plat. Petition. If it is desired to vacate a portion only of any plat or a street or alley therein, application in writing may be made for that purpose to the city council of the city wherein said land is situated, and in all other cases to the board of county commissioners of the county wherein said land is contained, which petition shall be signed by all the owners of land in the plat of which a portion is to be vacated, and by the owners of land contiguous or adjacent to any street or alley in such plat, to vacate or alter which application is made.

5030. (2020.) Id. Hearing. Order. Upon the filing of such application, the city council or board of county commissioners, as the case may be, shall, at its next regular meeting, proceed to hear and consider the same, and if the said council or board be satisfied that neither the public nor any person will be materially injured thereby, it shall order such portion of said plat or such street or alley to be vacated, altered, or changed as prayed for in the petition, which order shall be duly recorded in the office of the recorder of the county wherein said land is situated.

CHAPTER 8.

OCCUPYING CLAIMANTS.

5031. (2021.) Improvements under color of title; petition; stay. Where an occupant of real estate has color of title thereto, and in good faith has made valuable improvements thereon, and is afterwards in a proper action found not to be the owner, no execution shall issue to put the plaintiff in possession of the same after the filing of a petition as hereinafter provided, until the provisions of this chapter have been complied with.

Iowa, McClain's An. C. (1888) § 3151.
Possessory right, § 4867.
Color of title defined, § 5034.
Improvements allowed as counterclaim, § 7250.
Defendant claimed title only under the tax deed, and did not rely on a conveyance from the owner. Such improvements as were placed on the land were not induced because of any agreement or representation from such owner or reliance on his conveying the land; held, that plaintiff, as the grantee of such owner,

was not estopped from asserting title to the land.
Allen v. Fitzgerald, 23 U. 597; 65 P. 592.
Duke v. Griffith, 13 U. 361; 45 P. 276.
Actual possession of land under claim and color of title of a tax deed is sufficient to maintain an action against one who, having no title or right of possession, goes on the land and removes a building.
Kunkel v. Utah Lbr. Co., 29 U. 13; 81 P. 897.
The occupant may, after disposition of his appeal adverse to his claim of title, file his petition in the trial court to ascertain the value of the improvements made by him.
Fares v. Urban, 46 U. 609; 151 P. 57.
A claim for value of improvements placed upon the land of another as an occupying claimant can only be made after the title is adjudicated to be in a person other than the claimant of such improvements.
Utah Copper Co. v. Eckman, 47 U. 165; 152 P. 178.
The occupying claimant must show he had color of title and made the improvement in good faith, and where not made in good faith the real owner on recovery of the land will not be compelled to pay for the improvements.
Doyle v. West Temple Terr. Co., 47 U. 238; 152 P. 1180.

5032. (2022.) Claimant's petition. Trial. Such petition must set forth the grounds on which the defendant seeks relief, stating as accurately as practicable the value of the real estate, exclusive of the improvements thereon made by the claimant or his grantors, and the value of such improvements. The issues joined thereon must be tried as in ordinary actions, and the value of the real estate and of such improvements must be separately ascertained on the trial.
Iowa, McClain's An. C. (1888) §§ 3152, 3153.
The instructions need to cover only the grounds set forth in the petition.
Doyle v. West Temple Terr. Co., 47 U. 238; 152 P. 1180.

5033. (2023.) Rights of parties. The plaintiff in the main action may thereupon pay the appraised value of the improvements, and take the property, but should he fail to do this after a reasonable time, to be fixed by the court, the defendant may take the property upon paying its value, exclusive of the improvements. If this is not done within a reasonable time, to be fixed by the court, the parties will be held to be tenants in common of all the real estate, including the improvements, each holding an interest proportionate to the values ascertained on the trial.
Iowa, McClain's An. C. (1888) §§ 3154-3156.

5034. (2024.) "Color of title" defined. A purchaser in good faith at any judicial or tax sale, made by the proper person or officer, has color of title within the meaning or this chapter, whether such person or officer has sufficient authority to sell or not, unless such want of authority was known to such purchaser at the time of the sale, and his rights shall pass to his assignees or representatives. Any person has also color of title who has occupied a tract of real estate by himself, or by those under whom he claims, for the term of five years, or who has thus occupied it for less time, if he, or those under whom he claims have, at any time during such occupancy, with the knowledge or consent, express or implied, of the real owner, made any valuable improvements thereon, or if he or those under whom he claims have, at any time during such occupancy, paid the ordinary county taxes thereon for any one year, and two years have elapsed without a repayment of the same by the owner thereof, and such occupancy is continued up to the time at which the action is brought by which the recovery of the real estate is obtained; but nothing in this chapter shall be construed to give tenants color of title against their landlords.
Iowa, McClain's An. C. (1888) §§ 3157, 3158.
Improvements made under tax title, note to § 5031.

5035. (2025.) "Occupying claimant" defined. When any person has settled upon any real estate, and occupied the same for three years under or by virtue of any law or contract with the proper officers of the state for the purchase thereof, or under any law of, or by virtue of any purchase from, the United States, and shall have made valuable improvemetns thereon, and shall be found not to be the owner thereof, or not to have acquired a right to purchase the same from the state or the United States, such person shall be an occupying claimant within the meaning of this chapter.
Iowa, McClain's An. C. (1888) § 3159.

5036. (2026.) Waste by occupant. Set-off. In the cases above provided for, if the occupying claimant has committed any injury to the real estate by cutting timber, or otherwise, the plaintiff may set the same off against any claim for improvements made by the claimant.
Iowa, McClain's An. C. (1888) § 3160.

5037. (2027.) Execution may issue, when. The plaintiff is entitled to an execution to put him in possession of his property in accordance with the provisions of this chapter, but not otherwise.
Iowa, McClain's An. C. (1888) § 3161.

5038. (2028.) Rights of occupant of lands granted to the state. Any person having improvements on any real estate granted to the state in aid of any work of internal improvement, whose title thereto is questioned by another, may remove such improvements without injury otherwise to such real estate, at any time before he is evicted therefrom, or he may claim and have the benefit of this chapter by proceeding as herein directed.
Iowa, McClain's An. C. (1888) § 3162.

TITLE 94.

REGISTRY OF BIRTHS AND DEATHS.

5039. (2029.) Registration of births and deaths. It shall be the duty of the state board of health and vital statistics to have charge of the state system of registration of births and deaths; to prepare the necessary methods, forms, and blanks for obtaining and preserving such records; and to insure the faithful registration of the same in the towns, precincts, and in the office of the secretary of said board. The said board shall be charged with the uniform and thorough enforcement of the law throughout the state.
R. S. '98, § 2033; '99, p. 69; '05, p. 209.

5040. (2030.) State registrar. Clerical assistance. The secretary of the state board of health and vital statistics shall be state registrar, and shall have general supervision of vital statistics. The state board of health shall provide for such clerical and other assistance as may be necessary for the purposes of this title, and may fix their compensation within the amount appropriated therefor by the legislature. '05, p. 209.

5041. (2031.) Registration districts. For the purposes of this title, the state shall be divided into registration districts as follows:

Each city of the first and of the second class shall constitute a registration district, and the health officer therein shall be the registrar thereof; except within cities of the first and of the second class, each precinct in the state shall constitute a registration district. '05, p. 209.

5042. (2032.) Local registrars. Term. Removal. Within sixty days after July 9, 1905, the county commissioners of each county in the state shall select a local registrar of vital statistics for each registration district in the county, excepting cities of the first and of the second class, and the selection shall at once be reported by the said board to the state registrar. The state registrar shall promptly notify the local registrar of his appointment, and the latter shall return an acceptance in writing, together with the name and address of his deputy, whom he shall at once appoint, and whose duty it shall be to act in his stead in case of absence, illness, or disability. The term of appointment of local registrars shall be for two years, beginning with the 1st day of January, 1905, and their successors shall be appointed by the county commissioners in a similar manner at least ten days before the expiration of their terms of office. Each registrar shall qualify by taking the constitutional oath, which shall be filed with the county clerk. Any local registrar who fails or neglects to efficiently discharge the duties of his office or who fails to make prompt and complete returns of births and deaths shall on complaint of the state registrar, be forthwith removed from his office by the county commissioners, and a successor appointed. '05, p. 210.

5043. (2033.) Burial permits. The body of any person whose death occurs in the state shall not be interred, deposited in a vault or tomb, cremated, or otherwise disposed of, or removed from or into any registration district until a permit for burial or removal shall have been properly issued by

the registrar of the registration district in which the death occurs. And no such burial or removal permit will be issued by any registrar until a complete and satisfactory certificate and return of the death has been filed with him, as hereinafter provided; *provided,* that a transit permit, issued in accordance with the law and the health regulations of the place where the death occurred, may be accepted by the local registrar in the district where the body is to be interred or otherwise finally disposed of as a basis upon which he shall issue a local burial permit in the same way as if the death occurred in his district, but shall plainly enter, on the face of the copy of the record, the fact that it was a body shipped in for interment, and give the actual place of death. But when a body is removed from a district in Utah to an adjacent or near-by district for interment, not requiring the use of a common carrier or the issue of a transit permit, then the registrar's removal permit from the district where death occurred may be accepted as authority for burial.

R. S. '98, § 2035; '99, p. 69; '05, p. 210.

5044. (2034.) Stillborn children. Stillborn children, or those dead at birth, shall be registered as births and also as deaths, and a certificate of both the birth and the death shall be filed with the local registrar in the usual form and manner, the certificate of birth to contain, in place of the name of the child, the word "stillbirth." The medical certificate of the cause of death shall be signed by the attending physician, if any, and shall state the cause of death as "stillborn," with the cause of the stillbirth, if known; whether a premature birth, and, if born prematurely, the period of uterogestation in months, if known; and a burial or removal permit in usual form shall be required. Midwives shall not sign certificates of death for stillborn children, but such cases, and stillbirths occuring without attendance of either physician or midwife, shall be treated as deaths without medical attendance as provided for in § 5046. '05, p. 210.

5045. (2035.) Form of death certificate. The certificate of death shall contain the following items:

1. Place of death, including state, county, precinct, town, or city; if in a city, the street and house number; if in a hospital or other institution, the name of the same to be given instead of the street and house number;
2. Full name of decedent; if an unnamed child, the surname, preceded by "unnamed;"
3. Sex;
4. Color;
5. Conjugal condition—as single, married, widowed, or divorced;
6. Date of birth, including the year, month, and day;
7. Age in years, months, and days;
8. Place of birth, state or foreign country;
9. Name of father;
10. Birthplace of father, state or foreign country;
11. Maiden name of mother;
12. Birthplace of mother, state or foreign country;
13. Occupation: The occupation to be reported of any person who had any remunerative employment, women as well as men;
14. Signature and address of informant;
15. Date of death, including the year, month, and day;
16. Statement of medical attendance on decedent, fact and time of death, including the time last seen alive;
17. Cause of death, including the primary and immediate causes, and contributory causes or complications, if any, and the duration of each;
18. Signature and address of physician or official making the medical certificate;
19. Special information concerning death in hospitals and institutions and of persons dying away from home, including the former or usual residence, length of time at place of death, and place where disease was contracted;

20. Place of burial or removal;
21. Date of burial or removal;
22. Signature and address of undertaker, or person in charge of the funeral;
23. Official signature of registrar, with date when certificate was filed and registered number.

The personal and statistical particulars (items 1 to 13) shall be authenticated by the signature of the informant, who may be any competent person acquainted with the facts.

The statement of the facts relating to the disposition of the body shall be signed by the undertaker or person acting as such.

The medical certificate shall be made and signed by the physician, if any, last in attendance on the deceased, who shall specify the time in attendance, the time he last saw the deceased alive, and the hour of the day at which death occurred. And he shall further state the cause of death so as to show the course of disease or sequence of causes resulting in death, giving the primary and immediate causes, and also the contributory causes, if any, and the duration of each. Indefinite and unsatisfactory terms indicating only symptoms of disease or condition resulting from disease will not be held sufficient for issuing a burial or removal permit, and any certificate containing only such terms, as defined by the state registrar, shall be returned to the physician for correction and definition. Causes of death which may be the result of either disease or violence shall be carefully defined, and, if from violence, its nature shall be stated, and whether accidental, suicidal, or homicidal. And in case of deaths in hospitals, institutions, or away from home, the physician shall furnish the information required under this head (item 19) and shall state where, in his opinion, the disease was contracted.

R. S. '98, § 2035; '99, p. 69; '05, p. 211.

5046. (2036.) Death without medical attendance. In case of any death occurring without medical attendance, it shall be the duty of the undertaker to notify the registrar of such death, and when so notified the registrar shall inform the local health officer and refer the case to him for immediate investigation and certification prior to issuing a permit; *provided,* that when the local health officer is not a qualified physician, or when there is no such official, and in such cases only, the registrar is authorized to make the certificate and return from the statement of relatives or other persons having adequate knowledge of the facts; *provided further,* that if the circumstances of the case render it probable that the death was caused by unlawful or suspicious means, the registrar shall then refer the case to the coroner for his investigation and certification. '05, p. 212.

5047. (2036x.) Duties of undertaker. The undertaker, or person acting as undertaker, shall be responsible for obtaining and filing the certification of death with the registrar and securing a burial or removal permit prior to any disposition of the body. He shall obtain the personal and statistical particulars from the persons best qualified to supply them over the signature and address of his informant. He shall then present the certificate to the attending physician, if any, or to the health officer or coroner, as directed by the registrar, for the medical certificate of the cause of death and other particulars necessary to complete the record as specified in § 5046. And he shall then state the facts required relative to the date and place of burial over his signature and with his address, and immediately present the completed certificate to the registrar. The undertaker shall deliver the burial permit to the sexton or person in charge of the place of burial before interring the body, or attach the transit permit containing the registrar's removal permit to the box containing the corpse when shipped by any transportation company, to accompany same to destination, where it shall be taken up by the local registrar of the district in which interment is made, who shall issue a burial permit thereon. '05, p. 213.

5048. (2036x1.) Where interment is in registration district where death

occurs. If the interment or other disposition of the body is to be made in the registration district in which the death occurred, the wording of the burial permit may be limited to a statement by the registrar, and over his signature, that a satisfactory certificate of death having been filed with him as required by law, permission is granted to inter, or otherwise dispose of the body of the deceased, stating the name, age, sex, cause of death, and other necessary details upon the form prescribed by the state registrar. But in case the interment or other disposition of the body is to be made in some registration district other than that in which the death occurred, a complete copy of the certificate of death shall be attached to and made part of the permit.

'05, p. 213.

5049. (2036x2.) Duties of sexton. No sexton or person in charge of any premises in which interments are made shall inter or permit the interment of any body unless it is accompanied by a burial, removal, or transit permit as herein provided. And each sexton or person in charge of any burial ground shall indorse upon the permit the date of interment, over his signature, and shall immediately return all permits, so indorsed, to the local registrar of his district. He shall also keep a record of all interments made in the premises under his charge, stating the name of the deceased person, place of death, date of burial, and name and address of the undertaker, which record shall at all times be open to public inspection. '05, p. 213.

5050. (2036x3.) Registration of births. All births that occur in the state shall be immediately registered in the district in which they occur, as hereinafter provided. '05, p. 214.

5051. (2036x4.) Duty of attending physician, etc. It shall be the duty of the attending physician or midwife to file a certificate of birth, giving all the particulars required by this title, with the local registrar of the district in which the birth occurred, within ten days after the date of birth. And if there be no attending physician or midwife, then it shall be the duty of the father of the child, householder, or owner of the premises, manager or superintendent of institution in which the birth occurred, to file said certificate of birth with the local registrar within three days after the birth.

R. S. '98, §§ 2029, 2030, 2032; '05, p. 214.

5052. (2036x5.) Contents of birth certificate. The certificate of birth shall contain the following items:

1. Place of birth, including state, county, precinct, or city; if in a city, the street and house number; if in a hospital or other institution, the name of the same to be given instead of the street and house number;
2. Full name of child; if the child dies without a name before the certificate is filed, enter the words "died unnamed;" if the living child has not been named at the date of filing the certificate of birth, the space for "full name of child" is to be left blank, to be filled out subsequently by a supplemental report as hereinafter provided;
3. Name of child;
4. Whether a twin, triplet, or other plural birth; a separate certificate shall be required for each child in a case of plural birth, giving number of child in order of birth;
5. Whether legitimate or illegitimate;
6. Full name of father;
7. Residence of father;
8. Color or race of father;
9. Birthplace of father;
10. Age of father at last birthday, in years;
11. Occupation of father;
12. Maiden name of mother, in full;
13. Residence of mother;
14. Color or race of mother;
15. Birthplace of mother;
16. Age of mother at last birthday, in years;

17. Occupation of mother;

18. Number of child of this mother, and number of children of this mother now living;

19. Certificate of attending physician or midwife as to attendance at birth, including statement of year, month, day, and hour of birth, and whether the child was alive or dead at birth. This certificate shall be signed by the attending physician or midwife, with date of signature and address. If there was no physician or midwife in attendance, then the person whose duty it shall become to file a certificate of birth as required by § 5051 of this title shall draw a line through the words, "I hereby certify that I attended the birth of the above child," and shall write in lieu thereof the words, "No physician or midwife," filling out the remainder of the certificate in regard to the year, month, day, and hour of birth, and signing the certificate as father, householder, owner of premises, manager or superintendent of institution, as the case may be, with his address;

20. Exact date of filing in office of local registrar, attested by his official signature and registered number of birth, as hereinafter provided.

All certificates either of birth or death, shall be written legibly in unfading ink, and no certificate shall be held to be complete and correct that does not supply all of the items of information called for therein, or satisfactorily account for their omission. '05, p. 214.

5053. (2036x6.) Where name is not given in certificate. When any certificate of birth of a living child is presented without statement of the given name, then the local registrar shall make out and deliver to the informant a special blank for the supplemental report of the given name of the child, which shall be filled out as directed and returned to the registrar as soon as the child shall be named. The original certificate of birth shall not be considered complete until the supplemental report is filed or the blank returned with the statement "died unnamed." '05, p. 215.

5054. (2036x7.) Register of physicians, midwives, and undertakers. Every physician, midwife, and undertaker shall, without delay, register his or her name, address, and occupation with the local registrar of the district in which he or she resides or may hereafter establish a residence, and shall thereupon be supplied by the local registrar with a copy of this title, together with such rules and regulations as may be prepared by the state board of health relative to its enforcement. Within thirty days after the close of each calendar year, each local registrar shall make a return to the state registrar of all physicians and midwives who have been registered in his district during the whole or any part of the preceding calendar year. '05, p. 215.

5055. (2036x8.) Blanks to be furnished by state board. The state board of health shall prepare, print, and supply to all registrars all blanks and forms used in registering, recording, and preserving the returns, or in otherwise carrying out the purposes of this title, and shall prepare and issue such detailed instructions as may be required to secure the uniform observance of its provisions and the maintenance of a perfect system of registration. And no other blanks shall be used than those supplied by the state registrar. He shall carefully examine the certificates received monthly from the local registrars, and if any such are incomplete or unsatisfactory, he shall require such further information to be furnished as may be necessary to make the record complete and satisfactory. And all physicians, midwives, informants, or undertakers connected with any case, and all other persons having knowledge of the facts, are hereby required to furnish such information as they may possess regarding any birth or death, upon demand of the state registrar, in person, by mail, or through the local registrar. He shall further arrange, bind, and permanently preserve the certificates in a systematic manner, and shall prepare and maintain a comprehensive and continuous card index of all births and deaths registered, the cards to show the name of child or deceased, place and date of birth or death, number of certificate, and the volume in which it is contained. He shall inform all registrars what diseases are to be

considered as infectious, contagious, or communicable and dangerous to the public health, as decided by the state board of health, in order that, when death occurs from such diseases, proper precautions may be taken to prevent the spreading of dangerous diseases. R. S. '98, § 2034; '05, p. 216.

5056. (2036x9.) Duties of local registrar. It shall be the duty of the local registrar to supply blank forms of certificates to such persons as require them. And he shall carefully examine each certificate of birth or death when presented for record to see that it has been made out in accordance with the provisions of this title and the instructions of the state registrar, and, if any certificate of death is incomplete or unsatisfactory, it shall be his duty to call attention to the defects in the return and to withhold issuing the burial or removal permit until they are corrected. If the certificate of death is properly executed and complete, he shall then issue a burial or removal permit to the undertaker; *provided,* that in case the death occurred from some disease that is held by the state board of health to be infectious, contagious, or communicable and dangerous to the public health, no permit for the removal or other disposition of the body shall be granted by the registrar except under such conditions as may be prescribed by the state and local board of health. If a certificate of birth is incomplete, he shall immediately notify the informant and require him to supply the missing items, if they can be obtained. He shall then number consecutively the certificates of birth and death in two separate series, beginning with number one for the first birth and the first death in each calendar year, and sign his name as registrar in attest of the date of the filing in his office. He shall also make a complete and accurate copy of each birth and death certificate registered by him, upon a form identical with the original certificate, to be filed and permanently preserved in his office as the local record of such birth or death, in such manner as directed by the state registrar. And he shall, on the 5th day of each month, transmit to the state registrar all original certificates registered by him during the preceding month. And if no births or no deaths occurred in any month, he shall, on the 5th day of the following month, report that fact to the state registrar on a card provided for this purpose. '05, p. 216.

5057. (2036x10.) Compensation of local registrar. Each local registrar shall be paid at the rate of $3 per day for the time actually required in carrying out the provisions of this title. At the end of each quarter he shall make out an itemized bill for his services and forward the same to the state registrar for his approval, and if approved by him he shall return the same to the local registrar, who may thereupon present the same to the board of county commissioners for approval, and the same shall be paid by the county; but no bill for services of local registrars shall be paid until first approved by the state registrar. '05, p. 217.

5058. (2036x11.) State registrar to furnish copies. Fees. The state registrar shall, upon request, furnish any applicant a certified copy of the record of any birth or death registered under provisions of this title, for the making and certification of which he shall be entitled to a fee of one dollar, to be paid by the applicant. And any such copy of the record of a birth or death, when properly certified by the state registrar to be a true copy thereof, shall be prima facie evidence in all courts and places of the facts therein stated. For any search of the files and record, when no certified copy is made, the state hour of time of search, to be paid by applicant. And the state registrar shall keep a true and accurate account of all fees received by him under these provisions, and turn the same over to the state treasurer, at the end of each quarter. '05, p. 217.

5059. (2036x12.) Penalties. If any physician who was in medical attendance upon any deceased person at the time of death shall neglect or refuse to make out and deliver to the undertaker, sexton, or other person in charge of the interment, removal, or other disposition of the body, upon request, the medical certificate of death hereinbefore provided for, he shall be deemed

guilty of a misdemeanor. And if any physician shall knowingly make a false certification of the cause of death in any case, he shall be deemed guilty of a misdemeanor. And any physician or midwife in attendance upon a case of confinement, or any other person charged with responsibility for reporting births, in the order named in § 5051, who shall neglect or refuse to file a proper certificate of birth with the local registrar within the time required by this title, shall be deemed guilty of a misdemeanor. And if any undertaker, sexton, or other person acting as undertaker, shall inter, remove, or otherwise dispose of the body of any deceased person without having received a burial or removal permit as herein provided, he shall be deemed guilty of a misdemeanor. And any registrar, or deputy registrar, who shall neglect or fail to enforce the provisions of this title in his district, or shall neglect or refuse to perform any of the duties imposed upon him by this title or by the instructions and directions of the state registrar, shall be deemed guilty of a misdemeanor. And any person who shall wilfully alter any certificate of birth or death, or the copy of any certificate of birth or death, on file in the office of the local registrar, shall be deemed guilty of a misdemeanor. And any other person or persons who shall violate any of the provisions of this title, or shall wilfully neglect or refuse to perform any duties imposed upon them by the provisions of this title, shall be deemed guilty of a misdemeanor. And any common carrier, carrying or accepting through its agents or employes for carriage, the body of any deceased person without an accompanying permit issued in accordance with the provisions of this title, shall be deemed guilty of a misdemeanor. Any person convicted of a misdemeanor under the provisions of this title shall be fined in any sum not less than $10 nor more than $200; *provided,* that in case the death occurred outside of the state and the body is accompanied by a certificate of death, burial, or removal or transit permit issued in accordance with the law or board of health regulations in force where the death occurred, such death certificate, burial, or removal or transit permit may be held to authorize the transportation or carriage of the body into or through the state. R. S. '98, § 2036; '99, p. 69; '05, p. 217.

5060. (2036x13.) Further duties of local and state registrars. Local registrars are hereby charged with the strict and thorough enforcement of the provisions of this title in their districts, under the supervision and direction of the state registrar. And they shall make an immediate report to the state registrar of any violations of this law coming to their notice by observation, or upon complaint of any person, or otherwise. The state registrar is hereby charged with the thorough and efficient execution of the provisions of this title in every part of the state, and with supervisory power over local registrars to the end that all of the requirements shall be uniformly complied with. He shall have authority to investigate cases of irregularity or violation of law, personally or by accredited representative, and all registrars shall aid him, upon request, in such investigations. When he shall deem it necessary, he shall report cases of violation of any of the provisions of this title to the prosecuting attorney of the proper county, with a statement of the facts and circumstances, and, when any such case is reported to him by the state registrar, the prosecuting attorney shall forthwith initiate and promptly follow up the necessary court proceedings against the parties responsible for the alleged violation of law. And upon request of the state registrar, the attorney general shall likewise assist in the enforcement of the provisions of this title. '05, p. 218.

TITLE 95.

RELEASE OF JOINT DEBTOR.

5067. (2037.) Shall not discharge other debtors. A joint debtor upon contract or a judgment founded upon contract may be released from liability

by his creditor, and such release shall not discharge the other debtors beyond the just proportion of the debt for which the released debtor was liable or which he has paid.

Kansas G. S. (1889) § 1102*. Minn. (1894) § 5167*. Nev., § 4931.
Action against joint debtor, §§ 6511, 6558.

Ordinarily the discharge of one joint debtor discharges his co-debtor.
Rocky Mt. Stud Farm Co. v. Lunt, 46 U. 299; 151 P. 521.

5068. (2038.) Release of principal discharges surety. The preceding section shall not so apply as to permit a principal to be released without the discharge of his surety.

Decisions on release of surety, § 4097.

TITLE 96.

SALARIES.

CHAPTER 1.

STATE OFFICERS.

5070. (2049x.) Salaries of state officers. The salaries of the following state officers are hereby fixed as follows: Governor, $6000; secretary of state, $4000; state treasurer, $2500; State auditor, $3000; attorney-general, $4000; state superintendent of public instruction, $3000.

Am'd '01, p. 7; '09, p. 4; '11, p. 129.

Until this section went into effect, Jan. 1, 1909, said salaries were as fixed by § 1, chap. 73, p. 73, Laws '01, to which § 5070 is an amendment.
Salaries of state officers as originally fixed, Con. art. 7, sec. 20.
Payment of city officers' salaries, note to § 612.
Payment of county officers' salaries, note to § 5087.
State officers shall be paid fixed salaries, Con. art. 7, sec. 20; art. 21, sec. 1.
Fees to be paid over, Con. art. 21, sec. 2.

Each occupant of the office of territorial statitstician for the year 1895 is entitled to such a proportion of the salary as the time of service of each bears to the entire year.
State, ex rel. Bache v. Richards, 15 U. 477; 49 P. 532.
A state officer is entitled to his salary for a portion of his term of office for which he was appointed and commissioned and for which he had duly qualified, though during such portion of the term he had not assumed charge of the office.
Tanner v. Edwards, 31 U. 80; 86 P. 765.

5071. (2050.) Salaries of certain state officers. The annual salaries of the following state officers are fixed as follows: Clerk of the supreme court and ex-officio librarian, $2100; reporter of decisions of the supreme court, $1200; adjutant-general, $1500; assistant adjutant-general of the governor's staff, $600; bank examiner, $1800. Am'd '07, p. 31; '09, p. 22.

The 1909 act amending this section is constitutional.
Edler v. Edwards, 34 U. 13; 95 P. 367.

5072. (2050x.) Salaries of supreme court judges. Proviso. The salaries of the justices of the supreme court are hereby fixed at $5000 per annum, payable quarterly out of the state treasury; *provided,* that no mileage or expenses shall be allowed. '03, p. 64.

Salaries of justices of the supreme court as originally fixed, Con. art. 8, sec. 20.

5073. (2050x1.) Salaries of district judges. Proviso. The salaries of the judges of the district court are hereby fixed at $4000 per annum, payable quarterly out of the state treasury; *provided,* that no mileage or expenses shall be allowed, except that when any district judge, at the request of the supreme court, or of any judge of another district, or of the governor, shall hold court in a county outside of his own district, he shall be entitled to his actual and necessary expenses incurred thereby; which shall be paid quarterly, and the state auditor shall draw his warrant on the state treasurer at the end of each quarter for the amount of said actual and necessary expenses so incurred. Am'd '03, p. 71; '17, p. 243.

Salaries of district judges as originally fixed, Con. art. 8, sec. 20.
Laws of '03, p. 71, enacting that the salaries of district judges should be fixed at $4000 per annum, provided that no mileage or expenses should be allowed, was not subject to construction as though the proviso was omitted, the intent of the legislature to restrict the salary by cutting off mileage and expenses being apparent.
Marioneaux v. Cutler, 32 U. 475; 91 P. 355.

5074. (2050x2.) Salaries of district attorneys. The annual salaries of the several district attorneys for the several judicial districts of this state shall be as follows: In the first judicial district, $1500; in the second judicial district, $2000; in the third judicial district, $3000; in the fourth judicial district, $1500; in the fifth judicial district, $1500; in the sixth judicial district, $1500; in the seventh judicial district, $1500. '99, p. 80.

5075. (2051.) District judges and district attorneys to receive mileage. District judges and district attorneys shall receive mileage at the rate of five cents per mile, when traveling on the line of any railroad, and fifteen cents per mile when traveling off or away from the line of any railroad, for each mile actually and necessarily traveled in the performance of their official duties. Am'd '01, p. 102.

Judges not entitled to mileage since act of 1903, § 5073, and note.

5076. (2052.) Expenses of state officers. All state officers, except those otherwise specifically provided for, shall receive, in addition to their salaries, their actual and necessary expenses while traveling in the performance of their official duties.

5077. (2053.) Salary and mileage paid quarterly. The salaries of state officers shall be paid quarterly, and the state auditor shall draw his warrant on the state treasurer at the end of each quarter for the amount of salary and mileage then due from the state to each of the state officers.

MEMBERS AND EMPLOYES OF LEGISLATURE.

5078. (2054.) Compensation of members of legislature. The compensation of members of the legislature of the state of Utah shall be $4 per day during each session, and ten cents per mile for the distance necessarily traveled going to and returning from the place of meeting on the most usual route.

Compensation of members of legislature, Con. art. 6, sec. 9.

5079. (2055.) Compensation of officers and employes of legislature. The compensation of officers and employes of the legislature of the state of Utah shall be $4 per day, each, and such officers and employes shall consist of a secretary of the senate and a chief clerk of the house, a minute clerk of the senate and a minute clerk of the house, a docket clerk of the senate and a docket clerk of the house, an engrossing and enrolling clerk of the senate and an engrossing and enrolling clerk of the house, committee clerks of the senate and committee clerks of the house, a sergeant-at-arms of the senate and a sergeant-at-arms of the house, a messenger of the senate and two messengers of the house, a watchman of the senate and a watchman of the house, a doorkeeper of the senate and a doorkeeper of the house, a chaplain of the senate and a chaplain of the house, and such other assistants as may be found necessary.

CHAPTER 2.

COUNTY OFFICERS.

5086. (2056.) Classification of counties. For the purpose of regulating the compensation and salaries of all county officers not otherwise provided for, the counties of this state are classified according to assessed valuation of the several counties, as follows:

First class, all counties having an assessed valuation of $20,000,000 or over;

Second class, all counties having an assessed valuation of more than $15,000,000 and less than $20,000,000;

Third class, all counties having an assessed valuation of more than $10,000,000 and less than $15,000,000;

Fourth class, all counties having an assessed valuation of more than $8,000,000 and less than $10,000,000;

Fifth class, all counties having an assessed valuation of more than $7,000,000 and less than $8,000,000;

Sixth class, all counties having an assessed valuation of more than $6,000,000 and less than $7,000,000;

Seventh class, all counties having an assessed valuation of more than $5,000,000 and less than $6,000,000;

Eighth class, all counties having an assessed valuation of more than $4,000,000 and less than $5,000,000;

Ninth class, all counties having an assessed valuation of more than $3,000,000 and less than $4,000,000;

Tenth class, all counties having an assessed valuation of more than $2,000,000 and less than $3,000,000;

Eleventh class, all counties having an assessed valuation of more than $1,300,000 and less than $2,000,000;

Twelfth class, all counties having an assessed valuation of more than $1,000,000 and less than $1,300,000;

Thirteenth class, all counties having an assessed valuation of more than $600,000 and less than $1,000,000;

Fourteenth class, all counties having an assessed valuation of more than $300,000 and less than $600,000;

Fifteenth class, all counties having an assessed valuation of less than $300,000.

All state, county, etc., officers to be paid fixed salaries; fees turned over, Con. art. 21, secs. 1, 2.

5087. (2057.) Annual salaries of county officers. The salaries of the officers of all counties in the state shall be fixed by the respective boards of county commissioners at not to exceed the following maximum amounts; *provided,* that should the respective boards of county commissioners, or any of them, fail to fix the salary of any of the county officers as provided for in this section, the salary of the predecessor of said officer or officers whose salary has not been fixed, shall apply:

	Class 1	Class 2	Class 3	Class 4	Class 5	Class 6	Class 7	Class 8	Class 9	Class 10	Class 11	Class 12	Class 13	Class 14	Class 15
Commissioners, each..	$2500	$ 700	$ 600	$ 500	$ 500	$ 450	$ 450	$ 450	$ 300	$ 300	$ 200	$ 200	$ 150	$ 100	$ 100
Sheriff	3500	1800	1500	1500	1400	1300	1300	1300	1250	1250	1200	1200	800	750	400
Assessor	2400	1800	1000	1000	900	850	800	800	750	750	750	600	400	300	300
Clerk	3200	1800	1500	1500	1400	1300	1300	1300	1300	1000	1200	1000	800	750	500
Recorder	2650	1800	1500	1500	1150	1100	1050	1000	1200	1000	1200	900	750	550	400
Treasurer	3300	1800	1500	1500	1400	1300	1300	1300	1000	900	800	600	500	400	250
Attorney	3300	1800	1500	1500	1100	1000	1000	1000	800	800	700	600	500	400	300
Supt. of schools	2000	1200	1200	1000	1000	1000	1000	1000	1000	1000	1000	1000	750	500	500
Surveyor	2000	1000	1000	500	450	400	350	350	350	350	350	350	350	350	350
Auditor	2400	....	...	....	....	....	....	....	....	....	....	....	....	....	....

Am'd '99, p. 111; '05, p. 91; '11, p. 111.

Salaries of city officers, note to § 612.

Salaries of state officers, note to § 5070.

Where county court fixed the treasurer's salary for handling school funds during his term at $500 per annum, the court could not, after his term expired, reduce the amount.

Toronto v. Salt Lake Co., 10 U. 410; 37 P. 587.

The fees and allowances to the probate judge having been fixed by law, the county court has no authority to award him an additional salary as superintendent of county affairs.

Bartch v. Cutler, 6 U. 409; 24 P. 526

Dictum concerning mileage of members of county court serving as committeemen.

Christopherson v. Stanton, 13 U. 85; 44 P. 648.

5088. (2058.) When fixed. The board of county commissioners of each county shall biennially, at a meeting held at least three months prior to the election for county officers, fix and determine the salaries of county officers, for whom maximum salaries are fixed, for the two years next succeeding; *provided,* that the board of county commissioners of counties of the first class shall at a meeting held within thirty days after the passage of this chapter, fix and determine the salaries of county officers in accordance with the foregoing section; and *provided, further,* that the salaries of such officers shall not be reduced for the term for which they were elected and shall have qualified;

provided, further, that the salary of the county superintendents of schools be fixed at least three months prior to his election. Am'd '11, p. 115.

County officers to be paid fixed salaries, Con. art. 21, sec. 1.

Where the commissioners at a meeting held at least three months prior to the election of county officers fixed the salaries, the commissioners can not after the election and induction into office raise the salaries.

Cromquist v. Mathews, 51 U. —; 173 P. —.

5089. (2059.) Compensation of county commissioners. The members of the board of county commissioners shall not receive any compensation in addition to that provided in § 5087 for any special or committee work, but each member shall be paid the amount of his actual traveling expenses in attending the regular and special sessions of the board, and in the discharge of necessary committee work, not to exceed $300 each annually; *provided,* that an itemized statement shall be made, showing in detail the expenses incurred, and shall be subscribed and sworn to by the member claiming such expenses.

A provision of law granting mileage to selectmen at the rate of twenty cents per mile in going only, from their residences to the courthouse at each session of the court attended by them, does not entitle them to mileage while attending to the business of the court or discharging duties as committeemen.

Christopherson v. Stanton, 13 U. 85; 44 P. 648.

5090. (2060.) New counties. Reduction of class. Counties created and organized after the adoption of this chapter must immediately come under and be governed by its provisions so far as the same are applicable thereto. When the assessed valuation of any existing county has been reduced below the class and rank first assumed hereunder, it is the duty of the board of county commissioners of such county to designate the class to which such county has been reduced, and such county is thereafter in such class, but the salary of county officers is in no way affected for the term for which they were elected and shall have qualified. The board of county commissioners in a newly created county shall, at its first meeting after the organization of such county, for the purpose of fixing salaries and compensation of county officers, determine to which class the county belongs, and fix the salaries for the first term of the officers accordingly.

5091. (2061.) Paid monthly. The salaries of county officers must be paid monthly out of the general fund, or the salary fund, as the case may be, of the county, upon the order of the board of county commissioners. The salary of county superintendent of schools shall be paid out of the county school fund. Am'd '01, p. 41; '03, p. 186.

Commissioners may establish salary fund, § 1400x6.

5092. (2062.) Salary to be full compensation. Salary of deputy not to exceed two-thirds of that of principal. Exceptions. The salaries herein provided for county officers shall be full compensation for all services of every kind and description rendered by the officers named herein; and where deputies or assistants have been allowed to any officer as provided by law, the salary of any such deputy or assistant shall not exceed two-thirds of the amount fixed for the salary of the principal, and shall be fixed by the board of county commissioners, and the same shall be a county charge; *provided,* that the provisions of this section shall not apply to deputies and assistants in the county assessor's office and the county surveyor's office in counties of the second class or of any county of a lower class; and such deputies and assistants shall receive such compensation as shall be fixed by the board of county commissioners, and not to exceed $4 per day.

Am'd '03, p. 25; '15, p. 85.

Salaries to be in full compensation, Con. art. 21, sec. 2.

The duties which a clerk renders in naturalization proceedings are not duties imposed on nor duties forming a part of the office, and the salary received as compensation therefor does not constitute compensation for extra official services, and he need not account therefor to his county.

Eldredge v. Salt Lake County, 37 U. 188; 106 P. 939.

5093. (2063.) When offices combined. Whenever the board of county commissioners shall elect to combine the duties of any two or more county officers, the salary of the person discharging the duties of both or all of said offices shall be fixed at a sum not exceeding the highest salary paid to either or any of said officers whose offices are so combined, in addition to an amount not exceeding one-half of the salary fixed for the other officer when only two

offices are combined, or when more than two such offices are combined, in addition to such highest salary, one-third of the combined salaries of such other officers. If the office of assessor, treasurer, or county attorney shall be combined with any other office, the state shall pay an equitable proportion of the whole salary, which proportion shall be fixed by the state board of examiners, and shall in no case be less than one-third of the amount of the salary fixed for such office of assessor, treasurer, or county attorney prior to the same being combined with another office.

Consolidation of offices, § 1452.

TITLE 97.

SALE OF MERCHANDISE IN BULK.

5103. (2063x.) Purchaser of merchandise in bulk to obtain list of creditors of vendor. It shall be the duty of every person who shall bargain for or purchase any portion of a stock of merchandise, otherwise than in the ordinary course of trade and in the regular and usual prosecution of the seller's business, or an entire stock of merchandise in bulk, for cash or on credit, before paying to the vendor or his agent or representative, or delivering to the vendor or his agent or representative, any part of the purchase price thereof or any promissory note or evidence therefor, to demand of and receive from such vendor or agent, or if the vendor or agent be a corporation, then from the president, vice-president, secretary, or managing agent of such corporation, a written statement, sworn to substantially as hereinafter provided, of the names and addresses of all the creditors of said vendor to whom said vendor may be indebted, together with the amount of the indebtedness due or owing or to become due or owing by said vendor, to each of said creditors, and it shall be the duty of said vendor or agent to furnish such statement, which shall be verified by an oath to the following effect:

State of Utah, County of ..... ss.

Before me personally appeared (vendor or agent, as the case may be), who, being by me first duly sworn, upon his oath did depose and say that the foregoing statement contains the names of all the creditors of (name of vendor), together with their addresses, and that the amount set opposite each of said respective names is the amount now due and owing and which shall become due and owing by (vendor) to such creditors, and that there are no creditors holding claims due or which shall become due for or on account of goods, wares, or merchandise purchased upon credit, or on account of money borrowed to carry on the business of which said goods are a part, other than as set forth in said statement and in this affidavit that are within the personal knowledge of affiant.

Subscribed and sworn to before me this ..... day of ....., A. D. 19..... '05, p. 103.

Act of '01, p. 67, limiting right to sell merchandise in bulk held unconstitutional.
Block v. Schwartz, 27 U. 387; 76 P. 22.
This section is not applicable to the sale of the business of one engaged in shoe repairing who incidentally sold his customers small quantities of shoe laces, polish, etc.
Swanson v. De Vine, 49 U. —; 160 P. 872.

5104. (2063x1.) Sale void unless creditors notified. Whenever any person shall bargain for or purchase any portion of a stock of merchandise otherwise than in the ordinary course of trade and in the regular and usual prosecution of the seller's business, or an entire stock of merchandise in bulk, for cash or on credit, and shall pay any part of the price, or execute and deliver to the vendor thereof or to his order, or to any person for his use, any promissory note or other evidence of indebtedness, to give credit, whether or not evidenced by promissory note or other evidence of indebtedness, for said purchase price or any part thereof, without at least five days previously thereto having demanded and received from said vendor or from his agent the statement provided for in § 5103 and verified as there provided, and without noti-

fying also at least five days previously thereto, personally or by registered mail, every creditor as shown upon said verified statement of said proposed sale or transfer, with the price thereof, the person to whom said sale or transfer is to be made, and the time and conditions of payment, and without paying or seeing to it that the purchase money of the said property is applied to the payment of bona fide claims of the creditors of the vendor as shown upon said verified statement, share and share alike, such sale or transfer shall be fraudulent and void. '01, p. 67; '05, p. 104.

5105. (2063x2.) Penalty for false statement. Any vendor of any portion of a stock of merchandise otherwise than in the ordinary course of trade and in the regular and usual prosecution of the seller's business, or an entire stock of merchandise in bulk, or any person who is acting for or on behalf of any such vendor who shall knowingly or wilfully make or deliver or cause to be made or delivered a statement as provided for in § 5103, which shall not include the names of all the creditors of such vendor, with the correct amount due and to become due to each of them, or which shall contain any false or untrue statement, shall be deemed guilty of perjury, and upon conviction thereof shall be punished by imprisonment in the penitentiary for not less than one nor more than five years, or shall be fined in any sum not exceeding $2,000, or by both fine and imprisonment. '05, p. 105.

5106. (2063x3.) What is deemed sale under this title. Exception. Any sale or transfer of any portion of a stock of merchandise otherwise than in the ordinary course of trade and in the regular and usual prosecution of the seller's business, or an entire stock of merchandise in bulk, or whenever an interest in or to the business or trade of the vendor is sold or conveyed or attempted to be sold or conveyed, such shall be deemed a sale and transfer in contemplation of this title; *provided, however,* that if such vendor produces and delivers a written waiver of the provisions of this title from at least a majority in number and amount of his creditors as shown by such verified statement, then and in that case the provisions of this title shall not apply. '05, p. 105.

5107. (2063x4.) Certain sales excepted. Sellers, or vendors, and purchasers under this title shall include corporations, associations, copartnerships, and individuals, but nothing contained in this title shall apply to sales or transfers by executors, administrators, receivers, assignees under a voluntary assignment for the benefit of creditors, trustees in bankruptcy, or by any public officer under judicial process. '05, p. 105.

TITLE 98.

UNIFORM SALES ACT.

('17, p. 395.)

CHAPTER 1.

CONTRACTS OF SALE.

5110. Formation of the contract. Definitions. 1. A contract to sell goods is a contract whereby the seller agrees to transfer the property in goods to the buyer for a consideration called the price.

2. A sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price.

3. A contract to sell or a sale may be absolute or conditional.

4. There may be a contract to sell or a sale between one part owner and another.

5111. Capacity to sell. Sales to incompetents. Capacity to buy and sell

is regulated by the general law concerning capacity to contract, and to transfer and acquire property. Where necessaries are sold and delivered to an infant, or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor. Necessaries in this section mean goods suitable to the condition in life of such infant or other person, and to his actual requirements at the time of delivery.

5112. Contract may be written or oral. Subject to the provisions of this title and of any statute in that behalf, a contract to sell or a sale may be made in writing (either with or without seal) or by word of mouth, or partly in writing and partly by word of mouth, or may be inferred from the conduct of the parties.

5113. When contract not enforcible. 1. A contract to sell or a sale of any goods or choses in action of the value of $500 or upwards shall not be enforcible by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged, or his agent in that behalf.

Statute of frauds, §§ 5811-5825.

Defense of statute of frauds must be specially pleaded, note to § 5811.

Decisions under, § 2469, Comp. L. 1907:—

When the contract is executory for the sale of property to be made or manufactured, no property passes until it is finished and either delivered to him, or set apart, and accepted by him.

Robbins v. Chipman, 1 U. 335.

Agreement to sell hotel furniture and lease held sufficient.

Reno v. Beardsley, 6 U. 208; 21 P. 944.

Purchaser must actually receive the goods.

Hudson Fur. Co. v. Freed Fur. Co., 10 U. 31; 36 P. 132.

Where the treasurer of a corporation wrote a letter over his signature as treasurer saying that he would guarantee the money within thirty or forty days; held, not a personal guaranty.

Riter v. Sun F. & M. Co., 10 U. 140; 37 P. 257.

Verbal agreement to sell personal property for $200 or over is invalid, unless the provisions of this section are complied with.

Walker v. Bamberger, 17 U. 239; 54 P. 108.

Where an option, not reduced to writing, on an option, is taken and its terms complied with, the transaction is taken out of the statute of frauds and is valid.

Id.

A memorandum of an offer to sell seed, subscribed by the seller only, is sufficient to satisfy the statute of frauds, as to the party subscribing it and against whom the action is brought.

Bailey v. Leishman, 32 U. 123; 89 P. 78.

2. The provisions of this section apply to every such contract or sale, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract or sale be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery; but if the goods are to be manufactured by the seller especially for the buyer and are not suitable for sale to others in the ordinary course of the seller's business, the provisions of this section shall not apply.

3. There is an acceptance of goods within the meaning of this section when the buyer, either before or after delivery of the goods, expresses by words or conduct his assent to becoming the owner of those specific goods.

5114. Subject matter of contract. 1. The goods which form the subject of a contract to sell may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by the seller after the making of the contract to sell, in this title called "future goods."

2. There may be a contract to sell goods, the acquisition of which by the seller depends upon a contingency which may or may not happen.

3. Where the parties purport to effect a present sale of future goods, the agreement operates as a contract to sell the goods.

5115. Contracts covering sales of undivided shares. 1. There may be a contract to sell or a sale of an undivided share of goods. If the parties intend to effect a present sale, the buyer, by force of the agreement, becomes an owner in common with the owner or owners of the remaining shares.

2. In the case of fungible goods, there may be a sale of an undivided share of a specific mass, though the seller purports to sell and the buyer to buy a definite number, weight, or measure of the goods in the mass, and though the number, weight, or measure of the goods in the mass is undetermined. By such a sale the buyer becomes owner in common of such a share of the mass as the number, weight, or measure bought bears to the number, weight,

or measure of the mass. If the mass contains less than the number, weight, or measure bought, the buyer becomes the owner of the whole mass, and the seller is bound to make good the deficiency from similar goods, unless a contrary intent appears.

5116. When goods have perished or deteriorated at time of making contract. 1. Where the parties purport to sell specific goods, and the goods without the knowledge of the seller have wholly perished at the time when the agreement is made, the agreement is void.

2. Where the parties purport to sell specific goods, and the goods, without the knowledge of the seller, have perished in part, or have wholly or in a material part so deteriorated in quality as to be substantially changed in character, the buyer may at his option treat the sale:

(a) As avoided, or

(b) As transferring the property in all of the existing goods or in so much thereof as have not deteriorated, and as binding the buyer to pay the full agreed price if the sale was indivisible, or to pay the agreed price for the goods in which the property passes if the sale was divisbile.

5117. When goods perish or deteriorate before risk passes to buyer. 1. Where there is a contract to sell specific goods, and subsequently, but before the risk passes to the buyer, without any fault on the part of the seller or the buyer, the goods wholly perish, the contract is thereby avoided.

2. Where there is a contract to sell specific goods, and subsequently, but before the risk passes to the buyer, without any fault of the seller or the buyer, part of the goods perish, or the whole or a material part of the goods so deteriorate in quality as to be substantially changed in character, the buyer may at his option treat the contract:

(a) As avoided, or

(b) As binding the seller to transfer the property in all of the existing goods or in so much thereof as have not deteriorated, and as binding the buyer to pay the full agreed price if the contract was indivisible, or to pay the agreed price for so much of the goods as the seller, by the buyer's option, is bound to transfer if the contract was divisible.

5118. The Price. 1. The price may be fixed by the contract, or may be left to be fixed in such manner as may be agreed, or it may be determined by the course of dealing between the parties.

2. The price may be made payable in any personal property.

3. Where transferring or promising to transfer any interest in real estate constitutes the whole or part of the consideration for transferring or for promising to transfer the property in goods, this title shall not apply.

4. Where the price is not determined in accordance with the foregoing provisions, the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case.

5119. Where third person is to fix price. 1. Where there is a contract to sell or a sale of goods at a price or on terms to be fixed by a third person, and such third person, without fault of the seller or the buyer, cannot or does not fix the price or terms, the contract or the sale is thereby avoided; but if the goods or any part thereof have been delivered to and appropriated by the buyer he must pay a reasonable price therefor.

2. Where such third person is prevented from fixing the price or terms by fault of the seller or the buyer, the party not in fault may have such remedies against the party in fault as are allowed in §§ 5161-5179.

5120. Conditions and warranties. 1. Where the obligation of either party to a contract to sell or a sale is subject to any condition which is not performed, such party may refuse to proceed with the contract or sale or he may waive performance of the condition. If the other party has promised that the condition should happen or be performed, such first mentioned party may also treat the non-performance of the condition as a breach of warranty.

2. Where the property in the goods has not passed, the buyer may treat the fulfilment by the seller of his obligation to furnish goods as de-

scribed and as warranted expressly or by implication in the contract to sell as a condition of the obligation of the buyer to perform his promise to accept and pay for the goods.

5121. What constitutes warranty. Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only, shall be considered as a warranty.

5122. Implied warranty. In a contract to sell or a sale, unless a contrary intention appears, there is:

1. An implied warranty on the part of the seller that in the case of a sale he has a right to sell the goods, and that in case of a contract to sell he will have a right to sell the goods at the time when the property is to pass;
2. An implied warranty that the buyer shall have and enjoy quiet possession of the goods as against any lawful claims existing at the time of the sale;
3. An implied warranty that the goods shall be free at the time of the sale from any charge or encumbrance in favor of any third person, not declared or known to the buyer before or at the time when the contract or sale is made.

This section shall not, however, be held to render liable a sheriff, auctioneer, mortgagee, or other person professing to sell by virtue of authority in fact or law goods in which a third person has a legal or equitable interest.

5123. Id. Correspondence with sample and description. Where there is a contract to sell or a sale of goods by description, there is an implied warranty that the goods shall correspond with the description and if the contract or sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

5124. Id. Subject to the provisions of this title and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale except as follows:

1. Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose.
2. Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality.
3. If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed.
4. In the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose.
5. An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.
6. An express warranty or condition does not negative a warranty or condition implied under this title unless inconsistent therewith.

5125. Id. Sale by sample. In the case of a contract to sell or a sale by sample:

1. There is an implied warranty that the bulk shall correspond with the sample in quality.
2. There is an implied warranty that the buyer shall have a reasonable opportunity of comparing the bulk with the sample, except so far as otherwise provided in sub. 3, § 5156.

3. If the seller is a dealer in goods of that kind, there is an implied warranty that the goods shall be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of the sample.

CHAPTER 2.

TRANSFER OF PROPERTY AND TITLE.

5126. Transfer of unascertained property. Where there is a contract to sell unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained, but property in an undivided share of ascertained goods may be transferred as provided in § 5115.

5127. Specific goods. 1. Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

2. For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, usages of trade, and the circumstances of the case.

5128. Rules for ascertaining intention. Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:

Rule 1. Where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.

Rule 2. Where there is a contract to sell specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable shape, the property does not pass until such thing be done.

Rule 3. 1. When goods are delivered to the buyer "on sale or return," or on other terms indicating an intention to make a present sale, but to give the buyer an option to return the goods instead of paying the price, the property passes to the buyer on delivery, but he may revest the property in the seller by returning or tendering the goods within the time fixed in the contract, or, if no time has been fixed, within a reasonable time.

2. When goods are delivered to the buyer on approval or on trial or on satisfaction, or other similar terms, the property therein passes to the buyer:

(a) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction;

(b) If he does not signify his approval or acceptance to the seller, but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.

Rule 4. 1. Where there is a contract to sell unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made.

2. Where, in pursuance of a contract to sell, the seller delivers the goods to the buyer, or to a carrier or other bailee (whether named by the buyer or not), for the purpose of transmission to or holding for the buyer, he is presumed to have unconditionally appropriated the goods to the contract, except in cases provided for in the next rule and in § 5129. This presumption is applicable, although by the terms of the contract the buyer is to pay the price before receiving delivery of the goods, and the goods are marked with the words "collect on delivery," or their equivalents.

Rule 5. If a contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon.

5129. When right of property passes. 1. Where there is a contract to to sell specific goods, or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of possession or property in the goods until certain conditions have been fulfilled. The right of possession or property may be thus reserved notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee for the purpose of transmission to the buyer.

2. Where goods are shipped, and by the bill of lading the goods are deliverable to the seller or his agent, or to the order of the seller or of his agent, the seller thereby reserves the property in the goods. But if, except for the form of the bill of lading, the property would have passed to the buyer on shipment of the goods, the seller's property in the goods shall be deemed to be only for the purpose of securing performance by the buyer of his obligations under the contract.

3. Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the buyer or of his agent, but possession of the bill of lading is retained by the seller or his agent, the seller thereby reserves a right to the possession of the goods, as against the buyer.

4. Where the seller of goods draws on the buyer for the price and transmits the bill of exchange and bill of lading together to the buyer to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honor the bill of exchange, and if he wrongfully retains the bill of lading he acquires no added right thereby. If, however, the bill of lading provides that the goods are deliverable to the buyer or to the order of the buyer, or is indorsed in blank, or to the buyer by the consignee named therein, one who purchases, in good faith, for value, the bill of lading or goods from the buyer, will obtain the property in the goods, although the bill of exchange has not been honored, *provided,* that such purchaser has received delivery of the bill of lading indorsed by the consignee named therein, or of the goods, without notice of the facts making the transfer wrongful.

5130. Sales by auction. In the case of a sale by auction:

1. Where goods are put up for sale by auction in lots, each lot is the subject of a separate contract of sale.

2. A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made, any bidder may retract his bid; and the auctioneer may withdraw the goods from sale unless the auction has been announced to be without reserve.

3. A right to bid may be reserved expressly by or on behalf of the seller.

4. Where notice has not been given that a sale by auction is subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ or induce any person to bid at such sale on his behalf, or for the auctioneer to employ or induce any person to bid at such sale on behalf of the seller, or knowingly to take any bid from the seller or any person employed by him. Any sale contravening this rule may be treated as fraudulent by the buyer.

5131. When risk passes. Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not, except that:

1. Where delivery of the goods has been made to the buyer, or to a bailee for the buyer, in pursuance of the contract and the property in the goods has been retained by the seller merely to secure performance by the

buyer of his obligations under the contract, the goods are at the buyer's risk from the time of such delivery.

2. Where delivery has been delayed through the fault of either buyer or seller, the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault.

5132. Transfer of title. 1. Subject to the provisions of this title, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.

2. Nothing in this title, however, shall affect:

(a) The provisions of any factor's acts, recording acts, or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof.

(b) The validity of any contract to sell or sale under any special common law or statutory power of sale or under the order of a court of competent jurisdiction.

5133. Id. Where the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith, for value, and without notice of the seller's defect of title.

5134. Id. Where a person having sold goods continues in possession of the goods, or of negotiable documents of title to the goods, the delivery or transfer by that person, or by an agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving and paying value for the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same.

5135. Id. Where a person having sold goods continues in possession of the goods, or of negotiable documents of title to the goods, and such retention of possession is fraudulent in fact or is deemed fraudulent under any such rule of law, a creditor or creditors of the seller may treat the sale as void.

Fraudulent conveyances void, §§ 5814, 5821.
Mortgage of stock of goods, note to § 470.
Conditional sales, note to § 487.
Cases construing, § 2473, Comp. L. '07:—
Delivery to a carrier not specially designated by the buyer is not delivery to and acceptance by the buyer.
Hudson Fur. Co. v. Freed Fur. Co., 10 U. 31; 36 P. 132.
What amounts to a delivery within a reasonable time and an actual and continued change of possession depends largely upon the kind and nature of the property, the situation of the parties, and the circumstances peculiar to each case.
Blish v. McCornick, 14 U. 188; 49 P. 529.
Everett v. Taylor, 14 U. 242; 47 P. 75.
Farr v. Swigart, 13 U. 150; 44 P. 711.
White v. Pease, 15 U. 170; 49 P. 416.
Lumm v. Howells, 27 U. 80; 74 P. 432.
Johnson v. Emery, 31 U. 126; 86 P. 869.
The rule that a sale or assignment of chattels, unaccompanied by a change of possession, is fraudulent per se, under this section and § 5821, as to execution creditors or subsequent purchasers of the vendor, does not necessarily apply to assignments for benefit of creditors, but unreasonable delay in taking possession is a circumstance from which fraud may be inferred, unless explained.
Snyder v. Murdock, 20 U. 419; 59 P. 91.
But see Munns v. Loveland, 15 U. 250; 49 P. 743.
Sale of chattels without delivery thereof and not followed by actual change of possession constitutes in law a fraudulent disposition of property which authorizes creditors of the vendor to sue out an attachment.
Charleston Co-op v. Allen, 40 U. 575; 123 P. 578.
A chattel mortgage is invalid as against all persons who, without knowledge of its existence, give credit to the mortgagor at any time subsequent to execution and previous to filing.
Volker Lbr. Co. v. Utah & Oregon Lbr. Co., 45 U. 603; 148 P. 365.

5136. Negotiable document of title. A document of title in which it is stated that the goods referred to therein will be delivered to the bearer, or to the order of any person named in such document, is a negotiable document of title.

5137. Id. How negotiated. A negotiable document of title may be negotiated by delivery:

1. Where by the terms of the document the carrier, warehouseman or other bailee issuing the same undertakes to deliver the goods to the bearer, or

2. Where by the terms of the document the carrier, warehouseman or other bailee issuing the same undertakes to deliver the goods to the order of

a specified person, and such person or a subsequent indorsee of the document has indorsed it in blank or to bearer.

Where by the terms of a negotiable document of title the goods are deliverable to bearer, or where a negotiable document of title has been indorsed in blank or to bearer, any holder may indorse the same to himself or to any other specified person, and in such case the document shall thereafter be negotiated only by the indorsement of such indorsee.

5138. Id. Negotiated by indorsement. A negotibale document of title may be negotiated by the indorsement of the person to whose order the goods are by the terms of the document deliverable. Such indorsement may be in blank, to bearer or to a specified person. If indorsed to a specified person, it may be again negotiated by the indorsement of such person in blank, to bearer or to another specified person. Subsequent negotiation may be made in like manner.

5139. Id. Negotiable by holder though marked not. If a document of title which contains an undertaking by a carrier, warehouseman, or other bailee to deliver the goods to the bearer, to a specified person or order, or to the order of a specified person, or which contains words of like import, has placed upon it the words "not negotiable," "non-negotiable," or the like, such a document may nevertheless be negotiated by the holder and is a negotiable document of title within the meaning of this title. But nothing in this title contained shall be construed as limiting or defining the effect upon the obligations of the carrier, warehouseman, or other bailee issuing a document of title or placing thereon the words "not negotiable," "non-negotiable," or the like.

5140. Non-negotiable document may be transferred. A document of title which is not in such form that it can be negotiated by delivery may be transferred by the holder by delivery to a purchaser or donee. A non-negotiable document cannot be negotiated, and the indorsement of such a document gives the transferee no additional right.

5141. Who may negotiate document. A negotiable document of title may be negotiated:

1. By the owner thereof, or
2. By any person to whom the possession or custody of the document has been entrusted by the owner, if by the terms of the document the bailee issuing the document undertakes to deliver the goods to the order of the person to whom the possession or custody of the document has been entrusted, or if at the time of such entrusting the document is in such form that it may be negotiated by delivery.

5142. What is acquired when document is negotiated. A person to whom a negotiable document of title has been duly negotiated acquires thereby:

1. Such title to the goods as the person negotiating the document to him had or had ability to convey to a purchaser in good faith for value, and also such title to the goods as the person to whose order the goods were to be delivered by the terms of the document had or had ability to convey to a purchaser in good faith for value, and
2. The direct obligation of the bailee issuing the document to hold possession of the goods for him according to the terms of the document as fully as if such bailee had contracted directly with him.

5143. Rights of person to whom document has been transferred. A person to whom a document of title has been transferred, but not negotiated, acquires thereby, as against the transferor, the title to the goods, subject to the terms of any agreement with the transferor. If the document is non-negotiable, such person also acquires the right to notify the bailee who issued the document of the transfer thereof, and thereby to acquire the direct obligation of such bailee to hold possession of the goods for him according to the terms of the document. Prior to the notification of such bailee by the trans-

feror or transferee of a non-negotiable document of title, the title of the transferee to the goods and the right to acquire the obligation of such bailee may be defeated by the levy of an attachment or execution upon the goods by a creditor of the transferor, or by a notification to such bailee by the transferor or a subsequent purchaser from the transferor of a subsequent sale of the goods by the transferor.

5144. Id. By delivery. Where a negotiable document of title is transferred for value by delivery, and the indorsement of the transferor is essential for negotiation, the transferee acquires a right against the transferor to compel him to indorse the document unless a contrary intention appears. The negotiation shall take effect as of the time when the indorsement is actually made.

5145. What transferor warrants. A person who for value negotiates or transfers a document of title by indorsement or delivery, including one who assigns for value a claim by a document of title unless a contrary intention appears, warrants:

1. That the document is genuine;
2. That he has a legal right to negotiate or transfer it;
3. That he has knowledge of no fact which would impair the validity or worth of the document; and
4. That he has a right to transfer the title to the goods and that the goods are merchantable or fit for a particular purpose, whenever such warranties would have been implied if the contract of the parties had been to transfer without a document of title the goods represented thereby.

5146. Indorser not liable for failure of bailee. The indorsement of a document of title shall not make the indorser liable for any failure on the part of the bailee who issued the document or previous indorsers thereof to fulfill their respective obligations.

5147. Validity not affected, when. The validity of the negotiation of a negotiable document of title is not impaired by the fact that the negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the document was induced by fraud, mistake, or duress to entrust the possession or custody thereof to such person, if the person to whom the document was negotiated or a person to whom the document was subsequently negotiated paid value therefor, without notice of the breach of duty, or fraud, mistake, or duress.

5148. No attachment of goods in bailee's hands. If goods are delivered to a bailee by the owner or by a person whose act in conveying the title to them to a purchaser in good faith for value would bind the owner and a negotiable document of title is issued for them, they cannot thereafter, while in the possession of such bailee, be attached by garnishment or otherwise or be levied upon under an execution unless the document be first surrendered to the bailee or its negotiation enjoined. The bailee shall in no case be compelled to deliver up the actual possession of the goods until the document is surrendered to him or impounded by the court.

5149. Creditor's protection. A creditor whose debtor is the owner of a negotiable document of title shall be entitled to such aid from courts of appropriate jurisdiction by injunction and otherwise in attaching such document or in satisfying the claim by means thereof as is allowed at law or in equity in regard to property which cannot readily be attached or levied upon by ordinary legal process.

CHAPTER 3.

PERFORMANCE OF CONTRACT.

5150. Duty of buyer and seller. It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract to sell or sale.

5151. Delivery and payment. Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions; that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods.

5152. Delivery, place, time, expense. 1. Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer, is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, express or implied, or usage of trade to the contrary, the place of delivery is the seller's place of business, if he has one, and if not, his residence; but in case of a contract to sell, or a sale of specific goods, which to the knowledge of the parties when the contract or the sale was made were in some other place, then that place is the place of delivery.

2. Where by a contract to sell, or a sale, the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.

3. Where the goods at the time of sale are in the possession of a third person, the seller has not fulfilled his obligation to deliver to the buyer unless and until such third person acknowledges to the buyer that he holds the goods on the buyer's behalf; but as against all others than the seller the buyer shall be regarded as having received delivery from the time when such third person first has notice of the sale. Nothing in this section, however, shall affect the operation of the issue or transfer of any document of title to goods.

4. Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact.

5. Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state must be borne by the seller.

5153. Shortage, excess, mixed goods delivered. 1. Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts or retains the goods so delivered, knowing that the seller is not going to perform the contract in full, he must pay for them at the contract price. If, however, the buyer has used or disposed of the goods delivered before he knows that the seller is not going to perform his contract in full, the buyer shall not be liable for more than the fair value to him of the goods so received.

2. Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate.

3. Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole.

4. The provisions of this section are subject to any usage of trade, special agreement, or course of dealing between the parties.

5154. Delivery by instalments. 1. Unless otherwise agreed the buyer of goods is not bound to accept delivery thereof by instalments.

2. Where there is a contract to sell goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it depends in each case on the terms of the contract and the circumstances of the case, whether the breach of contract is so material as to justify the injured party in refusing to proceed further and suing for damages for breach of the entire contract, or whether the breach is severable, giving rise to a claim for compensation, but not to a right to treat the whole contract as broken.

5155. Delivery to carrier deemed delivery to buyer. Liability of carrier. Insurance. 1. Where, in pursuance of a contract to sell or a sale, the seller

is authorized or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is deemed to be a delivery of the goods to the buyer, except in the cases provided for in § 5128, rule 5, or unless a contrary intent appears.

2. Unless otherwise authorized by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable, having regard to the nature of the goods and the other circumstances of the case. If the seller omit so to do, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages.

3. Unless otherwise agreed, where goods are sent by the seller to the buyer under circumstances in which the seller knows or ought to know that it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their transit, and if the seller fails to do so, the goods shall be deemed to be at his risk during such transit.

5156. Examination of goods. C. O. D. 1. Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

2. Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

3. Where goods are delivered to a carrier by the seller, in accordance with an order from or agreement with the buyer, upon the terms that the goods shall not be delivered by the carrier to the buyer until he has paid the price, whether such terms are indicated by marking the goods with the words "collect on delivery," or otherwise, the buyer is not entitled to examine the goods before payment of the price in the absence of agreement permitting such examination.

5157. What is deemed acceptance. The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

5158. Acceptance does not discharge liability on warranty. In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But if, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefor.

5159. Refusal to accept goods. Notification. Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he notifies the seller that he refuses to accept them.

5160. Liability of buyer upon refusal to accept goods. When the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods. If the neglect or refusal of the buyer to take delivery amounts to a repudiation or breach of the entire contract, the seller shall have the rights against the goods and on the contract hereinafter provided in favor of the seller when the buyer is in default.

CHAPTER 4.

RIGHTS OF UNPAID SELLER AGAINST THE GOODS.

5161. Who is unpaid seller. The seller of goods is deemed to be an unpaid seller within the meaning of this title:

1. When the whole of the price has not been paid or tendered.

2. When a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has been broken by reason of the dishonor of the instrument, the insolvency of the buyer, or otherwise.

3. In this chapter the term "seller" includes an agent of the seller to whom the bill of lading has been indorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price, or any other person who is in the position of a seller.

5162. Unpaid seller retains. 1. Subject to the provisions of this title, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has:

(a) A lien upon the goods or right to retain them for the price while he is in possession of them;

(b) In case of the insolvency of the buyer, a right of stopping the goods in transitu after he has parted with the possession of them;

(c) A right of resale as limited by this title;

(d) A right to rescind the sale as limited by this title.

2. Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage in transitu where the property has passed to the buyer.

5163. Unpaid seller's lien. 1. Subject to the provisions of this title, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price, in the following cases, namely:

(a) Where the goods have been sold without any stipulation as to credit;

(b) Where the goods have been sold on credit, but the term of credit has expired;

(c) Where the buyer becomes insolvent.

2. The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee for the buyer.

5164. Id. On part delivery. Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien on the remainder, unless such part delivery has been made under such circumstances as to show an intent to waive the lien or right of retention.

5165. Id. When lost. 1. The unpaid seller of goods loses his lien thereon:

(a) When he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving the property in the goods or the right to the possession thereof;

(b) When the buyer or his agent lawfully obtains possession of the goods;

(c) By waiver thereof.

2. The unpaid seller of goods, having a lien thereon, does not lose his lien by reason only that he has obtained judgment or decree for the price of the goods.

5166. Stoppage in transitu. Subject to the provisions of this title, when the buyer of goods is or becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them in transitu; that is to say, he may resume possession of the goods at any time while they are in transit, and he will then become entitled to the same rights in regard to the goods as he would have had if he had never parted with the possession.

5167. Where goods are and are not in transitu. 1. Goods are in transit within the meaning of § 5166:

(a) From the time when they are delivered to a carrier by land or water, or other bailee for the purpose of transmission to the buyer, until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee;

(b) If the goods are rejected by the buyer, and the carrier or other bailee continues in possession of them, even if the seller has refused to receive them back.

2. Goods are no longer in transit within the meaning of § 5166:

(a) If the buyer, or his agent in that behalf, obtains delivery of the goods before their arrival at the appointed destination;

(b) If, after the arrival of the goods at the appointed destination, the carrier or other bailee acknowledges to the buyer or his agent that he holds the goods on his behalf and continues in possession of them as bailee for the buyer or his agent; and it is immaterial that a further destination for the goods may have been indicated by the buyer;

(c) If the carrier or other bailee wrongfully refuses to deliver the goods to the buyer or his agent in that behalf.

3. If goods are delivered to a ship chartered by the buyer, it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier or as agent of the buyer.

4. If part delivery of the goods has been made to the buyer, or his agent in that behalf, the remainder of the goods may be stopped in transitu, unless such part delivery has been made under such circumstances as to show an agreement with the buyer to give up possession of the whole of the goods.

5168. Right of stoppage in transitu. Duty of carrier. 1. The unpaid seller may exercise his right of stoppage in transitu either by obtaining actual possession of the goods or by giving notice of his claim to the carrier or other bailee in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice, to be effectual, must be given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may prevent a delivery to the buyer.

2. When notice of stoppage in transitu is given by the seller to the carrier, or other bailee in possession of the goods, he must redeliver the goods to, or according to the directions of the seller. The expenses of such delivery must be borne by the seller. If, however, a negotiable document of title representing the goods has been issued by the carrier or other bailee, he shall not be obliged to deliver or justified in delivering the goods to the seller unless such document is first surrendered for cancellation.

5169. Resale by the seller. 1. Where the goods are of a perishable nature, or where the seller expressly reserves the right of resale in case the buyer should make default, or where the buyer has been in default in the payment of the price an unreasonable time, an unpaid seller having a right of lien or having stopped the goods in transitu may resell the goods. He shall not thereafter be liable to the original buyer upon the contract to sell, or the sale, or for any profit made by such resale, but may recover from the buyer damages for any loss occasioned by the breach of the contract or the sale.

2. Where a resale is made, as authorized in this section, the buyer acquires a good title as against the original buyer.

3. It is not essential to the validity of a resale that notice of an intention to resell the goods be given by the seller to the original buyer. But where the right to resell is not based on the perishable nature of the goods or upon an express provision of the contract or the sale, the giving or failure to give such notice shall be relevant in any issue involving the question whether the buyer had been in default an unreasonable time before the resale was made.

4. It is not essential to the validity of a resale that notice of the time and place of such resale should be given by the seller to the original buyer.

5. The seller is bound to exercise reasonable care and judgment, in making a resale, and subject to this requirement may make a resale either by public or private sale.

5170. Rescission by the seller. 1. An unpaid seller having a right of lien, or having stopped the goods in transitu, may rescind the transfer of title and resume the property in the goods, where he expressly reserved the right to do so in case the buyer should make default, or where the buyer had been in default in the payment of the price an unreasonable time. The seller shall not thereafter be liable to the buyer upon the contract to sell or the sale, but may recover from the buyer damages for any loss occasioned by the breach of the contract or the sale.

2. The transfer of title shall not be held to have been rescinded by an unpaid seller until he has manifested by notice to the buyer or by some other overt act an intention to rescind. It is not necessary that such overt act should be communicated to the buyer, but the giving or failure to give notice to the buyer of the intention to rescind shall be relevant in any issue involving the question whether the buyer had been in default an unreasonable time before the right of rescission was asserted.

5171. Unpaid seller's rights. Subject to the provisions of this title, the unpaid seller's right of lien or stoppage in transitu is not affected by any sale, or other disposition of the goods which the buyer may have made, unless the seller has assented thereto. If, however, a negotiable document of title has been issued for goods, no seller's lien or right of stoppage in transitu shall defeat the right of any purchaser for value in good faith to whom such document has been negotiated, whether such negotiation be prior or subsequent to the notification to the carrier, or other bailee who issued such document, the seller's claim to a lien or right of stoppage in transitu.

CHAPTER 5.

ACTIONS FOR BREACH OF THE CONTRACT.

5172. Remedies of the seller. 1. Where, under a contract to sell or a sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract or the sale, the seller may maintain an action against him for the price of the goods.

2. Where, under a contract to sell or a sale, the price is payable on a day certain, irrespective of delivery or of transfer of title, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract. But it shall be a defense to such an action that the seller at any time before judgment in such action has manifested an inability to perform the contract or the sale on his part or an intention not to perform it.

3. Although the property in the goods has not passed, if they cannot readily be resold for a reasonable price, and if the provisions of sub. 4, § 5173, are not applicable, the seller may offer to deliver the goods to the buyer, and, if the buyer refuses to receive them, may notify the buyer that the goods are thereafter held by the seller as bailee for the buyer. Thereafter the seller may treat the goods as the buyer's and maintain an action for the price.

5173. Id. Measure of damages. 1. Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.

2. The measure of damages is the estimated loss directly and naturally

resulting, in the ordinary course of events, from the buyer's breach of contract.

3. Where there is an available market for the goods in question, the measure of damages is, in the absence of special circumstances, showing proximate damage of a greater amount, the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept.

4. If, while labor or expenses of material amount are necessary on the part of the seller to enable him to fulfill his obligations under the contract to sell or the sale, the buyer repudiates the contract or the sale, or notifies the seller to proceed no further therewith, the buyer shall be liable to the seller for no greater damages than the seller would have suffered if he did nothing towards carrying out the contract or the sale after receiving notice of the buyer's repudiation or countermand. The profit the seller would have made if the contract or the sale had been fully performed shall be considered in estimating such damages.

5174. Id. Upon repudiation of contract after delivery of goods. Where the goods have not been delivered to the buyer, and the buyer has repudiated the contract to sell or sale, or has manifested his inability to perform his obligations thereunder, or has committed a material breach thereof, the seller may totally rescind the contract or the sale by giving notice of his election so to do to the buyer.

5175. Remedies of the buyer where goods have passed. Where the property in the goods has passed to the buyer and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain any action allowed by law to the owner of goods of similar kind when wrongfully converted or withheld.

5176. Id. Where goods have not passed. 1. Where the property in the goods has not passed to the buyer, and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain an action against the seller for damages for non-delivery.

2. The measure of damages is the loss directly and naturally resulting in the ordinary course of events, from the seller's breach of contract.

3. Where there is an available market for the goods in question, the measure of damages, in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver.

5177. Id. Powers of court. Where the seller has broken a contract to deliver specific or ascertained goods, a court having the powers of a court of equity, may, if it thinks fit, on the application of the buyer by its judgment or decree, direct that the contract shall be performed specifically, without giving the seller the option of retaining the goods on payment of damages. The judgment or decree may be unconditional, or upon such terms and conditions as to damages, payment of the price and otherwise, as to the court may seem just.

5178. Id. Upon breach of warranty. 1. Where there is a breach of warranty by the seller, the buyer may, at his election:

(a) Accept or keep the goods and set up against the seller, the breach of warranty by way of recoupment in diminution or extinction of the price;

(b) Accept or keep the goods and maintain an action against the seller for damages for the breach of warranty;

(c) Refuse to accept the goods, if the property therein has not passed, and maintain an action against the seller for damages for the breach of warranty;

(d) Rescind the contract to sell or the sale and refuse to receive the

goods, or if the goods have already been received, return them or offer to return them to the seller and recover the price or any part thereof which has been paid.

2. When the buyer has claimed and been granted a remedy in any one of these ways, no other remedy can thereafter be granted.

3. Where the goods have been delivered to the buyer, he cannot rescind the sale if he knew of the breach of warranty when he accepted the goods, or if he fails to notify the seller within a reasonable time of the election to rescind, or if he fails to return or to offer to return the goods to the seller in substantially as good condition as they were in at the time the property was transferred to the buyer. But if deterioration or injury of the goods is due to the breach of warranty, such deterioration or injury shall not prevent the buyer from returning or offering to return the goods to the seller and rescinding the sale.

4. Where the buyer is entitled to rescind the sale and elects to do so, the buyer shall cease to be liable for the price upon returning or offering to return the goods. If the price or any part thereof has already been paid, the seller shall be liable to repay so much thereof as has been paid, concurrently with the return of the goods, or immediately after an offer to return the goods in exchange for repayment of the price.

5. Where the buyer is entitled to rescind the sale and elects to do so, if the seller refuses to accept an offer of the buyer to return the goods, the buyer shall thereafter be deemed to hold the goods as bailee for the seller, but subject to a lien to secure the repayment of any portion of the price which has been paid, and with the remedies for the enforcement of such lien allowed to an unpaid seller by § 5162.

6. The measure of damages for breach of warranty is the loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.

7. In the case of breach of warranty of quality, such loss, in the absence of special circumstances showing proximate damage of a greater amount, is the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.

5179. Damages for breach. Nothing in this title shall affect the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed.

CHAPTER 6.

INTERPRETATION AND DEFINITIONS.

INTERPRETATION.

5180. Rights under contract may be negatived by agreement or custom. Where any right, duty, or liability would arise under a contract to sell or a sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by custom, if the custom be such as to bind both parties to the contract or the sale.

5181. Declared rights may be enforced. Where any right, duty, or liability is declared by this title, it may, unless otherwise by this title provided, be enforced by action.

5182. Laws applicable when not otherwise herein provided. In any case not provided for in this title, the rules of law and equity, including the law merchant, and in particular the rules relating to the law of principal and agent, and to the effect of fraud, misrepresentation, duress, or coercion, mistake, bankruptcy, or other invalidating cause, shall continue to apply to contracts to sell and to sales of goods.

5183. Interpretation shall give effect to purpose of uniformity. This title shall be so interpreted and construed as to effectuate its general purpose to make uniform the laws of those states which enact it.

5184. Where provisions not applicable. The provisions of this title relating to contracts to sell and to sales do not apply, unless so stated, to any transaction in the form of a contract to sell or a sale which is intended to operate by way of mortgage, pledge, charge, or other security.

5185. Definitions. 1. In this title unless the context or subject matter otherwise requires:

"Action" includes counterclaims, set-off, and suit in equity.

"Buyer" means a person who buys or agrees to buy goods or any legal successor in interest of such person.

"Defendant" includes a plaintiff against whom a right of set-off or counterclaim is asserted.

"Delivery" means voluntary transfer of possession from one person to another.

"Divisible contract to sell or sale" means a contract to sell or a sale in which by its terms the price for a portion or portions of the goods less than the whole is fixed or ascertainable by computation.

"Document to title of goods" includes any bill of lading, dock warrant, warehouse receipt, or order for the delivery of goods, or any other document used in the ordinary course of business in the sale or transfer of goods, as proof of the possession or control of the goods, or authorized or purporting to authorize the possessor of the document to transfer or receive, either by indorsement or by delivery, goods represented by such document.

"Fault" means wrongful act or default.

"Fungible goods" means goods of which any unit is from its nature or by mercantile usage treated as the equivalent of any other unit.

"Future goods" means goods to be manufactured or acquired by the seller after the making of the contract of sale.

"Goods" includes all chattels personal other than things in action and money. The term includes emblements, industrial growing corps, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

"Order" in sections of this title relating to documents of title means an order by indorsement on the document.

"Person" includes a corporation or partnership or two or more persons having a joint or common interest.

"Plaintiff" includes defendant asserting a right of set-off or counterclaim.

"Property" means the general property in goods, and not merely a special property.

"Purchaser" includes mortgagee and pledgee.

"Purchases" includes taking as a mortgagee or as a pledgee.

"Quality of goods" includes their state or condition.

"Sale" includes a bargain and sale as well as a sale and delivery.

"Seller" means a person who sells or agrees to sell goods, or any legal successor in the interest of such person.

"Specific goods" means goods identified and agreed upon at time a contract to sell or a sale is made.

"Value" is any consideration sufficient to support a simple contract. An antecedent or pre-existing claim, whether for money or not, constitutes value where goods or documents of titles are taken either in satisfaction thereof or as security therefor.

2. A thing is done "in good faith" within the meaning of this title when it is in fact done honestly, whether it be done negligently or not.

3. A person is insolvent within the meaning of this title who either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due, whether he has committed an act of bankruptcy

or not, and whether he is insolvent within the meaning of the federal bankruptcy law or not.

4. Goods are in a "deliverable state," within the meaning of this title, when they are in such a state that the buyer would, under the contract, be bound to take delivery of them.

5186. Not applicable to sales prior to enactment. None of the provisions of this title shall apply to any sale, or to any contract to sell, made prior to the taking effect of this title.

5187. Warehouse receipts act not repealed. Nothing in this title or in any repealing clause thereof shall be construed to repeal or limit any of the provisions of the act to make uniform the law of warehouse receipts.

5188. Inconsistent laws repealed. All acts or parts of acts inconsistent with this act are hereby repealed, except as provided in § 5187.

5189. How cited. This title may be cited as the uniform sales act. '17, p. 395.

TITLE 99.

SINKING FUNDS.

5200. (2063x19.) Sinking funds of any subdivision of state may be invested. The city council of every city, the board of county commissioners of every county, the board of education of every city, the trustees of every school district, the directors of every irrigation district in the state of Utah, may cause any sinking fund, now existing or hereafter created by authority of the laws of the state, to be invested in any legal and lawful bonds bearing interest, issued by any city, county, or school district in the state of Utah, or by the state of Utah. Whenever such bonds are on the market at a fair and reasonable value, and the money in any said sinking funds exceeds the amount of any bond or bonds for which said fund was created, then such fund shall be used to redeem said bond or bonds at the market value thereof, and the custodians of any said sinking fund are hereby authorized to buy such bond or bonds. '01, p. 82.

Investment of state redemption fund by loan commissioners, § 3809.

TITLE 100.

STATE INSTITUTIONS.

CHAPTER 1.

GENERAL PROVISIONS.

5204. (2064.) Governing boards. How appointed. Members of the governing board of each state institution shall be appointed by the governor, with the advice and consent of the senate, except as in this title otherwise provided.

General appointive power of governor, Con. art. 7, secs. 9, 10; §§ 5682-5687.

5205. (2065.) Id. Vacancies. A vacancy in a governing board may occur by the expiration of a term, by death, by lawful removal from office, by the permanent departure of a member thereof from the state, by his incapacity to act, or by his resignation. Such vacancy, other than by the expiration of a term, shall be filled by the governor for the remainder of the term, with the advice and consent of the senate if in session. If the senate is not in session, the appointment shall be made and shall continue until the next regular session of the senate. Each member of the board shall hold until his successor shall be appointed and shall have qualified.

5206. (2066.) Officers must not be interested in contract. No member of the governing board of a state institution, nor official or employe of such institution, shall be pecuniarily interested, directly or indirectly, in any contract, business, or transaction entered into by or on behalf of the institution.

5207. (2067.) Supplies. Yearly contract. All general supplies for every state institution shall be contracted for by the year, except in cases where contracts for certain supplies cannot be advantageously made. Notice shall be given and contracts let in the manner provided in the two succeeding sections.

5208. (2068.) Building and repairs by contract. Advertisement. Whenever the needs of a state institution demand a building to be repaired or erected, or any work amounting to more than $200 to be done, the governing board of such institution shall advertise for at least ten days, in some newspaper published in this state and having a general circulation herein, for sealed proposals for repairing or erecting such building, or performing such work, in accordance with plans and specifications to be had at the office of the board.

Public work contractors must give bond, § 3753.

5209. (2069.) Proposals in writing. Opening. Award. The advertisement must state the place where and the day and hour when the proposals will be opened, and must reserve the right of the board to reject any or all proposals, and shall require a certified check for not less than five per cent of the amount of the bid to accompany the same. At the time and place specified in such notice, the board shall publicly open and read all proposals received, shall award the contract to the lowest responsible bidder, and shall require of such bidder a bond in one-half the amount of his bid, conditioned that he will properly perform the contract. In case none of the proposals be satisfactory, all must be rejected; and the board shall advertise anew in the same manner as before until a satisfactory proposal be submitted.

5210. (2070.) Appropriations. When available. How drawn. On the first day of each month, or as soon thereafter as the bills for the expenses for the previous month have been audited, the board of control of each state institution, or the proper committee thereof, duly authorized by the board for such purpose, shall make a requisition upon the state auditor for a warrant in sufficient amount to pay the bills so audited, and thereupon the state auditor shall draw his warrant against the appropriation made for such institution for the amount named in the requisition, in favor of the treasurer of the governing board of the institution, or, in case of the state prison, in favor of the warden thereof. To obtain such warrant, the treasurer of the board or the warden must present to the state auditor a written authorization from the board. Am'd '99, p. 76.

Does not supersede law of 1899. Sec. 5210, as amended 1899, p. 76, does not supersede law of 1899, p. 20, and auditor was authorized to draw warrant.
University v. Richards, 20 U. 457; 59 P. 96.

5211. (2071.) Boards to make biennial report. The governing board of each state institution shall make biennially to the governor, on the 1st day of January preceding each regular session of the legislature, a detailed report showing a statement of its important official acts, the growth and condition of the institution, the report of the chief executive officer thereof, a list of officials and their salaries, and an estimate of the cash value of the real and personal property of the institution or of the state in connection therewith, together with an inventory of the same.

5212. (2072.) Id. Receipts and expenditures. At such time also each governing board shall furnish to the governor and to the state auditor detailed accounts of its receipts and expenditures during the preceding two years, ending December 31st, as well as an itemized estimate of the income and requirements of the institution for the coming biennial period. Such accounts and estimates must be countersigned by the chief executive officer of the institution, and by the secretary or clerk of the same, if there is one. If such officer or secretary shall fail to so countersign, he shall be liable to a fine of $100.

5213. Moneys to be paid to state treasurer. Monthly report. All fees and moneys for the sale of products and live stock received by the state industrial school, the state school for the deaf and the blind, and the state mental hospital shall be paid into the state treasury at the close of each month and placed to the credit of the maintenance account of the institution from which said fees are received. A detailed report, verified under oath, of the moneys collected by the aforesaid institutions shall be filed with the state auditor and the state treasurer at the time such moneys are deposited with the state treasurer. '15, p. 39.

CHAPTER 2.

CREATING A PERMANENT FUND FOR THE UNIVERSITY OF UTAH, BRANCH NORMAL, AND AGRICULTURAL COLLEGE.

('11, p. 20.)

5214. Fund created. For the purpose of providing a permanent and perpetual fund for the general maintenance of the University of Utah, the Agricultural College of Utah, and the Branch of the Agricultural College of Utah, there is hereby appropriated and set aside for that purpose 28 per cent of the entire annual revenue derived from the general tax levy for state purposes in the state of Utah, exclusive of the state school and high school funds.

Am'd '13, p. 41.

5215. Apportionment. The general maintenance fund shall be divided as follows: The University of Utah, including the State School of Mines and the State Normal School, shall receive 64.43 per centum; the Agricultural College of Utah, 28.34 per centum; the Branch of the Agricultural College of Utah, 7.23 per centum of the funds in this chapter provided for.

Am'd '13, p. 41.

5216. Expenditures not to exceed revenues. The annual cost of the general maintenance herein provided for the University of Utah, the Agricultural College of Utah, and the Branch of the Agricultural College of Utah shall not exceed the amount in this chapter provided for, together with such revenue as may be derived from the several land grant funds of the above named institutions and the funds received by them from miscellaneous sources.

'13, p. 41.

5217. General maintenance defined. The term "general maintenance," as used in this chapter shall be so construed as to mean and include all necessary expenses of the above institutions, except for the purchase and delivery on the grounds of additional water, the purchase of grounds, and the erection and equipment of new buildings and permanent additions.

5218. Funds, when available. The funds becoming available under the provisions of this chapter shall be used for the school year beginning July 1 of each calendar year in which the tax providing said funds is levied.

5219. Disposition of unexpended balances. If, at the end of any school year, either of the above named institutions shall have on hand any unexpended balance of the general maintenance funds in this chapter provided for, such balance or balances shall be converted into a sinking fund to be used by such institutions for building purposes or other permanent improvements.

5220. Expenditures and deficits. The expenditure of the funds derived under the provisions of this chapter and the creation of any deficit in connection with the institutions herein named shall be under the same provisions as may be provided for expenditures and deficits in connection with other state institutions.

5221. State auditor to credit funds, when. The state auditor shall credit to the several institutions herein named the funds provided under the

provisions of this chapter at the same time or times and in the same manner as the district school funds are credited, and at the same time he shall notify in writing the said institutions of the actual amount of money in the state treasury to the credit of each for their general maintenance as provided in this chapter.

CHAPTER 3.

AGRICULTURAL COLLEGE.

5233. (2073.) Where located. The Agricultural College of Utah shall continue as now established and located at Logan, in the county of Cache.

Part of public school system, Con. art. 10, sec. 2.
Location at Logan City confirmed, rights perpetuated, Con. art. 10, sec. 4.
Land grant, enabling act, sec. 8.
Perpetual fund, Con. art. 10, secs. 3, 5, 7; art. 20, sec. 1.
Equipment and instructors at disposal of state road commission, § 2862.
Permanent fund for maintenance, §§ 5214-5221.

5234. (2074.) Object. The leading object of the college shall be to teach branches of learning related to agriculture and the mechanical arts, and such other scientific and classical studies as may promote the liberal and practical education of the industrial classes in the several pursuits and professions of life.

5235. (2075.) Board of trustees. The government and control of the college shall be vested in a board of trustees, which shall consist of the secretary of state and twelve resident citizens of the state, to be appointed by the governor. Six of said citizen members of the board shall be appointed to serve for two years and six of said citizen members for a term of four years, as may be designated by the governor at the time of their appointments; such appointments to be made at the expiration of the respective terms of the present members. Thereafter appointments shall be for the term of four years. Am'd '09, p. 231; '11, p. 53.

Filling of vacancies, § 5205.
Horse commission directed by Agricultural College trustees, § 2919.
Trustees of the Agricultural College, who were to qualify by giving bond and to receive compensation for services and perform various specified duties, are officers within the meaning of the organic act.
McCornick v. Thatcher, 8 U. 294; 30 P. 1091.
Where compiled laws of 1888 provided that the board of trustees of a college might expend all appropriations for the college, and a subsequent act appropriating money to the college provided for a board of construction to expend such appropriation, and contained a clause repealing all acts inconsistent with said act; held, that the latter act superseded the compiled laws in relation to such appropriation, and in default of a valid appointment of the board of construction, the trustees could not expend the appropriation.
Id.

5236. (2076.) Id. Has general charge. By-laws. Faculty. The board shall take charge of the general interests of the institution, and may sue and be sued in all matters concerning it. The board shall have power to enact by-laws and regulations for all concerns of the institution, not inconsistent with the laws of the state; and likewise to appoint a president of the faculty, professors, and such other officers and employes as, in its judgment, may be necessary, to prescribe their duties, and to determine their salaries.

To purchase supplies and erect buildings by contract, §§ 5207, 5209.
Officer or employe not to be interested in contracts, etc., § 5206.

5237. (2077.) Record and accounts. The board shall have kept an accurate record of its proceedings, which shall embrace copies of all contracts entered into, and a minute and accurate record of all expenditures, showing the amount paid, to whom paid, and for what service rendered, and materials purchased, and whether paid on account or in preformance of contract; and for all payments made vouchers shall be taken.

5238. (2078.) Board has general control. The board shall have the general control and supervision of the college, of the farm pertaining thereto, and of such property as may be vested in the college by law, of all appropriations made by the state for the support of the same, and also of lands or personalty that may hereafter be donated by the state, or by the United States,

or by any person or corporation, in trust for the promotion of agricultural and industrial pursuits.

5239. (2079.) Officers of board. The board shall elect one of its number president, and shall appoint a secretary and a treasurer.

Fees of horse commission paid to secretary Agricultural College, § 2919.

5240. (2080.) Oath and bond. With the exception of the secretary of state, the trustees shall qualify by taking the constitutional oath of office and by giving bonds with sufficient sureties to the state of Utah, in the penal sum of $1000 each, conditioned for the faithful performance of the duties of their office. Such bonds must be approved by the governor and filed with the secretary of state. The treasurer shall execute a bond in such sum as the board of trustees may determine. Am'd '11, p. 53.

5241. (2081.) Compensation of trustees. Each trustee shall receive as his compensation $4 per diem for each meeting of the board at which he shall be present, payable out of any moneys appropriated for the use of the Agricultural College, and he shall be allowed for traveling expenses mileage at the rate of ten cents per mile, for one way only, for the distance necessarily traveled in attending the meetings of the board.

5242. (2082.) Id. Future appointees. After the expiration of the terms of the present trustees, there shall be allowed to members of the board no compensation for their time or services, but their actual and necessary expenses incurred in the performance of their official duties, the account for which shall be verified on oath, shall be paid by the state treasurer on the warrant of the state auditor, out of any money in the treasury not otherwise appropriated.

Warrants drawn in favor of treasurer, § 5210.

5243. (2083.) Professors, instructors, etc. The board shall establish in the college an adequate number of professorships of the sciences related to agriculture and the mechanical arts. Such professorships shall be filled by able and competent professors, aided by such assistants, tutors, and other instructors as shall from time to time be necessary.

State leader in junior vocational work made supervisor of agricultural and industrial education, § 4542.

State leader in junior vocational work for girls made supervisor of home economices, § 4542.

5244. (2084.) Faculty. Assistants. President of faculty. The president of the trustees, the professors, and such assistants as may be designated by the board shall constitute the faculty of the college. The titles of such assistants shall be determined by the board. The president of the faculty shall be ex officio a member of the state board of education.

5245. (2085.) Employes removable. Any professor, instructor, officer, or employe of the college shall be removable at the pleasure of the board.

5246. (2086.) Religious preferences and sectarian teachings forbidden. In the appointments of professors, instructors, and other officers and assistants of said college, and in prescribing the studies and exercises thereof, and in every part of the management and government thereof, no partiality or preference shall be shown by the board to one sect or religious denomination over another; nor shall anything sectarian be taught therein. Persons engaged in conducting, governing, managing, or controlling the college in any of its parts, and its studies and exercises, shall faithfully and impartially carry out the provisions of this section for the common good.

No religious or partisan test to be required of teachers, Con. art. 10, sec. 12.

To be free from sectarian control, Con. art. 3, sec. 4; art. 10, sec. 1.

5247. (2087.) Courses of study in the Agricultural College. The courses of instruction in the Agricultural College, until otherwise provided for by law, shall comprise agriculture, horticulture, forestry, animal industry, veterinary science, domestic science and art, elementary commerce, elementary surveying, instructions in irrigation as applied to the measurement, distribution, and application of water for agricultural purposes, for which a degree of engineering in agriculture may be given, military science and tactics, history, language, and the various branches of mathematics, physical

and natural science, and mechanic arts, with special reference to the liberal and practical education of the industrial classes. But the Agricultural College shall not offer courses in liberal arts, pedagogy, the profession of law or medicine, or engineering, except agricultural engineering. Am'd '05, p. 25; '11, p. 52.
Courses in university restricted, § 5522.

5248. (2088.) Full course. Winter course. A full course of study in the institution shall be of not less than four years. The board may institute a winter course of lectures for others than students of the institution, under necessary rules and regulations.

5249. (2088x.) Board of trustees directed to establish winter course. The object of this section is the establishment and maintenance of a regular winter course of studies for students at the Agricultural College of Utah; which course shall include studies relating to agriculture and mechanical arts, and such other scientific and classical studies as the board of trustees and faculty may prescribe, and the board of trustees is hereby empowered and directed to establish such course. The special year of this course shall consist of five calendar months, beginning on or about November 1st of each year.
'99, p. 115.

5250. (2089.) Academical year. The academical year shall consist of not less than nine calendar months, and it may be divided into such terms by the board as, in its judgment, will best secure the objects for which the college was founded.

5251. (2090.) Qualifications for entrance. No student shall be admitted to the institution who shall not have attained the age of fifteen years, and who shall not have passed a satisfactory examination in arithmetic, geography, grammar, reading, spelling, and penmanship.
No religious or partisan test to be required of pupils, Con. art. 10, sec. 12.

5252. (2090x.) Entrance and tuition fees. Other receipts. All moneys to be paid to state treasurer. Monthly report. Instruction in the preparatory and regular courses of the Agricultural College of Utah shall be free to actual residents of the state, but an entrance fee, not to exceed $10 for residents and not less than $25 and not to exceed $50 for non-residents of Utah, may be required annually. The board of trustees may fix a reasonable charge for instruction in special studies not embraced in the regular course. All moneys received for entrance and tuition fees, or for sale of animals, shall be covered into the state treasury at the close of each month, and shall be placed to the credit of the maintenance account of the Agricultural College of Utah. A detailed report of the amounts collected from all sources, duly verified by the proper officers of said college, shall be filed with the state auditor and state treasurer at the time such moneys are deposited with the state treasurer.
Am'd '07, p. 134; '15, p. 40.

5253. (2091.) Text books. Degrees. The board of trustees shall, with the advice of the faculty, prescribe the books to be used in the institution, and confer, for similar or equal attainments, degrees and testimonials similar to those conferred by agricultural colleges elsewhere.

BRANCH NORMAL SCHOOL AT CEDAR CITY MADE A BRANCH OF THE AGRICULTURAL COLLEGE.

('13, p. 41.)

5254. School to be under the Agricultural College. The Branch of the State Normal School heretofore established and conducted at Cedar City, in the county of Iron, and state of Utah, is hereby constituted a branch of the Agricultural College of Utah, and the state shall maintain the same under the management, control, and direction of the board of trustees of the Agricultural College of Utah, which may offer only such courses of study therein as are permitted by law to be given in the said Agricultural College.

5255. Repeal. Exemptions. Secs. 2316, 2317, 2318, 2319, and 2320, Compiled Laws of Utah, 1907, are hereby repealed, but any right accruing under

the provisions of either of the said sections shall not be affected by this repeal.

5256. Title to be conveyed to the state. Secs. 5254-5256 shall not take effect until the former owners of the land on which the Branch of the State Normal School is now situated execute conveyances to the state of Utah conveying an unconditional title to the said tract of land. Such conveyances to be subject to the approval of the secretary of state.

EXPERIMENT STATIONS.

5260. (2092.) Agricultural experiment station. Objects. In connection with the college there shall be established an agricultural experiment station to conduct original researches into the physiology of plants and animals; the diseases to which they may be severally subject, with remedies therefor; the chemical composition of useful plants at different stages of growth; the comparative advantages of rotative croppings as pursued under a varying series of crops; the capacities of new plants or trees for acclimation in the state; the analysis of soils and waters; the chemical composition of manures, natural and artificial, with experiments designed to test their comparative effects on crops of different kinds; the adaptation and values of grasses and forage plants; the composition and digestibility of the different kinds of feed for domestic animals; the scientific and economic questions involved in the production of butter and cheese; the best methods of irrigation, with experiments designed to show the amount of water and number of waterings needed on different soils to produce the most abundant crops; and such other researches and experiments as bear directly on the agricultural industry of the state of Utah. The agricultural station shall be conducted in accordance with the provisions of an act of congress, passed March 2, 1887, entitled: "An act to establish agricultural experiment stations in connection with the colleges established in the several states, under the provisions of an act approved July 2, 1862," and of acts supplementary thereto.

5261. (2093.) Id. In charge of board. Bulletin. The board shall take charge of the agricultural experiment station, purchase suitable lands, erect needed buildings, and appoint necessary officers and assistants to conduct the experiments mentioned in § 5260. It shall cause bulletins and reports of the work at such station to be published and mailed as required in the act of congress aforementioned.

5262. (2093x2.) Investigation and demonstrations to be conducted. The experiment station of the Utah Agricultural College shall undertake and conduct investigations into the agricultural possibilities of the undeveloped sections of the state that are or may be in process of settlement, and shall conduct, in such localities, demonstrations for the purpose of teaching the settlers the correct methods of soil tillage, irrigation, crop production, and other agricultural practices. '05, p. 252; '11, p. 54.

5263. (2093x3.) Id. On dry lands. Said station shall conduct experiments to determine the methods by which the non-irrigated or dry lands of the state may be made to produce useful crops profitably, and shall establish farms wherever deemed advisable for the purpose of demonstrating the possibility of raising crops without irrigation in the districts represented by the farms. '03, p. 34; '07, p. 146; '11, p. 54.

5264. (2093x8.) Id. Alkali and water logged lands. Said station shall conduct experiments to determine the best and most economical methods of using irrigation water for the production of useful plants, and the best methods of reclaiming the alkali and water-logged lands of the state. Said stations shall also conduct such demonstrations as may be necessary to teach the farmers the right methods of irrigation and the possibility of reclaiming the water-logged and alkali lands of the state. '05, p. 12; '11, p. 54.

5265. (2093x1.) Shall maintain the southern Utah experiment farm. Said station shall maintain the southern Utah experiment farm, as now lo-

cated, for the experimental study of the agricultural conditions and possibilities of the semi-tropical part of the state, and shall make such other investigations and demonstrations in said district as may be deemed advisable. '99, p. 151; '05, p. 252; '11, p. 54.

Panguitch experiment station, § 5272.

5266. Alfalfa leaf weevil. Said station shall undertake investigations for the purpose of learning the life, history, habits, and methods of eradication of the alfalfa leaf weevil, and shall conduct, when deemed necessary, demonstrations to teach the farmers of the state the approved methods of combating and eradicating the alfalfa weevil. '11, p. 54.

5267. (2093x6.) Bulletins. Said station shall publish, as frequently as may be advisable, popular and technical bulletins containing information of value to the farmers of the state; *provided,* that at least one report shall be published at each legislative session of the work accomplished under the provisions of this chapter. '05, p. 252; '11, p. 54.

5268. Co-operation. Said station is hereby authorized to enter into co-operative agreements with the nation, state, or county governments, and with other organizations, institutions, and individuals, for the purpose of carrying out the provisions of this chapter. '11, p. 54.

5269. Id. Approval. All plans and co-operative agreements formulated under this chapter shall receive the approval, before becoming effective, of the board of trustees of the Utah Agricultural College. '11, p. 54.

5270. Appropriation. For the purpose of carrying into effect the provisions of this chapter, there is hereby appropriated from the state treasury from the funds not otherwise appropriated $15,000 for the year 1917; $15,000 for the year 1918, and $7,500 for the first six months of the year 1919. Am'd '17, p. 180.

PANGUITCH SCHOOL.

5271. Acceptance, condition. The governor is hereby authorized to accept from the United States the property known as the Panguitch school, including the lands, buildings, and fixtures pertaining to said school, upon condition that said lands and buildings shall be held and maintained by or under the direction of the state of Utah as an institution of learning, and that Indian pupils shall at all times be admitted at such school free of charge for tuition and on terms of equality with white pupils. '09, p. 275.

5272. To be used as an experiment station. The property known as the Panguitch school, located in Garfield county, including the lands, buildings, and fixtures pertaining to said school, shall be used as an experiment station in connection with the Agricultural College of Utah, and shall be known as the Panguitch school experiment station. '11, p. 126.

5273. Control vested in the board of trustees of the Agricultural College. The board of trustees of the Agricultural College shall take charge of and have the general control and supervision of such experiment station, and shall appoint the necessary officers and assistants to conduct the experiments thereon, and the board shall cause at least one report of the operations of said station to be printed annually in connection with, and as a part of the report provided for under the provisions of § 5267. '11, p. 126.

5274. Experiments, how conducted. The same experiments shall be conducted in connection with said experiment station as are now provided shall be conducted in connection with experiment stations established under the provisions of § 5260, and such experiments shall be conducted in the same manner and for the same purposes as provided by §§ 2093x2 and 2093x5, Compiled Laws of Utah, 1907 [substantially §§ 5262-5269]; *provided,* that in connection with said experiment station there shall be taught branches of learning relating to the practical work in agriculture. The board may fix a reasonable charge for instruction in the branches of learning taught; *provided,* that Indian pupils shall at all times be permitted to receive such in-

struction without tuition paid therefor, and on terms of equality with white pupils. '11, p. 126.

§§ 2093x2 and 2093x5 C. L. '07, were repealed, '11, p. 54, and substantially re-enacted, as §§ 5262-5269.

5275. May sell products. Fund created. The board of trustees shall have authority to sell the products of said experiment station, and all moneys received from the sale of such products, together with all moneys received from tuition, shall be held by the board in a separate fund, to be known as the Panguitch school fund, and shall be used and expended only under the supervision of the board in meeting the expenses incurred in the maintenance of said experiment station. The board shall keep an accurate record of all receipts and expenditures, and for all payments made vouchers shall be taken. '11, p. 126.

ERECTION AND EQUIPMENT OF ELECTRIC PLANT NEAR LOGAN.

5276. Erection authorized. Purposes. Appropriation. In order to furnish light and power for the Agricultural College at Logan, Utah, including the experiment station, and for the Industrial School and the Utah School for the Deaf and the Blind, at Ogden, Utah, for the University of Utah, including the State Normal School at Salt Lake City, Utah, and for the state prison at Salt Lake City, Utah, the sum of $40,000 is hereby appropriated out of any money in the state treasury not otherwise appropriated, for the erection of an electric power plant in Logan canyon, Utah, at a point to be designated by the board of trustees of the Agricultural College, and the state auditor is hereby authorized and directed, upon the application in writing of said board of trustees, to draw his warrant upon the state treasurer in favor of the said board of trustees of the Agricultural College, for the amount herein specified.

5277. Plans. Site. The board of trustees of the Agricultural College is hereby empowered and directed to prepare such plans as may be necessary and to cause to be erected at some suitable place in Logan canyon, Utah, a power plant and to equip the same, which said power plant shall furnish electric energy for light and power for the use of the Agricultural College, including the experiment station, at Logan, Utah.

5278. Contracts. The board of trustees of the Agricultural College is hereby authorized and empowered to make such contracts as shall be proper and reasonable, with individuals, with private or municipal corporations for the purpose of having transmitted such electric energy as may not be used at the Agricultural College and experiment station, at Logan, Utah, to other state institutions, including the Industrial School at Ogden, Utah, the Utah School for Deaf and the Blind, at Ogden, Utah, the University of Utah, at Salt Lake City, including the State Normal School, and the state prison, at Salt Lake City, Utah. '11, p. 88.

CONGRESSIONAL APPROPRIATIONS.

5279. (2094.) Appropriations by congress. The governor is hereby authorized to make application to the secretary of the treasury to obtain any appropriation made by congress in pursuance of the act above mentioned or of other acts supplementary thereto. Whenever the college and agricultural experiment station shall be entitled to any money, under the aforesaid or a similar act, the board of trustees shall execute and file with the secretary of the treasury an agreement to expend the money received, for the sole and exclusive purpose expressed in such act and in the manner therein directed, and to maintain a farm of at least twenty-five acres in connection with the Agricultural College. The board shall also execute and file with the said secretary its bond in the penal sum of $15,000, with two sufficient sureties approved by the state auditor, conditioned for the faithful performance of the agreement.

5280. (2094x.) Accepts grant of money. Use of same. The state of Utah hereby accepts the grant of money authorized by the act of congress entitled "An act to provide an increased annual appropriation for agricultural

experiment stations and regulating the expenditure thereof," approved March 16, 1906; and assents to the purpose of said grant as expressed in said act. It is hereby stipulated and agreed on the part of the state of Utah that all moneys received by the state according to the provisions of said act shall be used exclusively as provided in said act, and the state guarantees all money so received against loss or misapplication. '07, p. 30.

5281. (2094x1.) Receiving officer. The treasurer of the governing body of the Agricultural College of Utah is designated as the proper officer for receiving from the secretary of the treasury the moneys appropriated by said act. '07, p. 30.

FARMERS AND DOMESTIC SCIENCE INSTITUTES AND SCHOOLS.

('09, p. 9.)

5282. (2095.) Meetings, etc., to be held. The Agricultural College of Utah is hereby authorized and required to hold meetings, institutes, one or two-week schools, exhibitions, and demonstrations for the instruction of the citizens of Utah in the various branches of agriculture and domestic science. At least one meeting, institute, or school shall be held in each county each year, at such time and place and under such regulation as the Agricultural College may direct.

5283. May employ agents. Course of instruction. The Agricultural College may employ such agents as may be deemed necessary to assist the faculty in carrying out the provisions of §§ 5282-5286; and the course of instruction at the meetings, institutes, and schools herein provided for shall present the results of the most recent investigations in theoretical and practical agriculture and domestic science, especially as adapted to Utah conditions.

5284. (2096.) Local agricultural societies. It shall be the duty of those conducting institutes in any county or precinct in this state, under the provisions of §§ 5282-5286, to encourage and assist in the organization of local agricultural societies, and to encourage legitimate industrial enterprises.

5285. Annual report to be published. At the close of each year's institute work, the Agricultural College shall cause to be published in book or pamphlet form, for free distribution to the farmers of the state, an annual report of the institute work, which report shall contain the leading papers and discussions presented at the institute meetings of the state.

5286. Appropriation. For the purposes mentioned in §§ 5282-5286, the Agricultural College may use such sum as is deemed proper during the years 1917 and 1918, not exceeding the sum of $10,000 in either of said years, and for that purpose there is hereby appropriated out of any moneys in the state treasury not otherwise appropriated the sum of $20,000.

Am'd '11, p. 52; '17, p. 208.

FARM AND HOME DEMONSTRATORS IN THE SEVERAL COUNTIES.

('13, p. 208.)

5290. Trustees of Agricultural College authorized to place demonstrators. The board of trustees of the Utah Agricultural College are hereby authorized and directed to place practical farm and home demonstrators in various parts of the state of Utah. '13, p. 208.

5291. Duties of demonstrators. Such demonstrators shall study comprehensively the existing farm and home conditions within the districts assigned. They shall visit as far as possible from farm to farm and from home to home and shall present such facts and principles and practices of modern agricultural and home science as may seem needed in the development of the districts assigned. They may assist in the introduction of new crops, new methods of cultivation, and new machinery; encouraging boys' and girls' farm and home contests; in organizing cow-testing and similar organizations; in advancing county and local fairs, and in promoting in such other ways as

may be decided upon, the agricultural and home interests of the districts to which the demonstrators are assigned.

5292. Co-operation with department of agriculture. County appropriations. The board of trustees of the Utah Agricultural College are hereby authorized to enter into co-operative contracts with the United States department of agriculture, county or city officers, private and public organizations, or individuals, whereby the expense connected with the demonstration work authorized by §§ 5290-5296 may be borne jointly by the state of Utah and by any or all of the agencies above mentioned in this section. The county commissioners of each county in this state are hereby authorized and empowered to provide funds in an amount sufficient to meet the purposes of said law in their respective counties, but not exceeding in any one year the sum of $2500; *provided,* that all of said amount shall be expended for field work. Am'd '15, p. 11.

5293. One demonstrator to each county. Proviso. Not more than one demonstrator in each branch shall be placed in any one county; *provided,* that special consideration shall be given the counties sparsely settled or at some distance from railroads.

5294. Demonstrator to keep record of work and observation. Report. Each demonstrator shall do at least nine calendar months actual field work, or more as may be directed by the board of trustees of the Agricultural College. He shall keep a faithful and accurate record of his work and observations, which shall be filed in writing with such division of the Utah Agricultural College as may be prescribed by the above mentioned board of trustees.

5295. Report to the governor. The board of trustees of the Utah Agricultural College shall make biennially a report to the governor of the progress and findings of the work conducted under §§ 5290-5296.

5296. Appropriation. For the purpose of carrying into effect the provisions of §§ 5290-5296, there is hereby appropriated from the state treasury from the funds not otherwise appropriated, $16,000 for the year 1917; $18,500 for the year 1918, and $10,500 for the first six months of the year 1919. Am'd '17, p. 209.

CHAPTER 4.

UTAH ART INSTITUTE.

5300. (2098x.) State institute of art. A state institute of art is hereby created, to be known as Utah Art Institute; the object being to advance the interests of the fine arts, develop the influence of art in education, and to foster the introduction of art in manufactures. '99, p. 47.

5301. (2098x1.) Governing board. Membership. Qualifiications. Quorum. There shall be appointed by the governor, by and with the consent of the senate, a governing board of the institute consisting of five members who are residents of the state of Utah, two of whom shall be competent artists, one a competent architect, one a competent craftsman, and one a business man interested in art. Three members of the governing board shall constitute a quorum for the transaction of business, and three members of the governing board shall be authorized to purchase all works of art; *provided,* that two of the aforesaid members shall be the artist members of the board. '99, p. 47; am'd '09, p. 183; '15, p. 90.

5302. (2098x2.) Id. Term of office. Secretary and treasurer. Members to serve without compensation. Four members of the governing board shall be appointed for a term of two years and the fifth member, who shall be the business man hereinbefore referred to, shall be appointed for three

years. After the expiration of said terms, all appointments shall be made for a term of two years, and no member shall be appointed for two terms in succession. It shall be one of the duties of the business man referred to to act as secretary and treasurer of the board. Any appointments made to fill vacancies shall be for the unexpired portion of the term only. Each officer shall serve without compensation as such, and shall not receive any gifts, prizes, awards of money from the purchasing fund of the institute during the term of his office. '99, p. 47; am'd '09, p. 183; '15, p. 90.

5303. (2098x3.) Compensation. Must qualify. Vacancies. All members of the art institute shall serve without compensation as such. All persons appointed as members of the governing board shall qualify by subscribing to the oath of office before an officer with a seal that they will faithfully perform the duties of said office. Vacancies in the governing board shall be filled by appointment by the governor within one month from the time of such vacancy. '99, p. 48.

5304. (2098x4.) Board must organize. Quorum. Said board shall organize immediately after its appointment by electing from its members a president, a vice-president, a secretary, and treasurer of the Utah Art Institute. Said officers shall also be president, vice-president, secretary, and treasurer, respectively, of the governing board. Four members of the board shall constitute a quorum. '99, p. 48.

5305. (2098x5.) Powers of governing board. The governing board shall have power to adopt by-laws and rules of procedure to govern the Utah Art institute; to receive, hold, and manage its gifts, bequests, and property, and to perform all acts necessary to accomplish the duties hereinafter described. It shall also have the power to issue certificates of membership, and to offer and confer prizes, mentions, medals, and diplomas for works of art in painting, sculpture, and manufacture, when in competition, under rules prescribed by the governing board. The Utah Art Institute shall have a seal with which it shall attest its official acts. '99, p. 48.

5306. (2098x6.) Institute membership. Membership in the institute shall be of four classes, viz.: Members of the governing board, honorary members, annual members, and life members. '99, p. 48.

5307. (2098x7.) Honorary member for life. Any person who shall submit to the governing board a work of art executed by himself, which shall be accepted by said board, shall by the tender to the art institute of said work of art, or in lieu thereof the payment of $100, on receipt of a certificate of membership, issued by said board, become an honorary member for life. '99, p. 48.

5308. (2098x8.) Annual member. Any patron of art or a person interested in education or manufacture shall, upon the recommendation of four governing members or four honorary members, and the payment of $10, be entitled, if elected by the institute, to a certificate of membership for one year, and become an annual member. '99, p. 48.

5309. (2098x9.) Annual membership for life. Upon the payment of $100, any person receiving the recommendation of the governor of the state or four governing members or four honorary members shall, if elected by the institute, have all the privileges of annual membership for life. '99, p. 48.

5310. (2098x10.) Lectureship committee. There shall be appointed by the governing board a committee of three persons to be known as the art lectureship committee. '99, p. 48.

5311. (2098x11.) Exhibition committee. There shall be appointed by the governing board a committee of three artists or judges of art to be known as the exhibition committee. '99, p. 49.

5312. (2098x12.) Alice art collection committee. There shall be appointed by the governing board a committee of three to take charge of all works of art, which collection shall be known as the Alice art collection.

Every person holding a certificate of membership is eligible to hold office in said committee or the exhibition committee. '99, p. 49.

5313. (2098x13.) Membership certificates. Annual report. Suitable certificates of membership shall be provided by the governing board, and shall be signed by the president and countersigned by the secretary. An annual report of the Utah Art Institute shall be forwarded by the secretary to the governor of the state before December 1st of each year. '99, p. 49.

5314. (2098x14.) Annual course of lectures. It shall be the duty of the Utah Art Institute, through its art lectureship committee, to prepare annually a course of lectures on subjects of art, which shall be delivered in whole or in part before the students of the Agricultural College, or any branch college, the University of Utah, the Southern Branch Normal, the Industrial School, the state teachers' association, and the county teachers' institutes of each county. It shall be the duty of the art lectureship committee to advise with officers of state educational institutions and superintendents of public schools as to courses of drawing, design, and art, with a view to creating a stronger art influence in state educational institutions. '99, p. 49.

5315. (2098x15.) Annual exhibition. An annual exhibition to be known as the April exhibition shall be opened by the first of April of each year in Salt Lake City, and shall continue for at least thirty days. Immediately following the April exhibition the same collection shall be, as far as practicable, transferred to at least one other city in the state and shall be known as the state exhibition. Am'd '15, p. 90.

5316. (2098x16.) Custody and care of art collection. All works of art acquired under this chapter shall become part of the Alice art collection. Ample insurance shall be provided for the art collection by the governing board. Said art collection shall be held as the property of the state under control of the Art Institute, and may be loaned in whole or in part for exhibition purposes to different parts of the state according to rules and regulations prescribed by the governing board. The governing board shall take every precaution to avoid damage or destruction to the property of the Art Institute and the art works submitted by exhibitors, and shall provide ample insurance covering the same. All art works shipped to and from the place of exhibition shall be packed by an expert packer at the expense of the institute. Am'd '09, p. 184; '15, p. 90.

5317. (2098x17.) Appropriation. All moneys received by the Art Institute shall be applied or expended in the furtherance of the art interests of the state as ordered by the governing board. The sum of $1000 is hereby appropriated to the Art Institute from any moneys in the state treasury not otherwise appropriated, $500 of which shall be available for the year 1917 and $500 of which shall be available for the year 1918, which shall be used to defray the expenses of the Art Institute, its lectures and exhibitions. Any balance remaining of said $1000, together with the money raised by popular subscription, shall be added to the purchasing fund, and shall be expended on or before December 31 for purchasing works of art that were displayed at the April exhibition. Am'd '09, p. 186; '15, p. 90; '17, p. 276.

CHAPTER 5.

SCHOOL FOR THE BLIND.

5319. (2099.) Location. The institution for the blind heretofore established in connection with the state school for the deaf and dumb, and made a body corporate by the name of the Utah School for the Blind, shall continue as located at Ogden, in the county of Weber.

Location, land grant, rights, Con. art. 10, sec. 10; art. 19, sec. 3; art. 20, sec. 1. Land grant, enabling act, sec. 12.
School for the deaf, §§ 5324-5339.
Commission for adult blind, §§ 425-431.

5320. (2100.) Powers. It shall have perpetual succession, a corporate seal, and by the aforementioned name may sue and be sued, contract and be contracted with, and may take and hold by purchase, gift, devise, or bequest, real and personal property required for its uses. It may also convert property received by gift, devise, or bequest, and not suitable for its uses, into other property so available, or into money. It shall be deemed a public corporation, and its property shall be exempt from all taxes and assessments.

5321. (2101.) Trustees and officers same as those of school for the deaf. The trustees and officers of the Utah School for the Deaf are hereby constituted the trustees and officers of the Utah School for the Blind, which shall, until otherwise provided by law, be conducted as a co-ordinate institution with the said school for the deaf. Am'd '07, p. 119.

All fees and moneys from sales to be deposited with state treasurer, § 5213.

5322. (2102.) Objects. Free to residents. The purpose of the school shall be to provide a practical education for the blind of Utah who are of sound mind and body, under thirty years of age, capable of receiving beneficial instruction, and incapacitated, on account of blindness or inability to see, for instruction in the common schools; and to instruct such pupils in those mechanical trades and arts that tend to enable them to become self-supporting and useful citizens; and to provide a circulating library for the blind of the state Residents of Utah shall be entitled to the benefits of the school free of expense. Pupils from other states may be received and instructed on such terms as the governing board may prescribe. Am'd '07, p. 84.

5323. (2103.) Laws governing. All provisions of law governing the Utah School for the Deaf, as far as applicable, shall apply to the Utah School for the Blind. Am'd '07, p. 120.

CHAPTER 6.

SCHOOL FOR THE DEAF.

5324. (2104.) Changing name. Location. The institution for the deaf and dumb, heretofore made a body corporate by the name of Utah State School for the Deaf and Dumb shall hereafter be known and conducted as a body corporate under the name of Utah School for the Deaf, and shall continue as established and located in Ogden, in the county of Weber. All the rights, immunities, franchises, and endowments heretofore granted or conferred unto the Utah State School for the Deaf and Dumb are hereby confirmed and perpetuated unto the Utah School for the Deaf. Am'd '07, p. 14.

Location, land grant, rights, Con. art. 10, sec. 10; art 19, sec. 3; art. 20, sec. 1.
Land grant, enabling act, sec. 12.
School for the blind, §§ 5319-5323.

5325. (2105.) Powers. It shall have perpetual succession, a corporate seal, and by the aforementioned name may sue and be sued, contract and be contracted with, and may take and hold by purchase, gift, devise, or bequest, real and personal property required for its uses. It may also convert property received by gift, devise, or bequest, and not suitable for its use, into other property so available, or into money. It shall be deemed a public corporation, and its property shall be exempt from all taxes and assessments.

5326. (2106.) Objects. Free to residents. The purposes of the school shall be to provide a practical education for the deaf, the mute, and the deaf mute of the state, who are of sound mind and body, under thirty years of age, capable of receiving beneficial instruction, and incapacitated, on account of deafness or inability to speak, for instruction in the common schools; and to instruct such pupils in agriculture and in those mechanical trades and arts that tend to enable them to become self-supporting and useful citizens. Residents of the state shall be entitled to the benefits of the school free of expense. Pupils from other states may be received and instructed on such terms as the governing board may prescribe.

5327. (2107.) Board of trustees. The government and control of the school and management of its property and affairs shall be vested in a board of trustees which shall consist of the attorney-general and five resident citizens of the state, not more than three of whom shall be of the same political party. At the expiration of the respective terms of the citizen members of the Board their successors respectively shall be appointed, as follows: Two to serve a term of four years, and three to serve a term of six years.

Am'd '03, p. 51; '11, p. 138.

Appointment of members; filling vacancies, §§ 5204, 5205.
To purchase supplies and erect buildings by contract, §§ 5207-5209.
Officer or employe not to be interested in contracts, etc., § 5206.
All fees and moneys from sales to be deposited state treasurer, § 5213.

5328. (2108.) Id. Oaths and bonds. Excepting the attorney-general, each member of the board, before entering upon the duties of his office, shall take the official oath and execute a bond to the state with securities approved by the governor in the penal sum of $3000 conditioned for the faithful discharge of his duties. The oath and bond shall be filed in the office of the secretary of state. Am'd '11, p. 138.

5329. (2109.) Id. Meetings. The board shall meet at the school in March, June, September, and December of each year, on a date determined by the board, and at other times as often as may be necessary.

5330. (2110.) Id. Members to receive only actual expenses. No member of the board shall receive any compensation for his services as such member; but he may be paid his actual expenses incurred in attending meetings of the board or its committees, or in attending to any business of the school under the authority of the board or of its committees.

5331. (2111.) Id. Powers. Employes removable. No religious or political test. The board may adopt by-laws, and from time to time repeal or amend them, and it may therein provide for special meetings of the board, and for the distribution of its business to committees. It may make such rules, in accordance with law, as it may deem proper, regarding the admission, expulsion, and terms of instruction of pupils, and the internal management of the school. All contracts made with instructors and employes shall be subject to termination at any time, at the will of the board, when in its judgment the interests of the school shall require it. No partisan political nor sectarian religious doctrine shall be taught in the school; and no political nor religious belief shall be required as a qualification of any pupil, instructor, officer, or employe of the school.

No religious or partisan test to be required of teachers or of pupils, Con. art. 10, sec. 12.
To be free from sectarian control, Con. art. 3, sec. 4; art. 10, sec. 1.

5332. (2112.) President of board. The board shall choose one of its members president. Between the meetings of the board he may exercise its powers in the ordinary business of the school, and he shall be the executive officer of the board, and shall hold the office of president for two years. A vacancy in his office may be filled by the board for the remainder of the term.

5333. (2113.) Officers. The board must appoint a superintendent, who shall be the principal of the school. It shall appoint also a secretary of the institution, who may be a member of the board, and whose compensation shall not exceed $100 per annum; and a treasurer of the same, who shall not be a member of the board. The treasurer shall serve without compensation, and shall give a good and sufficient bond. Such bond shall run to the school in its corporate name, be approved by the board, and shall be delivered to the secretary of state.

5334. (2114.) Superintendent. Duties and powers. The superintendent of the school shall be a competent expert educator of the deaf and dumb, and he must be acquainted with the school management and class instruction of deaf, mute, and deaf mute persons. Subject to the approval of the board, the superintendent may select and dismiss all instructors or employes of the school. He shall be responsible for the care of the premises and of the property of the school, for the control of instructors and employes, for the regu-

lation of the household, for the discipline of the school, for the arrangement and execution of a proper course of study and manual training, and for the training of the pupils in morals and manners. He shall have general oversight of all the internal affairs of the school. The superintendent may be removed at any time by a majority vote of the full board of trustees.

5335. (2115.) Fiscal year. Appropriations. The fiscal year of the school shall commence on the 1st day of July and end on the 30th day of June in each year, and biennial appropriations made for its maintenance, unless otherwise specified, shall be deemed to be for the two years commencing on the 1st day of July next after the appropriation is made.

Warrants drawn in favor of treasurer, § 5210.

5336. (2116.) Indigent inmates. In all cases where an applicant for admission to, or an inmate of, the state school for the deaf and dumb shall be unable to pay for necessary clothing or transportation, application shall be made to the board of county commissioners of the county wherein the parent or guardian of the applicant resides. If the board of county commissioners finds the facts as represented, it shall so certify to the superintendent of the school, who must then provide the necessary clothing and transportation, and render bills for the same quarterly to the board of county commissioners of such county. If the bills be found correct, the board of county commissioners shall order them to be paid out of the county treasury.

COMPULSORY EDUCATION OF DEAF, DUMB, AND BLIND.

5337. (2117.) Deaf, mute, or blind children to be sent to school. Every parent, guardian, or other person having control of any deaf, mute, or blind child between the ages of eight and eighteen years, who, on account of its deafness, muteness, or defective sight is unable to be educated in the public schools, shall be required to send such child to the Utah School for the Deaf or the Utah School for the Blind for at least six months of each school year; *provided,* that in case it can be shown to the satisfaction of the board of trustees of the Utah School for the Deaf, and the Utah School for the Blind:

1. That such child is taught at home by a competent teacher in the same branches and the same length of time as children are required by law to be taught in the state school; or,

2. That such child has already acquired the branches of learning taught in the state school; or,

3. That such child is in such physical or mental condition (which must be certified, if required, by a competent physician) as to render such attendance inexpedient or impracticable—then the provisions of this chapter shall not apply. Am'd '07, p. 59.

Compulsory attendance of children at public school, §§ 4740-4743.

5338. (2118.) Id. Penalty for neglect. Any such parent, guardian, or other person having control of any totally deaf, mute, or blind child between the ages of eight and eighteen who fails to comply with the provisions of § 5337 after having been notified of its requirements, shall be guilty of a misdemeanor.

5339. (2119.) Id. Prosecution of offenders. It is hereby made the duty of the county attorney whenever such cases are reported to him to proceed immediately to prosecute such offenders.

UTAH STATE PROPERTY

CHAPTER 7.

UTAH STATE FAIR ASSOCIATION.

5345. (2120.) Corporate name changed. Powers. The Deseret Agricultural and Manufacturing Society, constituted and chartered on the 17th day of January, 1856, shall hereafter be known as the Utah State Fair Association, a body corporate with perpetual succession. It may have and use a

corporate seal, and by the aforementioned name sue and be sued, and contract and be contracted with, and may take and hold by purchase, gift, devise, or bequest, real and personal property required for its uses. It may also convert property received by gift, devise, or bequest, and not suitable for its uses, into other property so available, or into money. It shall be deemed a public corporation, and its property shall be exempt from all taxes and governmental assessments. The title to all property held by the Deseret Agricultural and Manufacturing Society shall be vested in the Utah State Fair Association. Am'd '07, p. 198.

State fair located at Salt Lake City, Con. art. 19, sec. 3.

5346. (2121.) Purposes of association. Property may be leased. Proviso. The purposes of the association shall be to promote in the state of Utah stock breeding, agriculture, horticulture, mining, manufacturing, and the domestic sciences and arts, and the association shall have the authority to use and to lease the property of the association during any portion of the interval between the holding of the annual or biennial exhibitions provided for in § 5353, for private stock exhibitions, circuses, wild west tournaments, shows, racing meets, and for other legitimate purposes, upon terms and conditions to be prescribed by the regulations of said association; *provided,* that all moneys received from such leases be covered into the state treasury at the end of each month to be placed to the credit of the state fair maintenance fund. Am'd '07, p. 199; '15, p. 45.

5347. (2122.) Controlled by board of directors. The government and control of the association and the management of its property and affairs shall be vested in a board of twelve directors. Am'd '07, p. 199.

5348. (2123.) Term. Oath of office. Bond. Each director shall be appointed for a period of four years. He shall qualify by taking the constitutional oath of office and by giving a bond, with sufficient sureties, to the state of Utah, in the penal sum of $1,000, conditioned for the faithful performance of his duties. Such bond must be approved by and delivered to the secretary of state. Am'd '07, p. 199.

Appointment of directors; filling of vacancies, §§ 5204, 5205.

5349. (2124.) Powers. The board of directors shall have power to enact by-laws and regulations for the association, and to fix the manner of, and the fees for, admission to membership therein. Am'd '07, p. 199.

5350. (2125.) Quorum. Appointment of secretary and treasurer. A majority of the directors shall constitute a quorum of the board. One of its members shall be chosen by the board as president. The president shall be the executive officer of the association, and shall hold office for two years, and until his successor is appointed and qualified. The board shall likewise appoint a treasurer, a secretary, and other necessary officials, and shall define their duties and determine their salaries. Am'd '07, p. 199.

5351. (2126.) Treasurer's bond. A bond for the faithful discharge of his duties may be required of the treasurer. Such bond must be approved by and delivered to the secretary of state. Am'd '07, p. 199.

5352. (2127.) No compensation. Expenses. The directors shall serve without pay, but their actual and reasonable expenses incurred in the performance of their official duties, the account for which shall be verified on oath, must be paid by the state treasurer, on the warrant of the state auditor, out of the money in the treasury not otherwise appropriated. Am'd '07, p. 199.

5353. (2128.) Annual or biennial fair. The association shall hold a biennial exhibition, and may hold an annual exhibition of such agricultural and domestic science, horticultural and mineral products, manufactured articles, and domestic and imported animals as, in its opinion, will most stimulate industrial pursuits among the people of this state, and may award premiums for the best specimens of such exhibited articles and animals; *provided,*

however, that the board of directors may permit competition on live stock exhibited by citizens of the several states and territories of the United States. Am'd '01, p. 38; '07, p. 200.

State fair located at Salt Lake City, Con. art. 19, sec. 3.

5354. (2129.) Entries. Premium list. The board shall fix the conditions of entry, and shall publish biennially or annually, as the case may be, a list of those things entitled to premiums. Am'd '07, p. 200.

CHAPTER 8.

STATE HISTORICAL SOCIETY.

('17, p. 219.)

5357. State institution. Powers. The State Historical Society of Utah, founded on the 22d day of July, 1897, and incorporated under the laws of the state, and now in existence, is hereby recognized as a state institution, with full power to carry out the objects and purposes for which it was organized.

5358. Property held for State. Custodian of historic material. Certification of records. The said society shall hold all its present and future collections of property for the state, and it is hereby made custodian of all records, documents, relics, and other material of historic value, which are now or hereafter may be in charge of any state, county, or other official not required by law to be kept as a part of the public records, ten years after the current use of same or sooner in the discretion of the heads of such departments, and copies thereof when made and certified by the secretary of said society under oath and seal shall have the same force and effect as if made by the original custodians.

5359. Rooms for collections. Catalogue. Use of public. The said society shall keep all collections made by it in suitable and convenient rooms to be provided by the secretary of state or the board of regents of the University of Utah, and shall properly catalogue, arrange, and display the same for the use of the public.

5360. Accounts and reports. The board of control of said society shall keep a correct account of funds received and disbursed by it, and shall make reports to the governor as in the case of other state institutions.

CHAPTER 9.

INDUSTRIAL SCHOOL.

5363. (2130.) Purpose, generally. The State Industrial School, situated in Ogden, in the county of Weber, shall be for the confinement, discipline, education, employment, and reformation of juvenile offenders committed to it according to law.

Location, Con. art. 19, sec. 3.
Land grant, enabling act, sec. 12.
Perpetual fund, Con. art. 19, sec. 3; art. 20, sec. 1.
Offenders sent from the juvenile court, §§ 1815, 1823.

5364. (2131.) Board of trustees. The government and control of the school shall be vested in a board of trustees which shall consist of the attorney-general and superintendent of public instruction and five resident citizens of the state. Not more than three of such citizen members shall be of the same political party, and they shall be appointed for the term of four years. Am'd '11, p. 56.

Appointment of trustees; filling of vacancies, §§ 5204, 5205.

5365. (2132.) Oath and bond. Each trustee, except the attorney-general and superintendent of the public instruction, shall qualify by taking the

constitutional oath of office and by giving a bond with sufficient sureties to the state of Utah in the penal sum of $1000, conditioned for the faithful performance of his duties. Such bond must be approved by the governor and filed with the secretary of state. Am'd '11, p. 56.

5366. (2133.) Id. Powers. The board of trustees may contract and be contracted with, and sue and be sued in all matters concerning the school. It may take, in the name of the state, and hold in trust for the school, realty or personalty, and may convert property not suitable for the uses of the school into property so available. It shall have power to enact by-laws and rules for the regulation of all the concerns of the institution, not inconsistent with the laws of the state; to see that the affairs of the institution are conducted in accordance with the requirements of law, and that strict discipline is maintained therein; to provide employment and instruction for the inmates; to appoint a steward, a teacher or teachers, and such other officers as, in its judgment, the wants of the institution may require, and to prescribe their duties; to exercise a vigilant supervision over the institution, the officers, and inmates; to remove any officer at its pleasure; and to determine the salaries to be paid to officers.

Officer or employe not to be interested in contracts, etc., § 5206.

To purchase supplies and erect buildings by contract, §§ 5207-5209.

5367. (2134.) Trustees serve without pay. Expenses. The members of the board shall receive no compensation for their time or services; but their actual and reasonable expenses, incurred in the performance of their official duties, the account for which shall be verified on oath, must be paid by the state treasurer on the warrant of the state auditor, out of money in the treasury not otherwise appropriated.

All fees and moneys from sales to be deposited state treasurer, § 5213.

5368. (2135.) President. Treasurer. Superintendent. The board shall elect one of its number president, another of its number treasurer, and it shall appoint as a superintendent a proper person not of its number. The treasurer, under the direction of the board, shall be the custodian of all funds belonging to the school, whether arising from appropriations made by the legistlature and drawn from the state treasury or from whatever source; and he shall execute to the state a bond with two or more sufficient sureties, approved by the secretary of state, in the penal sum of $20,000, conditioned that he shall faithfully account for all money and property that may come into his hands by virtue of his office.

Warrants drawn in favor of treasurer, § 5210.

5369. (2136.) Secretary. The board shall appoint a secretary, who shall not be of its number. It shall require the secretary and superintendent to give bonds in such penal sum as it may deem proper. The bonds of the treasurer, of the superintendent, and of the secretary must be delivered to the secretary of state.

5370. (2137.) Board to visit school. It shall be the duty of the board to visit the industrial school as often as it may deem necessary, to inquire into all matters connected with the government and discipline thereof; and one or more of the trustees, who may be designated by it, shall visit the school once in every month, and examine into the progress and behavior of the boys and girls in their schoolroom, and in their labor, and inspect the register and accounts of the superintendent. A record of these visits shall be kept in the superintendent's books. The board shall at all times have free access to all parts of the school, and may inspect all books, papers, documents, communications, and correspondence pertaining thereto.

5371. (2138.) Instruction to inmates. The board shall cause the boys and girls under its charge to be instructed in correct principles of morality, and in such branches of useful knowledge as shall be adapted to their age and capacity. Each inmate of the school shall, so far as practicable, be taught a trade or some useful occupation to fit him or her to earn a livelihood upon his or her release; and to carry out the provisions of this section there shall be established a manual training department in the school.

5372. (2139.) Apprenticing inmates. The board may in its discretion bind out children, with their consent or the consent of their parents or guardians, as apprentices or servants during their minority, to such persons and at such places to learn such proper trades and employments as in its judgment will be taught them for their reformation, amendment, and future benefit.

5373. (2146.) Expense of keeping, how paid. The board shall estimate and determine, as nearly as may be, the actual expense per annum of keeping and taking care of such boys or girls as are committed to the State Industrial School on the complaint of the parents or guardians of such boys or girls, for incorrigible or vicious conduct, and the costs of keeping such boys or girls, including the cost of transportation to the school and the costs of court, shall be wholly paid by such parent or guardian, unless for good cause the board shall otherwise order and direct, in which case such expenses, including cost of transportation, shall be paid by the county from which the child shall have been committed.

5374. (2147.) Discharge of person committed. Every boy or girl committed to the State Industrial School shall remain until he or she shall arrive at the age of twenty-one years, or be legally discharged. The discharge shall be a complete release of all penalties incurred by conviction of the offense for which he or she was committed.

5375. (2148.) Id. No boy or girl shall be committed to said school for a longer term than until he or she shall attain the age of twenty-one years; but the board by its order may, at any time after six months' service, discharge any boy or girl from the school as a reward for good conduct and upon satisfactory evidence of reformation.

5376. (2149.) Release on parole. The board shall have power to establish rules and regulations under which any child placed in the school may be allowed to go upon parole outside of the buildings and inclosures, but to remain in the legal custody and under the control of the board and subject at any time to be taken back within the inclosure of the institution. Full power to enforce such rules and regulations, and to retake and keep any child so upon parole, is hereby conferred upon the board, whose written order, certified by its secretary, shall be sufficient warrant for all reasons named therein to authorize any officer to return to actual custody any conditionally released or paroled child; and it is hereby made the duty of all officers to execute such order the same as an ordinary criminal process.

5377. (2150.) Female inmates. The board may, in its discretion, contract with the managers of any institution or organization in this state for the reformation of females for the care and keeping of any girl or girls who shall be committed to the State Industrial School, and may pay for the same out of the funds appropriated to the State Industrial School. Such girl or girls shall remain in legal custody and control and supervision of the board and subject at any time to be taken back to the institution.

5378. (2151.) Aiding to escape. Penalty. Every person who shall unlawfully aid or assist any boy or girl, lawfully committed to the State Industrial School, in escaping or attempting to escape therefrom, or knowingly conceal such boy or girl after his or her escape, shall be deemed guilty of a misdemeanor.

5379. (2152.) Removal for disorderly conduct. If any boy or girl, committed to the State Industrial School, shall prove unruly or incorrigible, or if his or her presence shall be manifestly and continually dangerous to the welfare of the school, the board shall have power to order his or her removal to the county from which he or she came. If such boy or girl shall have been convicted of a felony or misdemeanor, and judgment shall have been suspended, he or she shall be delivered to the sheriff of the county from which he or she came, and thereafter proceedings against such boy or girl shall be resumed as if no order committing him or her to the State Industrial School had been made.

CHAPTER 10.

STATE MENTAL HOSPITAL.

5383. (2153.) Location. Until otherwise provided, the State Insane Asylum now established and located at Provo City, in the county of Utah, shall be hereafter known as the State Mental Hospital. Am'd '03, p. 139.
Located at Provo, Con. art. 19, sec. 3. Perpetual fund, Con. art. 19, sec. 3; art. 20, Land grant, enabling act, sec. 12. sec. 1.

5384. (2154.) Objects. The objects of the State Mental Hospital shall be to care for all insane persons residing within the state; also the feeble-minded and non-insane epileptics capable of mental improvement, residing within the State; and to furnish them proper attendance, medical treatment, seclusion, rest, restraint, amusement, occupation, schooling, manual training, and support, tending to restore the mental and physical health of such persons, or to alleviate their suffering. Application for the admission of feeble-minded and non-insane epileptics shall be made to the superintendent of the hospital, who shall examine applicant and take evidence thereon and submit same to the state board of insanity. The said board shall have authority to admit or reject the applicant. Applicant shall make application by his or her guardian, parent, or friend, or by the chairman of the board of county commissioners of any county or member thereof. Am'd '03, p. 139; '09, p. 27.
N. Dak. § 988*.

5385. (2155.) Board of insanity. The government and control of the State Mental Hospital shall be vested in a board, to consist of the governor, state treasurer, and state auditor, which shall be known as the board of insanity. Am'd '03, p. 139.
Authorized by Con. art. 7, sec. 14.

5386. (2156.) Id. Traveling expenses. Each member of the board shall be allowed his traveling expenses in attending the meetings of the board, payable out of any money in the treasury of the hospital. Am'd '03, p. 139.

5387. (2157.) Id. Powers. The board may contract and be contracted with, and may sue and be sued in all matters pertaining to the hospital. It may take and hold by purchase, gift, devise, or bequest, real and personal property required for its use, and it may convert property and credits received by gift, devise, or bequest, and not suitable for its use, into money or property available for its use. Am'd '03, p. 139.

5388. (2158.) By-laws. The board may make by-laws for its own government and the government of the hospital, and shall have the general control and management of the affairs of the hospital. Am'd '03, p. 140.

5389. (2159.) Record. Meetings. Quorum. It shall cause to be kept by its secretary a full and correct record of its proceedings, which shall be open at all reasonable times to the inspection of any citizen. It shall hold stated meetings monthly at the hospital, on such days as may be prescribed by the by-laws. A majority of the board shall constitute a quorum for the transaction of business. The board shall make a thorough inquiry into all the departments of labor and expense, and a careful examination of the buildings, property, and general condition of the hospital, at least once in every three months. Am'd '03, p. 140.

5390. (2160.) Board has control of all insane persons in state. The board shall have the supervision and control of all insane persons in the state, whether residing in the hospital or other place. Am'd '03, p. 140.

5391. (2161.) Secretary. The board shall appoint a secretary, who shall not be of its number, and who shall hold office during the pleasure of the board. He shall have charge of the books and accounts of the board, shall keep a record of its proceedings at all stated and called meetings, and perform such other duties as the by-laws may prescribe or the board may require. He shall have such salary or compensation for his services, payable monthly, as may be fixed by the board. He shall give a bond with good and sufficient

sureties in a sum of not less than $1,000, to be approved by the board, and filed with the secretary of state. R. S. '98, § 2163; '03, p. 140.

5392. (2162.) Treasurer. The board shall appoint a treasurer, who shall not be of its number, and who shall hold office during the pleasure of the board. Before entering upon his duties, he shall subscribe an oath of office and give a bond payable to the state, with good and sufficient sureties, in a penal sum of not less than $10,000, to be approved by the board, conditioned for the faithful performance of his duties and for the delivery to his successor of all books, papers, vouchers, moneys, and effects held by him by virtue of his office. The bond of the treasurer shall be filed with the secretary of state. The treasurer shall render to the board monthly detailed statements of all moneys received and disbursed by him during the preceding month. No money shall be paid out by the treasurer except upon the order of the board, which order shall be spread upon its minutes. The treasurer shall perform such other duties as the by-laws may prescribe or the board may require, and shall have such salary or compensation for his services, payable monthly, as may be fixed by the board. If the board may so determine, the secretary and treasurer may be the same person. R. S. '98, § 2164; '03, p. 140.

Verified report filed with state auditor, § 5213. Warrants drawn in favor of treasurer, § 5210. All fees and money from sales to be paid treasurer, § 5213.

5393. (2163.) Medical superintendent. The board shall appoint a medical superintendent, who shall reside at the hospital, and who shall hold his office during the pleasure of the board. He shall be a well educated, experienced physician, a graduate in medicine, and shall have practiced his profession at least five years from the date of his diploma. He shall be the chief executive officer of the hospital, and shall have the general superintendence of the buildings, grounds, and property thereof, subject to the by-laws and regulations of the board. He shall have control of the patients, prescribe and direct their treatment, adopt sanitary measures for their welfare, and discharge such as, in his judgment, have recovered their reason. He shall appoint, with the approval of the board, as many attendants or employes as he may deem necessary for the efficient and economical care and management of the hospital, and, with the consent of the board, may fix their compensation, and may discharge any of them. He shall prescribe the duties of the subordinate officers and employes, maintain discipline among them, and enforce obedience to all regulations of the institution. R. S. '98, § 2165; '03, p. 141.

5394. (2164.) Id. To report needed supplies. The superintendent shall estimate and report to the board the amount, kind, and quality of provisions, fuel, and clothing required for the six months ending on the last day of May and November of each year, and when such estimate is approved by the board, the board shall advertise for bids for supplying the same as provided by law. Necessary expenditures, other than those for provisions, fuel, and clothing, may be made by the superintendent, subject to the approval of the board. R. S. '98, § 2167; '03, p. 141.

Supplies to be purchased and buildings erected by contract, §§ 5207-5209. Officer or employe not to be interested in contract, etc., § 5206.

5395. (2165.) Id. To keep records. The superintendent shall cause to be kept full and correct accounts and records of his official transactions from day to day, in books provided for that purpose, in the manner prescribed by the board. He shall report monthly to the board, producing vouchers for all expenditures made by him during the previous month. He shall cause all his accounts to be made up to and including the last day of November of each year, and shall submit an annual report to the board at its next regular or special meeting thereafter. The superintendent, or an assistant physician, shall visit the several wards of the hospital every day in the year. He shall receive an annual salary, payable monthly, to be fixed by the board. R. S. '98, § 2168; '07, p. 141.

5396. (2166.) Assistant physicians. Whenever the board shall deem it necessary, it may, upon the nomination of the superintendent, appoint one or

more assistant physicians, who shall be graduates in medicine. Their salaries shall be fixed by the board, to be paid in the same manner as the salaries of other employes, and they shall hold office during the pleasure of the board. They shall perform such duties as may be directed by the superintendent and prescribed by the by-laws. R. S. '98, § 2169; '07, p. 141.

5397. (2167.) Steward. The board, upon the nomination of the superintendent, shall appoint a steward, who shall give a bond, payable to the state, with good and sufficient sureties, in the penal sum of not less than $3,000. Such bond shall be approved by the board and be filed with the treasurer of the board. The steward, under the direction of the superintendent, shall have general oversight of the farm, stock, garden, grounds, fences, buildings, furniture, fixtures, and apparatus of the hospital, and shall receive all articles, goods, and merchandise belonging thereto, and shall be responsible for the safe keeping and economical distribution of the same. He shall perform such other duties as may be prescribed by the by-laws or required by the board. R. S. '98, § 2170; '03, p. 141.

5398. (2168.) Applications for admission. The judges of the district courts shall have cognizance of all applications for admission to the hopsital, or for the safe keeping of insane persons within their respective districts, except in cases otherwise provided for. In case of the absence of the district judge from any county, when an application as aforesaid should be heard, the judge of any other district may attend and hear the same upon the written request of the clerk of the district court of the county wherein the alleged insane person resides, or the chairman of the board of county commissioners may act upon such application. R. S. '98, § 2171; '03, p. 142.

Trial of insanity of criminals, etc., §§ 9327-9336. Petition for restoration to capacity, § 7818.

5399. (2169.) Blanks, etc., furnished. The board shall furnish the clerks of the several district courts with such blanks, warrants, certificates, etc., as will enable the district judges, with regularity and facility, to comply with the provisions of this chapter. R. S. '98, § 2172; '03, p. 142.

5400. (2170.) Form of application. Application for admission to the hospital shall be made in the form of an information, duly verified, alleging that the person in whose behalf the application is made is believed by the informant to be insane and a proper person for care and treatment at the mental hospital; that such person is found in the county and has a residence therein, if such is known to be the fact, and, if such residence is not in the county, alleging where it is, if known, or where it is believed to be, if the informant is advised on the subject. R. S. '98, § 2173; '03, p. 142.

5401. (2171.) Warrant to issue. Hearing. On the filing of such information, the district judge of the county in which such person resides, if a resident of the state, and, if a non-resident, then the district judge of the county in which such person shall be found, may examine the informant under oath, and, if satisfied there is reasonable cause therefor, shall at once investigate the grounds thereof. For this purpose he may require the person for whom such admission is sought to be brought before him, and may issue his warrant therefor to the sheriff, or any constable, of the county, which shall be in the form substantially as follows:

State of Utah, county of .....

To ..... greeting: You are hereby commanded to forthwith bring before me ....., alleged to be an insane person, and make due return hereof.

Witness my hand and the seal of the ..... district court, in and for ..... county, this ..... day of ....., 19.....

.....

Judge.

The district judge must set the case for hearing and notify the district attorney thereof. R. S. '98, § 2174; '03, p. 142.

5402. (2172.) Sheriff to provide. Proceedings. The sheriff may pro-

vide, at the expense of the county, for the suitable custody of such person until the investigation shall be concluded. If the judge shall be of the opinion, from such preliminary inquiries that he may make, that the presence of the person in whose behalf the application is made would probably be inexpedient, he may dispense with his presence. In the examination, testimony for and against the application must be heard. Any citizen of the county, or any relative of the person for whom the application is made, may appear and resist the application, and the parties may appear by counsel if they so elect. The district attorney must represent the state in such examination, and if in his opinion the person alleged to be insane is not a proper person for care and treatment at the hospital, he must resist the application. The judge shall cause to appear before him two practicing physicians, before whom the examination shall be conducted. R. S. '98, § 2175; '03, p. 143.

5403. (2173.) Physicians' duties on hearing. After a careful hearing of the testimony and a personal examination of the person alleged to be insane, the physicians shall certify on oath whether or not the person is insane, whether the case is of recent or curable character, whether the person has a homicidal, suicidal, or incendiary mania, or whether he would be dangerous, if at large, to the property of the community in which he may live. In connection with their examination, the physicians shall endeavor to obtain from the relatives of the person, or from others who may know the facts, correct answers as far as possible, to the interrogatories of the certificate, that must be propounded in such cases. R. S. '98, § 2176; '03, p. 143.

5404. (2174.) Physicians' certificate. The physicians' certificate aforementioned shall be in form substantially as follows:

PHYSICIANS' CERTIFICATE.

State of Utah, county of .....
..... and .....
being duly sworn, each for himself, certifies that he is a practicing physician in medicine, that at the request and in the presence of the Honorable .....
....., district judge of the ..... district court, in and for ..... county, he has heard the testimony concerning, and has personally examined ..... in reference to his mental state, and finds that said ..... is ..... insane and so far disordered in his mind as to endanger health, person, or property, and that his mental illness is not a case of idiocy, imbecility or simple feebleness of mind; that the further facts pertaining to his condition, as nearly as can be ascertained, are set forth in answers to the following questions:

1. Name? .....
2. Age? .....
3. Residence? .....
4. Nativity? .....
5. What state last from? ..... and how long in Utah? .....
6. Nationality? .....
7. Race? ..... Type? .....
8. Civil state? .....
9. How many children? ..... Age of youngest? .....
   Oldest? .....
10. Occupation? .....
11. Education? .....
12. Religious impressions? .....
13. Has the applicant been successful in business? .....
    .....
14. Have any relatives suffered from, or been treated for insanity? .....
    .....
15. Has there been a prolonged departure from the usual or customary conduct? ..... If so, when did this change take place? .....
    .....

16. Is the departure beyond his control?.....
17. Is this the first attack?.....If not, when did others occur?.....What their duration?.....
What treatment was employed?.....If sent to a hospital, state where.....How long at the hospital?.....
18. What peculiarity or defect is noticeable in the applicant?.....
19. Is there any permanent hallucination; if so, what is it?.....
20. Is there any permanent delusion; if so, what is it?.....
21. Has..... been intemperate in the use of liquor in any form?..... Opium in any form?..... Any other drug?..... Tea?..... Coffee?..... Tobacco in any form?.....
22. Is there a disposition to uncleanly habits?..... Destruction of clothing?..... Furniture?.....
23. Is there a disposition to injure others?..... Is it directed to relatives?..... Is it from sudden passion?..... Is it premeditated?.....
24. Is there a disposition to injure self?..... What means has he employed?..... or would he be likely to employ for the purpose?.....
25. Is there a disposition to burn property?.....
26. Review questions 23, 24, and 25, and state whether the applicant is actually homicidal..... suicidal..... or incendiary.....
27. Is there a disposition to wander?.....
28. Has the patient ever had convulsions?.....
29. Has the patient suffered from epilepsy?.....Eruptions?..... Discharges from sores?..... Injury to the head?..... Injury to spine?..... Is the applicant suffering from any other traumatisms, as hernia, fracture, tumor, or any wound?.....
30. Has the applicant undergone any surgical operations?..... Enumerate.....
31. Is the patient in his usual physical health apparently?..... or is he feeble?.....or emaciated?..... Does he eat?..... Does he sleep?..... Is there any defect in seeing?..... In hearing?..... In speaking?.....or co-ordination?.....or attention?.....or recall?.....or inhibition?.....Any evidence of paralysis?.....
32. Is the patient excited?.....or quiet?.....cheerful?.....or moody?.....or irritable?.....
33. Is the disease increasing?.....or decreasing?..... or stationary?.....
34. Are there any rational intervals?..... If so, do they occur periodically?.....
35. In what way is the applicant dangerous to be at large?.....
36. What is the probable cause of the applicant's mental illness?.....
37. To which class does the case belong?..... To which type?.....
38. Name and address of attending physician.....

39. Name, relation, and address in full of authorized correspondent.....

.....

R. S. '98, § 2178; '03, p. 143.

5405. (2175.) Judgment to be entered. On the return of the physicians' certificate, the judge shall, as soon as practicable, conclude his investigations, and shall find whether the person alleged to be insane is insane; whether, if insane, he is a proper person for care and treatment at the mental hospital; and whether the residence of such person is in such county, and if not in such county, where it is, if ascertainable. If he finds such person is not insane, he shall order his immediate discharge. If he finds such person insane and a proper person to receive care and treatment in the hospital, he shall order such person to be committed to the hospital, except as in § 5412 provided; *provided,* that no simply feeble-minded person, purely senile dement, person in an unconscious condition, infant, child under ten years of age, nor person suffering from a contagious or infectious disease, shall be considered a proper person for care and treatment at the mental hospital.

R. S. '98, § 2177; '03, p. 145.

5406. (2176.) Commitment. The judge's warrant of commitment shall be in form substantially as follows:

WARRANT OF COMMITMENT.

State of Utah, County of.....

I, ..., judge of the ..... judicial district in and for ..... county, upon the information of ....., caused ..... to be brought before me for examination as to ..... sanity, and having heard the testimony of ..... and ....., witnesses who have been acquainted with the said ..... during the time of ..... alleged insanity, and Drs. ..... and ....., practicing physicians, after hearing the testimony of the witnesses and after a personal examination of the said ....., having made the certificate by law required, find that the said ..... is insane and a proper person to receive care and treatment at the mental hospital; that the residence of said ..... is ..... county, Utah, and that ..... is ..... indigent and is ..... able to bear the actual charges and expenses for the time ..... may remain in the hospital. I therefore order the said ....., a .....male, aged ..... years, to be committed to the State Mental Hospital at Provo City, in Utah county, and ..... is charged with the execution of this order.

Witness my hand this ..... day of ....., 19.....

.....

Judge.

R. S. '98, § 2179; '03, p. 146.

5407. (2177.) Warrant, how executed. The district judge shall deliver to the sheriff or other person appointed to execute the warrant of commitment a certified copy of the information, the physicians' certificate, the warrant of commitment, and a certificate of the appointment of a guardian, if one be appointed. The sheriff, or other person appointed, shall execute the warrant by conveying the patient to the hospital, and delivering him, together with the copies of the information, physicians' certificate and warrant, to the superintendent. The superintendent shall acknowledge such delivery on the warrant, which the sheriff, or other person appointed, shall then return to the clerk of the district court of the county, with the amount of his actual expenses indorsed thereon. R. S. '98, § 2180; '03, p. 146.

5408. (2178.) Guardian appointed, when. In case a person committed to the mental hospital shall be possessed of property sufficient to pay any part of the costs incurred by reason of his commitment and his treatment at the hospital, the judge shall appoint a guardian for such person.

R. S. '98, § 2181; '03, p. 146.

Appointment of guardian, §§ 7816-7818.
Control of property, etc., §§ 7826-7842.
Special guardian for insane wife, § 2995.
Sale, mortgage, or lease of property, § 7838.
Estate liable for support, § 5417.
When estate exhausted, § 5410.

5409. (2179.) Guardian to give bond. Each guardian appointed for a person committed to the hospital shall give a bond, with good and sufficient

sureties, payable to the board of insanity. Such bond must be approved by the district judge, and shall be in form substantially as follows:

BOND.

Know all men by these presents: That, whereas ....., an insane person of ..... county, Utah, has been committed to the State Mental Hospital at Provo City, Utah;

Now, therefore, we, the undersigned, in consideration of the admission of said ..... to said hospital, do, jointly and severally, bind ourselves to the board of insanity, so long as ..... shall continue in said hospital and ..... property is sufficient for that purpose, to pay quarterly in advance, on the 1st days of December, March, June, and September, to said board the sum of ..... dollars for the care and treatment of said insane person, with such extra charges as may be occasioned by ..... requiring more than ordinary care and attention; to pay not exceeding $50 for all damages ..... may do to the furniture and other property of the hospital; to provide ..... with suitable clothing; to pay all expenses incurred by sending said patient to ..... friends in case one or either of us shall fail to remove ..... when required to do so; and to pay reasonable funeral expenses in case of ..... death.

In witness whereof, we have hereunto set our names this ..... day of ....., 19.....

(Names and addresses of signers.)

State of Utah, county of .....

..... and ....., being duly sworn, each for himself says that he is a resident of ....., in this state, is a freeholder therein and is worth the sum of $1,000 over and above all his debts and liabilities, exclusive of property exempt from execution.

.....

.....

Subscribed and sworn to before me this ..... day of ....., 19.....

R. S. '98, § 2182; '03, p. 146.

5410. (2180.) When property exhausted, state responsible. When the property in the hands of the guardian subject to sale shall be exhausted, the district judge shall give notice thereof to the board of insanity, and thereafter the state shall be liable for the costs of the care and maintenance of the patient. R. S. '98, § 2183; '03, p. 147.

Relatives may be compelled to support insane person, § 5853. Guardian for property of insane person, § 5408, and note.

5411. (2181.) Allowances to sheriff. The sheriff shall be allowed his actual expenses for conveying a patient to the hospital and returning therefrom, to be paid by the county from which such patient shall have been committed. In the absence of the sheriff, or his deputy, or their inability to act, the district judge may appoint some suitable person to execute the warrant. Such person so appointed shall take and subscribe an oath to discharge properly his duties in the matter. He shall be entitled to $3 per diem and his actual expenses going to and returning from the hospital, to be paid by the county from which the patient shall have been committed. He may, by consent of the district judge, secure such assistants as he may need to execute the warrant. An assistant shall receive such compensation as the board of county commissioners may determine, not exceeding $3 per diem and actual traveling expenses; *provided,* that no female shall be thus taken to the hospital without the attendance of some other female or some relative. The superintendent shall, in his acknowledgment of delivery, state whether there was such person in attendance, and give the name, or names, if any. If any relative or immediate friend of the patient, who is a suitable person, shall so request, he shall have the privilege of executing the warrant in preference to the sheriff or any other person taking such oath, and for so doing he shall be entitled to his necessary expenses but not fees. R. S. '98, § 2185; '03, p. 147.

5412. (2182.) Non-residents admitted. Non-residents of this state, conveyed or coming here while insane, may, upon the written recommendation

of the board of county commissioners of the county in which such insane person is found, be returned by the board of insanity to the home or friends of such insane person, if known, and must not be permitted to be supported in the hospital. This prohibition shall not prevent the commitment to, and temporary care in, the hospital of persons stricken with insanity while traveling through or temporarily sojourning in this state. R. S. '98, § 2187; '03, p. 148.

Penalty for bringing insane person into the state, § 5428.

Power of county commissioners, § 1400x43; § 5428.

5413. (2183.) Bond, form of. By order of the judge of the district court issuing the commitment, the relatives or friends of a patient in the hospital may receive such patient therefrom. Applications must be made to the judge and satisfactory evidence produced that such patient will be properly taken charge of and given proper care. The applicants shall give bond to the district court of the county in the following form:

State of Utah, county of .....

Know all men by these presents: That we, ... and ....., as sureties, are held and firmly bound unto the state of Utah in the penal sum of $....., lawful money of the United States, to be paid to the board of insanity, for which payment well and truly to be made we firmly bind ourselves, our executors and administrators, jointly and severally, by these presents. The condition of this obligation is such that whereas an order has been made by the judge of the ..... judicial district court, in and for ..... county, directing the superintendent of the State Mental Hospital to deliver the person of ....., an insane person, to ....., the ..... of said person, the said order being that the said ..... will take charge of and properly care for the said ....., that he will obey all orders of the said judge of said court relating to the proper care and custody of said patient, and that he will return said patient to the hospital when so ordered by the judge of said court, and will obey the laws of the state relating to insane persons. Now, therefore, if the said ..... shall faithfully perform the duties and comply with the requirements set forth, then this obligation shall be void and of no effect, otherwise to remain in full force and virtue.

Witness our hands this ..... day of ....., 19.....

In the presence of .....

(Signatures.)

State of Utah, county of .....

..... and ....., being duly sworn, each deposes and says that he is a resident of the state of Utah and a freeholder therein, and that he is worth the sum of $..... over and above all his debts and liabilities, exclusive of property exempt from execution.

(Signatures.)

Subscribed and sworn to before me this .....day of ....., 19 .....

.....

On having made the required proof and filed the foregoing bond, the district judge shall issue his order to the superintendent of the hospital directing him to deliver such patient to the person designated, which order shall be in the following form:

State of Utah, county of .....

To the superintendent of the State Mental Hospital:

Whereas, ... has made application that ..... be awarded the custody of ....., an insane person who was by me committed to the State Mental Hospital on the ..... day of ....., and ..... having complied with the provisions of law in such cases made and provided, you are hereby directed to deliver the said ..... to .....

.....

Judge.

R. S. '98, § 2188; '03, p. 148.

5414. (2184.) When return may be ordered. If after such removal it shall be brought to the knowledge of the judge that the person thus removed

is not cared for properly or is dangerous to person or property, he may order such person to be returned to the hospital; *provided,* no patient who may be under a criminal charge or conviction shall be discharged from the asylum without the order of the court having jurisdiction of such criminal case.

R. S. '98, § 2189; '03, p. 149.

Trial and commitment of insane criminals, etc., §§ 9327-9336.

5415. (2185.) Persons improperly detained. When it shall appear upon affidavit filed, or other evidence, that any patient in the hospital is not insane and is unjustly deprived of his liberty, or is not a proper person to receive care and treatment in the hospital, the board of insanity shall ask for an immediate inquiry into the merits of the case by the district judge of the district in which such patient is held. If on such examination it shall appear to the said judge that such person is not insane, or is not a proper person to receive care and treatment in the hospital, his immediate discharge shall be ordered in the following form:

State of Utah, county of.....

To the superintendent of the State Mental Hospital:

Having this day examined ....., a person heretofore committed to the State Mental Hospital, and having adjudged the said ..... as being now sane and restored to reason, or as not being a proper person to receive treatment in the hospital, you are therefore directed to return ..... to the county of ..... at the expense of said county.

.....

Judge.

If found to be insane, the judge shall order his continued detention, and may order the parties demanding of the board such inquiry to pay the cost of examination. R. S. '98, § 2190; '03, p. 149.

5416. (2186.) Discrimination. If at any time it becomes necessary for want of room, or other cause, to remove any patient, or to discriminate in the general reception of patients into the hospital, the superintendent shall give notice thereof to the several clerks of the district courts. Only harmless and incurable patients may be removed by the board of insanity. Indigent patients so removed must be returned to the county from which they were committed at the expense of said county. When discrimination in reception is necessary, patients shall take precedence in the following order: (1) Cases of less than one year's duration; (2) chronic cases of more than one year's duration, presenting the most favorable prospects for recovery; (3) those for whom application has been longest on file. When cases are equally meritorious the indigent are to be preferred. R. S. '98, § 2191; '03, p. 150.

5417. (2187.) Estate liable. The provisions herein made for the support of the insane at public charge shall not release the estate of such persons from liability for their care and treatment, and the board is authorized and empowered to collect from the estate of such persons any sum paid by the state in their behalf. R. S. '98, § 2192; '03, p. 150.

Guardian for and support of an insane person, §§ 5408, 5410, and notes.

5418. (2188.) Officers, etc., exempt from certain service. All resident officers, attendants, assistants, and employes in the mental hospital shall be exempt from jury and militia service during the term of their employment.

R. S. '98, § 2195; '03, p. 150.

5419. (2189.) Unlawful restraint forbidden. No person supposed to be insane shall be unlawfully restrained of his liberty by any other person, otherwise than in pursuance of authority obtained as herein provided, excepting for such a brief period as may be necessary for the safety of persons and property and until such authority can be obtained. R. S. '98, § 2196; '03, p. 150.

5420. (2190.) Physicians' fees. Examining physicians shall be allowed $5 each by the board of county commissioners of the county in which the examination is had, unless such physician shall be otherwise paid.

R. S. '98, § 2197; '03, p. 150.

5421. (2191.) Inmates to be taken proper care of. Every person committed to the hospital must be suitably clothed and his person properly cleansed before he be delivered to the superintendent by the sheriff or other person executing the warrant of commitment, and the superintndent may refuse to receive such patient until the provisions hereof are complied with. All costs for the examination and commitment, and for suitable clothing, and for the proper cleansing of the patient shall be paid by the county from which such patient is committed. If the patient be not indigent, the county shall receive the costs thereof from the parties liable therefor.

R. S. '98, § 2198; '03, p. 150.

5422. (2192.) Commissioners to care for insane. On information laid before the board of county commissioners of any county that a certain insane person in the county is suffering for want of proper care, the board shall forthwith inquire into the matter, and, if it finds the information well founded, it shall make all needful provisions for the care of such person.

R. S. '98, § 2199; '03, p. 150.

Commissioners to provide for the poor, etc., § 1400x40.

5423. (2193.) When room insufficient. On receipt of notice from the board of insanity or the superintendent of the hospital that any person committed to the hospital can not be received therein for want of room, the board of county commissioners shall require such person to be suitably provided for until such admission can be had, or until the occasion therefor shall no longer exist. If such person is indigent, the county shall be entitled to receive from the state a sum equal to the amount allowed by the state for the cost of care and treatment of indigent patients in the hospital. R. S. '98, § 2200; '03, p. 151.

5424. (2194.) Improper introduction a misdemeanor. If any person shall in anywise attempt to introduce another into the hospital contrary to the provisions of this chapter, he shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in any sum more than $50 and less than $300. R. S. '98, § 2201; '03, p. 151.

5425. (2195.) Improper treatment a misdemeanor. Any one having care of an insane person who shall unduly restrain such person, either with or without authority, or who shall treat such person with wanton severity or cruelty, or shall in any way abuse such person, shall be deemed guilty of a misdemeanor, besides being liable in an action for damages.

R. S. '98, § 2202; '03, p. 151.

5426. (2196.) Intrusion, etc., a misdemeanor. If any person shall, without permission, enter any of the buildings or inclosures appropriated to the use of the patients, or shall make any attempt to do so, or shall enter anywhere upon the premises belonging to the hospital, and commit, or attempt to commit, any trespass or depredation thereon, or if, either from within or without the inclosures, wilfully annoy or disturb the peace or quietness of the institution, or any patient therein, upon conviction thereof before a justice of the peace, he may be fined in any sum not less than $5 nor more than $50, or may be imprisoned not less than five nor more than fifty days, or may be punished by both such fine and imprisonment, in the discretion of the court. R. S. '98, § 2203; '03, p. 151.

5427. (2197.) Abduction, escape, etc. Penalty. If any person shall abduct or induce any patient to elope or escape from the hospital, or shall attempt to do so, or shall aid or assist therein, he shall, upon conviction thereof, be fined in any sum over $50 and less than $300, or be imprisoned not less than fifty days nor more than six months, or may be punished by both such fine and imprisonment, in the discretion of the court.

R. S. '98, § 2204; '03, p. 151.

5428. (2198.) Bringing insane persons into the state punishable. Whoever shall bring or cause to be brought into this state any idiot, imbecile, or insane person, with the intent to make such person a charge upon the state, shall be fined $100, besides being liable, at the suit of the state, for all damages

incurred thereby, and for cost of transportation to the place whence such idiot, imbecile, or insane person shall have come. The board of county commissioners is hereby invested with authority to transport such idiot, imbecile, or insane person to the place whence he came. R. S. '98, § 2205; '03, p. 151.

County board may prohibit common carriers from leaving non-resident insane in the county, § 1400x43.
County board may recommend return of insane person, § 5414.
County board to care for insane, § 5422.

5429. (2199.) Penalty for violations generally. Any person refusing or neglecting to comply with, or wilfully and knowingly violating, any of the provisions of this chapter, except where another penalty is herein provided, shall, upon conviction thereof, be fined in any sum not exceeding $500, or be imprisoned not more than three years, or be punished by both such fine and imprisonment in the discretion of the court. R. S. '98, § 2206; '03, p. 152.

CHAPTER 11.

BRANCH OF STATE MINERS' HOSPITAL.

5432. (2207.) Establishing branch hospital. There shall be established at Park City, Summit county, a branch of the State Miners' Hospital for the treatment of the sick and disabled miners of the state, to be known as the Branch of the State Miners' Hospital.

Land grant, enabling act. sec. 12.

5433. (2208.) Commission to control. The government and control of the Branch of the State Miners' Hospital shall be vested in a board of commissioners to consist of the governor and two other members appointed by the governor, by and with the consent of the senate, who shall be known as the board of commissioners of the Branch of the State Miners' Hospital.

5434. (2209.) Powers of board. The board may contract and be contracted with, and may sue and be sued, in all matters concerning the hospital. It may take and hold by purchase, gift, bequest, or devise real and personal property required for its uses, and it may convert property and credits received by gift, bequest, or devise, and not suitable for its use, into money and property available for its uses.

5435. (2210.) Organization, rules, etc. The board may appoint a secretary, a treasurer, a medical superintendent, and such other officers as it may deem necessary, and may make by-laws for its own government, and shall have general control and management of the affairs of the hospital. A majority of the members of the board shall constitute a quorum for the transaction of busines.

To purchase supplies and erect buildings by contract, §§ 5207, 5209.
Officer or employe not to be interested in contract, etc., § 5206.
Warrant drawn in favor of treasurer, § 5210.

5436. (2211.) Removal of employes. The board may remove any officer or employe of the hospital by a majority vote of its number, for neglect of duty or for refusal to comply with the by-laws made for the establishment and government of the institution.

5437. (2212.) Board of certify number of patients. On or before the 1st day of January of each year, the board shall certify to the state auditor the number of indigent patients, the number of pay patients, and the number of patients who pay in part, and also the amount paid by each.

5438. (2213.) Application for admission to hospital. Application for admission to the hospital must be made to the medical superintendent under such rules and regulations as the board may establish.

5439. (2214.) Id. Costs of treatment. In case a person received into the hospital shall be possessed of property sufficient to pay the costs of treatment, or any part of the same, he shall be admitted on such terms as the board may fix; *provided,* that the hospital shall be free to any indigent miner.

5440. (2215.) Expenses. Special care. The relatives or friends of any

patient in the hospital may pay any portion or all of his expenses therein. Patients who desire it, and shall be able to pay the expenses thereof, may be provided with a special attendant or have such other special care as the superintendent may deem expedient.

5441. (2216.) Infectious or contagious diseases. No patient having an infectious or contagious disease shall be admitted into the hospital.

5442. (2217.) Donation of site a condition precedent. This chapter shall take effect only upon condition that there shall be donated and conveyed to the state a suitable site for such hospital, to be subject to the approval of the board of commissioners hereinbefore provided for, and on the further condition that there shall be donated and actually paid to the said board of commissioners the sum of $5,000 as a fund to assist in the building of the hospital herein provided for.

5443. (2218.) Building. Maintenance. Bequests. Reports. The sum of $5,000 is hereby appropriated, to be used under the direction and control of the said board of commissioners in the erection of a building for such hospital. The board of commissioners may expend in the maintenance of the hospital such sums as may be paid into the same by patients, and may also receive gifts, bequests, and devises of personal and real estate, and apply the same, or the proceeds thereof, according to the intention of the donors, for the use and benefit of the hospital. The board shall make semi-annual reports to the governor of all its transactions.

CHAPTER 12.

STATE PRISON.

5444. (2219.) Object. The state prison, situated in the county of Salt Lake, shall be for the confinement of persons lawfully sentenced thereto.

Located at Salt Lake City, Con. art. 19, sec. 3.
Land grant, enabling act, sec. 12.
Land held in trust, Con. art. 20, sec. 1.

5445. (2220.) Board of corrections. The government and control of the state prison, and the charge of its general interests and affairs shall be vested in a board of corrections which is hereby created, and which shall consist of the governor ex officio and two resident citizens of the state, both of which citizen members shall not be of the same political party. The citizen members of the board shall be appointed by the governor, by and with the consent of the senate. Each citizen member of the board shall hold office for four years, and until his successor shall be appointed and qualified.

Am'd '05, p. 123.

Appointment of members; filling of vacancies, §§ 5204, 5205.
Board of pardons, §§ 4330-4337.
State prison commissioners to have supervision of state prison until otherwise provided by law, Con. art. 7, sec. 13.
Appoints parole agent, § 5451.
Furnish prisoners' records to board of pardons, when, § 4337.

5446. (2221.) Id. Oaths and bonds. Each member of the board shall qualify by taking the constitutional oath of office and by giving a bond, with sufficient sureties, to the state of Utah, in the penal sum of $1,000, conditioned for the faithful performance of his duties. Such bond must be approved by and delivered to the secretary of state.

5447. (2222.) Id. Powers. The board of corrections may contract and be contracted with, and may sue and be sued in all matters concerning the state prison.

5448. (2223.) Id. To serve without compensation. Expenses. The members of the board of corrections shall receive no compensation for their time or services, save their actual and reasonable expenses incurred in the performance of their official duties, the account for which, to be verified on oath, shall be paid by the state treasurer, on the warrant of the state auditor, out of moneys in the treasury not otherwise appropriated.

5449. (2224.) Officers of prison. Oaths and bonds. The officers of the state prison shall consist of a warden, who shall be the principal keeper, one deputy warden, one clerk, who shall also be a keeper, one physician who is a surgeon, a matron, and as many keepers and guards as the warden and the board may deem necessary. The board may appoint persons having the necessary practical knowledge to be overseers of such work as may hereafter be established, when, in its judgment, such appointments will promote the efficiency of the prison labor. Each of said officers, before entering upon the duties of his office, shall take and subscribe the official oath prescribed in the constitution, and file the same with the secretary of state.

5450. (2225.) Warden. Appointment. Term. Qualifications. The board shall appoint the warden, who shall hold office during its pleasure. He shall possess the ability and qualifications necessary to successfully carry on the industries of the prison, and be one who has the executive ability essential to the proper management of the officers and employes under his jurisdiction, and to enforce and maintain proper discipline in every department.

Am'd '17, p. 252.

5451. Appointment of parole agent. Powers and duties. The board of corrections is hereby authorized to appoint some suitable and discreet person who shall be known as parole agent for the state of Utah, whose duties shall be prescribed by the board of corrections. The parole agent is hereby given all the powers that guards, peace officers, and sheriffs now possess, to be exercised anywhere within the state of Utah. When not on duty away from the state prison the parole agent shall perform the duties of a guard or other duties that he may be directed to perform by the warden relating to the affairs of the state prison or prisoners. The parole agent shall hold his office at the pleasure of the board. '13, p. 121.

5452. (2226.) Other officers. The deputy warden and all other officers and employes of the prison shall be appointed by the warden of the prison, subject to the approval of the board, and shall hold their offices during the pleasure of the warden and the board.

5453. (2227.) Warden to reside at prison. Bond. The warden shall reside at the prison in apartments to be assigned to him by the board. He shall be in constant attendance at the prison except when absent on some necessary duty, or sick, in which case his duties during his absence or illness shall be performed by the deputy. In no case shall the warden and deputy warden be absent from the prison at the same time. Before entering upon the duties of his office, the warden of the prison shall execute to the state a bond with two or more sufficient sureties, in the penal sum of $20,000, conditioned that he shall faithfully account for all money and property that may come into his hands by virtue of his office, and perform all the duties incumbent upon him as such warden, according to law. The bond shall be approved by the board and delivered to the secretary of state.

5454. (2228.) Warden to keep daily journal. The warden shall keep a daily journal of the proceedings of the prison, in which he shall note every infraction of the rules and regulations of the prison by any officer or guard thereof, which shall come to his knowledge, and he shall make a memorandum therein of every complaint made by any convict of cruel or unjust treatment by any officer of the prison, or of a want of good and sufficient food or clothing; and also of every infraction of the rules and regulations of the prison by any prisoner, naming him and specifying the offense; and also what punishment and the extent thereof, if any, shall have been inflicted. The journal shall be laid before the board of the prison at every stated meeting, and at every special meeting when demanded.

5455. (2229.) Duties of warden. It shall be the duty of the warden under the rules and regulations adopted by the board for the government of the prison:

1. To exercise a general superintendency over the government, disci-

pline, and police of the prison, and to superintend all the business concerns thereof;

2. To give necessary directions to all inferior officers, keepers, and guards, and to examine whether they have been careful and vigilant in their respective duties;

3. To examine daily into the state of the prison, and the health, conduct, and safe keeping of the prisoners;

4. To use every proper means to furnish employment to prisoners most beneficial to the state and best suited to their several capacities;

5. To superintend any manufacturing and mechanical business that may be carried on by the state, pursuant to law, within the prison; to receive the articles manufactured, and to sell and dispose of the same for the benefit of the state;

6. To take charge of the realty attached to, and of the personalty belonging to the prison;

7. To inquire into the justice of any complaint made by any of the convicts relative to their provisions, clothing, or treatment;

8. To be, under the direction of the board, the custodian of appropriations made by the legislature and drawn from the state treasury, and of all funds belonging to the prison and arising from the labor of the convicts or the sales of manufactured articles;

9. And generally to have charge of all departments of the prison and its officers as the executive head.

Warrants drawn in favor of warden, § 5210. Direct prisoners' work on roads, § 5509.

5456. (2230.) Moneys to be paid to state treasurer. Monthly report. At the end of each month, the warden of the state prison shall cover into the state treasury all moneys received by him from every source by virtue of his office, together with an itemized statement, on oath, that the said statement is true and complete in detail of the moneys so received, which money shall, by the state treasurer, be placed to the credit of the maintenance account of the state prison. Am'd '15, p. 37.

5457. (2231.) Id. To take charge of convict's personal effects. The warden shall take charge of the property which a convict may have about his person when received at the prison. The money so taken shall be placed in the prison accounts to the credit of the convict from whom it is taken; the other property, if of any value, and not of a perishable nature, shall be kept by the warden and returned to the convict when he shall be discharged, or all shall be delivered to his legal representatives in case of his death before being released; *provided,* that if no legal representative shall demand such property within two years after the death of the convict, the whole of it shall become the property of and be applied to the use of the state.

5458. (2232.) Clerk of prison. Bond. The clerk of the prison, before entering upon the duties of his office, shall execute a bond to the state, with sufficient sureties, to be approved by the board, in the penal sum of $5,000, conditioned that he will keep a true, honest, and faithful record of the accounts of the prison, and pay over all moneys that may come into his hands as such clerk, and will faithfully discharge all the duties of such office as prescribed by law and the rules and regulations of the prison. The bond shall be filed in the office of the secretary of state.

5459. (2233.) Id. Duties. It shall be the duty of the clerk of the prison:

1. To attend at the prison daily during the proper business hours, unless, by the direction of the board or the warden, he be otherwise engaged in transacting business on account of the prison;

2. To keep the books and accounts of the prison in such manner as to clearly exhibit all the financial transactions relating to it; to also keep a register of convicts, in which shall be entered in alphabetical order the name of each convict, the crime of which he is convicted, the date of his conviction, term of sentence, from what county, and by what court sentenced, his place

of nativity, age, occupation, complexion, stature, number of previous convictions, and whether previously confined in a prison in this or any other state, together with when and how he was discharged. The board or warden may require such additional facts to be stated on the register as may be deemed proper;

3. To do all such writing as may be required of him by the board or warden relating to the affairs of the prison.

5460. (2234.) Duties of physician. It shall be the duty of the physician of the prison:

1. To attend at all times to the wants of sick convicts, whether in the hospital or in their cells, and to bestow upon them all necessary medical service;

2. To examine weekly, in company with the warden, the cells of the convicts, for the purpose of ascertaining whether or not they are kept in a proper state of cleanliness and ventilation, and if they are not so kept to point out to the warden the deficiencies, and report the same monthly to the board of the prison;

3. To prescribe the diet of sick convicts, and his directions in relation thereto shall be strictly followed; and to be present at and superintend all corporal punishments which may be inflicted in the prison;

4. To keep a daily record of all admissions to the hospital, and of cases treated in the cells or elsewhere, including the sex, color, nativity, age, occupation, habits of life, crime, period of entrance and discharge from the hospital, and disease;

5. To make a yearly report to the board of the sanitary condition of the prison during the year, which report shall also contain a condensed statement of the information contained in his daily record;

6. To make all such other reports as the board or warden may from time to time require.

5461. (2235.) Id. Excusing convict from labor. It shall be the duty of the physician, in case any convict claims to be unable to labor by reason of sickness, to examine such convict; and if it is his opinion, upon examination, that the convict is unable to labor, he shall immediately certify the same to the warden, and the convict shall thereupon be relieved from labor and admitted to the hospital, or be placed in his cell or elsewhere, for medical treatment, as the physician shall direct, having due regard for the convict's safe keeping. Such convict shall not be required to labor so long as, in the opinion of the physician, his disability shall continue; and whenever the physician shall certify to the warden that such convict is sufficiently recovered to be able to labor, the convict shall be required to labor.

5462. (2236.) Drugs, how furnished. The necessary medicines and other hospital stores for the use of the prison shall be furnished by the board and shall be compounded by the physician free of charge to the state.

5463. (2237.) Board has access to prison, etc. It shall be the duty of the warden and other officers of the prison, whenever requested, to admit the board of the prison or any member thereof into every part of the prison; to exhibit to it, or any member of it, on demand, all the books, papers, accounts, and writings pertaining to the prison or the business, government, discipline, or management thereof, and to render the board every other facility to discharge its duties.

5464. (2238.) Salaries of officers and employes to be fixed by board. Perquisites. The salaries of all officers and employes of the Utah state prison shall be fixed by the state board of corrections, and shall be paid monthly at the office of the prison. The warden shall, in addition to his salary, be allowed the use of house, fuel, lights, and provisions for his family and for guests who visit him on business connected with the prison, and any officer may, in the discretion of the board, be allowed the use of a house and an apartment free of rent. No officer or any person employed in or about the

prison shall be permitted to receive in any way perquisites, emoluments, or supplies for himself or his family from the prison other than the compensation allowed by the board. The board may, if it shall deem it for the interest of the prison, require the keepers, guards, and such of the employes as it may designate, to be lodged and messed or boarded in the prison, and for that purpose may furnish lodging rooms in a plain and substantial manner, and supply provisions from the prison stock, which shall be cooked and prepared by the labor of convicts, and served at such time and on such terms, and in such place as the board may direct. Am'd '01, p. 99.

5465. (2239.) Member of board not to be warden. Officers not to be interested in contracts. No member of the board shall be warden of the prison, nor be concerned in the business thereof, nor hold any other appointment or place connected with the prison, and no person shall be appointed member of the board, warden, deputy warden, or clerk, or to any other employment in the prison, who shall be personally interested, directly or indirectly, in any kind of business carried on in the prison. No member of the board, warden, nor any other officer of the prison shall employ the labor of any convict upon any work in which he or any other officer shall be personally interested. Should any officer be or become in any manner personally interested in any contract for furnishing provisions, clothing, or other necessaries for the use of the state prison, or be or become in any manner personally interested in any contract for buildings or the construction of buildings of any kind in any way connected therewith, or for furnishing material of any kind for the construction of such buildings, such officer so interested shall, upon conviction thereof, be removed from office and forfeit any interest he may have in such contract.

Officers or employes not to be interested in contracts, etc., § 5206. Supplies purchased and buildings erected by contract, §§ 5207-5209.

5466. (2240.) Officers, etc., exempt from militia and juries. The warden, deputy warden, clerk, keepers, guards, and other necessary attendants shall, while in the actual employ of the state as such, be exempt from military and jury duties.

5467. (2241.) Board meetings. Journal. President. Prison rules. The board shall meet at the state prison bi-monthly and oftener as the proper control and management thereof may require. A majority of the members of the board shall constitute a quorum for the transaction of business; but for a meeting held for the appointment or removal of the warden, or any business relating thereto, at least ten days' notice in writing to each member shall have been given, by the president or secretary of the board, stating the object of the meeting. All orders and resolutions of the board shall be entered in its journal. At the first meeting after their appointments, and biennially thereafter, the members shall choose the president of the board. The clerk of the prison shall act as secretary of the board, and shall attend and keep regular minutes of its proceedings and of all rules and regulations adopted by it, which shall be recorded in a book kept at the office of the prison for that purpose, and shall be signed by the members of the board present. It shall be the duty of the board to make and adopt all such general rules for the government and discipline of the prison as it may deem expedient, and from time to time to change and amend the same as circumstances may require.

5468. (2242.) Classification of prisoners. Inspections. Conduct of prisoners. It shall be the duty of the board to classify the prisoners into three grades, as follows: In the first grade shall be included those appearing to be corrigible or less vicious than the others and likely to observe the laws and maintain themselves by honest industry after their discharge; in the second grade shall be included those appearing to be incorrigible or more vicious, but so competent to work and so reasonably obedient to prison discipline as not to seriously interfere with the productiveness of their labor, or of the labor of those with whom they may be employed; in the third grade shall be included those who are incorrigible, or so insubordinate, or so incompetent,

otherwise than from temporary ill health, as to seriously interfere with the discipline or productiveness of the labor of the prison. The board shall also make and adopt rules for the separation and classification of prisoners, for their promotion and reduction from one grade to another, and from time to time to change and amend the same as circumstances may require. In making such rules and regulations the board shall, as far as practicable, consistent with the discipline of the prison, adopt such as shall, in its judgment, best conduce to the reformation of the convicts. A printed copy of the rules and regulations shall be furnished every officer and guard at the time he is appointed and sworn, and so much thereof as relates to the duties and obligations of the convicts shall be hung up in a conspicuous place in each cell and shop, and such rules shall, so far as practicable, be written or printed in a language known to the convict occupying the cell. The board shall, at its regular meetings, examine all the different departments of the prison, and inquire into all matters connected with the government, discipline, and policy thereof, the punishment and employment of the convicts therein confined, the books, accounts, and vouchers of the warden and clerk, the money, the purchases, and sales of the articles provided for the prison or sold on account thereof, and whether or not the convicts are properly fed, clothed, and governed. The board shall also inquire into any improper conduct which may be alleged to have been committed by the warden or any other officer or employe of the prison, and for that purpose may issue subpoenas to compel the attendance of witnesses and the production of books, papers, and writings before the board with like effect and subject to the same penalties for disobedience as in cases of trial before justices of the peace, and the board may examine any witnesses produced before it, on oath to be administered by the president of the board, or in his absence by some other member thereof.

Attendance of witnesses, production of books and papers, and contempts, §§ 1802, 7122-7151, Prisoners work on roads, § 5508-5514. 7525.

5469. (2243.) Food, clothing, etc., of convicts. The board may make regulations in regard to the food, rations, clothing, and bedding of the convicts, as the health, well-being, and circumstances of each may require; but all diet, rations, clothing, beds, and bedding shall be plain, of good quality, and in sufficient quantity for the sustenance and comfort of the convicts.

5470. (2244.) Reports to and from board. The board shall annually, and oftener as it may deem necessary, require reports from the warden and other officers of the prison in relation to all matters connected with the management, business, discipline, money, and property thereof, and the condition, conduct, and employment of the convicts confined therein. The biennial reports of the board to the governor and legislature must show the whole number of convicts in the prison, and the whole number received during each of the two years, with the names of the counties whence they were received, and the crimes of which they were convicted, together with the number of those who shall have died, have been discharged, escaped, or pardoned, and such other facts and suggestions as will fully exhibit the entire workings of the prison during the two preceding years.

5471. (2245.) Register of criminals. Respecting each prisoner received into the prison, the board shall cause to be entered from time to time in a register such facts as can be ascertained of parentage and of early social influence as seem to indicate the constitutional and acquired defects and tendencies of the prisoner, and, based upon these, an estimate of the character of the prisoner and the best probable plan of treatment. Upon such register shall also be entered, from time to time, minutes of observed improvement or deterioration of character, and notes as to methods of treatment employed, and all orders or alterations affecting the standing or situation of the prisoner, and any facts of personal history which may be brought to the knowledge of the board affecting the question of the final release of the prisoner, or his being suffered to go out on parole.

Sec. 2251, R. S. '98, declared in conflict with Con. art. 7, sec. 12, which confers pardoning powers on board of pardons. State v. State Board of Corrections, 16 U. 478; 52 P. 1090.

5472. (2254.) Convicts repairing walls, etc. The warden shall also have authority, under such regulations as the board may adopt, to employ convicts in the erection or repair of the buildings or walls of the prison, or on the prison farm.

5473. (2255.) United States convicts. Convicts sentenced to the state prison by any court of the United States may be so received and there kept in pursuance of their sentences upon such terms as the board may adopt.

5474. (2256.) Board of pardons may restore lost civil rights, when. Except in cases of treason or impeachment, the board of pardons may, in its discretion, remove the disabilities of any person who shall have lost his civil rights by reason of conviction of a public offense. The board of corrections, upon the request of the board of pardons, shall, in the case of an application of a convict or of an ex-convict to be restored to his civil rights, furnish the board of pardons with a statement of such person's deportment during his imprisonment; and it may at all times make whatever recommendations to the board of pardons it shall believe proper, respecting such person's restoration to such rights.

Duties and powers of board of pardons, Con. art. 7, sec. 12; §§ 4330-4337

5475. (2257.) Employment of convicts. It shall be the duty of the prison board to meet at least once in six months to determine what lines of productive labor shall be pursued in the prison, and in so determining the board shall select diversified lines of industry with reference to interfering as little as possible with the same lines of industry carried on by citizens of this state. No contract shall be made for the labor of prisoners confined in the state prison, but they shall be employed by the warden under rules and regulations established by the board.

Convict labor not to be contracted, Con. art. 16, sec. 3. Prisoners work on roads, §§ 5508-5514.

5476. (2258.) Id. Making articles for state. The board shall be required to employ as many prisoners as are necessary in making articles for the various state institutions, as far as practicable; and the state institutions shall pay to the prison the market price of all articles furnished.

5477. (2259.) Id. Irrigation works. For the purpose of reclaiming, by irrigation, state lands, and for the purpose of furnishing public work for convicts confined in the state prison, the state board of corrections is hereby authorized to locate and construct, in the name of and for the use of the state, ditches, canals, reservoirs, and feeders, for irrigating and domestic purposes, and for that purpose may use convict labor of persons confined, or that may be confined, as convicts in the state prison.

Col. Mills' An. C. (1891) § 2483*.
Convicts may labor outside prison grounds only on public works, Con. art. 16, sec. 3.

5478. (2260.) Prisoner to receive part of earnings. The board may adopt rules for crediting to deserving prisoners some portion of their earnings; to unmarried prisoners, not to exceed ten per cent of their net earnings, to be paid to them on discharge; and to married prisoners, not to exceed twenty-five per cent of their net earnings, to be delivered to their families, if living in this state and shown to be dependent upon them for support. If married prisoners have not resident families so dependent, they are to be credited with the same amount as unmarried prisoners, and paid the same on discharge.

5479. (2261.) Change of labor. Whenever the warden or the board shall deem it necessary for the health or discipline of a convict, or for the interest of the state, any convict may be transferred from one kind of work to another, as the warden or the board shall from time to time direct.

5480. (2262.) Release from solitary confinement. Convicts who may have been, or may hereafter be, sentenced to solitary confinement in the state prison at hard labor for life may be released from solitary confinement and employed as other convicts are, whenever and for such time as the board may by resolution direct; and the board is authorized to allow such convicts under

whatever restrictions it may deem necessary and proper, to correspond with relatives and friends.

5481. (2263.) All convicts to labor eight hours a day. All convicts, other than such as are confined in solitude for misconduct in the prison, shall as far as practicable be kept constantly employed at hard labor for an average of not less than eight hours a day, Sundays and holidays excepted, unless incapable of laboring by reason of sickness or other infirmity.

5482. (2264.) Freedom of religious worship. No inmate of the state prison shall be denied the full exercise of his religious belief and the liberty of worshiping according to the dictates of his conscience; *provided, however,* that nothing in this section shall be so construed as to impair the discipline of the prison, as far as may be needful for the good government and safe custody of its inmates, nor to prevent the assembling of all the inmates in the chapel thereof for such general religious instruction as the board may deem wise and expedient.

5483. (2265.) Prisoners kept singly in cells. Whenever there shall be a sufficient number of cells in the prison, it shall be the duty of the warden to keep the prisoners singly in a cell at night, and also during the day when unemployed.

5484. (2266.) Duties of employes. Punishment of prisoners. It shall be the duty of guards, keepers, and employes of the state prison to be ready at all times to attend to any duty required of them by the warden or deputy warden. The several keepers and guards are hereby expressly charged with all the duties and responsibilities of jailers. It shall be the duty of guards, keepers, and other employes of the state prison to faithfully enforce all rules and regulations of the board relative to their respective duties. Any guard, keeper, or other employe of the state prison who shall knowingly violate any rule or regulation adopted by the board, or who shall violate any of the provisions of this chapter, or who shall neglect to perform the duties required of him by the rules and regulations of the prison or by the provisions of this chapter, shall be guilty of a misdemeanor, and upon conviction thereof may be punished by a fine not exceeding $1000, or by imprisonment in the state prison for a period not exceeding three years, or by both such fine and imprisonment, in the discretion of the court. The warden or deputy warden may punish convicts for misconduct in such manner and under such regulations as shall be adopted by the board; *provided,* that punishment by showering with cold water or whipping with the lash on the bare body shall in no case be allowed. The warden or deputy warden shall, the next day after inflicting punishment upon any convict, enter in a book, kept for that purpose, a written memorandum thereof signed by him, stating the offense committed and the kind and extent of the punishment inflicted; but in no case shall any punishment be brutal or inhuman, and no corporal punishment shall be inflicted without the presence of the prison physician.

5485. (2267.) Attempts to escape, etc. When several convicts acting together, or a convict alone, shall offer violence to an officer or gaurd of the prison, or to any other convict or person, or shall do or attempt to do any injury to the building, or any workshop or appurtenances thereof, or shall attempt to escape, or resist or disobey any lawful and reasonable command, the officers of the prison shall use all suitable means to defend themselves and the prison property, to enforce the observance of discipline, and to frustrate such attempt to escape, and to secure the persons of such offenders.

5486. (2268.) Liquor, etc., on prison grounds. No spirituous or fermented liquor, drug, medicine, nor poison shall, on any pretense whatever, be sold or given away in the prison or in any building appurtenant thereto, or on the land granted to the state for the use and benefit of the prison; and no such liquors shall be given to, nor suffered to be used by, any convict or employe in the prison unless he be sick, and then only under the special direction of the prison physician.

5487. (2269.) Custody of books. Distributing reports. All books of accounts, registers, and other documents and papers relating to the affairs of the prison shall be considered public property, and shall remain therein, and the warden shall preserve at least one set of copies of all official reports made to the governor and legislature respecting the prison, and likewise a set of similar reports in relation to the prisons of other states, as far as he shall be able to obtain the same. To accomplish this purpose, there shall be printed biennially for the use of the prison 300 extra copies of the report of the board, 100 of which shall be supplied to the warden for exchange with prisons of other states, and the warden shall promptly transmit to each of the state prisons in the United States one copy of such report.

5488. (2270.) Economy to be enforced. It shall be the duty of the warden and the deputy warden to see that rigid economy is practiced in all matters pertaining to the prison and in the employment of prisoners, and that duplicate receipts be taken for all expenditures made by them on account of the prison, one of which shall be sent to the auditor's office monthly.

5489. (2271.) Board to audit accounts. It shall be the duty of the board to examine and audit before payment all bills and accounts of the prison, at least bi-monthly, to enter a strict account of the same in its books, and after the accounts shall have been examined, entered, and audited, they shall be transmitted by the board to the state auditor.

5490. (2272.) Inventory, when taken. In case of a vacancy in the office of warden, the board shall cause an inventory to be taken, and the state auditor shall settle the accounts of the former warden on the presentation of his books and vouchers, duly authenticated.

5491. (2273.) Delivery of convicts. It shall be the duty of the sheriff of every county in which any criminal shall be sentenced to confinement in the state prison, or shall be sentenced to death, to cause such convict to be removed from the county jail within five days after the sentence and conveyed to the state prison and delivered to the warden thereof. Am'd '01, p. 35.

5492. (2274.) Id. Expense. The actual expenses of sheriffs in conveying convicts to the prison shall be made out in a bill containing the items thereof, and shall be presented to the warden when the prisoner is delivered at the prison. The warden shall certify on it that the prisoner has been received, and the bill, including the sheriff's actual expenses in returning to the county whence the prisoner shall have been sent, shall be audited by the state auditor and paid from the state treasury. Before drawing his warrant the state auditor shall correct any errors in the bill as to form, items, or amount, and the sheriff shall be paid his actual traveling expenses and the expenses of the convict.

5493. (2275.) Id. Copy of sentence. When any convict shall be delivered to the warden of the prison, the officer having such convict in his charge shall deliver to such warden the certified copy of the sentence, received by such officer from the clerk of the court, and shall take from such warden a certificate of delivery of such convict; and such certified copy of the sentence of any convict shall be prima facie evidence of the facts therein contained.

5494. (2276.) Letters, etc., to and from prison. No person, without the consent of the warden or deputy warden, shall bring into or carry out of the state prison any letter or writing, or any information to or from any convict; nor deliver to any convict any poison, implement, or other thing which may be used to injure such convict or any person. Any person who shall violate the provisions of this section shall be guilty of a misdemeanor.

Escapes and assisting therein, §§ 7967-7971.
Delivery of poisons, drugs, etc., to prisoners, § 7972.

5495. (2277.) Visitors. The following persons shall be authorized to visit the prison at pleasure, namely: The governor, members of the legislature, state officers, the judges of the supreme and district courts, grand jurors,

prosecuting attorneys, attorneys on professional business, sheriffs, members and officers of any board authorized by law to visit the same, and all regular officiating ministers of the gospel. But no other person shall be permitted to go within the walls of the prison where convicts shall be confined, except by special permission of the warden, or under such regulations as the board shall prescribe.

5496. (2278.) Visitors' admission fee for library fund. It shall be lawful for the board to establish rules for the admission of visitors within the prison, and it may prescribe a reasonable sum, not more than twenty-five cents, to be charged each individual for one admission. The warden shall procure suitable tickets, which shall be held by the clerk. The clerk shall keep an account of the sales thereof, and pay over the money received to the warden daily. The gate-keeper at the prison entrance shall receive the tickets, and shall deliver them each day to the warden before the prison is closed. It shall be the duty of the board to appropriate annually out of the fees received from visitors such sum as the board may determine for the purchase of books to be kept at the prison for the use of convicts. Am'd '01, p. 82.

5497. (2279.) Prison school. A school may be maintained in the prison for the instruction of convicts confined therein. It shall be conducted under such regulations as may be approved by the board of corrections.

5498. (2280.) Library. The library now established at the prison for the use of the convicts shall be maintained, subject to such regulations as the board may approve.

5499. (2281.) Contagious diseases. In case any pestilence or contagious disease shall break out among the prisoners in the prison, or in the vicinity of the prison, the board may cause the convicts therein to be removed to some suitable place of security, where such of them as may be sick shall receive all necessary care and medical attendance, and such convicts shall be returned, as soon as it may be safe to do so, to the prison, and be there confined according to the respective sentences, if the time be unexpired.

5500. (2282.) Fire. Whenever, by reason of the prison or any building contiguous or near thereto being on fire, there shall be reason to apprehend that the convicts may be injured or endangered by such fire, or may escape, the warden may remove the convicts to some safe and convenient place, and there confine them as long as may be necessary to avoid the danger.

5501. (2283.) Id. Repairs. If any of the shops or buildings are destroyed or injured by fire, or other cause, they may be rebuilt or repaired immediately under the direction of the board, and with the approval of the governor, and the expense thereof shall be paid from the state treasury. The money for this purpose shall be drawn from the state treasury and accounted for in the manner now provided by law.

5502. (2284.) Audit and report of accounts. It shall be the duty of the state auditor to examine and audit the accounts of the warden, and to lay a statement of the same before the legislature at each regular session thereof.

5503. (2285.) Escapes. Rewards. Whenever any convict shall escape from the prison, it shall be the duty of the warden to take all proper measures for the apprehension of such convict, and for that purpose he may offer a reward not exceeding $50 for the apprehension and delivery of such convict; such reward and other sums of money, necessarily paid for advertising and apprehending any convict who may escape from prison, shall be audited by the state auditor and paid out of the state treasury. If any prisoner shall be retaken, the time between the escape and his recommittal shall not be computed as part of the term of imprisonment, but he shall remain in the prison a sufficient length of time after the term of his sentence would have expired, if he had not escaped, to equal the period of time he may have been absent by reason of his escape.

Governor may offer rewards, § 9393.

5504. (2286.) Discharged convicts. Clothing. Money. When a convict shall be discharged from prison by pardon or otherwise, the warden shall furnish him with clothing, if he be not already provided for, not exceeding $10 in value, and such sum of money, not exceeding $10, as the warden may deem necessary and proper; *provided,* the prisoner have less than $10 of earnings to his credit. The board may, in its discretion, furnish such convict with a further sum of money, not exceeding $15, whenever in its opinion the necessities of the convict are such as to require the same. Instead of paying to a discharged convict the sum of $10 or under as above allowed, the warden may, in his discretion, expend the money and allowance, or such portion thereof as may be necessary, in paying the fare of the convict to his home or place of destination.

5505. (2287.) Crimes committed in prison. Any convict now or hereafter confined in the state prison for any term other than life, and who during the term of such confinement shall commit a crime punishable, under the laws of this state, by imprisonment in such institution, shall be subject to the same punishment as if the crime had been committed at any other place, or by a person not so confined.

A convict may be tried and sentenced before his term of imprisonment has expired for a criminal offense committed in trying to escape. People v. Flynn, 7 U. 378; 26 P. 1114.

5506. (2288.) Prior rights not affected hereby. No lien, demand, claim, or contract established or made before the 3rd day of April, 1896, by the warden or clerk of the prison in behalf of the state shall be in anywise changed or affected by the provisions of this chapter; but the rights of the state and of all parties to contracts or obligations theretofore made shall remain as complete and as binding, and may be enforced in the same manner and as fully as if the provisions of this chapter had not been enacted.

5507. (2289.) Vested rights not affected hereby. All rights and liabilities existing, acquired, or incurred before the 3rd day of April, 1896, are hereby saved; and all proceedings heretofore pending may be consummated under and according to the law in force when such proceedings were commenced.

USE OF CONVICTS AND PRISONERS IN CONSTRUCTION OF ROADS.

('11, p. 106.)

5508. Convicts and prisoners may be required to work upon state roads. Convict labor may be utilized in providing material for constructing roads and also in the construction and improvement of roads, the prisoners in the county jail may be required to work upon county roads under regulations made by the board of county commissioners, and prisoners in the state prison may be required to work upon state roads.

State road commission, §§ 2850-2863.

5509. Control of convict labor. When state prison convicts are used in the construction or improvement of any state road, the work shall be under the authority and control of the state road commission, the state board of corrections and the warden of the Utah state prison, subject to the provisions of § 5512.

5510. Supervision of work. The supervision of the state road work provided for herein shall be under such competent persons as may be selected by the state road commission; *provided,* that no supervisor shall cause or permit any person under his direction to be employed for more than eight hours of any day.

5511. Powers of state board of pardons. The state board of pardons shall have power and they are hereby authorized to adopt rules and regulations providing for the granting of privileges to prisoners and employes upon state roads, public buildings, and public grounds which shall especially provide for the granting of additional reduction of sentence for good behavior, such reductions to be conditioned upon their good behavior and ef-

ficient work while employed on state roads, public buildings, and public grounds.

5512. State road commission to designate when work shall be done. State roads upon which convicts are to be used shall be located and surveyed by and under the direction of the state road commission, who will designate from time to time the particular section or sections of said roads which shall be constructed or improved. When any section of state road has been selected for construction or improvement, the state road commission shall cause plans and specifications covering the construction or improvement of said road to be prepared, and in designating the material to be used in said construction or improvement the state road commission shall take into consideration the climate, soil, materials to be had, and the extent and nature of the probable traffic on said road with a view to the most economic construction consistent with efficiency. The state road commission may appoint a road engineer, whose salary shall be fixed by said commission, who shall have, in addition thereto, his actual and necessary traveling expenses while actually engaged in the discharge of the duties of his office, which salary and expenses shall be paid by the said road commission out of the state road fund, from the portion of said fund which is available to the county in which the work is done, by warrants of the state auditor; or by the county commissioners of the county where the work is done, upon requisitions issued by the state road commission. On or before the 10th day of every month the said road engineer shall certify to the state road commission the number of days of service rendered and the expenses incurred by him during the month next preceding, which certificate shall separately state the items of service and expenses rendered and incurred in respect to said state road in each county through which the same may pass.

5513. Securing right of way. The county commissioners of the several counties of this state are hereby authorized and required to secure the right of way for any state road in the location selected by the state road commission in accordance with the laws of the state now in force or which may hereafter be enacted relative to securing rights of way for public roads.
Am'd '17, p. 222.

5514. Bridges and culverts. All bridges and culverts required in connection with this road construction shall be built under the supervision and in accordance with plans approved by the state road commission, and so far as is deemed advisable shall be constructed by convict labor. Any material necessary to be purchased for said bridges and culverts shall be paid for by the state road commission out of the state road fund, from the portion of said fund which is available to the county in which said bridges and culverts are located.

5515. Appropriation. The sum of $20,000 is hereby appropriated out of any moneys in the state treasury not otherwise appropriated, payable upon vouchers of the warden of the Utah state prison, approved by the state board of corrections, upon warrants drawn by the state auditor, for the purpose of paying the necessary extra guards and foremen and for the purchase of tools, implements, and blasting materials, supplies and equipment necessary in the prosecution of said work and for transportation. All purchases of tools, implements, blasting materials, and supplies and equipment primarily for road building use shall be approved by the road engineer appointed by the state road commission. '11, p. 106.

CHAPTER 13.

UNIVERSITY.

5520. (2290.) General powers. The name of the university organized under an act approved February 28, 1850, and laws amendatory or supple-

mentary thereto, shall hereafter be University of Utah, and by this name it is constituted and continued a body corporate, with perpetual succession. It may have and use a corporate seal, and by the aforementioned name may sue and be sued, and contract and be contracted with. It is vested with all the property and franchises of, and shall be subject to all the contracts, obligations, and liabilities of, the former corporation.

University part of public school system, Con. art. 10, sec. 2.
Location at Salt Lake City confirmed, rights perpetuated, Con. art. 10, sec. 4.
Land grant, enabling act, sec. 8; Con. art. 10, sec. 5.
Perpetual fund, Con. art. 10, secs. 3, 5, 7; art. 20, sec. 1.
Act providing for removal of university to its present site, laws of 1899, pp. 20, 21.

5521. (2291.) Id. It may take and hold by purchase, gift, devise, or bequest, real and personal property required for its uses. It may also convert property received by gift, devise, or bequest, and not suitable for its uses, into other property so available, or into money. It shall be deemed a public corporation, and shall be subject to the laws of this state, existent or hereafter enacted, relating to its purposes and government. Its property shall be exempt from all taxes and assessments.

5522. (2292.) Courses of study in the university. The university, until otherwise provided for by law, shall be the highest branch of the system of public education. As far as practicable its courses and methods shall be arranged to supplement the instruction of the subordinate branches of such system, with a view to afford a thorough education to students of both sexes in the arts, the sciences, literature, and the civil professions, including engineering; but the university must not include in its courses agriculture, except elementary agriculture as is or may be prescribed in the normal course, horticulture, animal industry, veterinary science, domestic science and art, except as is or may be prescribed in the normal course, and instruction in irrigation as applied to the measurement, distribution, and application of water for agricultural purposes. Am'd '05, p. 54; '11, p. 42.

Part of public school system, Con. art. 10, sec. 2.
Supervisors of agricultural, industrial and home economics education to co-operate with, § 4543.

5523. (2293.) Board of regents. The government of the university and the management of its property and affairs shall be vested in a board of regents consisting of the secretary of state and twelve resident citizens of the state to be appointed by the governor. As the terms of the incumbents expire, except that of the secretary of state, their successors shall be appointed and shall hold office for a period of four years, the terms of each commencing on the 1st day of July next after their appointment. Am'd '11, p. 54.

Appointment of regents; filling of vacancies, §§ 5204, 5205.

5524. (2294.) Oath and bond. Every regent, except the secretary of state, before entering upon the duties of his office, shall take the official oath and execute to the university a bond, with sureties to be approved by the secretary of state, in the penal sum of $1000, each conditioned for the faithful discharge of his duties. These oaths and bonds shall be filed with the secretary of state. Am'd '11, p. 54.

5525. (2295.) Id. Powers. Executive committee. The board shall have power to enact by-laws and regulations for all concerns of the institution, not inconsistent with the laws of the state. A quorum of the board shall consist of five members. Between meetings of the board, its full powers may be exercised as to the ordinary business of the university, by an executive committee of five members appointed by the board, a majority of whom shall constitute a quorum thereof.

Supplies to be purchased and buildings erected by contract, §§ 5207-5209.
Officers or employes not to be interested in contracts, etc., § 5206.

5526. (2296.) Chairman and secretary of board. The board shall choose one of its number chairman. He shall be the executive officer of the board, and shall hold office for two years, and until his successor is chosen and has qualified. It shall likewise appoint a secretary, who may be a regent, and a treasurer, who shall not be a regent; and it may require from each a bond to

the university for the faithful discharge of his duties. Such bonds must be approved by and delivered to the secretary of state. Bonds taken by the university, to secure the faithful discharge of official duties, shall be copied in the regents' record book, and in case of the loss or destruction of any bond, the record shall be prima facie evidence of the contents and execution of such bonds.

Warrants drawn in favor of treasurer, § 5210.

5527. (2297.) Faculty. The board may provide for the constitution and organization of the faculty of the university, of which the president thereof shall be the chairman and executive officer. It may, in its discretion, commit to the faculty the selection and the dismissal of instructors and employes, and the determination of their compensation as well as the general management of instruction and of the examination, admission, and classification of students.

5528. (2298.) Board to appoint faculty. The board shall appoint the president and the professors of the university, shall prescribe their duties, and determine their salaries.

5529. (2299.) President's ex officio duties. The president of the university shall be ex officio a member of the board of regents, with all the rights, privileges, and obligations of every other member thereof; and, furthermore, he shall be ex officio a member of the state board of education.

State board of education, §§ 4505-4516.

5530. (2300.) Contracts with instructors, etc. All contracts hereafter made with professors, instructors, or employes, whether for a definite or indefinite time, shall be subject to termination at the will of the board, or of its executive committee, if the board be not in session, when the interests of the university so require.

5531. (2301.) May take gifts and devises. The board in its corporate capacity may take by grant, gift, devise, or bequest, any property, real or personal, for the use of any department of the university, or of any professorship, chair, or scholarship therein, or for the library, an observatory, workshops, gymnasiums, experimental apparatus, a students' loan fund, or any other purpose appropriate to the objects of the university. Such property shall be received, held, invested, and managed, and the proceeds thereof used by the board, for the purposes, and under the conditions prescribed in the grant or donation. If by the terms of any such grant, gift, devise, or bequest, conditions be imposed which are impracticable under the laws of the state, such grant or donation shall not thereby fail. But the conditions thereof must be rejected and the intent of the grantor or donor carried out as nearly as may be. No grant, gift, devise, nor bequest for the benefit of the university shall be defeated or prejudiced by any misnomer, misdescription, or informality whatever; *provided*, that the intention of the grantor or donor can be shown or ascertained with reasonable certainty.

5532. (2302.) Regents not to receive compensation. Expenses. No regent shall receive any compensation for his services as regent; but he may be allowed his actual expenses incurred in attending meetings of the board or its committees, or in attending to any business of the university under authority of the board or its committees.

5533. (2303.) Fiscal year. The fiscal year of the university shall commence on the 1st day of July and end on the 30th day of June in each year, and biennial appropriations made for its maintenance, unless otherwise specified, shall be deemed to be for the two years commencing on the 1st day of July next after the appropriation is made.

Fiscal year of the state changed to begin Dec. 1st, § 5794; it had been fixed by Con. art. 13, sec. 1, to begin Jan. 1st.

5534. (2304.) Degrees. The university may confer degrees upon students who have satisfactorily completed any of its prescribed courses of study. It may also confer special, honorary, or emeritus degrees upon former mem-

bers of its faculty, for long or eminent service in the university, but otherwise no such degrees shall be conferred.

5535. (2305.) Name changed to State School of Education. Normal Scholarships. The state normal school shall be continued as a department of the university, for students of both sexes, and it shall also be known as the State School of Education, and its special work and purpose shall be to train teachers for all grades and departments of the public school. It shall offer courses of study which shall include educational theory and practice in teaching, leading to degrees; and shall prescribe work including educational theory and practice in teaching, leading to teachers' certificates and diplomas. Four hundred scholarships shall be maintained in the School of Education; *provided,* that the holders of such scholarships enrolled in the secondary training department of the School of Education shall at no time exceed two hundred. The holders of these scholarships shall be exempt from payment of all matriculation fees. The appointment shall be made for a term of years corresponding to the length of the course or prescribed work the student elects to pursue, and shall terminate at the time such student is graduated, or receives a teacher's certificate or diploma. On or before the 1st day of May of each year the president of the university shall determine the number of appointments to be made for the succeeding year, and shall send notice thereof to the state superintendent of public instruction. Am'd '99, p. 121; '09, p. 48.

5536. (2306.) Id. Appointment to. Appointments to normal scholarships shall be made by the state superintendent of public instruction, on nomination by the county boards of examiners, or city boards of education, when such cities are not under the supervision of the county superintendent of schools. It shall be the duty of the superintendent of public instruction, on or before the last day of May of each year, to apportion to the counties and cities, on the basis of school population, the number of normal scholarships to which they may be respectively entitled. Appointments to vacancies in normal scholarships existing at or after the opening of the academic year of the university may be made by the president of the university. Students who have been appointed to normal scholarships may be examined before admission to the school by, or under the direction of, the university faculty, and such students may be rejected, if found to be unqualified.

5537. (2307.) Id. Normal certificates and diplomas. Holders of normal scholarships shall be required to declare their intentions to complete the prescribed work of normal instruction for a degree, diploma, or certificate, and, after completion of such work, to teach in the public schools of this state. In the event of such students discontinuing their studies at the university before said instruction is completed, they shall be required to pay to the university the amount of matriculation fees required of other students for a corresponding term of attendance; *provided,* that the president of the university may grant leave of absence not exceeding one year at any time to a holder of a normal scholarship, and may appoint to the vacancy during the absence on leave of the regular holder. The president of the university may at any time cancel, for neglect or incompetency, the normal scholarship of any student, and he may require, upon such cancellation, the payment to the university of all fees unexacted by reason of the scholarship. Holders of teachers' certificates issued by the School of Education of the university shall be entitled, without further examination as to scholarship, to teach the grades or subjects mentioned in the certificates for a period of five years after such certificates are issued. Holders of teachers' grammar grade diplomas thus issued shall be entitled thereafter to teach in the elementary schools without examination as to scholarship; *provided,* that the holder of such diploma after having had two years of successful experience in teaching in this state shall be entitled to a life grammar grade diploma to be issued by the state board of education. The university may confer degrees upon students who have satisfactorily completed the prescribed courses in the

School of Education, which degrees shall thereafter be sufficient evidence of the holder's qualification to teach in the elementary and high schools without examination as to scholarship; *provided,* that a degree from the university with an accompanying diploma conferred prior to September 1, 1911, shall have the same force as a degree given for the completion of a course in the School of Education. Am'd '09, p. 48.

Rank and effect of normal certificate, § 4509.

5538. (2308.) Preparatory course. A course of studies preparatory to the regular university courses may be maintained for such length of time as the board shall think necessary.

5539. (2309.) Entrance fee. Tuition. Moneys to be paid to state treasurer. Monthly report. Instruction in the regular courses in the University of Utah shall be free to the actual residents of the state of Utah, but an entrance fee not to exceed $20 shall be required annually, and the board of regents must require a tuition from non-residents, in either of said courses, not less than $25 and not to exceed $50. The board of regents must fix and require an annual tuition for each of the other courses of the University of Utah in a sum not exceeding $75 for residents of Utah, and not exceeding $150 for non-residents. No partisan, political, or sectarian religious doctrine shall be taught or inculcated in the university, nor any political or religious test shall be required as a qualification of any student, professor, instructor, officer, or employe of the University of Utah. All moneys received by the University of Utah as entrance or tuition fees, or moneys received from any source whatsoever, shall be paid into the state treasury at the close of each month, and shall be placed to the credit of the maintenance account of the University of Utah. A detailed report of fees collected, verified under oath, shall be filed with the state auditor and the state treasurer at the time fees are deposited with the state treasurer. Am'd '07, p. 256; '15, p. 38.

Political or partisan tests forbidden, Con. art. 10, sec. 12. To be free from sectarian control, Con. art. 3, sec 4; art. 10, sec 1.

5540. (2310.) Founding and naming professorship. Any person or persons who may give or bequeath to the university a sum not less than $40,000, for the purpose of founding a professorship in any department thereof, shall have the privilege of giving name to such professorship. A similar gift or bequest of not less than $25,000, for the purpose of founding an adjunct professorship, shall entitle the giver to the like privilege.

5541. (2311.) Nominating first incumbent. Any person or persons who may give or bequeath to the university a sum not less than $50,000, for the purpose of founding a professorship in any of its departments, shall have the privilege of giving name to such professorship, and of nominating its first incumbent. A similar gift or bequest of not less than $35,000, for the purpose of founding an adjunct professorship, shall entitle the giver to the like privileges.

5542. (2312.) Id. Nominating incumbent in perpetuity. Any person or presons who may give or bequeath to the university a sum not less than $60,000, for the purpose of founding a professorship in any of the departments, shall have the privilege of giving name to such professorship, and of designating the manner in which the incumbents thereof, in succession forever, shall be nominated; *provided,* that the board of regents of the university shall have the privilege of rejecting any nomination or of removing any incumbent for cause. A similar gift or bequest of not less than $45,000, for the purpose of founding an adjunct professorship, shall entitle the giver to the like privileges.

5543. (2313.) Founding fellowship or lectureship. Any person or persons who may give or bequeath to the university a sum not less than $10,000, to found a fellowship or lectureship in any of its departments, shall have the privilege of naming such fellowship or lectureship, and of nominating its first incumbent.

5544. (2314.) Id. Nominating incumbents in perpetuity. Any person

or persons who may give or bequeath a sum not less than $15,000, to found a fellowship or lectureship in any department of the university, shall have the privilege of naming such fellowship or lectureship, and of designating the manner in which the incumbents thereof, in succession forever, shall be nominated; *provided,* that in case of a lectureship, the board of regents of the university shall have the privilege of rejecting any nomination, or of removing any incumbent for cause.

5545. (2315.) Scholarships. University scholarships in the different departments shall be of three different classes, first, second, and third, according as the endowment is $3000, $2000, or $1000, and any person or persons founding a scholarship of any class, or in any department, shall have the privilege of naming such scholarship, and of nominating its first incumbent.

APPROPRIATION FOR CARRYING ON ARCHAEOLOGICAL EXPLORATION.

5546. Appropriation. Purposes. Deposit of collections. Four thousand dollars, of which amount one-half shall be available in each of the fiscal years beginning, respectively, July 1, 1917, and July 1, 1918, is hereby appropriated out of any public moneys not otherwise appropriated, to the regents of the University of Utah, for the purpose of carrying on archæological and historical explorations among the ruins of prehistoric people who once lived within the confines of this state. All collections thus made shall be deposited in the state museum at the University of Utah, where, except as to duplicates which may be exchanged, they shall be retained for examination by the general public. '17, p. 206.

SCHOOL OF MINES.

5547. (2320x.) School of mines established. A State School of Mines is hereby established in connection with, and as a department of, the University of Utah, in accordance with the enabling act admitting Utah into the union of states. '01, p. 31.

5548. (2320x1.) Under control of university. Said school shall be under the management and control of the regents of the University of Utah. '01, p. 32.

5549. (2320x2.) Beneficiary of land grants. Said school shall be the beneficiary of all land grants and appropriations made or to be made by the United States to the state of Utah for the establishment and the maintenance of a school of mines. '01, p. 32.

5550. (2320x3.) Course of studies. In said school there may be offered to students, studies and courses of instruction relating to mining, metallurgical, electrical, and such other branches of engineering as pertain to the pursuit and development in all its branches of the mining industry of Utah. '01, p. 32.

ENGINEERING EXPERIMENT STATION.

('09, p. 49.)

5551. Engineering experiment station established. The Utah engineering experiment station is hereby established in connection with, and as a department of the state school of mines.

5552. Management. Said station shall be under the management and control of the regents of the University of Utah.

5553. Objects. Said station is hereby authorized to carry on experiments and investigations pertaining to any and all questions and problems that admit of experimental and scientific methods of study and the solution of which would tend to benefit the industrial interests of the state or would be for the public good; also to publish bulletins and employ other feasible means of giving information to the public concerning the results of experiments and other work of the station; *provided, however,* that the authority hereby conferred does not authorize said station to concern itself with prob-

lems that properly belong to the experiment station of the Agricultural College of Utah, such as those pertaining to agriculture, irrigation, horticulture, forestry, stock raising, and dairying.

5554. Report. The regents of the University of Utah shall make a biennial report of said engineering experiment station to the governor of the state at a time designated by the governor.

5555. Fiscal year. The fiscal year of said station shall be identical with that of the University of Utah and shall begin July 1, 1909.

MINING AND METALLURGICAL RESEARCH DEPARTMENT.

5556. Purposes. Appropriation. Fifteen thousand dollars, of which amount one-half shall be available in each of the fiscal years beginning respectively, July 1, 1917, and July 1, 1918, is hereby appropriated out of any moneys in the state treasury not otherwise appropriated for the equipment and maintenance of a mining and metallurgical research department in the Utah experiment station, connected with the state school of mines. The purposes of this research department shall be to conduct experiments and researches, either alone or in co-operation with the national bureau of mines and other agencies, with a view of finding ways and methods of profitably treating low-grade ores, of securing a higher percentage of extraction of metals from their ores, of obtaining other information that shall have for its object the benefit of the mining industry and the utilization and conservation of the mineral resources of the state, and to publish and distribute bulletins and articles relating to the department and its work.

5557. Expenditures by board of regents. Reports. The money appropriated by § 5556 shall be spent under the direction of the board of regents of the University of Utah, which board shall make biennial reports to the governor of the work of the department and of expenditures under § 5556. '13, p. 199; am'd '17, p. 179.

DISPOSITION OF UNCLAIMED DEAD BODIES.

5558. (2320x4.) Unclaimed bodies to go to medical department. It shall be the duty of any person into whose charge may come the unclaimed dead body of a convict or other person to be buried at public expense to give notice to the dean of the department of medicine of the state university within twenty-four hours after the receipt of any such body, specifying in said notice the probable cause of death; and, at the requisition of the dean of said department, he shall forward such body to the university, at its expense, within twenty-four hours of the receipt of such requisition. All bodies so delivered shall be properly embalmed, and shall be preserved for a period of not less than sixty days, during which time any personal friend or relation of the deceased making request for said body for private interment shall be given possession thereof. '07, p. 8.

5559. (2320x5.) Id. Receipt. Record. A receipt for the body shall be given to the officer or person delivering the same, and the medical department of the university shall keep, or cause to be kept, a record of all such bodies so received, in which shall be recorded at length all facts necessary for the identification of such bodies. '07, p. 8.

5560. (2320x6.) Id. Purposes used for. Final disposition. Such bodies unclaimed after the expiration of sixty days, as hereinbefore specified, may be used for the promotion of medical and surgical science, and the instruction and study of physicians and students of anatomy and embalming in the state of Utah. After having served such purpose, the remains shall, in all cases, be properly cremated or receive decent burial. '07, p. 8.

5561. (2320x7.) Must give notice of unclaimed body. Penalty. Any person having in charge the unclaimed dead body of a convict, or other person to be buried at public expense, who fails or neglects to give notice to the department of medicine of the state university, as provided in § 5558, and any

person upon whom the dean of said department has made formal requisition for such unclaimed dead body, who fails or neglects to forward the same as provided in § 5558, shall be guilty of a misdemeanor. '07, p. 8.

TITLE 101.

STATE LANDS.

CHAPTER 1.

STATE BOARD OF LAND COMMISSSIONERS.

5571. (2321.) Board of land commissioners created. A state board of land commissioners is hereby created, which shall consist of five resident citizens of the state, who shall be appointed by the governor, by and with the consent of the senate. Each commissioner shall hold his office for two years and until his successor is appointed and qualified.

Am'd '99, p. 85; '01, p. 33; '05, p. 34.

5572. (2322.) Oath and bond of commissioners. Each commissioner shall, before entering upon his duties, take the oath of office and give a bond to the state, with sureties to be approved by the governor, in the sum of $10,000, for the faithful performance of his duties, which bond shall be deposited in the office of the secretary of state. Am'd '99, p. 85.

5573. (2323.) Salary and expenses of commissioners. Each of the appointed commissioners shall receive for his services an annual salary of $1200, except the secretary, who shall receive $1800, payable quarterly; and the said commissioners shall receive actual and necessary traveling expenses while in the performance of their official duties. Am'd '99, p. 86; '01, p. 33.

5574. (2324.) Board to elect president and secretary. Bond and authority of secretary. The board shall elect one of its members president and another of its members as secretary thereof. The secretary shall take the constitutional oath, and give a bond to the state in the sum of $500,000, same to be approved by the state board of examiners and filed with the secretary of state. The bond of the secretary shall be conditioned for the faithful performance of his duties, and the safe keeping of all funds and securities entrusted to his care. He shall employ, subject to the approval of the board, such clerical help as may be needed for the proper carrying on of the work in the office, and may require from such clerical help a bond in such sum as he may deem necessary for the faithful performance of their duties, the state to pay all expenses in the furnishing of such bonds. The secretary shall be in charge of the office and in control of and responsible for the discipline of all employes. He shall be the custodian of all notes, mortgages, and other evidences of indebtedness arising from investment of state funds made by the board, and shall collect all interest due the state on all such; and interest so collected thall be paid into the state treasury to the credit of the fund to which it belongs, on the last business day of each month.

Am'd '99, p. 86; '05, p. 34; '07, p. 163.

5575. (2325.) Board to control state lands. The board of land commissioners shall have the direction, management, and control of all lands heretofore, or which may hereafter be, granted to this state by the United States government, or otherwise, and to lands lying below the water's edge on any lake or stream to the bed of which the state is entitled, for any and all purposes whatsoever, except lands used or set apart for public purposes or occupied by public buildings, and shall have the power to sell or lease the same for the best interests of the state and in accordance with the provisions of this chapter and the constitution of the state; *provided,* that lands belonging

to the state, lying below the water's edge of any lake or stream, shall not be sold, except that whenever all the owners of lands bordering on any lake or bay thereof desire to unwater such lake or bay, thereby to reclaim the bed thereof for agriculeural purposes, said land board may sell the land comprising such bed to such riparian owners at the cash price of not less than $2.50 per acre, upon their making application to purchase the same and furnishing a bond to the state of Utah, with surety or sureties satisfactory to said land board, in double the amount of the purchase price of the land, and conditioned on such reclamation taking place within five years from the date of such sale. In accomplishing such reclamation, no interference shall take place with existing water-rights. The sale of whatever right, title, and interest the state of Utah has in such bed shall be by quit-claim deed or other similar conveyance, with reservation to the state of all mineral rights. Nothing herein contained shall be construed as a legislative declaration of ownership by the state of Utah of beds of non-navigable lakes or bays thereof or of beds of non-navigable rivers or streams. Am'd '99, p. 86; '11, p. 65; '17 p. 387.

Land grants and the disposition to be made of them, enabling act, secs. 6-12.

Provisions concerning land grants and funds, Con. art. 10, secs. 5, 7, 10; art. 19, sec. 3; art. 20, sec. 1.

Board to control desert lands, § 5633.

Powers concerning reservoir fund, § 5660.

Make rules under reservoir land grant fund, § 5670.

Construct reservoir, § 5660.

Sink wells, § 5675.

Sections 16 and 36 are not reserved from sale under the general land laws of the United States until official survey.

Ferry v. Street, 4 U. 521; 7 P. 712; 11 P. 571.

The territorial legislature had no power to pass a law authorizing the county court to lease sections of land reserved by the United States for school purposes.

Burrows v. Kimball, 11 U. 149; 41 P. 719.

The U. S. statutes making it unlawful to inclose the public lands applies to surveyed school lands. (Overruling U. S. v. Elliot, 7 U. 389; 26 P. 1117.)

U. S. v. Elliot, 12 U. 119; 41 P. 720.

In the absence of a constitutional provision, the state cannot be sued, and action cannot be maintained against the board of land commissioners for damages resulting from the break of an irrigation canal, as it is in effect an action against the state, and judgment would have to be paid out of state funds.

Wilkinson v. State, 42 U. 483; 134 P. 626.

Where the state constructed an irrigation reservoir and canal more than adequate to take care of ordinary floods, an adjoining land owner cannot recover damages against the engineers or the individual members of the board of land commissioners in charge of the work for damages to his land resulting from a break in the canal due to unprecedented floods.

Id.

The whole matter of disposing of the state lands is placed in the hands of the land board. The courts will not review their acts for irregularities, but can consider only whether they have acted without jurisdiction.

Whitmore v. Candland, 47 U. 77; 151 P. 528.

5576. (2326.) Quorum. Records. Seal. The board shall have a seal to affix, with the secretary's attestation, to all instruments of conveyance, certificates, and other official acts. A majority of the board shall constitute a quorum for the transaction of business. A full record of its proceedings shall be kept by the secretary, who shall preserve all papers and documents submitted to the board. Am'd '99, p. 86; '11, p. 136.

The record of the land board giving the value of the land, but leaving blank the column as to improvements, where there is a blank oath signed by a commissioner stating that the commissioners considered the matter of improvements, is evidence that they did so and found them of no value.

Whitmore v. Candland, 47 U. 77; 151 P. 528.

5577. (2327.) Board to select land and invest proceeds. The board shall cause all the public lands now owned by the state, or lands the title to which may hereafter be vested in the state, to be selected and registered, and thereafter sold or leased; and the funds arising from the sale or leasing thereof shall be invested in the manner provided in this chapter. Am'd '99, p. 86.

Investment of funds, § 5607.

5578. (2328.) Apportionment of land among funds. The board shall designate what lands selected by the state shall be assigned to each specific fund designated in said grants made by the United States. Such selections shall be so apportioned among the various grants that each shall receive as nearly as possible its pro rata share of the different classes of land selected. Am'd '99, p. 86.

Lands granted, provisions, etc., enabling act, secs. 6-12.

Provisions concerning land grants, Con. art. 10, secs. 5, 7, 10; art. 19, sec. 3; art. 20, sec. 1.

5579. (2329.) Board to cause lands to be appraised. The board shall cause the state lands and the improvements thereon to be appraised or reappraised at such times as it may deem for the best interest of the state. The board may appoint one or more suitable persons to select, locate, and appraise all lands granted to the state. Am'd '99, p. 86; '05, p. 34.

While an appraisement of state lands and improvements thereon by a single member of the board may be somewhat irregular, it is not void; the court will not review the land

board's appraisement in the absence of fraud or collusion.
Whitmore v. Candland, 47 U. 77; 151 P. 528.

It is only the removable improvements that are to be appraised.
Id.

5580. (2330.) Selections by legal subdivisions. Transfers to and from the United States. All selections of land shall be made in legal subdivisions according to the United States survey, and when the selection has been made and approved by the board, it shall take such action as shall be necessary to secure the approval of the proper officers of the United States, and the final transfer to this state of the lands selected. The board is hereby empowered to cancel, relinquish, or release the claims of the state to, and to re-convey to the United States, any particular tract of land erroneously listed to the state, or any tract upon which, at the time of selection, a bona fide claim has been initiated by an actual settler. Am'd '99, p. 86; '13, p. 21.

Selected under the direction of the secretary of the interior, enabling act, sec. 13.

Secretary of state to transmit to county recorders transcripts of land selected, §§ 5704, 5705.

5581. (2331.) Compensation of assistants. The person or persons appointed under the provisions of § 5579 shall each receive a compensation of not to exceed $4 per day for all the time actually and necessarily employed, and his actual and necessary traveling expenses while in the performance of his duties. Am'd '99, p. 87.

5582. (2332.) Plats. Irrigable lands and water supply. Classification of lands. The board shall provide, for field and office use, uncertified plats of the surveyed lands of the state; shall ascertain, as far as practicable, what of the unappropriated government lands in the state are capable of irrigation, and the sources and reliability of the supply of water for the same; and shall select such lands as may be suitable under the various grants made by the general government to the state, and shall classify said lands upon the office plats according to the following classification: Agricultural, grazing, timber, reservoir sites, natural gas producing, mineral, coal, stone, saline, or arid lands, and show whether the same are improved or occupied. Am'd '99, p. 87.

5583. (2335.) Payment of necessary expenses. All necessary expenses attending the examination, survey, location, selection, appraisement, and sale of state lands, the purchase of blanks, books, and stationery, the compensation of officers, and all expenses necessarily incurred in carrying out the provisions of this chapter shall be paid by the state treasurer from the fund appropriated for that purpose, on the warrants of the auditor issued on vouchers certified to by the board. Am'd '99, p. 87.

5584. (2336.) Sales at auction. Price. Quantity. Preference rights. Payments. In all counties where the public lands or any portion thereof have been appraised, the board shall, when deemed conducive to the best interest of the state, attend in person or by agent, at such time as the board shall direct, and offer at public auction, at the courthouse of the county, and sell to the highest bidder all or any of the appraised and unsold and unleased lands situated in the county where such public auction is held; *provided,* that no land shall be sold for less than the appraised value thereof, and that no more than 160 acres nor less than a legal subdivision, except as hereinafter provided, shall be sold to any one individual, company, or corporation; and *provided, also,* that sales of such lands shall be made only to citizens of the United States or to those who have declared their intention to become such; and *provided, further,* that where cities, towns, or villages desire to purchase grazing lands lying contiguous to said cities, towns, or villages, or other lands which they have used continuously for a period of ten years for grazing purposes, they shall have the preference right to do so. Arid lands may be sold, as in this section provided, in amounts not to exceed 320 acres, and grazing lands in amounts not to exceed four sections. Upon such sale the commissioner in attendance shall receive, from the purchasers, the first payment upon lands sold, and shall issue a receipt therefor, and pay the same over to the secretary of the board with his report of such sale.
Am'd '99, p. 87; '17, p. 346.

Private sale of lands, § 5589.

5585. (2336x.) Regulation of sale of state lands within area of government irrigation works. No lands belonging to the state, within the areas to be irrigated from works constructed or controlled by the United States or its duly authorized agencies, shall hereafter be sold except in conformity with the classification of farm units by the United States, and the title to such land shall not pass from the state until the applicant therefor shall have complied with the provisions of the laws of the United States and the regulations thereunder concerning the acquisition of the right to use water from such works, and shall produce the evidence thereof duly issued; *provided,* that the area or areas to be so irrigated shall be determined by due notice, given by the United States or its duly authorized agencies, and filed with the state board of land commissioners. After the withdrawal of lands by the United States for any irrigation project, no application for the purchase of state lands within the limits of such withdrawal shall be accepted, except upon the conditions prescribed in this section. Any state lands needed by the United States for irrigation works shall be sold to the United States at private sale at the appraised value of such lands. '05, p. 177.

Right of way granted for federal irrigation works, § 5617.

5586. (2337.) Preference right to settlers. Amount. Price. Improvements. Reservoir sites. U. S. survey defined. Actual and bona fide settlers or occupants who have improved state lands and were, on January 1, 1894, actual settlers or occupants thereon shall have the preference right to purchase the land whereon such settlement has been made or of which such occupancy was had, not exceeding such amount as would, on January 1, 1894, or at the present time, make the entire holding of such person in this state not to exceed 480 acres of land. Where settlers have resided upon, occupied, or cultivated any lands granted to the state for school purposes prior to the extension of the surveys of the United States over said lands, or who hold the same, or the possession thereof, by purchase from the original settlers or their assigns, said original settlers having resided upon, occupied, or cultivated such lands prior to the extension of the surveys of the United States over the same, they may be permitted to purchase such lands at a price not less than twenty-five per cent of their appraised value; *provided,* that the purchase price of such lands settled upon or occupied prior to the extension of the surveys of the United States over said lands shall be not less than $1.25 per acre. In making such appraisement, the valuation of improvements thereon shall not be taken into consideration. Improvements, within the meaning of this section, shall be held to mean anything permanent in character, the result of labor upon or in connection with the land, which has enhanced the value of the same beyond what said land would be worth had it been permitted to remain in its original state. Application to make such purchase by said preferred claimant must be made prior to July 1, 1897; *provided,* that such extensions of time shall not be construed to affect the rights of persons whose applications have already been filed. Such lands as are suitable for reservoir sites may be reserved from sale or lease either as agricultural, grazing, or timber lands, and they shall be disposed of by the board in such manner and at such price, not less than the appraised valuation, as in the judgment of the board will benefit the settlers on lands on lower levels, preference being given to such corporations or associations formed by actual settlers for irrigation purposes as will enable the said reservoir sites to be utilized by the greatest number of actual settlers. The United States surveys referred to in this section are hereby declared to be those surveys by which any school lands were first sectionized or subdivided by a United States surveyor or a duly appointed deputy; and all records or plats of such surveys shall be deemed prima facie evidence of such surveys to the state board of land commissioners, and the board may hear and consider other testimony.

This section is continued in force only "until all applications filed by virtue of the same are fully disposed of," by laws of '99, p. 95.

Sec. 5587, enacted 1899, p. 165, did not repeal this section, nor operate retroactively to the prejudice of parties who had filed on school lands in pursuance of this section, as they were expressly provided for by chap. 64, laws of '99. Twiggs v. Land Com'rs, 27 U. 241; 75 P. 729.

It is not necessary that a person shall actu-

ally reside upon the land, in order to be an "occupant" thereof.
Id.
One who has purchased a possessory right from an original settler is entitled to the same privileges and benefits under this section as his grantor would have had, had he continued in possession and not parted with his interest.
Id.

On a resurvey of land to establish a lost boundary, the original corners established by the government surveyors, if they can be definitely found, or if the place where they were originally established can be definitely determined are conclusive, regardless of the correctness of their location.
Washington Rock Co. v. Young, 29 U. 108; 80 P. 382.

5587. (2337x.) Id. Refunding of payments in certain cases. Actual and bona fide settlers or occupants who have improved state lands and were, January 1, 1894, actual settlers or occupants thereon, and whose claims were filed with the state board of land commissioners prior to June 30, 1897, shall have the preference right to purchase the land whereon such settlement was made, or of which occupancy was had, not exceeding such amount as would, on January 1, 1897, or at the present time, make the entire holding of such person not to exceed 480 acres of land. Where settlers have resided upon, occupied, or cultivated any lands granted to the state for school purposes, prior to March 1, 1869, or who on January 1, 1894, held the same or the possession thereof by purchase from such settlers or occupants or their assigns, they may be permitted to purchase such lands at not less than twenty-five per cent of the appraised value; *provided,* that the purchase price shall be not less than $1.25 per acre; *provided, further,* that where certificates of sale for such lands have heretofore been issued by the state board of land commissioners, the payments in accordance with the terms of said certificates shall be made. At the first regular session of the legislature after full payment on any such certificate has been made, the holder of such certificate may file his claim for the difference between the sum paid on said certificate and the sum which should have been exacted if this law had been in force on June 30, 1897. '99, p. 165.

Refund to lessees of school lands under law of 1892, see note to § 5600.

As to effect of enactment of this section, see note to § 5586.

5588. (2337x1.) Id. Application of preferred claimant to make purchase. Actual and bona fide settlers or occupants who have improved unsurveyed state school lands, and were for two years prior to the extension of the United States survey over said lands actual settlers or occupants thereof, or who hold the same, or the possession thereof, by purchase from the original settlers or their assigns, said original settlers having resided upon, occupied, or cultivated said lands for two years prior to the extension of the surveys of the United States over the same, may be permitted to purchase such lands at private sale at the appraised valuation thereof. Applications to make such purchase by said preferred claimants must be made within ninety days after the plats of said surveys have been filed in the United States land office.
R. S. '98, § 2337; '99, p. 87.

5589. (2337x2.) Private sale. Price. Whenever any citizen of the United States, or person who has declared his intention to become such, shall make application in writing for the selection by the state of any tract of land in satisfaction of any grant to the state, the board may select and contract to sell the same at private sale to the person requesting the selection thereof at a price to be fixed by the board, not less than one dollar per acre; *provided,* that at the time of making such contract twenty-five cents per acre shall be deposited with the board to be applied as the first payment on such land after the same is patented to the state, and the remainder of the purchase price shall be paid in not to exceed ten equal yearly payments. All lands heretofore selected by the board upon the application of citizens may be sold to the applicants under the provisions of this section. '99, p. 88.

There are no provisions of this chapter which indicate that the word "may" occurring in the sentence "The board may select and contract to sell," etc., in § 5589, was used in any other than its ordinary sense.
Miles v. Wells, 22 U. 55; 61 P. 534.
Sec. 5589 does not make it the duty of the board to select and contract land applied for, nor to fix a uniform price for all lands selected.
Id.
Under this chapter, after an application for lands is made, until the selection is made and the price to be paid, and the time within which the deferred payments shall be made are fixed by the board, and assented to by the applicant, and a contract of sale containing the stipulation agreed upon is executed, the applicant has no vested rights whatever.
Id.
A court has no jurisdiction to direct, by mandamus, how the discretionary power, vested in the board by this chapter, shall be exercised.
Id.

5590. (2338.) Relinquishment of filings under United States laws, and purchase from state. The state board of land commissioners is hereby authorized to contract with the bona fide occupants who have in good faith filed upon the lands in this state under the laws of the United States, whereby said occupants can relinquish their said entry to said lands and be permitted to purchase the said tract of land of the state after its selection by the state board at private sale, at a price to be fixed by the board, which price shall be not less than $1.25 per acre; *provided,* that at the time of making such contract twenty-five cents per acre shall be deposited with the board, to be applied as the first payment on such land after the same is patented to the state, and the remainder of the purchase price shall be paid in not to exceed ten equal yearly payments; *provided further, however,* that this section does not confer any authority upon said board to contract with such occupants, in any manner whatever, who have gone into possession or filed upon such land after an application has been filed by any other person or persons with said board for the selection or purchase of the state, of the same lands or any part thereof.
Am'd '99, p. 88; '01, p. '33; '07, p. 267.

5591. (2339.) Sale of timber includes lease of land. Forfeiture. Ownership for ten years. The board may sell the timber on the unsold and unleased lands of the state, except as provided in § 5612, in the same way as it may sell state lands, but payment for such timber must be made as provided in § 5594. A failure to make such payment shall work a forfeiture of the contract of such sale; *provided,* that all right of ownership in any timber on lands of the state by right or virtue of purchase from the state shall cease ten years from and after such purchase. Am'd '99, p. 88.

5592. (2340.) Protection of growing timber. No contract by the board for the sale of timber on any lands of the state shall permit or entitle the purchaser to cut, use, injure, or destroy any growing timber or trees less than eight inches in diameter at the butt. The board shall make such rules and regulations for the disposal of the tops and limbs of trees cut for logging and other purposes as shall secure the young growing timber on the state lands from injury and destruction by fire. Nothing in this chapter shall be construed to prevent settlers from removing any timber from unsold or unclaimed lands of the state for their own domestic use. Am'd '99, p. 88.
Timber cutting forbidden, § 2354.

5593. (2341.) Notice of sale to be published. Exception. Notice of all sales of land or timber, except timber which has no value for manufacturing, commercial, or saw purposes, shall be given by publication in some newspaper published and of general circulation in the county wherein the sale shall be held, and, when deemed necessary by the board, in such other newspaper as the board may designate; if there is no such newspaper published in the county, then in some newspaper published in the state, having general circulation in such county, to be designated by the board. Such notice or notices shall be published for at least once a week for four weeks next preceding such sale, and shall specify the time when and the place where the sale will be held.
Am'd '99, p. 89; '15, p. 44.

5594. (2342.) Payments for land or timber. Notes of purchaser. Interest. Payments for lands and timber sold under the provisions of this chapter shall be as follows: Not less than one-tenth of the purchase price to be paid in cash at the time of sale, and the balance in not to exceed ten equal yearly payments. On all lands on which there is timber appraised at not exceeding $2.50 per acre the board may, in its discretion, add to and consider as a part of the value of the land the value of such timber, and such land shall be sold or leased as agricultural or grazing land and paid for as if no timber were growing thereon. The rate of interest on all deferred payments shall be five per cent per annum, and shall be paid as follows: On the day of sale the interest on the unpaid portion of the purchase price shall be computed and paid up to the 1st day of January next ensuing, and thereafter the interest and one-tenth of the purchase price remaining after the first payment has

been made shall become due and payable annually in advance on the 1st day of January of each year. No timber or lands on which timber forms an appreciable part of the value of such lands shall be sold except for cash, unless the purchaser shall secure the state the payment of the full purchase price by giving, at the time of purchase, an execution of notes for purchase, a good and sufficient bond running to the state for double the value of the timber on said lands; said bond to be in such form as the board may direct, and subject to its approval. Any purchaser may make full payment for land purchased at any time, and after the payment of the amount required to be paid at the time of sale, a purchaser may pay any part of the amount due equal to one or more annual payments. Am'd '99, p. 89.

5595. (2343.) Secretary of board to receive payments for land. All payments of principal, interest, or rental shall be made to the secretary of the board, who shall issue his receipt in duplicate therefor, and shall transmit the original receipt to the person making the payment, and deliver the duplicate to the state auditor. Am'd '99, p. 89.

5596. (2345.) Payments for improvements or removal of same. Any person purchasing land upon which improvements have been made by any other person, and appraised as provided in § 5579, shall pay to the secretary of the board, in addition to the amount of principal and interest required by law to be paid at the time of sale, the full appraised value of such improvements. The amounts thus paid for improvements shall be paid by the secretary of the board to the owners of such improvements, unless such owners shall elect, within ninety days after such sale, to remove the improvements and do remove the same, for which purpose they shall have the right to go upon the land. In case the owner elects to remove the improvements, and removes the same within the said ninety days, the secretary shall return to the person by whom it was paid the amount paid for improvements. Am'd '99, p. 89.

If the appraisers consider any improvements as having no value, the owner may still remove them within the stipulated time. Whitmore v. Candland, 47 U. 77; 151 P. 528.

5597. (2346.) Certificate of sale when full payment not made. Upon the sale of land under the provisions of this chapter, as herein provided, the state board shall issue to the purchaser a certificate of sale, showing the land purchased, the amount paid, the amount due, and the time when the principal and interest shall become due. Am'd '99, p. 90.

Fee for issuance of certificate, § 2514.

5598. (2347.) Lands unsold at auction may be sold at private sale. Whenever the board shall have exposed for sale at public auction any lots of the lands of this state pursuant to law, and any of such lots shall remain unsold, the board may, in its discretion, issue certificates for the sale thereof to such persons, respectively, as shall thereafter make application for any of the said lots, at not less than the appraised value. Am'd '99, p. 90.

5599. (2348.) Patents, how issued. Upon the filing of the certificate of sale with receipts attached, evidencing full payment of principal and interest for any tract of land sold, the governor shall, under the great seal of the state, issue a patent therefor to the purchaser, his assignee, or successor in interest. In case the purchaser shall have died and the land described shall have been sold by order of a court having jurisdiction, and such sale shall have been duly confirmed by order of said court, the patent shall be issued to the purchaser to whom confirmation of sale is made. If the estate of a deceased person shall have been distributed by order of such court, the patent shall be issued to the heirs of said deceased person or to such other person as may be shown by such decree of distribution to be entitled to the same. All patents so issued shall be attested by the secretary of state, and a record thereof shall be kept in the office of the board. Am'd '99, p. 90; '13, p. 51.

Patent when subject to easement for highway, § 2809; for other purposes, §§ 5616, 5617.

5600. (2349.) Lands may be leased. Term. Quantity. Applications. Payment. Preference. All state lands unleased and unsold shall be subject to lease at the actual leasing value thereof as fixed by the board. Lands other than grazing and arid lands shall be leased for terms of not more than

five years, and in tracts not exceeding 640 acres in extent to any one person, company, or corporation. Grazing and arid lands may be leased for such terms not exceeding twelve years and in tracts of such quantities as may be for the best interest of the state, at the discretion of the board; *provided,* that no lease shall exceed 50,000 acres to any one person or corporation; and *provided, further,* when it shall be shown that a lease has been secured for the purpose of a re-lease, or for the benefit of any person or corporation other than the lessee, the board shall declare such lease void, unless such lease be consented to by the board. Applications for lease shall be made to the board, and shall contain an affidavit that the applicant is not the owner of a lease of state lands of more than 640 acres, except grazing or arid lands, including the amount applied for, and that he desires to lease for his own use and benefit. Applications for lease shall be accompanied by the fees provided by law to be paid for making such lease. If the board deems it advisable to lease said land, it shall cause the same to be appraised and determine the annual rental thereon, and the secretary of the board shall thereupon notify the applicant thereof, and upon receipt of the first instalment of rental, a lease of the land applied for, duly executed, shall be delivered to the lessee. The first payment upon a lease shall be until the 1st day of January next ensuing. Subsequent payments shall be due and payable annually, in advance, on the 1st day of January of each year; *provided,* that where inhabitants of cities, towns, or villages desire to lease the grazing lands lying contiguous to said cities, towns, or villages, or other lands which they have used continuously for a period of ten years for grazing purposes, they shall have the preference right to do so. In leasing grazing or arid lands, the board shall give the preference right to actual settlers. The board may withhold from sale or lease lands on which there are springs of water, where water for stock purposes is scarce and their sale or lease, if enclosed, would, in the opinion of the board, create a monopoly of large tracts of the United States or state grazing lands in favor of the purchasers or lessees of such lands on which such springs or streams are located; and *provided, further,* that the board shall give the preference right to lease the grazing lands of the state to citizens of the state. Am'd '99, p. 90; '11, p. 109.

Fee for making leases, § 2514.
Money paid by lessees of school lands refunded by virtue of chap. 76, laws of '92. (On rehearing, 21 U. 187; 60 P. 982.)
Thoreson v. State Board of Ex., 19 U. 18; 57 P. 175.

5601. (2350.) Id. Applications to lease. Except as otherwise provided in this chapter, applications to lease shall be considered in the order that said applications are filed; *provided,* that when simultaneous applications are filed the board may, if deemed advisable by it, let the said land to the person who, in addition to the four per cent of the appraised value, will pay the highest rental for said land; and, *provided, further,* that applications to lease land already under lease shall not be received before sixty days prior to the expiration of said lease, and all such applications received within said sixty days shall be considered simultaneous. Am'd '99, p. 91; '07, p. 267.

5602. (2352.) Id. Covenants of lease. Forfeiture. Improvements. Each lease shall contain covenants that the lessee will promptly pay the rental annually in advance, that no waste shall be committed on the land, that the premises shall be surrendered at the expiration of the term of the lease, that the lessee will not sublet without the written consent of the board, and that a failure to pay the agreed rental for a period of one month from the time such rental is due will work a forfeiture of said lease after a notice as hereinafter provided, and that where improvements have been placed on the land by any person other than the lessee, the lessee will allow the owner of the improvements to remove the same within ninety days. Am'd '99, p. 91.

5603. (2353.) Default. Extension. Right to re-purchase. Any lessee or purchaser or his assignee, who is in default for non-payment of rental, principal, or interest due the state for a period of one month, shall be notified by the board by registered letter of such default, and if, within one month

after service of such notice, such delinquent has not paid such rental, principal, or interest so delinquent, and has procured no extension of time, his lease or contract of sale shall be forfeited, and such forfeiture shall be noted on the records of the board; *provided,* that where, through good and reasonable cause, such purchaser or lessee has been unable to meet his payments when due, the board may, in its discretion, extend the time for making such payments, not to exceed one year at any one extension, on the person or persons paying interest on such deferred payments at the rate of 5 per cent per annum; *provided, further,* that no subsequent extension shall be granted until all payments of principal and interest due before such subsequent extension shall have been made. The board may make such rules regarding such extensions as it deems proper. Any person whose contract of sale has been forfeited may, however, be relieved from such forfeiture at any time before the land has been appraised, or reappraised, or has again been sold, by paying all arrears of rental, principal, and interest, and 5 per cent penalty thereon. Any person whose contract of sale has been forfeited, and thereafter the land included therein leased to another person, may be given priority right to repurchase said land at a reappraised price and have credited thereon all moneys paid to the state land board on previous purchase, whenever in the opinion of the board the facts of the particular case would be equitable and just. Am'd '99, p. 91; '07, p. 268; '11, p. 139; '13, p. 8; '17, p. 220.

5604. (2354.) Cutting timber on leased lands. The lessee of state lands shall in no case be allowed to cut or use more timber therefrom than shall be necessary for the improvement of such lands, or for fuel for the use of the family of the lessee. The cutting and hauling of timber from leased agricultural or grazing lands to sawmills is prohibited. Am'd '99, p. 92.

Protection of timber, § 5592.

5605. (2355.) Secretary's fees. For making certified copies of papers, or records,, by the secretary, the same fees as are charged by the secretary of state for like services shall be collected. Am'd '99, p. 92; '05, p. 34.

Fees of board generally, § 2514. Fees of secretary of state, § 2511.

5606. (2356.) Payment of moneys into state treasury. On the first business day of each month, the secretary of the board shall pay into the state treasury all moneys received during the previous month, classified as to sales, leases, interest, fees, penalties, and forfeitures. All sums paid for fees shall go into the general fund. All penalties shall be regarded as interest, and all forfeitures shall go to the respectvie permanent funds. Am'd '99, p. 92.

5607. (2357.) Investment of funds. Security and rate of interest on farm loans. The board shall make the necessary orders for the investment or disposal of the funds derived from the sale and rental of public lands of this state, in the state treasury. Such funds shall be invested for and on account of the specific purposes for which the lands were granted, in government, state, county, city, or school district bonds, or in scrip or warrants issued against the funds to be raised by special or local taxes or assessment under the provisions of the laws of the state of Utah, or notes of the state made under the provisions of §§ 3806-3807, or in warrants on the reservoir land grant fund issued under the provisions of § 5664; or in mortgages on improved farm lands within the state, or otherwise as provided by law, but no loan secured by mortgage on such improved lands shall exceed one-half value of the same, exclusive of improvements; *provided,* that investments in warrants drawn on the reservoir land grant fund shall never at any time exceed in the aggregate the sum of $500,000. Whenever the board shall order the investment of any part of such funds, said board shall notify the state auditor of such order and the state auditor shall draw a warrant for the amount stated in the notice in favor of the state board of land commissioners, and the state treasurer shall pay such warrant out of the funds designated. The annual interest on all improved farm land loans herein provided for shall be 6 per cent; *provided,* that the expense of investigation of titles and values shall be paid by the intending borrower.

Am'd '99, p. 92; '03, p. 54; '05, p. 35; '07, p. 145; '11, p. 100; '15, p. 43.

5608. Investment. In addition to the securities in which public land funds of the state may, under the provisions of § 5607, be invested, the state board of land commissioners are hereby authorized to invest any of the funds derived from the sale and rental of public lands of the state in notes of counties made under the provisions of § 1364; *provided,* that such loans or investments shall not in any one county exceed one-half of one per cent of the assessed valuation of the county as shown by the last tax assessment. '11, p. 137.

5609. (2357x.) Interest and rentals. Whenever the state board of examiners shall so direct, the interest derived from the investment of funds belonging to the state school fund, or the respective state institutions, together with all moneys received from rentals, shall from time to time, upon proper requisition therefor, be used for the maintenance of the common schools, or said institutions; and whenever the board shall order the use of said funds, or any portion thereof, it shall notify the state auditor of such order, and the state auditor shall thereupon credit the amount to the maintenance account of the common schools, or said institutions, and the funds so credited to the maintenance of said institutions shall be drawn in the manner provided by law for the withdrawal of funds appropriated by the legislature for the maintenance of said institutions. R. S. '98, § 2357; Am'd '99, p. 93; '09, p. 185.

5610. (2358.) Lands subdivided into lots and sold. Any portion of the public lands of this state, excepting such lands as are occupied by bona fide settlers, who have a preference right of purchase, as hereinbefore provided, may be subdivided into lots, and sold as provided in this chapter, the board being satisfied that, by a subdivision of any tract into lots, the sale of the same could be made for a greater amount than if sold in legal subdivisions as designated by United States surveys. The board shall have authority to employ the necessary surveyors to survey such tracts, to be subdivided into lots of such size as it shall determine. A plat of the survey so made shall be filed in the office of the county recorder of the county wherein the land is situated, and a copy thereof filed in the office of the board. Tracts so subdivided shall not be subject to lease, but each lot shall be sold at public auction at such times as the board may direct. The manner of appraisement and sale of such subdivided lands shall be in all respects the same as in the case of other lands sold. Am'd '99, p. 93.

5611. (2359.) State auditor's account with secretary of board. The state auditor shall charge the secretary of the board with the amount of money, rental, interest, and principal, separately, received from the sale or lease of lands, as shown by the duplicate receipts of the state treasurer; and upon presentation of the state treasurer's duplicate receipt shall credit the secretary of the board with the amount of the same. Am'd '99, p. 93.

5612. (2360.) Forest and water supply reserves. The board shall set apart and reserve from sale such tracts of timber lands and the timber thereon as may, in the opinion of the board, be required to preserve the forests of the state, prevent the diminution of the flow of rivers, and aid in the irrigation of the arid lands. Am'd '99, p. 93.

Forest reserves authorized, Con. art. 18, s ec. 1.

5613. (2361.) Board to make rules and regulations. Supplies. The board shall have power to make all needful rules and regulations, not inconsistent with the provisions of this chapter, for carrying the same into effect; and shall supply all records, books, and papers that may be required for the purposes of this chapter. Am'd '99, p. 93.

5614. (2362.) Employment of counsel. The board shall cause the state to be properly represented in all suits, actions, controversies, or claims relating to state lands. Am'd '99, p. 93.

5615. (2363.) Annual report to be published. The secretary, under the direction of the board, shall annually, on the 1st day of January in each year, make a full report of the board's transactions, showing the amount of lands

in each county belonging to the state, to what fund they belong, their value to the amount sold or leased during the year. Said report shall contain such other items of information concerning the state lands as the board may deem proper, and the board shall report the same to the governor. Am'd '99, p. 94.

5616. (2364.) Certain rights-of-way. Land board authorized to grant. Terms. Nothing in this chapter shall be so construed as to impair the vested or accrued rights of any ditches or irrigation company, or any person owning any ditch or ditches on or passing through any state lands, or to prevent the sale of more than 160 acres for a continuous right-of-way, or for stations and building grounds within the state for a common carrier, or for canal or irrigation companies or associations. And the board is hereby authorized and empowered to grant rights-of-way on, through, and over any state lands for the transmission of electrical energy, or for telephonic purposes, and for canal and irrigation companies, and for roads, railroads, tramways, tunnels, ditches, flumes, pipes, and dumping places to facilitate the milling, smelting, or other reduction of ores, or the working of mines, quarries, or mineral deposits; outlets, natural or otherwise, for the deposit or conduct of tailings, refuse, or water from mills, smelters, or other works for the reduction of ores or from mines, quarries, or mineral deposits, and such rights-of-way shall be granted at such prices and upon such terms as to said board may seem wise and proper, or without compensation if, in its judgment, the lands on, through, or over which said rights-of-way are to be located, or other lands or property of the state, will receive benefits therefrom sufficient to compensate the state for the damage occasioned thereby.

Am'd '99, p. 94; '01, p. 33; '15, p. 63.

Right of way granted to railroads, § 1233.

5617. (2364x.) Id. For canals, etc., constructed by United States. There is hereby granted, over all lands now or hereafter belonging to the state of Utah, a right of way for ditches, tunnels, and telephone and transmission lines, constructed by authority of the United States. All conveyances of state lands hereafter made shall contain a reservation of such right of way.

'05, p. 176.

Lands within area of federal irrigation work reserved, § 5585.

5618. (2365.) State land holdings compacted. Exchange of lands. In order to compact, as far as practicable, the land holdings of the state, the board is hereby authorized to exchange any of the land held by the state for other land within the state held by other proprietors; and, upon resolution of the board, the governor is hereby authorized to execute and deliver the necessary patents to such other proprietors and receive therefrom proper deeds of the lands so exchanged; *provided,* that no exchange shall be made by the board until a patent for the land so received in exchange shall have been issued by the government of the United States to such proprietors or their grantors. Am'd '99, p. 94.

5619. (2366.) Testimony in contests. Notice. Where contests arise as to the preference rights of claimants for lands under the control of the board of land commissioners, the board shall have full power to direct the taking of testimony concerning the points involved, which shall be reported in full to said board. It shall be the duty of the secretary of the board to notify the parties to the contest of the findings and conclusions of said board. Am'd '99, p. 94.

5620. (2367.) Members may subpœna witnesses and administer oaths. Any member of the board may issue subpœnas to compel the attendance of witnesses and the production of books and papers before him or the board, and may administer oaths in the performance of his official duty.

Am'd '99, p. 94.

5621. (2368.) Application for survey of unsurveyed lands. The governor is hereby authorized and directed, by and with the consent of the state board of land commissioners, to make application to the commissioner of the general land office for the survey of public unsurveyed lands for the purpose

of satisfying the public land grant to this state, in accordance with the provisions of chap. 301, 28 U. S. statutes at large, pp. 394, 395. Am'd '99, p. 94.

5622. (2369.) Deferred payments. All deferred payments for the sale of university lands shall be made in accordance with the contracts of sale, to the secretary of the board, in the manner provided in this chapter for other payments. Am'd '99, p. 94.

5623. (2369x2.) Must indorse date of receipt on all applications, bids, contracts, or other papers. It is hereby made the duty of the state board of land commissioners, upon the receipt in its office of any application, bid, contract, or other paper, immediately on the receipt thereof to indorse thereon the day and time of the receipt thereof. '07, p. 266.

5624. (2369x3.) Members of board prohibited from acquiring state lands. The members of the state board of land commissioners and the employes of said board are hereby prohibited from acquiring, either directly or indirectly, any state lands or interest therein; *provided,* that the provisions hereof shall not interfere with any pending application, or any contract to purchase any state lands, or with the renewal of any existing lease made prior to the passage of this section. '07, p. 267.

5625. (2369x4.) Penalty for hindering application. Any member or employe of the state board of land commissioners who, either directly or indirectly, in his own interest, or in the interest of another, interferes with or hinders the application of a bona fide applicant to acquire state lands or any interest therein, shall, upon conviction thereof, be deemed guilty of a misdemeanor. '07, p. 267.

CHAPTER 2.

DESERT LAND GRANTED BY THE UNITED STATES.

5632. (2372.) Acceptance. The state of Utah hereby accepts the conditions of § 4 of the act of congress entitled, "An act making appropriations for sundry civil expenses of the government for the fiscal year ending June 30, 1895, and for other purposes," approved August 18, 1894, and acts amendatory thereof, and of the act of congress (public 114) approved April 4, 1910, in so far as the same relates to the extension of the provisions of said acts of congress over lands within the former Uintah Indian reservation, together with all grants of lands to the state under the provisions of the aforesaid acts. Am'd '09, p. 29; '11, p. 141.

By the act revising chap. 1 of this title, relating to state board of land commissioners, the entire title was repealed '99, pp. 85-95, apparently by inadvertence, as chap. 2 was thereafter re-enacted, 01, pp. 49-54.

5633. (2373.) Selection and disposal of lands by commissioners. The selection, management, and disposal of said land shall be vested in the state board of land commissioners. Said board is hereby authorized to make all contracts necessary to carry out the provisions of this chapter, and may make such rules not in conflict with this chapter or the said act of congress as it may deem best.

General powers of the board, § 5575.

5634. (2374.) Application to board for selection of arid lands. Any person, company, association, or corporation desiring to construct ditches, canals, reservoirs, or other irrigation works to reclaim lands under the provisions of this chapter, shall file with the board an application for the selection of the lands to be reclaimed, designating such lands by legal subdivisions. This application shall be accompanied by a proposal to utilize or extend an irrigation system already constructed, or one in process of construction, or the rights to construct which have been acquired, or to construct ditches, canals, reservoirs, or other irrigation works, for the complete reclamation of the lands so designated. The proposal shall be prepared in accordance with

the rules of the board and the rules, practice, and regulations of the department of the interior, which shall state the source of water supply, whether the right to the same has been acquired or is sought to be acquired; the location and dimensions of the works already constructed or in process of construction, or the location and dimensions of the proposed works, with estimated cost of such proposed works, the maximum price and terms per acre at which perpetual water rights will be sold to settlers on the land to be reclaimed, and the maximum price per acre per annum for maintenance tax. In the case of corporations, it shall state the name of the corporation, the purpose of its incorporation, the names and places of residence of its directors and officers, the amount of its authorized and of its paid-up capital. If the applicant is not a corporation, the proposal shall set forth the name or names of the parties, and such other facts as shall enable the board to determine as to their financial ability to carry out the proposed enterprise.

5635. (2375.) Certified check to accompany proposal. A certified check in such reasonable sum as may be required by the rules of the board, not less than $250, shall accompany each such proposal, the same to be held as guaranty for the execution of the contract with the state in accordance with its terms, by the party submitting such proposal, in case of the approval of the same and the selection of the land by the board, and to be forfeited to the state in case of failure of said parties to enter into a contract with the state in accordance with the provisions of this chapter.

5636. (2376.) Land board to examine. Notice. Protests. Upon receipt of such application and proposal the board shall examine the same, and if it does not comply with the regulations of the department of the interior and the rules of the board, it must be returned to the applicant for correction; but if it does so comply, the board shall determine whether the reclamation of the land applied for can be secured by means of the irrigation system proposed to be extended to such land for the purpose of its reclamation, whether there are sufficient water rights vested in the applicant, or there is sufficient unappropriated water in the source of supply, and whether the capacity of the constructed or proposed works is adequate to reclaim the lands described; whether or not the proposed cost of construction is reasonable; and whether or not the lands proposed to be irrigated are desert in character and such as may be properly set apart under the provisions of said act of congress, and the regulations of the department of the interior thereunder; *provided,* that immediately upon the filing of any application the board shall give notice for thirty days in a newspaper of general circulation in the state, of the nature of the application and a description in general terms of the lands applied for, giving the county where situated and the source of water supply. Written objections to the application may be filed with the board within forty days from the first publication of said notice, and the board shall consider and decide upon the merits and sufficiency of such objections.

5637. (2377.) Request for withdrawal of lands from entry. Upon the filing of said application the board shall forthwith file a list of the lands contained in said application in the local land office with a request for the withdrawal of the land described therein from entry.

5638. (2378.) Disapproval of application. When applications and proposals are not approved by the board, it shall cause the parties making the same to be notified of its action and its reasons therefor. The parties so notified shall have sixty days after such notification in which to submit a satisfactory proposal. Should such application upon final hearing be not approved by the board, it shall file in the local land office a request to dismiss the application required to be made under the provisions of § 5637.

5639. (2379.) Contract between state and applicant. Price of land and water to be fixed. Bond. Upon the withdrawal of the land by the department of the interior, it shall be the duty of the board to enter into a contract

with the applicant, which contract shall contain complete specifications of the location, dimensions, character of material, class of work, and estimated cost of the proposed works, and the maximum price and terms per acre at which perpetual water rights shall be sold to settlers, and the maximum cost per annum for the maintenance tax, and the price and terms upon which the state is to dispose of the land to settlers. In the discretion of the board, the contract may provide that the sale to a settler of a tract of land with a permanent water right shall include a pro rata interest in the reservoir and irrigation works, equal to the proportion that the tract of land purchased by him bears to the entire tract to be reclaimed by the said irrigation system; and that upon full payment of the purchase price of the said land and water right, capital stock of the corporation representing such interest shall be transferred to such settler, if the said irrigation system shall be constructed by a corporation, or if by a person or company then such interest shall be conveyed to the settler by the person or company constructing the said irrigation system. The price and terms for water rights, maintenance tax, and land shall in all cases be reasonable; and said contracting party or parties shall have the power to fix, in the conract with the applicant for the land and permanent water right, the amount or quantity of the annual water supply; and said party or parties or corporations shall have the right to provide reasonable rules and regulations for the use and distribution of the annual supply of water, such rules and regulations to be approved by the board; and said contractor shall enter into satisfactory bond in a penal sum equal to five per cent of the estimated cost of the works for the faithful performance of the provisions of the contract with the state; but in no case shall said bond exceed the sum of $50,000.

5640. (2380.) Time for completion. Forfeitures. All contracts shall state that the works covered by the contract shall begin within six months of the day of contract and that the construction shall be prosecuted diligently and continuously to completion, and that the cessation of work under a contract for a period of six months shall forfeit to the state all rights under said contract and the penal sum named in the bond; *provided,* that no property or right which was vested in the applicant or contractor at the date of the contract shall be forfeited; and *provided, also,* that in cases of contractors who at the date of the application own or have vested rights in water, and in a reservoir, a reservoir site, canals, or other irrigation works, the forfeiture shall extend only to such portions of the system unconstructed at the time of default and to the penalty of the bond given by such contractor.

Am'd '09, p. 29.

5641. Repeal. All laws or parts of laws in conflict with § 5640 are hereby repealed, and no proceedings heretofore taken by the state board of land commissioners, or by applicants under the provisions of this chapter, shall be held or deemed to be irregular or invalid because of the fixing by § 5640 of April 1, 1903, as the limit of time for the construction of works under contracts entered into with applicants, or because of the failure of the state of Utah to accept by express enactment the amendments made by congress to § 4 of the act of congress entitled, "An act making appropriations for sundry civil expenses of the government for the fiscal year ending June 30, 1895, and for other purposes," approved August 18, 1894. '09, p. 29.

5642. (2381.) Notice of failure to comply with contract. State may complete works. Upon the failure of the contractor to comply with any requirement of his contract, it shall be the duty of the board to notify such contractor of such failure, and that, unless the contractor shall comply with such requirements within sixty days from the date of such notice, the bond and contract, and, except as herein otherwise provided, all work constructed thereunder shall be at once and thereby forfeited to the state, as provided in § 5640. The board shall bring action in the proper court to cause the said works to be forfeited, and thereafter shall advertise for proposals to complete the said work, and may, in proper cases, contract with a bidder who will pay the original contractor the highest sum for the works partially completed, and

complete the said works, and supply water rights to the settlers on the lands to be reclaimed, for the price and upon the terms stated in the original contract. If no bid shall be received for the completion of said works and furnishing water rights to such settlers, for the price and upon the terms stated in the original contract, then the board shall bring the proper action for recovering the amount of the bond of the contractor.

5643. (2382.) Citizens may enter land. Conditions. Any citizen of the United States, or any person having declared his intention to become a citizen of the United States, over the age of twenty-one years, may make application to the board to enter any of said lands not exceeding 160 acres, under the regulations of the department of the interior and the rules of the board. Each application must be accompanied by a certified copy of a contract for the perpetual water right made by the applicant with the person or corporation authorized by the board to furnish water for the reclamation of said lands, together with 25 cents per acre for the land applied for, and contain the declaration that he will settle upon and improve said land, and if said application is allowed, the board shall cause to be issued a certificate of the location to the applicant. If the application is not allowed, the 25 cents per acre accompanying it shall be returned to the applicant. If the construction company fails to furnish water to any settler under the provisions of its contract with the state, the state shall refund to such settler all payments that he shall have made to the state. The board shall dispose of all lands accepted by the state under the provisions of this chapter at a price not to exceed $1 per acre, except for lands within the former Uintah Indian reservation, 25 cents per acre to be paid at the time of entry and the remainder at the time of making the final proof by the settler, but no settler shall be entitled to make more than one entry. For lands within the former Uintah Indian reservation the board shall charge a price of not more than $2.25 per acre and not less than $1.50 per acre, 25 cents per acre to be paid at the time of entry and the remainder at the time of making final proof by the settler. Of the price charged for such lands situated within the former Uintah Indian reservation the board shall pay to the United States the sum of $1.25 per acre as provided in the said act of congress referred to in § 5632, and the board is hereby authorized to make all contracts necessary and to pay to the United States the sum necessary to carry out the provisions of this chapter.

Am'd '09, p. 29; '11, p. 141.

5644. (2383.) Proceeds to constitute a reclamation fund. All moneys received by the board from the sale of lands selected under the provisions of this chapter shall be deposited with the state treasurer, and such sums as may be necessary shall be available for the payment of the expenses of the board in carrying out the provisions of this chapter, and such expense shall be paid in a warrant drawn by the state auditor in the manner that other expenses of the board are paid, and any balance remaining over and above the expenses necessary to carry out the provisions of this chapter shall constitute a trust fund to be used only for the reclamation of other arid lands; *provided,* that until there is sufficient money in the said reclamation trust fund the expenses of the board in carrying out the provisions of this chapter may be paid from a Carey act expense fund to be appropriated by the legislature, and the auditor shall register such claims paid out of said expense fund in the order of their presentation. Whenever, except as provided in this chapter, money is in the said reclamation trust fund equal to a claim which has been paid out of the said Carey act expense fund, the auditor shall draw a warrant on said reclamation fund so as to reimburse the state for sums that have been paid out of said Carey act expense fund. The board shall draw, by requisition on the auditor, the sums necessary to pay to the United States in order to obtain patent to lands accepted in this chapter and the auditor shall draw his warrant on said reclamation trust fund giving precedence to sums to be paid to the United States over warrants to reimburse the state for expenses. Am'd '11, p. 143.

5645. (2384.) Completion of irrigation works. Upon the completion of the said works or any section thereof the contractor shall notify the board that he is prepared to supply water to the land designated in his application, or any particular tract thereof, whereupon the board shall cause proof of that fact to be made to the department of the interior with a request that a patent to such land be issued to the state, and shall cause a notice to be given to each settler of such fact, and within three years thereafter each settler shall appear before the board and make final proof of reclamation, settlement, and occupation in accordance with the regulations of the department of the interior and the rules of the board, and shall make final payment for the land entered by him. Upon final payment by any settler, the state shall issue a patent for the land entered, which shall be executed in the same manner that other patents are executed.

5646. (2385.) Water rights appurtenant to lands. Lien thereon for water. Foreclosure. Redemption. The water rights to all lands acquired under the provisions of this chapter shall attach to and become appurtenant to the land as soon as the title passes from the United States to the state. Any person or corporation furnishing water for any tract of land so acquired shall have a first and prior lien on said water rights and land upon which said water is used, for all deferred payments for said water rights, and said lien to be in all respects prior to any or all other liens created or attempted to be created by the owner and possessor of said land, and shall remain in force and effect until the last deferred payment for the water rights is fully paid and settled according to the terms of the contract under which said water rights were acquired. The contract for the water rights upon which the aforesaid lien is founded shall be recorded in the office of the county recorder of the county where said land is situated. Upon default of any deferred payments secured by any lien under the provisions of this chapter, the person or corporation holding or owning said lien may foreclose the same according to the terms and conditions of the contract granting and selling to the settler the water rights, and such foreclosure shall be in the manner that mortgages are foreclosed in this state; *provided,* that such settler or settlers shall have the right, within one year from the date of foreclosure as provided in this section, to redeem such land and water rights, by payment of the sum of such deferred payment or payments with interest at not to exceed twelve per cent per annum, with accrued cost of maintenance.

Water rights pass with the land, § 3477.

5647. (2386.) Lien on land for cost of reclamation. Under the provisions and subject to the conditions of the act of congress entitled "An act making appropriations for sundry civil expenses of the government for the fiscal year ending June 30, 1897, and for other purposes," approved June 11, 1896, and under a section of the sub-title of said act "surveying the public lands," a lien is hereby created in favor of the contractor on and against the separate legal subdivisions of land reclaimed for the actual cost and necessary expenses of reclamation and reasonable interest thereon from the date of reclamation until disposed of to actual settlers.

Liens generally, §§ 3722-3793.

5648. (2387.) Maps of canals and other irrigation works. The maps in the office of the board shall show the location of the canals or other irrigation works approved in the contract with the board, and all lands entered under the provisions of this chapter shall be subject after entry to the rights of way of such canals or irrigation works, said right of way to embrace the entire width of the canals and such additional width as may be required for its proper operation and maintenance, the width of right of way to be specified in the contract provided for in this chapter.

5649. (2388.) Contractors to make annual reports. The board shall require annual reports from each contractor, giving such details respecting the fulfillment of the contract as the board may require.

CHAPTER 3.

RESERVOIR LAND GRANT FUND.

('09, p. 269.)

5659. (2389.) Reservoir land grant fund created. There is hereby created a fund to be known as the reservoir land grant fund, said fund to consist of all moneys received from the sale of land selected under the grant for this state of 500,000 acres of land for the establishment of permanent water reservoirs for irrigating purposes.

Land grant, enabling act, sec. 12.

By the act revising chap. 1 of this title, relating to state board of land commissioners, the entire title was repealed ('99, pp. 85-95), apparently by inadvertence, as chap. 3 was thereafter re-enacted, '01, pp. 56-58.

5660. (2390.) Reservoir sites and land to be selected. Loans. The state board of land commissioners is hereby authorized and directed to cause to be selected suitable sites for the construction of reservoirs and to procure, by selection, grant, or purchase, the title to the land to be covered by water stored in such reservoirs, and to cause to be constructed suitable reservoirs for the purpose of storing water to be supplied to the state and other lands. The use of the reservoir land grant fund for these purposes shall be preferred. The state board of land commissioners is hereby authorized and empowered to loan the reservoir land grant fund to corporations or associations within the state of Utah for the construction or completion of reservoirs, whether public or private, at the rate of interest not to exceed 5 per cent per annum, in such sums, for such securities, and for such periods of time as in its judgment will promote the interest of the state and encourage the construction of reservoirs for agricultural jurposes; *provided,* that no such loan shall be made except the same be secured by the first lien upon improved real estate or establshed water rights; nor in an amount to exceed 40 per cent of the cash value of such securities at the time the loan is made; and *provided, further,* that, upon the completion of any reservoir for which a loan from the reservoir land grant fund has been made, one-tenth of the principal of any loan, together with the accrued interest, shall be repaid to the reservoir land grant fund on the last day of December each year until the full amount of the principal and all accrued interest of any such loan shall have been fully paid. It is further provided that whenever lands are selected for reservoir sites in connection with an irrigation project to be developed by the state by use of the reservoir land grant fund, and whenever lands are selected for irrigation and reclamation by use of the reservoir land grant fund, said selected lands shall be paid for from the reservoir land grant fund at a price of not less than $2.50 per acre, the money so realized to go to the various land grants from which the selections were made, said money being divided among these several grants in the same proportion as the selection of lands for said purposes. Am'd '11, p. 82.

General power of land board, § 5575.

5661. (2391.) Plans and specifications. When a reservoir site has been selected, the said board shall cause to be made, by the state engineer, plans and specifications in detail showing the kind and quantity of materials required and the work necessary to be performed in the construction of such reservoir, together with an estimate of the total cost of the same and of the number of acres that may be irrigated therefrom. All plans and specifications shall be made with a view to constructing a substantial, permanent reservoir.

5662. Contracts. Sale of lands and water rights. Extension of time for payments. Upon the determination by the board that any irrigation project is practicable, it may cause to be let contracts for the construction of the same, in such portions or sections as may be practicable to construct and complete as parts of the whole project, and thereupon the board shall give public notice of the lands irrigable under such project and the limit of area that will be sold to any one citizen, which limit shall represent the acreage which, in the opinion of the board, may be reasonably required for the support

of a family upon the lands in question; also the place and time when the lands will be disposed of and also the manner and terms of such disposal. The said charges shall be determined with a view to returning to the reservoir land grant fund the cost of construction of the project, with interest at the rate of 5 per cent per annum, computed from the date of the completion of the project. With reference to lands in private ownership which may be irrigated by the waters of an irrigation project, the board shall make a written contract with each land owner before making any provision for the irrigation of such private lands by means of the irrigation system that is to be constructed. Said contract shall be drawn so as to properly secure the state for the expense of construction of the works necessary to irrigate such private lands and shall provide what the cost of the irrigation of said private land shall be, which in no case shall be less than the actual cost thereof. And the state board of land commissioners is hereby authorized to sell water or water rights pertaining to any state irrigation project to incorporated irrigation companies upon such securities as shall be approved by the said board, and at a price not less than the actual cost of storage and delivery of said water. The board shall have authority, when the interests of the state and the successful sale, development, and colonization of the land require such action, to abate payments of interest due from purchasers of land and water or either of them, or to extend the time of payments on principal and interest due or to become due, with or without interest, upon such terms and conditions as to the board shall seem just. Whenever the board has abated interest or granted extensions under the authority given in this section, the action of the board shall be entered in detail upon the records of the board showing in each case the reasons for the action of the board, and full statement of such action shall be included in the next annual report of the board. Am'd '13, p. 46.

5663. (2395.) State engineer to supervise construction work. During the construction of any reservoir, the said board shall cause the same to be supervised by the state engineer with such assistants as he may deem necessary.

5664. Requisitions for money. As the work progresses, the board shall make requisitions upon the state auditor for such sums of money as may be necessary in payment therefor, and the state auditor must thereupon draw his warrants upon the state treasurer for the amounts specified in such requisitions, the same to be paid out of any money in the reservoir land grant fund.

5665. Funds available. All the reservoir land grant fund is hereby appropriated for the purpose of carrying out the provisions of this chapter.

5668. Unpaid warrants to be registered and draw interest. Retirement. If any warrant drawn on the reservoir land grant fund is not paid by the state treasurer upon presentation, he shall register the same and indorse thereon, "not paid for want of funds," giving the date thereof, and such warrants and all warrants heretofore issued and outstanding shall bear interest at the rate of 5 per cent per annum from date of registration until paid, interest payable on the 1st day of April of each year. Whenever the treasurer has the sum of $1000 on hand in said fund, he shall call in the warrants issued on said fund and registered, in the order of their presentation. '15, p. 43.

5669. Transfer of land and water right. All reservoirs constructed under the provisions of this chapter, together with the water rights acquired thereby, shall be and remain the property of the state of Utah until the land to be irrigated thereby is sold and disposed of and fully paid for, and the same shall become appurtenant to the lands to be irrigated thereby, and when any such lands are sold and patented by the state such patents shall convey a proportionate interest in such reservoirs and water rights.

5670. (2400.) Rules and regulations. The state board of land commissioners is hereby authorized to perform any and all acts and to make such

rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this chapter into full force and effect.

SINKING OF WELLS TO PROVIDE SUBTERRANEAN WATERS.

('09, p. 44; '11, p. 89.)

5675. (2369x.) Experiments to be conducted. The state board of land commissioners is hereby authorized and directed to conduct experiments in sinking wells, flowing or artesian wells, and other methods of obtaining subterranean waters for culinary purposes on the arid lands within the state. Am'd '11, p. 89; '13, p. 47.

5676. Location of wells. Such wells shall be located in localities where the surrounding land is adapted for dry farming. Not more than two wells shall be located in any one county. '11, p. 89.

5677. (2360x1.) May be driven on state or private lands. Conditions. Installation of machinery. Such wells may be driven on state or private lands. If on private lands, then the owner thereof must give to the state a good and sufficient deed of conveyance for at least one acre of land where such well is located, together with a right of way for a public highway of not less than four rods in width from the highway to the location of the said well. Whenever it is necessary to install machinery for lifting the water from such wells, the board is hereby authorized and empowered to make such installation and all rules necessary to lease said wells to the responsible bidder who will agree to furnish the water to the users thereof at the lowest price per gallon, for a period not to exceed five years. Am'd '11, p. 89.

5678. Appropriation. For the purpose of carrying out the provisions of §§ 5675-5677, the sum of $7500, or so much thereof as may be necessary, is hereby appropriated from the state treasury. '13, p. 47.

CHAPTER 4.

LAND IN LIEU OF UNSURVEYED SCHOOL LAND.

5681. (2401.) Unsurveyed school land relinquished conditionally. The state of Utah hereby relinquishes and surrenders to the United States of America all its claim and title to the second, sixteenth, thirty-second and thirty-sixth sections in the state of Utah, heretofore granted by the United States, as remain unsurveyed by the United States, at the date of the passage of an act by congress, that may hereafter be enacted, granting to the state of Utah land equal in area to the land hereby relinquished, such grant to be in lieu of the land hereby relinquished. This relinquishment is made upon the express condition that the United States shall grant to the state of Utah land equal in area to the sections two, sixteen, thirty-two, and thirty-six, as remain unsurveyed at the time of such grant, the state to have the right to select the land so granted in the smallest legal subdivisions.

R. S. '98, §§ 2401, 2402; '01, p. 27.

Land grants, enabling act, secs. 6-12.
Acceptance of land grants, Con. art. 20, sec. 1.
By the act revising chap. 1 of this title, relating to state board of land commissioners, the entire title was repealed ('99, pp. 85-95), apparently by inadvertence, as chap. 4 was thereafter re-enacted, '01, p. 27.

TITLE 102.

STATE OFFICERS.

CHAPTER 1.

GOVERNOR.

5682. (2403.) Duties. In addition to those prescribed by the constitution, the governor has the power and must perform the following duties:

1. He is to supervise the official conduct of all executive and ministerial officers;

2. He is to see that all offices are filled and the duties thereof performed, or, in default thereof, apply such remedy as the law allows, and, if the remedy is imperfect, acquaint the legislature therewith at its next session;

3. He is to make the appointments and fill vacancies as required by law;

4. He is the sole official organ of communication between the government of this state and the government of any other state or of the United States.

5. Whenever any suit or legal proceeding is pending against this state, or which may affect the title of this state to any property, or which may result in any claim against the state, he may direct the attorney general to appear on behalf of the state, and may employ such additional counsel as he may judge expedient;

6. He may require the attorney general or the county attorney of any county to inquire into the affairs or management of any corporation existing under the laws of this state;

7. He may require the attorney general to aid any county attorney in the discharge of his duties;

8. He may offer rewards, not exceeding $1,000 each, payable out of the general fund, for the apprehension of any convict who has escaped from the state prison, or of any person who has committed, or is charged with the commission of a felony;

9. He must perform such duties respecting fugitives from justice as are prescribed by law;

10. He must issue and transmit election proclamations as prescribed by law;

11. He must issue land warrants and patents as prescribed by law;

12. He must in the year 1899 and biennially thereafter, prior to the meeting of the legislature, deliver to the secretary of state, for publication, all biennial reports of officers and boards for the two preceding years;

13. He may require any officer or board to make special reports to him, upon demand, in writing;

14. He must discharge the duties of member of all boards of which he is or may be made a member by the constitution or by the laws of the state;

15. He has such other powers and must perform such other duties as are devolved upon him by law.

Election, qualifications, term, duties, compensation, Con. art. 7.
To appoint county commissioners, when, § 1373.
Appointive power, Con. art. 7, sec. 9, 10.
Election proclamations, § 2103.
Appointment of presidential electors, § 2252.
Salary $6,000 per annum, § 5070.
May offer reward for apprehension of fugitives, § 9393.
Delivery of fugitives upon extradition, § 9394.
Demand for fugitives from this state, § 9405.
Election proclamations, §§ 2103, 2104.
Patents for state lands, §§ 5599, 5645.
May apply for survey of public lands, § 5621.
May apply for congressional appropriation for Agricultural College, § 5279.
To execute cession of jurisdiction over federal building sites, § 2505.
Issue proclamation on change of class of city, § 526.
Issue Thanksgiving day proclamation, § 2860.
Propose organization irrigation district, § 3501.
Issue proclamation defining boundaries new and old counties, § 1352.
Direct legislation proclamation, § 2309.
Publish list defaulting corporations, § 1274.
Approve sale fish fry and eggs, § 2648.
May appoint special counsel to prosecute corrupt practices, §§ 2397, 2400.
Investigate corrupt practices, § 2397.
Duties under liquor prohibition act, §§ 3344, 3346, 3376.
Concurrence necessary to condemn live stock, § 192; to withdraw water from appropriation, §§ 3555, 3573.
May permit use of seal of state; when, § 5801.
The failure of the governor to appoint the members of a board within a month after the

offices came into existence, as provided by law, did not invalidate the appointments, the provisions as to the time of making such appointments being merely directory.
People v. Hasbrouck, 11 U. 291; 39 P. 918.

5683. (2404.) Recess appointments. Within ten days after the meeting of the legislature, the governor must transmit to the senate a list of all appointments made by him under the provisions of the constitution or of law during the recess of the legislature.

5684. Officers may be removed for cause. All officers who are or shall be appointed by the governor alone, or by the governor by and with the consent of the senate, may, for official misconduct, habitual or wilful neglect of duty, or for other good and sufficient cause, at any time during the recess of the legislature, be removed and the vacancy supplied during such recess, by the governor. '11, p. 64.

5685. Appropriation. Appointment of auditors and counsel. Rights and duties of officials pending examination. There is hereby appropriated the sum of $25,000, or so much thereof as may be required, to be placed at the disposal of the governor, in the appropriate fund; and the governor is hereby authorized to appoint auditors and accountants and employ counsel with the right to examine all books, records, and accounts of any state officer, department, institution, board, commissioner, agency, or persons or corporations in control of any public fund or property, and pending such investigation to suspend any officer appointed by the governor, and to prosecute any inquiry deemed necessary as to the management or disposition of any public funds or property, and to commence and prosecute such action as may be deemed advisable to recover any moneys, funds, or property, if any, improperly converted or disposed of, and for such other relief as the case may require; and the governor is hereby authorized to expend the said $25,000, or so much thereof as may be needed, for the purposes aforesaid. And it shall be the duty of all officers, boards, commissioners, agencies, or other persons or corporations having or having had control of any public funds or property to submit all books, records, accounts, and papers of every description relating to any public funds or property to the persons properly accredited by the governor for the purpose of making the examination and inquiry hereinbefore provided. '17, p. 28.

5686. (2405.) Records to be kept. The governor must cause to be kept the following records:

1. An account of all his official expenses and disbursements, including the incidental expenses of his departemnt, and an account of all rewards offered by him for the apprehension of criminals and persons charged with crime;

2. A register of all appointments made by him, with date of commission and names of appointees and predecessors.

5687. (2406.) Commission all appointive officers. The governor must commission all officers of the militia, and all officers appointed by the governor or by the governor with the consent of the senate.
Mont. Pol. C., § 1002*.

5688. (2407.) Duties and powers of acting governor. Every provision of the laws of this state in relation to the powers and duties of the governor, and in relation to acts and duties to be performed by others toward him, extends to the person performing, for the time being, the duties of governor.

BIENNIAL BUDGET.

('17, p. 35.)

5691. Plan of expenditures. State officials to make itemized estimates. Governor to revise and submit budget. Duties and powers of legislature. Limitations. Within twenty days after the convening of the state legislature, the governor shall submit a budget for the two ensuing fiscal years. Said budget shall contain a complete plan of proposed expenditures and estimated revenues for the ensuing biennium. Accompanying said budget shall

be a statement showing the revenues and expenditures for the two fiscal years next preceding; the current assets, liabilities, reserves, and surplus or deficit of the state; the debts and funds of the state; an estimate of the state's financial condition as of the beginning and end of the biennium covered by the budget; and any explanation the governor may desire to make as to the important features of the budget and any suggestion as to methods for the reduction or increase of the state's revenue. Said budget shall embrace an itemized estimate of the appropriations for the state legislature as certified to the governor by the president of the senate and the speaker of the house; for the executive department; for the judiciary department; to pay and discharge the principal and interest of the debt of the state of Utah; for the salaries payable by the state under the constitution and laws of the state; and for such other purposes as are set forth in the constitution and laws of the state; and for all other appropriations. The governor shall deliver to the presiding officer of each house the budget, and a bill for all the proposed appropriations of the budget clearly itemized and classified; and the presiding officer of each house shall promptly cause said bill to be introduced therein. The governor may, before final action thereon by the state legislature, amend or supplement the budget to correct an oversight, or in case of an emergency, with the consent of the state legislature, by delivering such amendment or supplement to the presiding officers of both houses; and such amendment or supplement shall thereby become a part of said budget bill as an addition to the items in said bill or as a modification of or substitute for any item in said bill such amendment or supplement may affect. The state legislature may not alter said bill except to strike or reduce items therein; *provided, however,* appropriations necessary for the payment of interest or principal due on the public debt shall not be reduced or eliminated; and *provided, further,* that the salary or compensation of any public officer shall not be decreased during his term of office. Neither house shall consider any other appropriation, except an emergency appropriation for the immediate expense of the state legislature, until the budget has been finally acted upon by both houses. Every appropriation in addition to that provided for in the budget shall be embodied in a separate act, and shall be limited to some single work, object, or purpose therein stated. No supplementary appropriation shall be valid if it exceeds the amount in the state treasury available for such appropriation, unless the legislature making such appropriation shall provide the necessary revenue to pay such appropriation by a tax, direct or indirect, to be laid and collected as shall be directed by the state legislature; *provided,* that such tax shall not exceed the rates permitted under the constitution of Utah. This provision shall not apply to appropriations to suppress insurrections, defend the state, or assist in defending the United States in time of war. The governor, for the purpose of making up said budget, shall have the power, and it shall be his duty, to require from the proper state officials, including all heads of executive and administrative departments and state institutions, bureaus, boards, commissions, and agencies expending or supervising the expenditures of state moneys, and all institutions applying for state moneys and appropriations, such itemized estimates and other information, in such form and at such times as he may direct. The estimate for the legislative department, as certified by the presiding officers of both houses, shall be included in the budget without revision by the governor. The governor may provide for hearings on all estimates and may require the attendance at such hearings of representatives of state departments and institutions and of other institutions or individuals applying for state appropriations. The governor may, in his discretion, revise all estimates, except those relating to the legislative department, those providing for the payment of the principal and interest of the state debt, and for the salaries and expenditures specified by the constitution and laws of the state. The total appropriations made and expenditures authorized by the budget must not exceed the estimated revenues from taxes, fees, and all other sources for the

next ensuing biennium, which estimate shall be furnished the governor by the state auditor at least six months prior to the convening of the state legislature in regular session. If any item in the budget as enacted shall be held invalid upon any ground, such invalidity shall not affect the budget itself or any other item in it; *providing, however,* that no act appropriating money passed by the twelfth session of the legislature shall be affected by this repeal.

CHAPTER 2.

SECRETARY OF STATE.

5694. (2408.) Duties. The secretary of state is charged with the custody:

1. Of the enrolled copy of the constitution;
2. Of the acts and resolutions passed by the legislature;
3. Of the journals of the legislature, and all bills, resolutions, memorials, petitions, and claims introduced in the senate or the house of representatives;
4. Of the great seal;
5. Of all books, records, deeds, parchments, maps, and papers kept or deposited in his office pursuant to law.

5695. (2409.) Id. In addition to the duties prescribed by the constitution, it is the duty of the secretary of state:

1. To attend at every session of the legislature for the purpose of receiving bills and resolutions thereof, and to perform such other duties as may be devolved upon him by resolution of the two houses, or either of them;
2. To keep a register of and attest the official acts of the governor;
3. To affix the great seal, with his attestation, to commissions, pardons, and other public instruments to which the official signature of the governor is required;
4. To record in proper books all conveyances made to the state, and to file all articles of incorporation deposited in his office;
5. To receive and record in proper books the official bonds of all state officers required to give bond, and then to deliver the originals to the state treasurer, excepting the bond of the state treasurer, of which the secretary shall remain the custodian;
6. To take and file in his office receipts for all books distributed by him, and to direct the county clerk of each county to do the same;
7. To certify to the governor the names of those parties who have received at any election the highest number of votes for any office, the incumbent of which is commissioned by the governor;
8. To furnish on demand, to any person paying the fees therefor, a certified copy of all or any part of any law, record, or other instrument filed or deposited or recorded in his office;
9. To deliver to the printer entitled to the same, at the earliest day practicable after a final adjournment of each session of the legislature, copies of all laws, resolutions, and journals kept, passed, or adopted at such session, with proper indexes of the same;
10. To notify in writing the county attorney of the proper county of the failure of any officer in his county to file in his office a sworn statement of fees received by such officer, when such sworn statement is required by law;
11. To present to the legislature, at the commencement of each session thereof, a full account of all purchases made and expenses incurred in furnishing fuel, light, and stationery;
12. To keep a fee-book, as provided by law, which book must be verified annually by his affidavit entered therein;
13. To file in his office descriptions of seals in use by the different state officers, and to furnish such officers with new seals whenever required;

14. To discharge the duties of a member of all official boards of which he is or may be made a member by the constitution or the laws of the state, and all other duties required of him by law;

15. To report to the governor, on or before the 1st day of January preceding the biennial session of the legislature, a detailed account of all official actions since his previous reports, and accompany the report with a detailed statement, under oath, of the manner in which all appropriations for his office have been expended;

16. To receive, designate, and record all trade marks;

17. As soon as he receives the bound reports of the decisions of the supreme court, he shall deliver to the clerk of the supreme court, as state law librarian, a sufficient number, which the latter shall distribute as follows: To the library of congress and to the state law library, each two copies; to such of the states and territories of the United States as will exchange reports with this state, each one copy; to the governor, to the United States district judge for this state, to the justices of the supreme court, to the justices of the district courts, to the attorney general, to county attorneys, and to clerks of the district courts, each one copy; *provided,* that the clerk of the district court of Salt Lake county shall be entitled to three copies of each report of the decisions of the supreme court of the state, for the use of the district courts of Salt Lake county.

Election, qualifications, term, duties, compensation, Con. art. 7.
Fees of secretary of state, § 2511.
To record bonds of state officers, § 4267.
Duties relating to peddlers' licenses, §§ 4393-4403.
To record contracts for conditional sale of railroad equipment, § 1261.
May appoint deputy, § 5790.
Collect corporation license tax, § 1270-1276.
Duties relating to motor vehicle licenses, §§ 3960-3971.

5696. (2410.) Distribution of laws and journals. Immediately after the laws, resolutions, and journals mentioned in sub. 9 of the preceding section are bound, the secretary of state must distribute them as follows:

1. To each department of the government at Washington and of the government of this state, one copy;

2. To the library of congress and the state law library, two copies each;

3. To each of the states and territories, one copy;

4. To the United States district judge for this state, to each of the judges of the supreme and district courts, and to each of the state officers of this state, one copy;

5. To each member of the legislature and to the secretary of the senate and the chief clerk of the house of representatives at the session at which such laws were adopted, one copy;

6. To the incorporated colleges of the state and to the University of Utah, each one copy;

7. To the county clerk of each county, five copies of such laws for the use of the county;

8. To each county attorney and to each clerk of the district court, one copy of such laws;

9. To each free public library in the state, one copy, to be furnished on the application of the librarian.

5697. (2411.) Must indeliby mark state books. The secretary of state must indelibly mark each book distributed to officers in this state, except legislative members and officers, with the name of the county to which and the official designation of the officer to whom it is sent. Such marked books remain the property of the state, and must be, by the officers receiving them, delivered to their successors.

5698. (2412.) Has charge of capitol. The secretary of state is the superintendent and has charge of the state capitol, or rooms or buildings hired for that purpose, and he must keep the same and property therein in good order and repair, under the direction of the board of examiners.

5699. (2413.) To keep and issue supplies. It is the duty of the secretary of state to receive and keep all supplies and articles purchased by the board of examiners as a board of supplies, and to issue to any state officer or

board, on the requisition of the board of examiners, any stationery, book, or other supplies, and take a receipt therefor, and file said requisition and receipt in his office. He must keep a book called "book of supplies," and enter therein a complete list of all stationery, books, articles, or other supplies furnished him under contract made by such board, making a separate list of each class of articles and all purchases made by the board, the amount and cost of each article furnished each state officer or board and each member of the legislature. He must embody in his report to the legislature a statement taken from such book, showing the amount of supplies purchased and disposed of.

5700. (2414.) Public documents, how printed. The public documents of the state of Utah shall be published under the direction of the secretary of state, with the view to such uniformity of size, quality of paper, type, and other particulars as will permit them to be formed in continuous numbers in consecutive volumes.

5701. (2415.) Id. The secretary of state shall divide public documents to be published into several series, according to their several subjects, as nearly as may be, and no moneys shall be paid out of the treasury, except on compliance herewith, for any printing or publishing aforesaid.

5702. (2416.) Id. The provisions of the two sections next preceding shall not apply to the decisions of the supreme court, nor to bills printed for the legislature or other printing for its use during its session, not appropriate to be put in pamphlet form.

5703. (2416x.) Blank forms. Index of county officers. The secretary of state shall, and it is hereby made his duty so to do, prepare the necessary blank forms for the purposes mentioned in §§ 1539, 1540, and forward a supply thereof to each county clerk. The secretary of state shall receive and file in his office all certificates received by him pursuant to said sections, and shall keep as one of the records of his office, a suitably bound and indexed book, in which he shall enter in appropriate columns from the information contained in such certified statement received from the several county clerks, the name of the county, the elective officers of each county, excepting justices of the peace and constables, the name of the person holding each office, the date of the officer's election or appointment, the date of the expiration of the term of such officer, and such other information as said certified statements disclose. '07, p. 205.

5704. (2416x1.) Transcript of state lands filed with county recorder. It shall be the duty of the secretary of state, on or before October 1st, to prepare and transmit to the county recorder of each county a certified transcript of all lands within said county selected for the state of Utah under the provisions of an act of congress, approved July 16, 1894, as shown by the lists approved prior to January 1, 1907, by the commissioner of the United States general land office, and which said lists are now on file in the office of the secretary of state. '07, p. 265.

5705. (2416x2.) Id. On January 1, 1908, and on the 1st days of July and January thereafter, it shall be the duty of the secretary of state to transmit to the county recorder of each county a certified transcript of all lands within said county selected for the state of Utah under the provisions of an act of congress, approved July 16, 1894, as shown by the lists approved during the preceding six months by the commissioner of the United States general land office, and then on file in the said office of the secretary of state.
'07, p. 266.

5706. (2416x3.) List of notaries to be filed with clerks of district courts. The secretary of state shall, on or before the 1st day of May, 1903, furnish to the clerk of the district court of each county of the state of Utah a certified list of all notaries public holding unexpired commissions in the county of said clerk of the district court, and giving the date of the expiration of each of said commissions. '03, p. 120.

5707. (2416x4.) Id. It shall be the duty of the said secretary of state, whenever he shall hereafter issue a notarial commission to any person in any county of this state, to certify such fact to the clerk of the district court of the county for which said commission is issued, giving also the dates of issuance and expiration of the same. '03, p. 120.

Clerk to keep record, § 1537.

5708. (2417.) Board of examiners to audit expenses, when. The expenses incurred by the secretary of state in carrying into effect the provisions of §§ 5695-5699 must be audited by the board of examiners and paid out of any moneys specially appropriated for that purpose.

5709. (2418.) Great seal. The secretary of state is alone authorized to use or affix the great seal of this state to any document whatever, and he only in pursuance of law; and the said secretary is hereby made responsible for its safe keeping.

Use for trading or advertising purposes prohibited, § 5800. Governor may permit use, when, § 5801.

5710. (2419.) Id. Description. The great seal of the state of Utah shall be two and one-half inches in diameter, and of the following device: The center a shield and perched thereon an American eagle with outstrecthing wings; the top of the shield pierced by six arrows crosswise; under the arrows the motto "Industry"; beneath the motto a bee-hive, on either side growing sego lilies; below the bee-hive the figures "1847"; and on each side of the shield an American flag; encircling all, near the outer edge of the seal, beginning at the lower left-hand portion, the words "The Great Seal of the State of Utah," with the figures "1896" at the base.

5711. (2420.) Id. Illegal use. Any person who shall illegally use the great seal of this state, or such seal when defaced, shall be guilty of a felony.

5712. (2420x.) Bond. The secretary of state shall execute a bond in the sum of $25,000. '05, p. 13.

CHAPTER 3.

AUDITOR.

5715. (2421.) Duties. It is the duty of the state auditor:

1. To superintend the fiscal concerns of the state;

2. To report to the governor on the 1st of January next preceding each regular session of the legislature, a statement of the funds of the state, its revenues, of the public expenditures during the two preceding fiscal years, together with a detailed estimate of the expenditures to be defrayed from the treasury for the two ensuing fiscal years, specifying therein each object of expenditure and distinguishing between such as are provided for by permanent or temporary appropriation, and such as must be provided for by a new statute, and suggesting the means from which such expenditures are to be defrayed; and to make a semi-annual report to the governor of the condition of the state treasury;

3. To accompany his biennial reports with tabular statements, showing the amount of each appropriation for the two preceding fiscal years, the amount expended, and the balance, if any; also showing the amount of revenue chargeable to each county for such years, the amount paid, and the amount unpaid or due therefrom;

4. When requested, to give information in writing to either house of the legislature relating to the fiscal affairs of the state, or to the duties of his office;

5. To suggest plans for the improvement and management of the public revenues;

6. To keep and state all accounts in which the state is interested;

7. To keep an account of all warrants drawn upon the treasurer, and a

separate account under the head of each specific appropriation, showing at all times the unexpended balance of such appropriation;

8. To keep an account between the state and the state treasurer, and therein charge the state treasurer with the balance in the treasury when he came into office, and with all moneys received by him, and credit him with all warrants drawn on and paid by him;

9. To keep a register of warrants showing the fund upon which they are drawn, the number, in whose favor, and the appropriation applicable to the payment thereof;

10. To audit all claims against the state in cases where there are sufficient provisions of law for the payment thereof;

11. To require, in his discretion, any person presenting an account for settlement, to be sworn before him, and to answer orally or in writing, as to any facts relating to it;

12. To require all persons who have received any moneys belonging to the state and have not accounted therefor, to settle their accounts;

13. To inspect at least once a year the books of any persons charged with the receipt, safekeeping, or disbursement of public moneys;

14. To require, in his discretion, all persons who have received moneys or securities, or have had the disposition or management of any property of the state of which an account is kept in his office, to render statements thereof to him; and all such persons must render such statements at such times and in such form as he may require;

15. To direct and superintend the collection of all moneys due the state, and institute suits in its name for all official delinquencies in relation to the assessment, collection, and payment of the revenue, and against persons who by any means have become possessed of public money or property and have failed to pay over or deliver the same, and against all debtors of the state; of which suits the courts of the county in which the seat of government may be located have jurisdiction, without regard to the residence of the defendants;

16. To draw warrants on the state treasurer for the payment of moneys directed by law to be paid out of the treasury; but no warrant must be drawn unless authorized by law. Every warrant must be drawn upon the fund out of which it is payable and specify the appropriation applicable to the payment thereof;

17. In cases where it is inconvenient for parties in whose favor state warrants are drawn to call at the office of state auditor and receipt for same, the auditor is hereby authorized, when the postoffice address of such payee can be conveniently ascertained, to forward by mail, any warrant issued to such party, and in all such cases the indorsement of the payee on the back of warrant shall constitute the auditor's receipt, and no further receipt shall be necessary.

18. To procure and have printed all state licenses, and to sign the same, and furnish the state treasurer with licenses and charge him with the same;

19. To authenticate with his official seal all drafts and warrants drawn by him and all copies of papers issued from his office;

20. To collect and pay into the state treasury all fees received by him;

21. To perform the duties of a member of all boards of which he is or may be made a member by the constitution or laws of the state, and such other duties as are prescribed by the constitution and by law.

Am'd '99, p. 108; '05, p. 10; '13, p. 150.

Salary $3,000 per annum, § 5070.

May appoint deputies, § 5790.

Election, qualifications, term, duties, Con. art. 7.

Not to draw warrants unless claim approved by board of examiners, exceptions, § 2482.

Fees of state auditor, § 2512.

Verified report of fees and money collected by state industrial school, state school for deaf and blind, state mental hospital, § 5213; agricultural college, § 5252; university, § 5539, filed with.

Barber's board, bond to be filed, § 365.

It is the duty of the state auditor to examine the accounts of state and county officers, and to satisfy himself that lawful fees are collected, reported, and paid. If fees are not paid as provided in this chapter, it is the duty of the auditor to institute proper proceedings for collection.

State, ex rel. Richards v. Stanton, 14 U. 180; 46 P. 1109.

Sub. 15 authorizes the state auditor to institute mandamus against county assessor and

county commissioner to correct erroneous assessment. Ririe, State Auditor, v. Randolph, 50 U. —; 169 P. 941.

5716. (2421x.) Warrant, only when authorized. It shall be unlawful for the state auditor to audit or draw a state warrant in payment of any claim against the state for any money, unless an appropriation has been previously made for such purposes or unless authorized by law. '07, p. 185.

5717. (2423.) School funds. The state auditor must keep a separate account of the school fund, and of the interest and income thereof, together with such moneys as may be raised by special tax or otherwise for school purposes; and he must, on the 31st day of March, and of December of each year, report to the superintendent of public instruction, a statement of the securities belonging to the school fund, of the moneys in the treasury subject to apportionment, and the several sources from which they accrue. He must draw his warrant on the state treasurer in favor of the treasurer of any county or of any board of education, whenever such treasurer presents, with his endorsement, an order drawn by the superintendent of public instruction in favor of such county. Am'd '99, p. 110.

School moneys to be paid over on warrant of state auditor, § 5464.

5718. (2424.) Warrants, order in which issued. All warrants for claims which have been audited by the board of examiners and filed in his office must be drawn in the order of the numbers placed upon them by that board.

5719. (2425.) Actions for delinquent payments. Whenever any person has received moneys, or has money or other personal property which belongs to the state by escheat or otherwise, or has been intrusted with the collection, management, or disbursement of any moneys, bonds, or interest accruing therefrom, belonging to or held in trust by the state, and fails to render an account thereof to and make settlement with the state auditor within the time prescribed by law, or, when no particular time is specified, fails to render such account and make settlement, or who fails to pay into the state treasury any moneys belonging to the state, upon being required so to do by the state auditor, within twenty days after such requisition, the state auditor must state an account with such person, charging twenty-five per cent damages, and interest at the rate of ten per cent per annum from the time of failure; a copy of which account in any suit thereon shall be prima facie evidence of the things therein stated; but in case the state auditor cannot, for want of information, state an account, he may in any action brought by him aver the fact, and allege generally the amount of money or other property which is due to or which belongs to the state.

The failure of the county clerk to pay fees collected by him as provided by law after an account has been stated with him and demand made entitled the state to charge said clerk twenty-five per cent damages and interest at the rate of ten per cent; nor is payment to the county treasurer a sufficient release. State, ex rel. Richards v. Stanton, 14 U. 180; 46 P. 1109.

5720. (2426.) Access to all state books. The state auditor shall have access to all state offices during business hours for the inspection of such books, papers, and accounts thereof as may concern his duties.

5721. (2427.) Bond. The state auditor must execute an official bond in the sum of $50,000.

Public school fund, Con. art. 10, sec. 3. Annual levy of state school tax, § 5998.

CHAPTER 4.

TREASURER.

5724. (2428.) Duties. It is the duty of the state treasurer:

1. To receive and keep all moneys belonging to the state and not required to be received and kept by some other person;

2. To file and keep the certificates of the state auditor delivered to him when moneys are paid into the treasury;

3. To deliver to each person paying money into the treasury and to the

state auditor a duplicate receipt showing the amount, the sources from which the money accrued, and the fund into which it is paid, which receipts must be numbered in order, beginning with number one at the commencement of each fiscal year; *provided*, where moneys are received from a county treasurer the state treasurer shall issue a receipt therefor in triplicate, one for the county treasurer, one for the county auditor, and the other for the state auditor;

4. To pay warrants drawn by the state auditor out of the funds upon and in the order in which they are presented;

5. Upon payment of any warrant, to take, upon the back thereof, the receipt of the person to whom it is paid, to cancel it with a proper stamp, and to file said warrant with the state auditor on the last day of each month, and take his receipt therefor;

6. To keep an account of all moneys received and disbursed;

7. To keep separate accounts of the different funds;

8. To report to the state auditor on the last day of each month the amount disbursed for the redemption of bonds and in payments of warrants during the month, which reports must show the date and number of such bonds and warrants, the funds out of which they are paid, and the balance of cash on hand in the treasury to the credit of each fund;

9. On the 1st day of January preceding the biennial session of the legislature, to report to the governor the exact balance in the treasury to the credit of the state, with a summary of the receipts and payments of the treasury during the two preceding fiscal years; and to make a semi-annual report to the governor of all moneys received from all sources, and of all moneys disbursed;

10. At the request of either house of the legislature, or of any committee thereof, to give information in writing as to the condition of the treasury, or upon any subject relating to the duties of his office;

11. To authenticate with his official seal all writing and papers issued from his office;

12. To disharge the duties of a member of all official boards of which he is or may be made a member by the constitution or by the laws of the state.

Am'd' 99, p. 100; '07, p. 64.

Election, qualifications, term, duties, compensation, Con. art. 7.
Salary $2,500 per annum, § 5070.
May appoint a deputy; powers, § 5790.
Custodian of bonds of state officers, § 4267.
State industrial school, state school for deaf and blind, state mental hospital, § 5213; agricultural college, § 5252; university, § 5539; state prison, § 5456, filed with.
Barbers' board to pay fees and moneys to state treasurer, § 365.
Corporation license tax turned over to, § 1276.

5726. (2429.) "General fund" defined. The general fund consists of moneys received into the treasury and not specially appropriated to any other fund.

5727. (2430.) Payment or indorsement of warrants. It is the duty of the state treasurer to keep a book in which he must enter all warrants presented for payment, giving the names of the owners, and the number and amounts of the warrants, and the date of presentment. All warrants so presented shall be paid, or the money held in reserve therefor, by the said treasurer, in the order of their presentation and registry, and not otherwise. Whenever any such warrant is presented and there is no money in the treasury applicable thereto, the treasurer shall indorse on the warrant, "not paid for want of funds," with the date, noting the time of such presentation for payment in the book kept for that purpose.

5728. (2431.) To post list of warrants redeemable. The state treasurer must quarterly post upon the door of his office a list of all warrants that he may have funds in the treasury to redeem or pay, the payment of which has not been demanded during the last quarter.

5729. (2432.) Inspection of treasurer's books. The treasurer must keep his books open at all times for the inspection of the governor, state auditor, state board of examiners, bank examiner, members of the legislature, and any committee appointed to examine them by either house thereof.

5730. (2433.) Has access to state books. The state treasurer shall have full access to all offices of the state for inspection of such books, papers, and accounts thereof as concern his duties.

5731. (2434.) Accounts. Annual statement; publication of same. The state treasurer must keep a separate account of each fund in his hands, and must at the end of each fiscal year report to the governor, in writing, under oath, the amount of all moneys in his hands to the credit of every such fund, and the amount received and paid out of every such fund during the year. The governor must verify said report and cause the same to be immediately published, in at least one newspaper published at the seat of government.

Am'd '03, p. 57.

5732. (2435.) Bond. The state treasurer must execute an official bond in the sum of $350,000.

5733. (2436.) Temporary suspension. If the state board of examiners, upon examination, finds that the books of the state treasurer do not correspond with the amount of funds on hand, or do not show the actual condition of the funds, or if it appear to said board that any moneys belonging to the state have been embezzled, diverted, or in any manner taken from the treasury without authority of law, or that the state treasurer has been gulity of negligence in keeping his books, or in taking care of the public moneys, the board must certify the fact to the governor, who, upon receipt of such certificate, must forthwith take possession of all books, moneys, papers, and other property belonging to the state which have come into the possession of such state treasurer by virtue of his office or otherwise, and must temporarily suspend him from his office as state treasurer.

Board of examiners to publish amount of money in state treasury biennially, § 2485.

5734. (2437.) Id. Expert examination. Temporary treasurer. The state board of examiners must thereupon procure the services of an expert to examine the books, papers, and all matters connected with the office of the state treasurer so suspended, and if it appears to said board on such examination that such state treasurer has embezzled or converted to his own use the public moneys, or has been negligent in keeping his books, or in taking care of the public moneys, the governor, on the certificate of said board of that fact, must appoint another person to fill the place of such suspended state treasurer, and such person so appointed must execute an official bond, and enter upon the office of state treasurer, as provided by law. The governor must report all his acts done under this and the next preceding section to the next succeeding legislature, and the state treasurer so appointed holds his office until the suspended state treasurer is restored or until his successor is elected and qualified.

CHAPTER 5.

ATTORNEY-GENERAL.

5736. (2438.) Duties. It is the duty of the attorney-general:

1. To attend the supreme court and all courts of the United States, and prosecute or defend all causes to which the state or any officer thereof in his official capacity is a party;

2. After judgment on any of the causes referred to in the preceding subdivision, to direct the issuing of such process as may be necessary to carry the same into execution;

3. To account for and to pay over to the proper officer all moneys which may come into his possession belonging to the state;

4. To keep a register of all cases in which he is required to appear, which must show the court in which the cases have been instituted and tried, and whether they are civil or criminal; if civil, the nature of the demand, the stage

of proceedings, and, when prosecuted to judgment, a memorandum of the judgment, of any process issued thereon, and whether satisfied or not, and if not satisfied, the return of the sheriff; and if criminal, the nature of the crime, the mode of prosecution, the stage of proceedings, and, when prosecuted to sentence, a memorandum of the sentence and of the execution thereof if the same has been executed, and if not executed, of the reason of the delay or prevention; and must deliver the same to his successor in office;

5. To exercise supervisory powers over the county attorneys of the state in all matters pertaining to the duties of their offices, and from time to time require of them reports as to the condition of public business intrusted to their charge;

6. To give his opinion in writing and without fee to the legislature or either house thereof and to any state officer, board, or commission, when required, upon any question of law relating to their respective offices;

7. When required by the public service or directed by the governor, to assist the county attorney of any county in the discharge of his duties;

8. To purchase in the name of the state, under the direction of the state board of examiners, any property offered for sale under execution issued upon judgments in favor of or for the use of the state, and to enter satisfaction, in whole or in part, of such judgments as the consideration of such purchases;

9. Whenever the property of a judgment debtor in any judgment mentioned in the preceding subdivision has been sold under a prior judgment, or is subject to any judgment, lien, or incumbrance taking precedence of the judgment in favor of the state, under the direction of the state board of examiners to redeem such property from such prior judgment, lien, or incumbrance, and all sums of money necessary for such redemption must, upon the order of the state board of examiners, be paid out of any money appropriated for such purposes;

10. When in his opinion it is necessary for the collection or enforcement of any judgment hereinbefore mentioned, to institute and prosecute in behalf of the state such actions or proceedings as are necessary to set aside and annul all conveyances fraudulently made by such judgment debtors, and the cost necessary to the prosecution must, when allowed by the state board of examiners, be paid out of any money not otherwise appropriated;

11. To discharge the duties of a member of all official boards of which he is or hereafter may be made a member by the constitution or by the laws of the state, and such other duties as may be prescribed by law;

12. To report to the governor, on the 1st day of January preceding the regular biennial session of the legislature, the condition of the affairs of his department, stating the number, character, condition, and result of the actions prosecuted or defended by him on behalf of the state, and the amount of fines and penalties collected. He shall include in his report copies of the reports of county attorneys, and shall also direct attention to any defect in the practical operation of the laws relating to revenue and criminal offenses, and suggest such amendments as in his judgment are necessary to subserve the public interests;

13. To institute and prosecute proper proceedings in any court of the state or of the United States to restrain and enjoin corporations organized under the laws of this or any other state or territory from acting illegally or in excess of their corporate powers and contrary to public policy, and, in proper cases, to forfeit their corporate franchises, dissolve such corporations, and wind up their affairs.

Election, qualifications, term, duties, Con. art. 7.
Salary $4,000 per annum, § 5070.
May appoint a deputy; powers, etc., § 5790.
Direct district attorney, § 5764.

5737. (2439.) Bond. The attorney-general must execute to the state an official bond in the sum of $5000.

5738. (2440.) Actions to recover escheat property. It is the duty of the attorney-general to institute investigations for the recovery of all real or personal property which may have escheated or should escheat to the state,

and for that purpose he has the power to cite any and all persons before any of the district courts of this state to answer inquiries and render accounts concerning the said property, real or personal, and to examine all books and papers of any and all corporations. When any real or personal property is discovered which should escheat to the state, the attorney-general must institute suit in the district court of the county where said property shall be situated for the recovery, to escheat the same to the state.

CHAPTER 6.

STATE BACTERIOLOGIST AND PATHOLOGIST.

('09, p. 182.)

5744. Position created. The position of state bacteriologist and pathologist is hereby created.

5745. Office holder designated. Deputy. The professor of bacteriology and pathology of the University of Utah, in addition to his duties in connection with that institution, is hereby designated as and declared to be state bacteriologist and pathologist. The state bacteriologist and pathologist may have at least one deputy or assistant for whose actions the state bacteriologist shall be responsible.

5746. Laboratory. The bacteriological and pathological laboratory at the University of Utah, in addition to being a department of that institution, is hereby designated and declared to be a state public health laboratory, which laboratory shall be under the control and regulation of the state University of Utah, through the state bacteriologist and pathologist, who shall be director of the said public health laboratory.

5747. Duties. It shall be the duty of the state bacteriologist and pathologist to make all necessary investigations pertaining to public health within his department, and to examine and analyze all substances submitted to him by the state board of health, its members or officials, and to make such report thereon as the said board may direct. County and municipal boards of health or individuals desiring the services, co-operation, or assistance of the state bacteriologist and pathologist are hereby directed to make application to the secretary of the state board of health for such services, co-operation, or assistance.

CHAPTER 7.

STATE CHEMIST.

5751. (2445x.) Office created. The office of state chemist is hereby created. Such chemist shall be appointed by the governor, by and with the consent of the senate, and his term of office shall be for four years from the date of his appointment; and vacancies occurring in the office from any cause shall be filled by appointment for the balance of the unexpired term.

'03, p. 84; am'd '11, p. 64.

Member state dairy and food bureau, § 1917.

5752. (2445x1.) Salary. The salary of the state chemist shall be $2000 per annum, which shall be paid in the same manner as the salaries of other state officers, together with his necessary and actual expenses incurred in the discharge of his official duty. '03, p. 84; am'd '11, p. 65.

5753. (2445x2.) Duties of state chemist. It shall be the duty of the chemist to analyze all articles of food and drink manufactured, sold, and used within this state, when submitted to him by the state dairy and food com-

missioner, or the state board of health, and to make a biennial report to the dairy and food commissioner and the state board of health, which report shall contain a record of all analyses made by him, and such other information as he may consider of value and interest. '03, p. 85; '05, p. 90.

Powers and duties of state chemist under pure food law, §§ 1922-1932, 1951.
Fix standard for vinegar, etc., § 3349.
Certificate prima facie evidence, § 1960.
Duty for live stock board, § 226.

CHAPTER 8.

DISTRICT ATTORNEY.

5757. (2445x3.) Office of district attorney created. There is hereby created within the state of Utah the office of district attorney, whose election, qualifications, duties, and term of office shall be as is hereinafter provided. '99, p. 77.

Salaries of district attorneys, § 5074.

5758. (2445x4.) Election, term of office. At the general election to be held in 1900, and quadrennially thereafter, there shall be elected in each of the several judicial districts of this state an officer to be known as district attorney, whose term of office shall be for four years, beginning on the first Monday of January succeeding his election. The said officer shall be elected by the qualified electors of the respective judicial districts of this state and under the laws and regulations governing the election of the district judges. '99, p. 77.

5759. (2445x5.) Qualifications. No person shall be eligible to the office of district attorney who, at the time of his election, is not a qualified elector and a bona fide resident of the judicial district for which he may be elected; nor shall any person be eligible to said office who has not been admitted to practice in the supreme court of this state. '99, p. 77.

5760. (2445x6.) Oath and bond. Upon entering upon the duties of his office, each district attorney shall take the constitutional oath and shall give a bond in the penal sum of $5,000 for the faithful performance of the duties of his office, to be approved by the judge of the district. '99, p. 78.

5761. (2445x7.) Duties of. It shall be the duty of the district attorney to appear and prosecute for the state in the district court of his district, and in all criminal prosecutions, and in all civil cases in which the state may be interested, and render such assistance as may be required by the attorney general in all such cases that may be appealed to the supreme court; he shall attend the deliberations of the grand jury; he shall draw all indictments and informations for offenses against the laws of this state within his district, and shall cause all persons indicted or informed against to be speedily arraigned; he shall cause all witnesses for the state to be subpœnaed to appear before the court or grand jury; he shall examine carefully into the sufficiency of all appearance bonds that may be tendered to the district court of his district, and, upon the order of the court, shall institute proceedings in the name of the state for recovery upon the forfeiture of any appearance or other bonds running to the state, and enforce the collection thereof. '99, p. 78.

Appoint assistant, § 5773.
Duties as to dairy and food law, § 1955; liquor prohibition act, §§ 3360, 3374; industrial commission act, §§ 3085, 3148, 3157; public utility act, § 4839.
As far as this chapter attempted to change existing laws relating to the duties of county attorneys without amending or repealing as provided by the constitution, it was held inoperative.
State v. Beddo, 22 U. 432; 63 P. 96.
State v. Morrey, 23 U. 273; 64 P. 764.
The doctrine of the two foregoing cases was materially modified in
Mill v. Brown, 31 U. 473; 88 P. 609.
Marioneaux v. Cutler, 32 U. 475; 91 P. 355.
While the district attorney is authorized to incur necessary expenses in the prosecution of criminal cases and to make them county charges, he may not bind the county beyond what is reasonably necessary, or for service rendered beyond the reasonable value thereof.
Kytka v. Weber Co., 48 U. 421; 160 P. 111.

5762. (2445x8.) May prosecute before justice of the peace, when. Other powers and duties. The district attorney shall, when not conflicting with other official duties, attend to all legal business required of him in his district

by the attorney-general, without charge, when the interests of the state are involved. Any district attorney may, whenever he deems it necessary, appear and prosecute before any justice of the peace within his district in the preliminary examination of any person charged with a felony. All the duties and powers as public prosecutor now devolving upon county attorneys shall be assumed and discharged by the district attorney, except in cases of prosecutions for misdemeanors and preliminary examinations before justices of the peace; *provided,* that the district attorney may, whenever he deems it necessary, appear and prosecute for misdemeanors and in preliminary examinations before justices of the peace. Am'd '99, p. 78; '15, p. 41.

5763. (2445x9.) Id. It shall be the duty of the district attorney to appear and prosecute for the state in the district court of his district, in all criminal prosecutions, and in all civil cases in which the state may be interested, and to assist in any civil case in which any county of his district may be interested, when required to do so by the county commissioners, and render such assistance as may be required by the attorney general in all such cases that may be appealed to the supreme court; he shall attend the deliberations of the grand jury; he shall draw all indictments and informations for offenses against the laws of this state within his district, and shall cause all persons indicted or informed against to be speedily arraigned; he shall cause all witnesses for the state to be subpœnaed to appear before the court or grand jury; he shall examine carefully into the sufficiency of all appearance bonds that may be tendered to the district court of his district, and, upon the order of the court, shall institute proceedings in the name of the state for recovery upon the forfeiture of any appearance or other bonds running to the state, and enforce the collection thereof. '01, p. 70; '03, p. 64.

Information under this section, as amended in 1901, held valid.
State v. Reynolds, 24 U. 29; 66 P. 614.

The court has authority to direct the district attorney to institute an action on a forfeited bail bond.
State v. Davis, 27 U. 368; 75 P. 857.

A contention, in an action on a bail bond given by one charged with abortion, that no such crime was known to the law of the state, was without merit.
Id.

5764. (2445x10.) Id. The district attorney shall, when not conflicting with other official duties, attend to all legal business required of him in his district by the attorney general, without charge, when the interests of the state are involved. Any district attorney may, whenever he deems it necessary, appear and prosecute before any justice of the peace within his district in the preliminary examination of any person charged with felony. '01, p. 71.

5765. (2445x11.) May employ clerk. Each district attorney in judicial districts having a population of 75,000 inhabitants or more shall have power to employ a clerk, at a salary of $900 per annum, whose compensation shall be paid quarterly by the state, out of the state treasury. '01, p. 71.

5766. (2445x12.) Statement at close of term. He shall at the close of every term make out a statement of all fines, penalties, and forfeitures accruing to the state, adjudged and made final at such term, and also of all fines, penalties, and forfeitures accruing to the state that have been collected or received by any officer required to collect or receive the same, stating each case and the amount, and shall transmit such list to the state auditor, and shall proceed against such officer and his sureties for any neglect of duty of which he may be guilty. '99, p. 78.

5767. (2445x13.) Escheated property. Report to attorney general. It shall be the duty of each district attorney to ascertain, by all practicable means, what estate or property, within his district, has escheated or reverted to the state, and he shall require the assessor of taxes of each county within his district to furnish him, annually, a list of all real or personal property that may have so escheated or reverted, and the district attorney shall file a copy of such list in the office of the state auditor and of the attorney-general. He shall also, on the 1st day of December of each year, file a report with the attorney general, stating the number of criminal prosecutions in his district, the character of offenses charged, the number of convictions, the amount of fines

and penalties imposed, and the amount collected. He shall call attention to any defect in the particular operation of the law, and suggest such amendments as in his judgment are necessary to perfect the same. '99, p. 78.

5768. (2445x14.) County attorney to report to district attorney. It shall be the duty of the county attorney of any county within his district, immediately upon the termination of any examination before any justice of the peace of any person charged with felony, where such person has been ordered held to answer in the district court, to forward to the district attorney a transcript of the docket in such case, including a copy of the original complaint and of the commitment, a list of the necessary witnesses of the state, with their postoffice addresses, and such a statement of the facts as will enable the district attorney to determine for what specific offense an information should be filed before the district court. '99, p. 79.

5769. (2445x15.) Must not counsel defendant nor compromise suits. No district attorney shall in any manner consult, advise, counsel, or defend, within this state, any person charged with any crime, misdemeanor, breach of any penal statute or ordinance, nor shall he be qualified to prosecute or dismiss in the name of the state any case in which he has previously acted as counsel for the accused on the pending charge; nor shall he in any case compromise any cause or enter a nolle prosequi either before or after the filing of an indictment or information, without the consent of the court. '99, p. 79.

5770. (2445x16.) Acting district attorney. If at the convening of any term of the district court or the impaneling of any grand jury in his district, the district attorney shall be absent or unable to perform his duties, from sickness or otherwise, or in any case in which he shall be disqualified, he shall, if the time permit, request some other district attorney of the state to appear and serve during his absence or disqualification, and in case no other district attorney can serve, the court shall forthwith appoint some attorney to act for the state in the place of the district attorney, during the absence, inability, or disqualification of said district attorney; and the person appointed shall have full power to discharge all the duties of said office during the absence, inability, or disqualification of the district attorney, and shall receive a reasonable compensation for his services, to be allowed by the court and certified to the state auditor, who, upon its allowance by the state board of examiners, shall issue his warrant therefor. Such allowance shall be deducted from the salary of the district attorney. '99, p. 79.

5771. (2445x17.) Office forfeited. In case any district attorney shall fail or refuse to perform the duties of his office for a period of thirty consecutive days without reasonable excuse, or in case he shall be absent from the state or the district for ninety days, he shall be deemed to have forfeited his office, except that such absence may be extended as provided by the constitution of this state in the case of judicial officers. And in case any vacancy occur in the office of district attorney by death, resignation, absence, failure, or refusal to perform his duties or otherwise, the said office shall be filled in the manner prescribed for the filling of vacancies in state and judicial offices, and the appointee shall hold his office for the same time as provided in the case of appointees to state and judicial offices. '99, p. 79.

5772. (2445x18.) State officers. How paid. District attorneys shall be deemed to be state officers, and their salaries and such expenses as are provided herein shall be paid by the state in the manner prescribed for the payment of judges of the district court, and they shall receive the same mileage as is provided for such judges, and their salaries shall be as hereinafter provided, which they shall take in lieu of all other compensation; and from and after the approval of this chapter the state shall not be liable for any portion of the salaries of county attorneys in the fourth, fifth, sixth, and seventh judicial districts, nor for any portion of the salaries of county attorneys in the first, second, and third judicial districts after the 1st day of January, A. D. 1901.

Salaries of district attorney, § 5074. Mileage of district attorneys, § 5075.

ASSISTANT TO DISTRICT ATTORNEY.

('09, p. 23.)

5773. May appoint deputy. Each district attorney in judicial districts having a population of 90,000 or more inhabitants, such population to be determined by the last preceding United States census, shall have power to appoint a deputy at a salary of $1800 per annum, which shall be paid quarterly out of the state treasury.

5774. Qualifications. Bond. Said deputy shall be an attorney at law in good standing, admitted to practice by the supreme court of the state of Utah, and shall, during the absence or disability of the district attorney, perform all the duties pertaining to the office. The district attorney shall be answerable for neglect or misconduct in office of such deputy and may require from him a bond for his own security. The appointment of such deputy shall be in writing, filed with the secretary of state, and may be revoked at the pleasure of the district attorney.

CHAPTER 9.

STATE GEOLOGIST.

('17, p. 244.)

5778. Office created. Term. Salary. The governor is hereby authorized to appoint, by and with the consent of the senate, a state geologist, who shall be an experienced and reputable geologist and mining engineer. He shall hold his office subject to the pleasure of the governor, and may be removed by the latter at any time. He shall receive a salary to be determined by the governor, not to exceed $5000 per annum, and for any term of service less than a year shall receive such portion of the designated yearly salary as his time of actual service bears to such period.

5779. Examine, classify, and appraise lands. For the purpose of aiding state and county officers, departments, boards, or bureaus of the state or counties, the state geologist shall, when directed by the governor, visit, examine, classify, and appraise the following lands:

1. Any lands owned by the state or in which the state has an interest;
2. Any lands containing coal or hydrocarbons, and any lands chiefly valuable for their porphyritic copper deposits.

5780. Right of inspection. The state geologist shall have the right, at all reasonable times, to enter and examine any and all mine workings, and to go upon any property which he may be called upon to appraise under the provisions of this chapter.

5781. Records. Information. He shall keep an accurate record of his investigations and findings, and shall furnish such information to the governor and to such other public officers as the governor may direct. He shall have access to all books and records of individuals, associations, or corporations having any interest in lands which he is charged with the duty of appraising, when such books or records may assist him in ascertaining the value of such lands.

5782. Duties. When requested so to do by the governor, the state geologist shall attend in person sessions of county or state boards of equalization for the purpose of advising the members of such boards in relation to the value of property subject to ascertainment by such boards for taxation purposes; he shall freely accord to county assessors access to the records of his office for the purpose of assisting such assessors in determining the value of property which they are required to assess.

5783. Assistants. The state geologist is hereby authorized to appoint such necessary assistants and field help as will enable him to properly dis-

charge the duties of his office, and is authorized to appoint such necessary deputies as may be approved by the governor.

5784. Wilful interference a misdemeanor. Any wilful interference on the part of any person or corporation, obstructing the state geologist in the performance of his duties, shall be deemed a misdemeanor.

5785. Appropriation. The sum of $15,000, or so much thereof as may be necessary, is hereby appropriated to be paid out of the general fund for the purpose of carrying out the provisions of this chapter, and the state auditor is hereby authorized to draw warrants covering approved claims hereunder.

CHAPTER 10.

DEPUTY STATE OFFICERS.

5790. (2460.) Appointment. Duties. Responsibility of principal. The secretary of state, state auditor, state treasurer, attorney general, and superintendent of public instruction may each appoint a deputy, who may, during the absence or disability of the principal, perform all the duties pertaining to the office, except those required of the principal as a member of any board. The principal shall be answerable for neglect or misconduct, in office, of his deputy, and may require from him a bond for his own security. The appointment of a deputy shall be in writing, and shall be revocable at the pleasure of the principal; and all such appointments and revocations shall be filed with the secretary of state.

Reference to an officer may include deputy, etc., § 5848.

CHAPTER 11.

STATE FISCAL YEAR.

5794. (2460x.) Fiscal year. The fiscal year of the state of Utah shall commence on the 1st day of December of each year. '05, p. 28.

Similar section, § 5992.

Fiscal year to begin Jan. 1st, unless changed by legislature, Con. art. 13, sec. 1.

5795. (2460x1.) Accounts closed end of fiscal year. All officers who are required by law to report annually or biennially to the legislature or governor shall close their accounts on said date, and as soon thereafter as practicable shall prepare and compile their respective reports. '05, p. 28.

5796. (2460x2.) Biennial reports transmitted to secretary of state. All reports intended for the use of the legislature shall be transmitted by the respective officers to the secretary of state on or before the 15th day of December before the assembling of the legislature; and the secretary of state shall cause the same to be printed, in accordance with the laws regulating the public printing, before the assembling of the legislature. '05, p. 28.

5797. (2460x3.) Printed reports transmitted to legislature. Upon the organization of the legislature, the secretary of state shall transmit to the senate and house of representatives copies of each printed report for the use of the members of the legislature. '05, p. 28.

CHAPTER 12.

RESTRICTING USE OF FAC-SIMILE, PHOTOGRAPH, IMPRESSION, OR IMITATION OF THE GREAT SEAL OF THE STATE.

('11 p. 25.)

5800. Prohibiting use for trade or advertising purposes. The use of a fac-simile, photograph, impression, or imitation of the great seal of the state of Utah for trade or advertising purposes is expressly prohibited.

5801. Special uses. The governor may, in his discretion, permit the use of a fac-simile, photograph, impression, or imitation of the great seal of the state of Utah for purposes other than trade or advertising.

5802. Penalty. Any person violating any of the provisions of this chapter shall be deemed guilty of a misdemeanor.

TITLE 103.

STATUTE OF FRAUDS.

5811. (2461.) Transfers, etc., affecting lands to be in writing. Exception. No estate or interest in lands, other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or by deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same, or by his lawful agent thereunto authorized by writing.

Cal. Civ. P., § 1971*.

Similar section, § 4874.

Contract of leasing for longer than one year is invalid, unless in writing, § 5813.

Title by operation of law, § 5812, and note.

Conveyances to hinder and delay creditors, § 5821, and note.

Contracts for transfer of lands to be in writing, § 5813.

Specific performance enforced in case of part performance, § 5824, and note.

Trusts, how created and proved, § 5812, and note.

Agreements to be performed within a year, § 5817, and note.

The plea of the statute of frauds is a personal privilege, which a party may waive, and he must interpose the special plea to make it available in his defense.

Abba v. Smyth, 21 U. 109; 59 P. 756.

Steed v. Harvey, 18 U. 367; 54 P. 1011.

Wilson v. Sullivan, 17 U. 341; 53 P. 994.

Lauer v. Richmond Mer. Inst., 8 U. 305; 31 P. 397.

Verbal agreement as to boundary line invalid under the statute of frauds; though acquiescence for twenty years will establish same.

Strickley v. Hill, 22 U. 257; 62 P. 893.

A contract by which an old woman in apparent good health agrees to leave all her property, worth about $5,000, to a sixteen-year-old girl, in consideration of the latter's promise to live with and take care of her as long as she lives, is taken out of the statute of frauds by the rendition of the services during the lifetime of the woman, and is not void for want of mutuality and fairness; and after her death the contract will be specifically enforced in favor of the girl who performed her part of the agreement, though the woman died within three or four months after the execution of the contract.

Brinton v. Van Cott, 8 U. 480; 33 P. 218.

If the grantee, in consideration of a conveyance, promises to pay a mortgage on the land given by his grantor, he thereby makes the debt his own, and such promise is not within the statute of frauds.

Thompson v. Cheesman, 15 U. 43; 48 P. 477.

Clark v. Fisk, 9 U. 94; 33 P. 248.

Montgomery v. Reif, 15 U. 495; 50 P. 623.

McKay v. Ward, 20 U. 149; 57 P. 1024.

An implied dedication of land as a highway is not within the statute of frauds, and may be established by parol or in any conceivable way by which the intent of the owner can be made apparent.

Schettler v. Lynch, 23 U. 305; 64 P. 955.

Letters agreeing to exchange real estate constitute a sufficient compliance with the statute of frauds, (Distinguished in Glasmann v. Condon, 27 U. 463; 76 P. 343.)

Leonard v. Woodruff, 23 U. 494; 65 P. 197.

Where a grantor delivers a deed to a third person, absolutely as his deed, without reservation and without intending to reserve any control over the instrument, though it is not to be delivered to the grantee until the grantor's death, the deed, when delivered, is valid and takes effect from the first delivery. (But see Peck v. Rees, 7 U. 467; 27 P. 581.)

Wilson v. Wilson, 32 U. 169; 89 P. 643.

An agreement that a mortgage, signed by several tenants in common was for the benefit of one and that the others should be held harmless and their interest in the property protected by satisfying the mortgage out of the undivided interest in the beneficiary, must be in writing.

Jackson v. Dallin, 47 U. 512; 154 P. 341.

A verbal agreement to convey land may, if part performed, be enforced, but acts done prior to verbal contract to convey land are never a part performance upon which to base specific performance of the agreement.

Price v. Lloyd, 31 U. 86; 86 P. 767.

The making of valuable improvements by the donee in possession is essential to the enforcement of a parol gift of land, but improvements made which do not tend to the permanent improvement of the land but are conducive to the comfort of the tenant will not suffice.

Id.

Price v. Lloyd, 43 U. 441; 135 P. 268.

A parol partition between joint owners of realty, such as partners, when carried out and followed by actual possession in severality of the several parcels, is valid, and will be enforced notwithstanding the statute of frauds.

Allen v. Allen, 47 U. 145; 166 P. 1169.

A purchaser of real estate on instalments, who is in default, verbally assigns his contract to another, and the vendor, upon his request,

executes a new contract with the assignee, cannot invoke this section to defeat the transfer.
Budge v. Barron, 51 U. —; 170 P. 745.

LEASES:

Verbal agreement to transfer lease and hotel furniture not within statute of frauds.
Reno v. Beardsley, 6 U. 208; 21 P. 944.

The acceptance of rent payable monthly under a lease void under the statute of frauds converts the holding into a tenancy from month to month, and does not render the whole of the executory part of the lease valid.
Utah Loan & Trust Co. v. Garbutt, 6 U. 342; 23 P. 758.

Where one executor without authority from his co-executors, who were not under disability and not absent from the territory, made a lease in writing for more than one year, the lease was invalid under §§ 2467, 2469, 3910, C. L. 1888.
Id.

An oral agreement between a sub-tenant and the tenant, made subsequently to the written lease, and after the sub-tenant had taken possession of the property, is valid.
Podlech v. Phelan, 13 U. 333; 44 P. 838.

Rights of lessee, parol lease of mine.
Ruffatti v. Societe Mines, 10 U. 386; 37 P. 591.

A lease by parol for two years is void and of no force or effect whatever.
Utah Optical Co. v. Keith, 18 U. 464; 56 P. 155.

5812. (2462.) Prior section not to affect wills or implied trusts. The preceding section shall not be construed to affect the power of a testator in the disposition of his real estate by last will and testament; nor to prevent any trust from arising or being extinguished by implication or operation of law.

Trustees and the statute of limitations, note

TRUSTS, ETC.:

For instances of trust arising by operation of law, see
Haight v. Pearson, 11 U. 51; 39 P. 479.
Rogers v. Donnellan, 11 U. 108; 39 P. 494.
Chambers v. Emery, 13 U. 374; 45 P. 192.

Where a corporation is formed on certain mining claims by the owners, and thereafter for years possesses and develops them, it will be deemed to have title by operation of law, in a case where no formal transfer was made.
Murray Hill M. Co. v. Havenor, 24 U. 73; 66 P. 762.

A trust in personal property may be declared, admitted, or created by parol declarations, and may be proved by parol evidence, and as to such trusts the statute of frauds does not apply; but a trust relating to real property must be declared and proved by some writing executed by the parties creating the trust.
Skeen v. Marriott, 22 U. 73; 61 P. 296.

Property purchased by E., with money furnished by C., pursuant to a parol agreement between the two that such purchase should be a joint enterprise, but that the purchase should be in the name and through the agency of E.; held, to be a resulting trust and not affected by the statute of frauds; held further, that in such case he who furnished the money became the cestui que trust, and the holder of the legal title, the trustee, and that the trust may be proved by parol evidence, even after the death of the trustee.
Chambers v. Emery, 13 U. 374; 45 P. 192.

Where K., C., and R. entered into an agreement to purchase certain lands, to share equally in the payments, and to own equal interests when paid for, and after the first payment made thereon and contract given in the name of C. and R., K. assigned one-half of his interest by oral agreement to E.; held, that such assignment was not within the statute of frauds.
Knauss v. Cahoon, 7 U. 182; 26 P. 295.
Coffin v. McIntosh, 9 U. 315; 34 P. 247.

Where a person having no interest in real estate orally agrees with another that the latter should purchase it with his own funds, taking the title in his name, that he should thereafter convey it to the first person at an agreed price, no resulting or constructive trust arises, and is within the statute of fraud.
Chadwick v. Arnold, 34 U. 48; 95 P. 527.

A trust ex malificio arises whenever a person acquires a legal title to property of another by means of intentional, false, or fraudulent verbal promise to hold the same for a certain purpose, and having thus obtained the title, retains and claims the property as his.
Id.

Where the wife of the debtor of the corporation conveyed her land to the corporation to sell the same for the best price obtainable, and to retain so much of the proceeds as was necessary to pay the husband's debts and to account for the same, the obligation of the corporation was in the nature of a trust, and if it sells the property to one of its officers for a price less than could have been obtainable, it is liable, and the officer so purchasing is charged with the trust, and if he sells the property at an advance he holds the proceeds in trust for the beneficiary.
Gay v. Young Men's Co-op. Insti., 37 U. 280; 107 P. 237.

Where a property is taken in a person's name in trust for another, upon the trustee's death, his administrators may be required to deed the property to beneficiary.
Christensen v. Williams, 34 U. 127; 97 P. 219.

To establish a trust in stolen money, the particular pieces of money need not be identified, but it is enough that among those taken from the thief there is enough of each kind to make up those received by the receiver.
Schramm-Johnson Drugs v. Kleeb, 51 U. —; 169 P. 161.

A trust will not be impressed upon funds in the hands of the alleged trustee where the original trust property or trust fund cannot be traced or identified either in its original or substituted form.
Kent v. Kent, 50 U. —; 165 P. 271.

Where a wife held title to property, real and personal, of which her husband was the sole owner, and the wife, by unequivocal acts and conduct clearly indicated that she always recognized the rights of her husband, and that the equitable title to the property was in him, and made deeds to him of such property, the property was held by her in trust for the husband.
Wheelwright v. Roman, 50 U. —; 165 P. 513.

One desiring to declare and enforce a parol trust must show, with at least reasonable certainty, the terms of the trust, and sufficient facts so that the court may be able to ascertain, with reasonable certainty, the essential terms of the trust before it can declare and enforce it.
Coray v. Holbrook, 40 U. 325; 121 P. 572.

Where one agrees with the owner of real estate subject to a mortgage to bid in the property at a foreclosure sale, and thereafter convey the title to the owner for a certain sum, where the owner relies upon such agreement and the land was bid in for about one-third of its value, and before the redemption period expired the owner paid a portion of the price to be paid, held that a trust ex malificio arose which is enforcible in equity.
Chadwick v. Arnold, 34 U. 48; 95 P. 527.

5813. (2463.) Contracts affecting lands to be in writing. Exception. Every contract for the leasing for a longer period than one year, or for the sale of any lands or any interest in lands, shall be void unless the contract or some note or memorandum thereof is in writing and subscribed by the party

by whom the lease or sale is to be made or by his lawful agent thereunto authorized in writing.

Lease for more than a year to be in writing, § 5811, and note.

The rule in this section is applicable only to executory contracts, and has no application to an executed agreement.

Cutright v. Union Savings Inv. Co., 33 U. 486; 94 P. 984.

Where a purchaser on instalments removes from the premises and orally notifies the vendor that he has moved out and would make no further payments and surrenders the keys, held that his interest is forfeited even though the surrender rested in parol.

Id.

Where authority of agent to purchase land was not in writing, it does not invalidate a contract signed by him, there being no statute requiring an agent's authority to be in writing.

Le Vine v. Whitehouse, 37 U. 260; 109 P. 2.

Query: Can a contract required to be in writing be modified by parol?

Moon v. Bollwinkel, 47 U. 389; 154 P. 939.

A memorandum reciting the receipt of $30 as part payment of thirty acres of land, is insufficient; it does not describe the land.

Adams v. Manning, 46 U. 82; 148 P. 465.

5814. (2464.) Conveyances to defraud purchasers are void. Every conveyance of any estate or interest in lands, or the rents or profits of lands, and every charge upon lands, or the rents or profits thereof, made or created with intent to defraud prior or subsequent purchasers thereof for a valuable consideration, shall be void as against such purchasers.

Penalty for fraudulent conveyances, §§ 8343, 8346.

Conveyances to defraud creditors are void, §§ 5134, 5135, 5821, and notes.

5815. (2465.) Id. Not if he had notice. No such conveyance or charge shall be deemed fraudulent in favor of a subsequent purchaser who had actual or legal notice thereof at the time of his purchase, unless it appears that the grantee in such conveyance or person to be benefited by such charge was privy to the fraud intended.

Minn. (1894) § 4205.

5816. (2466.) Gifts for use of grantor, when void. All deeds, gifts, conveyances, transfers, or assignments, verbal or written, of goods, chattels, or things in action, made in trust for the use of the person making the same, shall be void as against the existing or subsequent creditors of such person.

Gifts to wife invalid, when, note to § 5821.

5817. (2467.) Certain agreements void unless in writing. In the following cases every agreement shall be void, unless such agreement or some note or memorandum thereof be in writing and subscribed by the party to be charged therewith:

1. Every agreement that by its terms is not to be performed within one year from the making thereof;

2. Every promise to answer for the debt, default, or miscarriage of another;

3. Every agreement, promise, or undertaking, made upon consideration of marriage, except mutual promises to marry;

4. Every special promise made by an executor or administrator to answer damages or to pay the debts of the testator or intestate out of his own estate;

5. Every agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission.

Am'd '09, p. 119.

Cal. Civ. C., § 1624; Cal. Civ. P., § 1973.

When promise to answer for another need not be in writing, § 5819.

The promise of the defendant for the payment of a subsisting debt of another comes within the statute of frauds; but if the effect of the contract of the defendant had been to discharge the original debt and he became the sole debtor, and there was no debt of another to which his promise was collateral, then the contract would not have been within the statute.

First Nat. Bank v. Kinner, 1 U. 100.

In the absence of proof showing personal liability, no personal judgment can be rendered against an administrator for the debts of the deceased.

Bacon v. Thornton, 16 U. 138; 51 P. 153.

An oral promise to pay a dividend of a certain per cent, within a year, is valid and may be enforced.

Thompson v. Whitney, 20 U. 1; 57 P. 429.

Written contract for leasing of farm on shares held not unilateral and not within the statute of frauds.

Abba v. Smyth, 21 U. 109; 59 P. 756.

An oral agreement by grantee to pay grantor for life one-half of crops that should be grown upon certain premises was not within the provisions of this section, requiring every agreement that by its terms is not to be performed within one year from the making thereof to be in writing since the grantor might die within one year.

Johnson v. Johnson, 31 U. 408; 88 P. 230.

Letters and telegrams containing real estate broker's contract are sufficient to constitute "some notes or memorandum thereof in writing subscribed by the party to be charged therewith."

Fritsch v. Hess, 49 U. 75; 162 P. 70.

Contracts under this section and § 5813 need be signed only by the vendor.

LeVine v. Whitehouse, 37 U. 260; 109 P. 2.

Where the contract has been fully executed, the agent may recover his commission.

Kerr v. Hillyard, 50 U. —; 170 P. 981.

5818. (2468.) Representation as to credit of others to be in writing. To charge a person upon a representation as to the credit of a third person, such representation or some memorandum thereof must be in writing subscribed by the party to be charged therewith.

Contracts concerning sales of goods, and without delivery, etc., see uniform sales act., §§ 5812, 5813.

5819. (2471.) When promise to answer for another need not be in writing. A promise to answer for the obligation of another, in any of the following cases, is deemed an original obligation of the promisor, and need not be in writing:

1. Where the promise is made by one who has received property of another upon an undertaking to apply it pursuant to such promise; or by one who has received a discharge from an obligation in whole or in part in consideration of such promise;

2. Where the creditor parts with value, or enters into an obligation, in consideration of the obligation in respect to which the promise is made, in terms or under circumstnaces such as to render the party making the promise the principal debtor, and the person in whose behalf it is made, his surety;

3. Where the promise, being for an antecedent obligation of another, is made upon the consideration that the party receiving it cancels the antecedent obligation, accepting the new promise as a substitute therefor, or upon the consideration that the party receiving it releases the property of another from a levy, or his person from imprisonment under an execution on a judgment obtained from the antecedent obligation; or upon a consideration beneficial to the promisor, whether moving from either party to the antecedent obligation, or from another person;

4. Where a factor undertakes, for a commission, to sell merchandise and guaranty the sale;

5. When the holder of an instrument for the payment of money, upon which a third person is or may become liable to him, transfers it in payment of a precedent debt of his own, or for a new consideration, and in connection with such transfer enters into a promise respecting such instrument.

Promise to answer for debt, default, or miscarriage of another invalid unless in writing, § 5817.

5820. (2472.) Contracts by telegraph deemed to be in writing. Contracts made by telegraph shall be deemed to be contracts in writing; and all communications sent by telegraph and signed by the person or persons sending the same, or by his or their authority, shall be held and deemed to be communications in writing.

Transactions by telegraph or telephone, §§ 6117-6120.

5821. (2474.) Conveyances to hinder or defraud creditors void. Every conveyance or assignment in writing or otherwise of any estate or interest in lands, or in goods, or things in action, or of rents or profits issuing therefrom, and every charge upon lands, goods, or things in action, or upon the rents or profits thereof, made with the intent to delay, hinder, or defraud creditors or other persons of their lawful suits, damages, forfeitures, debts, or demands, and every bond or other evidence of debt given, suits commenced, decree or judgment suffered with the like intent, as against the person hindered, delayed, or defrauded, shall be void.

Chattel mortgages intended to hinder and delay creditors held void, note to § 470.

Conditional sales, note to § 487.

Conveyances to defraud purchasers are void, § 5814.

Gifts for use of grantor void as against creditors, § 5816.

A person, though in debt, may sell his property to whom he pleases, if no lien exists to prevent it, and if the transaction is a fair one, made in good faith, and for a valuable consideration.

Snell v. Crowe, 3 U. 26; 5 P. 522.

An assignment for the benefit of creditors which empowers the assignee to sell on credit is fraudulent and void as to the creditors of the assignor.

Lippincott v. Rich, 19 U. 140; 56 P. 806.

Beus v. Shaughnessy, 2 U. 492.

A fraudulent intent on the part of the debtor alone is not sufficient to avoid the assignment for benefit of creditors when no preferences are made, as in this case, and where neither the assignee nor creditor participated in the fraud.

Billings v. Parsons, 17 U. 22; 53 P. 730.

See Coblentz v. Driver Merc. Co., 10 U. 96; 37 P. 242.

Voluntary conveyance by debtor to his children is void where the effect is to defraud his creditors.

Ogden State Bank v. Barker, 12 U. 13; 40 P. 765.

See also Ogden State Bank v. Barker, 12 U. 27; 40 P. 769.

A conveyance by a husband to his wife of all his property for a nominal consideration is in-

valid as to a creditor whose debt existed at the time, though not in judgment. No actual fraud need be shown.

Gustin v. Wathews, 25 U. 168; 70 P. 402.

A complaint, to subject to the payment of a judgment property which has been conveyed by a judgment debtor, which alleges facts and transactions constituting fraud in law, is sufficient, though such transactions are not therein characterized as fraudulent.

Cooper v. Utah L. & Ry. Co., 35 U. 570; 102 P. 202.

Where a deed is attacked on ground of fraud, parol evidence is admissible to show the actual consideration in contradition of the consideration expressed in the deed.

Plant v. Ritter, 47 U. 506; 155 P. 426.

5822. (2475.) "Creditors and purchasers" includes heirs, etc. Every conveyance, charge, instrument, or proceeding declared to be void by the provisions of this title, as against creditors and purchasers, shall be equally void as against the heirs, successors, personal representatives, or assigns of such creditors or purchasers.

5823. (2476.) Purchaser in good faith not affected hereby. The provisions of this title shall not be construed in any manner to affect or impair the title of a purchaser for a valuable consideration, unless it appears that such purchaser had previous notice of the fraudulent intent of his immediate grantor or of the fraud rendering void the title of such grantor.

Minn. (1894) § 4225.

5824. (2477.) Specific performance not affected hereby. Nothing in this title contained shall be construed to abridge the powers of courts to compel the specific performance of agreements in case of part performance thereof.

IN CASE OF PART PERFORMANCE:

A parol gift of an unpatented town lot followed by possession cannot thereafter be rescinded.

Cooke v. Young, 2 U. 254.

A parol sale of land without delivery of possession is void though part of the purchase price was paid; and it is immaterial that the contract was a renewal of one under which possession had been delivered, the former contract having been mutually abandoned.

Maxfield v. West, 6 U. 327; 23 P. 754.

Specific performance will not be decreed unless description is sufficient or can be made so.

Easton v. Thatcher, 7 U. 99; 25 P. 748.
Reed v. Lowe, 8 U. 39; 29 P. 740.
Darke v. Smith, 14 U. 35; 45 P. 1006.

A parol partition of lands between co-heirs carried out and followed by actual possession in severalty of the several parcels will be enforced, notwithstanding the statute of frauds, on the ground of part performance when the partition is equitable and the parties acted understandingly.

Whittemore v. Cope, 11 U. 344; 40 P. 256.
Ayres v. Jack, 7 U. 249; 26 P. 300.
Toland v. Corey, 6 U. 395.

In case of part performance, specific performance will be enforced.

Lynch v. Coviglio, 17 U. 106; 53 P. 983.

Verbal transfer of land followed by possession and the making of permanent improvements by the donee may be enforced in equity.

Karren v. Rainey, 30 U. 7; 83 P. 333.
Price v. Lloyd, 31 U. 86; 86 P. 767.
But see Darke v. Smith, 14 U. 35; 45 P. 1006.

Where one who owned considerable land contracted to sell thirty acres, the fact that the purchaser mended fences on a particular thirty acres, and occasionally grazed stock thereon after paying part of the purchase price, is not such a part performance as will take the case out of the statute of frauds; the contract not desginating the particular land.

Adams v. Manning, 46 U. 82; 148 P. 465.

5825. (2478.) Lawful agent may sign for principal. Every instrument required by the provisions of this title to be subscribed by any party may be subscribed by the lawful agent of such party.

Conveyance of real property by agent authorized by writing, §§ 4874, 5811.

TITLE 104.

STATUTES.

CHAPTER 1.

REPEALS.

5829. (2479.) Compiled Laws of 1917. This compilation of the laws of Utah shall be known as the Compiled Laws of Utah, 1917, and may be so cited or referred to, giving number of section when particular reference to any law therein contained is desired.

The above section has been rewritten to refer to this compilation instead of to Revised Statutes of 1898, and C. L. 1907.

Repeal does not affect prosecutions, § 5835.

Decisions on repeal and amendment of statutes, note to § 5839.

Compiled Laws of 1876. An act providing that the Compiled Laws of Utah published under the auspices of the special committee "are hereby approved and adopted" did not amount to the enactment of any new law, but was simply an approval of the work of the compiling committee.

Lyman v. Martin, 2 U. 136.

Compiled Laws of 1888. Where a statute of 1878 was included in the compilation of 1888, '17, p. 381.

but with errors, and in 1890 the legislature enacted that wherever there was a difference between the original acts and the compilation of 1888, the original acts should control; held, that the statute of 1878 was continued in force.
People v. Reggel, 8 U. 21; 28 P. 955.
Revised Statutes of 1898; general repealing clause construed.
Pratt v. Swan, 16 U. 483; 52 P. 1092.

5830. (2480.) All prior laws repealed. Exceptions. All acts and resolutions passed by the legislative assembly of the territory of Utah, and all acts and resolutions passed by the legislature of the state of Utah prior to the second regular session of the legislature are hereby repealed, subject to the limitations and exceptions herein expressed, saving and excepting the following, to wit:

1. Those providing for the issue, validation, disposition, exchange, or redemption of any bonds or warrants of the territory or state of Utah, or of any county, municipality, or school district therein, in so far as such acts or resolutions affect any such bonds or warrants now outstanding and unpaid;

2. Those accepting grants of land, or money, or other property for the territory or state of Utah, or for any subdivision or institution thereof, together with the conditions, restrictions, and limitations attached to such grants;

3. Those changing the names of individuals;

4. Those releasing any individual or public corporation from liability to the state;

5. Those of a private nature, granting any right or franchise;

6. "An act authorizing county clerks and notaries public to take acknowledgments of articles of incorporation of private corporations organized under the provisions of chap. 1, part 4, of the Compiled Laws of Utah, 1888, providing for filing and recording the same, and validating and confirming the acknowledgment, filing, depositing, and recording of articles of incorporation made since the admission of this state by probate judges and clerks, and repealing all inconsistent acts," approved January 24, 1896;

7. "An act authorizing the governor to appoint notaries public, confirming appointments heretofore made, and validating official acts under such appointments," approved January 31, 1986;

8. "An act to provide for the custody of papers and records of United States and supreme court commissioners, for the continuation of actions begun before them, and the issuance of process and proceedings upon judgments obtained in their courts," approved February 7, 1896;

9. "An act providing for the transfer of causes pending in the territorial supreme and district courts to the proper state courts," approved February 18, 1896;

10. "A resolution fixing the termination of the first session of the legislature," approved April 4, 1896.

Effect of repeal on public offenses, § 5835, and note.
Decisions on interpretation of constitution, note to Con. art. 6, sec. 1.
Decisions on repeal and amendment of statutes, note to § 5839.
A general repealing statute like § 5830 must be construed in the light of the circumstances surrounding its enactment; held, that it did not repeal a statute which it purported to repeal.
Pratt v. Swan, 16 U. 483; 52 P. 1092.

5831. (2481.) Laws of 1897 deemed subsequent to Revised Statutes, 1898. The enactment of this revision is not to affect or repeal any act of the legislature passed at any time during the second regular session, and all such acts are to have full effect as if passed after the enactment of this revision, and so far as such acts vary from or conflict with any provision contained in said revision, they are to have effect as subsequent statutes and as repealing any portion of the revision inconsistent therewith.

This section has reference to the Revised Statutes of 1898.
R. S. U. S. (1878) § 5601*; Cal. C. Civ. P., § 2.

5832. (2482.) Repeal not to affect tenure of office. Exceptions. All persons who, at the time when the said repeal shall take effect, shall hold any office under the statutes hereby repealed, shall continue to hold the same under the tenure thereof, except those offices which are abolished and those as to which a different provision is made by the revised statutes.

N. Dak. (1895) §§ 2684, 2685*; Cal. C. Civ. P., § 6*; Mont. Pol. C., § 6*.
Under chap. 37, laws 1894, as reenacted and amended by chap. 73, laws of 1896, the chief of police of Salt Lake City was entitled to hold office during good behavior and until other-

wise provided by statute, and, under provisions of § 5832, he was continued in office.
Pratt v. Swan, 16 U. 483; 52 P. 1092.
Where appellant was appointed a policeman under a statute which fixed the tenure of his office to be during good behavior, and he was discharged without cause, under the provisions of this section, such discharge was unlawful.
Everill v. Swan, 17 U. 514; 55 P. 68.
Under provisions of chap. 37, laws of 1894, and chap. 73, laws of 1896, relating to police and fire departments, in so far as they affected the departments of cities of more than 12,000 inhabitants, were not continued in force by § 5832, but were repealed by § 5830, and under § 570x59, the municipality was given the right to enact the ordinance under which petitioner and his assignors were removed from the fire department.
Moreton v. Swan, 20 U. 79; 57 P. 718.

5833. (2483.) Repeal does not affect accrued right. Procedure. This repeal of existing statutes shall not affect any act done, any right accruing or which has accrued or been established, nor any suit or proceeding had or commenced in any civil cause before the time when such repeal takes effect; but the proceedings in such cases shall be conformed to the provisions of the revised statutes as far as consistent.
Iowa, McClain's An. C. (1888) § 54; Cal. C. Civ. P., § 8*; Mont. Pol. C., § 8*.

5834. (2484.) Effect of repeal on limitations. When a limitation or period of time prescribed in any existing statute for acquiring a right or barring a remedy, or for any other purpose, has begun to run before the revised statutes go into effect, and the same or any limitation is prescribed in the revised statutes, the time which has already run shall be deemed a part of the time prescribed as such limitation by the revised statutes.
Cal. C. Civ. P., § 9; Mont. Pol. C., § 9.
Effect on contracts of change in statute of limitations, § 6491, and note to § 6466.

5835. (2485.) Offenses, etc., not affected unless mitigated. No offense committed, and no penalty or forfeiture incurred under any statute hereby repealed and before the repeal takes effect, shall be affected by the repeal, except that when a punishment, penalty, or forfeiture is mitigated by the provisions herein contained, such provisions shall be applied to a judgment to be pronounced after the repeal.
Iowa, McClain's An. C. (1888) § 55; Cal. Pen. C., § 6*.
Effect of enactment of constitution, note to Con. art. 1, secs. 10, 12.
Secs. 4 and 5 of penal code of 1876 provided, in effect, that former statutes concerning crimes remain in force so far as they relate to offenses committed prior to the passage of the code. An offense committed prior to the passage of said code may be prosecuted as if that act had never been passed, notwithstanding the repeal by the penal code of the statute creating such offense.
People v. Idaho Bill, 2 U. 326.
Although § 4643 was repealed by § 4359, R. S. 1898, its provisions were continued in force by this section as to all offenses committed before the revised statutes went into effect, and all penalties incurred thereunder may be enforced the same as if revised statutes had never taken effect.
State v. Woolsey, 19 U. 486; 57 P. 426 and 415.

5836. (2486.) Criminal prosecutions not affected. Procedure. No suit or prosecution pending when this repeal takes effect, for an offense committed or for the recovery of a penalty or foreiture incurred, shall be affected by the repeal, but the proceedings may be conformed to the provisions of the revised statutes as far as consistent.
Iowa, McClain's An. C. (1888) § 56.
One convicted of a crime before statehood must be tried by a jury of twelve, and such jury may under the statutes be called for such trial.
State v. Hart, 19 U. 438; 57 P. 415.

5837. (2487.) "Heretofore" and "hereafter" defined. The terms "heretofore" and "hereafter," as used in the revised statutes, have relation to the time when the same take effect.
Iowa, McClain's An. C. (1888) § 57; Cal. Pe n. C., § 6*.

CHAPTER 2.

CONSTRUCTION.

5838. (2488.) Common law in force. The common law of England, so far as it is not repugnant to, or in conflict with the constitution and laws of the United States, or the constitution and laws of this state, shall be the rule of decision in all the courts of this state.
Cal. Pol. C., § 4468; Nevada (1885) § 3021; Mont. Pol. C., § 5152.
Statutes in derogation of the common law not strictly construed, § 5839, and note.
During all the time since the "Organic Act" was approved (Sept. 9, 1850), the common law has been in force in Utah.
Hilton v. Thatcher, 31 U. 360; 88 P. 20.
People v. Green, 1 U. 11.
Although the common law has not been

adopted by any statute, it should be regarded as prevailing here, so far as it is not incompatible with our situation and government.
Thomas v. U. P. Ry. Co., 1 U. 232.
First Nat. Bank v. Kinner, 1 U. 100.
Though the phrase "common law of England," used in the statute, does not include the judicial decisions of England rendered subsequently to July 4, 1776, yet as evidence of what the common law as adopted is they are entitled to respect, and in particular cases may properly be regarded as conclusive.
Johnson v. U. P. Coal Co., 28 U. 46; 76 P. 1089.
A judgment recovered by the sovereign for a penalty in a criminal proceeding creates no lien on the judgment debtor's land.
Thompson v. Avery, 11 U. 214; 39 P. 829.
The definition of an infamous crime against nature denounced by, § 8121, must be sought in the common law.
State v. Johnson, 44 U. 18; 137 P. 632.
By the organic act of congress in 1850 for the government of the territory, the old English common law with reference to women and their status under marriage was not adopted, but only so much thereof as was applicable to the conditions of the new territory which recognized the equitable right of a married woman to a separate estate.
Hatch v. Hatch, 46 U. 116; 148 P. 1096.
A decision of the federal court as to whether an employe is engaged in interstate commerce, will be taken in preference to a decision of a state court since the question involved is one upon which the Federal Courts have the right to speak.
Kuckmeister v. L. A. & S. L. R. R., 51 U. —; 172 P. 725.

5839. (2489.) Statutes in derogation of common law liberally construed. Rules of equity prevail. The rule of the common law that statutes in derogation thereof are to be strictly construed has no application to the revised statutes. The revised statutes establish the law of this state respecting the subjects to which they relate, and their provisions and all proceedings under them are to be liberally construed with a view to effect the objects of the statutes and to promote justice. Whenever there is any variance between the rules of equity and the rules of common law, in reference to the same matter, the rules of equity shall prevail.

Cal. C. Civ. P., § 4*; Mont. C. Civ. P., § 3453*.
Law and equity may be administered in the same action, Con. art. 8, sec. 19.
Decision on mandatory provisions of the constitution, note to Con. art. 1, sec. 20.
Decisions on interpretation of constitutional provisions, note to Con. art. 6, sec. 1.
Decisions on enactment of laws within the police power, note to Con. art. 6, sec. 1.
Decisions on general powers of the legislature, note to Con. art. 6, sec. 1.
Common law in force in Utah, § 5838, and notes.
Decisions on general powers of court of equity, note to § 1667.
Distinction between legal and equitable remedies remains, note to § 5982.
See decisions on interpretation of lien law, note to § 3741.
The mere fact that a statute is mandatory in form does not necessarily make it so in its effect.
Eccles Lumber Co. v. Martin, 31 U. 241; 87 P. 713.
In case of doubt as to the construction of a statute regarding the compensation of a public officer, that construction most favorable to the officer should be adopted.
U. S. v. Averill, 4 U. 416; 7 P. 527; sec U. S. v. Averill, 130 U. S. 335.
Where a right exists only by statutory enactment, the statute must be strictly construed and followed, or the right cannot be enforced.
Burrows v. Kimball, 11 U. 149; 41 P. 719.
Statutes in derogation of the common law are to be liberally construed.
In re Garr's Estate, 31 U. 57; 86 P. 757.
Upon a question of the first impression, the court is required to give full effect to this section.
Houston Real Estate Inv. Co. v. Hechler, 44 U. 64; 138 P. 1159.
This section is mandatory,
Hammond v. Wall, 50 U. —; 171 P. 148.

ENACTMENT OF STATUTES; CONSTITUTIONALITY:

The courts have power to declare any act of the government in any of the departments, which violates the constitution, to be utterly void; and, in exercising this function, in regard to an act of the legislature, they do not trench upon the domain of the legislative department.
Ritchie v. Richards, 14 U. 345; 47 P. 670.
When the court construes the law, and holds that it has a certain effect, and bases its judgment upon it, the legislature cannot declare that the law as to that case has any other effect than that declared by the court.
In re Handley's Estate, 15 U. 212; 49 P. 829.
The legislature is the law-making body, and the only limits upon its power are those set by the constitution. If it enacts a law within its authority the courts have no right to arrest its execution.
Kimball v. Grantsville, 19 U. 368; 409, 410; 57 P. 1, 10.
Nichols v. Cherry, 22 U. 1; 60 P. 1103.
State v. Lewis, 26 U. 120; 72 P. 388.
State v. S. L. City, 23 U. 13; 64 P. 460.
A legislative enactment will be presumed constitutional until the contrary is shown; and the courts will resolve a reasonable doubt in favor of constitutionality.
People v. Ritchie, 12 U. 180; 42 P. 209.
State v. Holden, 14 P. 71; 46 P. 756.
State v. Tingey, 24 U. 225; 67 P. 33.
Young v. S. L. City, 24 U. 321; 67 P. 1066.
State v. Sopher, 25 U. 318; 71 P. 482.
State v. Lewis, 26 U. 120; 72 P. 388.
Highland Boy G. M. Co. v. Strickley, 28 U. 215; 78 P. 296; affirmed 200 U. S. 525.
Marioneaux v. Cutler, 32 U. 475; 91 P. 355.
When the validity of a statute is questioned, the enrolled act, duly signed, proved, and deposited, is prima facie but not conclusive evidence of its constitutional enactment and of what the law is.
Ritchie v. Richards, 14 U. 345; 47 P. 670.
Lyman v. Martin, 2 U. 136.
Where the invalid portion of a statute is distinctly separable from the remainder, and the remainder in itself is complete, the invalid portion may be rejected and the remainder stand.
City of Eureka v. Wilson, 15 U. 67; 48 P. 150.
Duncan v. McAllister, 1 U. 81.
People, ex rel Dickson v. Clayton, 4 U. 421; 11 P. 206.
But see Bromley v. Reynolds, 2 U. 525.
Where a portion of an act is unconstitutional and the remaining portion can be upheld, it will be done.
Ritchie v. Richards, 14 U 345; 47 P. 670.
Eureka City v. Wilson, 15 U. 67; 48 P. 150.
State v. Beddo, 22 U. 432; 63 P. 96.
Utah S. & T. Co. v. Diamond C. & C. Co., 26 U. 299; 73 P. 524.

INTENTION OF LEGISLATURE; CONSTRUCTION:

A statute should be so expounded as to give effect to what was manifestly the intention of the legislature.
Eclipse Mfg. Co. v. Nichols, 1 U. 252.
State v. Eldredge, 27 U. 477; 76 P. 337.
In construing a constitutional provision, the

intention of the framers must prevail, whatever language may have been employed to express it.
State v. Eldredge, 27 U. 477; 76 P. 337.
State v. City Council, 23 U. 13; 64 P. 460.

Where the provisions of a statute are repugnant or susceptible of two constructions, one of which gives effect to all of its provisions, and one of which does not, that construction will be adopted which permits all its provisions to stand in force.
Cary L. Co. v. Partridge, 10 U. 322; 37 P. 572.
Morrison v. Cary L. Co., 9 U. 70; 33 P. 238.

All statutes relating to the same subject matter, which are not necessarily inconsistent with each other, are to be construed together as constituting one act, and, when it can be done with any reasonable construction, made to harmonize.
Twiggs v. Land Com., 27 U. 241; 75 P. 729.
Miles v. Wells, 22 U. 55; 61 P. 534.
Page v. Utah Com., 11 U. 119; 39 P. 499.
Nelden v. Clark, 20 U. 388; 59 P. 524.
State v. Eldredge, 27 U. 477; 76 P. 337.
State v. Richards, 20 U. 457; 59 P. 96.

The true meaning and intent of a statute is to be ascertained from the whole thereof, and, to ascertain such meaning and intent, the court will punctuate or disregard punctuation as may be necessary.
Union R. T. Co. v. Lynch, 18 U. 378; 55 P. 639.
Richardson v. T. Hill M. Co., 23 U. 366; 65 P. 74.

Where one word has been erroneously used in a constitution, statute, or other written instrument for another, and the context affords the means of correction, the proper word will be deemed substituted.
White v. R. G. W. Ry., 25 U. 346; 71 P. 593.

It is a rule of statutory and constitutional construction that the meaning of general words will be restricted when it is found necessary in order to carry out the intention of the lawmakers.
State v. Eldredge, 27 U. 477; 76 P. 337.
People, ex rel. Board of Education v. Utah Com'rs, 7 U. 279; 26 P. 577.

A general rule for the construction of statutes is that, where a part of an act has been repealed, it must, although of no operative force, still be taken in construing the rest.
Ogden City v. Boreman, 20 U. 98; 57 P. 843.
State v. Third District Court, 32 U. 418; 91 P. 133.

In determining whether the legislature has granted to a municipal corporation the power to levy and collect special taxes, the statutes under which such power is claimed are to be strictly construed.
Woodring v. Straup, 45 U. 173; 143 P. 592.

The court, in construing a statute, must give to every word or phrase its ordinary meaning, unless the context shows that to do so will defeat the legislature intent.
Law v. Smith, 34 U. 394; 98 P. 300.

Where the supreme court has made a palpable error in construing a statute, the court should correct the error when the correction will not inflict serious injury to any one, and will enforce the legislative intent.
Id.

Effect must be given to the legislative intent when ascertained, and, where the language is plain and unambiguous, it must be necessarily found in the language itself.
Town of Garland v. Maughan, 35 U. 426; 100 P. 934.

The court will construe transactions so as to avoid a forfeiture, where such construction is permissible, whether the transaction is one in equity or at law.
Moran v. Knights of Col. 46 U. 397; 151 P. 353.

While punctuation may be disregarded for the purpose of ascertaining legislative intent, yet the conjunction cannot be so disregarded.
B. of Ed. v. Hanchett, 50 U. —; 167 P. 686.

The court, to harmonize conflicting statutory provisions and to effectuate the intention of the legislature, may either restrict or enlarge the ordinary meaning of the words in the statutes, and this rule has special force where the statutes must be made to conform with the constitution.
State v. Pay, 45 U. 411; 146 P. 300.

The courts, in construing statutes, must declare the intention of the legislature as manifested by what it said in view of the object sought to be attained, and when the intention is clear, the ordinary rules of construction fail.
Gallagher v. Third Dist. Court, 36 U. 68; 104 P. 750.

The rule laid down in this section should be considered, and in construing § 6546, the action will not be dismissed upon the sole ground that a copy of the complaint was not served or deposited, but only where neither the complaint, summons, and proof of service thereof are filed, and a copy of the complaint has not been served on defendant nor deposited with the clerk for him.
West Mt. L. & S. Co. v. Danley, 38 U. 218; 111 P. 647.

Where a conflict exists between two enactments, whether enacted at the same or different sessions, the court must if possible give force and effect to all the provisions contained in both acts, notwithstanding the apparent conflict.
B. of Ed. v. Hunter, 48 U. 373; 159 P. 1019.

A special statute on a subject matter controls a general statute relating thereto.
Morck v. White, 41 U. 480; 126 P. 330.

REPEALS:

Where a revision covers the same subject and repeals all laws in conflict therewith, a conflicting law will be deemed repealed.
Taylor v. Robertson, 16 U. 330; 52 P. 1.
Pratt v. Swan, 16 U. 483; 52 P. 1092.

Where a law is passed as a substitute for a prior enactment, covering the whole subject of the former law, the latter is repealed without express words of repeal.
Bartch v. Meloy, 8 U. 424; 32 P. 694.
O. S. L. Ry. v. Standing, 10 U. 452; 37 P. 687.

Laws 1903, chap. 86, p. 71, entiled, "An act fixing the salaries of district judges," and fixing such salary at $4,000 and expressly providing that no mileage or expenses should be allowed, though containing no express provisions for repeal, repealed by implication § 2051, R. S. 1898, declaring that district judges should receive mileage at the rate of eight cents for each mile actually and necessarily traveled in the performance of their official duties. (Approving Mill v. Brown, 31 U. 473; 88 P. 609, which case modified State v. Beddo, 22 U. 432; 63 P. 96.)
Marioneaux v. Cutler, 32 U. 475; 91 P. 355.
State v. Richards, 20 U. 457; 59 P. 96.
Nelden v. Clark, 20 U. 382; 59 P. 524.

A subsequent affirmative statute, general in its terms, will not be so construed as to repeal by implication a prior statute, unless there is such a repugnancy between the two as to make them irreconcilable, and then the later in point of time will abrogate the former, though only to the extent of such repugnancy.
In re Gannett, 11 U. 283; 39 P. 496.
Armstrong v. Ogden City, 9 U. 255; 34 P. 53.
Hudson Fur. Co. v. Freed Fur. Co., 10 U. 31; 36 P. 132.
People, ex rel. Murphy v. McAllister, 10 U. 357; 37 P. 578.
Judge v. Spencer, 15 U. 242; 48 P. 1097.
Cope v. Cope, 137 U. S. 682; reversing 7 U. 63; 24 P. 677.
People v. Burtleson, 14 U. 258; 47 P. 87.
Ogden v. Hamer, 12 U. 337; 42 P. 1113.
Peterson v. City of Ephraim, 14 U. 147; 46 P. 657.
State v. Eldredge, 27 U. 477; 75 P. 729.

A statutory right of appeal may be taken away by repeal even as to cases previously appealed.
North Point Irr. Co. v. Utah Canal Co., 14 U. 155; 46 P. 824.
Eastman v. Gurrey, 14 U. 169; 46 P. 828.
Rhemke v. Clinton, 2 U. 438.

The act of March 12, 1890, in terms repealing the previous act in regard to mechanics' liens, but covering the same subject and containing many identical provisions, is to be construed as a continuation of the earlier act with modifications.
Garland v. Bear River Irr. Co., 9 U. 350; 34 P. 368; affirmed 164 U. S. 1.

By an act of the territorial legislature of Utah, approved January 19, 1855, the Church of

Jesus Christ of Latter-day Saints was incorporated; held, first, that the act of congress of July 1, 1862, repealing portions of the territorial act was not an implied approval of the remainder of the act; second, that congress had power by an act in force March 3, 1887, to annull the remainder of the law; third, that such disapproval was not a law impairing the obligations of a contract; fourth, that property acquired and held by the church in violation of the act of congress was subject to forfeiture, and the escheating thereof does not interfere with any vested right.

U. S. v. The Church, 5 U. 361; 15 P. 473.

The general rule that an unqualified repeal of a statute creating an office abolishes the office and removes the incumbent is well established; but, where the repealing statute was enacted merely for the purpose of effecting a revision and codification of the laws, it must be construed in the light of circumstances which surrounded its enactment, and effect must be given to the intent of the legislature, even though the repeal appears to be, in terms, express.

Pratt v. Swan, 16 U. 483; 52 P. 1092.
Everill v. Swan, 17 U. 514; 55 P. 68.
See Moreton v. Swan, 20 U. 79; 57 P. 718.

Effect of compilations of 1878 and 1888.

Lyman v. Martin, 2 U. 136.
People v. Reggel, 8 U. 21; 28 P. 955.
Effect of repeals on criminal prosecutions, § 5835, and note.

Where there is any conflict or incongruity between an earlier and a later statute on the same subject, the later, and not the earlier, controls, and it is the earlier and not the later act that is modified.

State ex rel. Gallagher v. Third Dist. Court, 36. U. 68; 104 P. 750.

When a statute repeals another statute or provision on the same subject, so much of the other statute as is superseded by the invalid part of the later statute is not repealed, but continues in full force and effect.

Board of Education v. Hunter, 48 U. 373; 159 P. 1019.

While repeals by implication are not favored, where later provisions are clearly repugnant to existing provisions, the later ones control, and the earlier provisions must be deemed repealed by implication to the extent of the repugnancy.

State v. Carman, 44 U. 353; 140 P. 670.

Sec. 4298, Comp. Laws '07, making the sale of intoxicating liquors to an Indian a felony, was repealed by the Laws of '11, chap. 106, making its sale to an Indian a misdemeanor, so far as to make a sale to a full-blooded Indian a misdemaenor instead of a felony.

State v. Carman, 44 U. 353; 140 P. 670.
State v. Justice, 44 U. 484; 141 P. 109.

While all statutes in pari materia should be construed together, yet where two statutes relating to the same subject matter are repugnant, and cannot be reconciled, the later enactment must be accepted as the legislative will.

B. of Ed. v. Daines, 50 U. —; 166 P. 977.

Where a statute is made effective only from a future date, but in terms repeals a former law on the subject, the repealing clause becomes effective only when the statute goes into effect.

B. of Ed. v. Hunter, 43 U. 373; 159 P. 1019.

And a conviction before the repeal is effective should be sustained.

Salina City v. Lewis, 51 U. —; 172 P. 2861.
Salina City v. Nielson, 51 U. —; 172 P. 290.

STATUTE ADOPTED FROM ANOTHER STATE:

The act of Utah having been copied from a statute of California which was itself taken from a statute of another state, the supreme court is not bound by the construction of the statute made by the courts of California.

Coulam v. Doull, 4 U. 267; 9 P. 568; affirmed 133 U. S. 216.

Whitney v. Fox, 166 U. S. 637; affirming Wood v. Fox, 8 U. 380; 32 P. 48.

Where the territorial legislature has adopted portions of the code of a neighboring state, which had previously been construed by the supreme court of such state its takes them with the construction placed upon them, and is not bound to follow a decision of the federal supreme court on the construction of the same statute determined on appeal from a state other than the one from which the law was adopted.

People v. Ritchie, 12 U. 180; 42 P. 209.

It is a general, though not binding, rule of statutory construction, that where the provisions of a statute have received judicial construction in one state and it is then adopted in another, it is adopted with the construction so given it.

Dixon v. Rickets, 26 U. 215; 72 P. 947.
State v. Mortensen, 26 U. 312; 73 P. 562, 633.
Matthews v. Jensen, 21 U. 207; 61 P. 303.
Young v. S. L. City, 24 U. 321; 67 P. 1066.
State v. De Weese, 50 U. —; 172 P. 290.

Where the statute creates a right, the possessor thereof is entitled to have the same enforced in accordance with the rules of procedure outlined by our own statutes rather than those of some other state.

Nat'l Un. F. Ins. Co. v. D. & R. G. R. Co., 44 U. 26; 137 P. 653.

5840. (2490.) Revised Statutes not retroactive. No part of the revised statutes is retroactive, unless expressly so declared.

Cal. C. Civ. P., § 3; Mont. C. Civ. P., § 3451.

Ex post facto laws forbidden, Con. art. 1, sec. 18.

A statute will not be given a retrospective effect, unless its terms show clearly a legislative intention that it should operate retrospectively.

Farrel v. Pingree, 5 U. 443; 16 P. 843.
Mercur M. Co. v. Spry, 15 U. 222; 52 P. 382.

5841. (2491.) Civil and criminal remedies not merged. When the violation of a right admits of both a civil and criminal remedy, the right to prosecute the one is not merged in the other.

5842. (2492.) Effect of repealing a statute. The repeal of a statute does not revive a statute previously repealed, nor affect any right which has accrued, any duty imposed, any penalty incurred, nor any action or proceeding commenced under or by virtue of the statute repealed.

Has no application to municipal ordinances or proceedings instituted under them.

Pleasant Grove City v. Lindsay, 41 U. 154; 125 P. 389.

5843. (2493.) Time, how computed. The time in which any act provided by law is to be done is computed by excluding the first day and including the last, unless the last is a holiday, and then it is also excluded.

Cal. C. Civ. P., § 12; Mont. Pol. C., § 11.

Holidays, §§ 2860, 2861, and notes.

When negotiable instrument matures on a holiday, § 4233.

In the computation of time, fractions of days are not reckoned; and, when an act is required by a contract to be done within a specified period from or after a particular day, the general rule is to exclude the day thus designated, and to include the last day of the specified period.

Tilton v. Sterling Coal Co., 28 U. 173; 77 P. 758.

Where the term of a lease extends "from Dec. 1, 1904, to Dec. 1, 1906, a term of two years," it expires Nov. 30, 1906, if possession is taken Dec. 1, 1904, or Dec. 1, 1906, if possession is taken Dec. 2, 1904.
I. X. L. Furniture Co. v. Berets, 32 U. 454; 91 P. 279.
Applied in determining time in which to appeal.
Fuller v. Ferrin, 50 U. —; 168 P. 1179.

5844. (2494.) When appointed day is a holiday. Whenever any act of a secular nature, other than a work of necessity or mercy, is appointed by law or contract to be performed upon a particular day, which day falls upon a holiday, such act may be performed upon the next business day with the same effect as if it had been performed upon the day appointed. Nothing in this nor the preceding section shall be so construed as in any manner to change, alter, or modify the time of the maturity of negotiable instruments.

Cal. C. Civ. P., § 13*; Mont. Pol. C., § 13*.
Holidays, §§ 2860, 2861, and notes.
When negotiable instrument falls due on a holiday, § 4233.

5845. (2495.) Seal, how affixed. When the seal of a court, or public officer, is required by law to be affixed to any paper, the word "seal" includes an impression of such seal upon the paper alone, as well as upon wax or a wafer affixed thereto. In all other cases the word seal may include a scroll printed or written.

Cal. C. Civ. P., § 14*; Mont. Pol. C., § 13*.
Private seals unnecessary, § 4876.

5846. (2496.) Where authority joint, majority may act. Words giving a joint authority to three or more public officers or other persons are construed as giving such authority to a majority of them, unless it is otherwise expressed in the act giving the authority.

Cal. C. Civ. P., § 15; Mont. Pol. C., § 14.
Authority of majority of executors or of administrators, § 7716; of arbitrators, §§ 3226, 6904, 7211; of referees, § 7211.
Query: How far does this section affect the acts of public boards?
Tooele Bldg. v. Tooele H. S., 43 U. 362; 131 P. 894.

5847. (2497.) Words and phrases, how construed. Words and phrases are construed according to the context and the approved usage of the language; but technical words and phrases, and such others as have acquired a peculiar and appropriate meaning in law, or are defined by statute, are to be construed according to such peculiar and appropriate meaning or definition.

Cal. C. Civ. P., § 16; Mont. Pol. C., § 15.
Certain words and phrases defined, § 5848, and notes.
Use of abbreviations, numerals, § 1824.
Common usage should govern in construing a word or phrase.
Z. C. M. I. v. Hollister, 3 U. 292; 3 P. 87; affirmed 111 U. S. 62.
Miles v. Wells, 22 U. 55; 61 P. 534.

5848. (2498.) Rules for construction of statutes. In the construction of the statutes, the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the legislature or repugnant to the context of the statute:

1. The word "month" means a calendar month, unless otherwise expressed, and the word "year" or the abbreviation "A. D." is equivalent to the expression "year of our lord."

2. The word "oath" includes "affirmation," and the word "swear" includes the word "affirm." Every mode of oral statement under oath or affirmation is embraced in the term "testify," and every written one in the term "depose."

3. The word "signature" includes any name, mark, or sign written with the intent to authenticate any instrument or writing.

4. The word "writing" includes printing, writing, and typewriting.

5. The word "person" includes bodies politic and corporate, partnerships, associations, and companies.

6. The singular number includes the plural, and the plural the singular.

7. Words used in the masculine gender comprehend, as well, the feminine and neuter.

8. Words used in the present tense include the future.

9. The word "property" includes both real and personal property.

10. The terms "land," "real estate," and "real property" include land, tenements, hereditaments, water rights, possessory rights, and claims.

11. The term "personal property" includes every description of money, goods, chattels, effects, evidences of rights in action, and all written instru-

ments by which any pecuniary obligation, right or title to property is created, acknowledged, transferred, increased, defeated, discharged, or diminished, and every right or interest therein.

12. The word "will' includes codicils.

13. The word "writ" signifies an order or precept in writing, issued in the name of the state, or of a court or judicial officer; and the word "process" a writ or summons issued in the course of judicial proceedings.

14. The word "state," when applied to the different parts of the United States, includes the District of Columbia and the territories; and the words "United States" may include the district and the territories.

15. The words "highway" and "road" include public bridges, and may be held equivalent to the words "county way," "county road," "common road," and "state road."

16. The words "insane person" include idiots, lunatics, distracted persons, and persons of unsound mind.

17. The words "sheriff," "county attorney," "clerk," or other words used to denote an executive or ministerial officer may include any deputy or other person performing the duties of such officer, either generally or in special cases; and the words "county clerk" may be held to include "clerk of the district court."

18. The word "executor" includes administrator, and the term "administrator" includes executor, when the subject matter justifies such use.

19. The word "population," where used in these revised statutes, or in any statute hereafter passed, shall be taken to be that as shown by the last preceding state or national census, unless otherwise specially provided.

20. The word "councilman" may include trustees of towns.

21. The word "town" may mean incorporated town and may include cities, and the word "city" may mean incorporated town.

22. The word "vessel," when used with reference to shipping, includes steamboats, canal boats, and every structure adapted to be navigated from place to place. Am'd '07, p. 78.

Cal. C. Civ. P., § 17*; Cal. Pol. C., § 17*; Mont. Pol. C., § 16*.
The word "process" defined, § 1500.
Construction of "real estate," "conveyance," "heirs," §§ 4868-4871, 6379, 6364.
Public highways defined, § 2800.
"Incompetent person" includes what, § 7817.
When principal includes deputy, § 1462.
Construction of terms used in taxation, § 5865.
Word "property" defined, Con. art. 13, sec. 2.
English language used, § 1823.
Abbreviations and numerals allowable in legal documents, § 1824.
Technical words and phrases, how construed, § 5847.
Words and phrases construed according to the context and the approved use of language, § 5847.

Mining claims are real property and pass by deed.
Lavagnino v. Uhlig, 26 U. 1; 71 P. 1046; affirmed 198 U. S. 443.

The word "provided" construed.
Marioneaux v. Cutler, 32 U. 475; 91 P. 355.

This section, by implication at least, excludes the common law from all subjects that are regulated by statute.
R. G. W. Ry. Co. v. S. L. Inv. Co., 35 U. 528; 101 P. 586.

TITLE 105.

SUPPORT OF POOR BY RELATIVES.

5853. (2499.) Who liable. Amount. Every poor person who shall be unable to earn a livelihood in consequence of any bodily infirmity, idiocy, lunacy, or other unavoidable cause, shall be supported by the father, grandfather, mother, grandmother, child, grandchild, brother, or sister of such poor person, if they or any of them be of sufficient ability; and if any person shall fail or refuse to support his or her father, grandfather, mother, grandmother, child, grandchild, sister, or brother, having the ability to do so, when directed by the board of county commissioners of the county where such poor person shall be found, whether such relative shall reside in the same county or not, and the burden of supporting such poor person shall fall upon the county, such relative shall forfeit and pay to the board of county commissioners, for the use of the poor of the county, such sums as may be by the board

of county commissioners deemed adequate and proper to be paid, not exceeding $20 a month for each and every month during which the county may be charged with the support of such poor person; *provided, however,* that any poor person who is the owner of real property and receiving county aid for their sustenance, by reason of their indigency, or dependency, said amounts so received from the county by such person or persons, together with legal interest thereon, shall, after the decease of said indigent person, be a preferred claim against his estate in favor of the county; *provided,* that whenever any person becomes a pauper from intemperance or other bad conduct, he shall not be entitled to the support from any relative except parent or child.

Am'd '11, p. 110.

County commissioners to provide for the poor, § 1400x40-52.

Delinquent husband or father, how punished, § 8113.

5854. (2500.) Id. Order in which liable. Children shall first be called upon to support their parents, if there are children of sufficient ability; and if there are none of sufficient ability, the parents of such poor person shall be next called upon; and if there are neither parents nor children, the brothers and sisters shall next be called upon; and if there are neither brothers nor sisters, the grandchildren of such poor person shall next be called upon, and then the grandparents; *provided,* that a married woman shall not be liable to a suit for maintenance beyond the interest or income of the estate of such married woman held in her own right.

TITLE 106.

TAXATION.

CHAPTER 1.

PROPERTY LIABLE TO TAXATION.

5861. (2501.) All property taxed, unless exempted. All property in this state, not exempt under the laws of the United States, or under the constitution of this state, shall be taxed in proportion to its value, as hereinafter provided.

Taxation to be equal and uniform, Con. art. 13, sec. 3.

Word "property" defined, Con. art. 13, sec. 2.

Levy of city taxes, § 671, and note.

All property taxable except that specifically exempted, Con. art. 13, secs. 2-4.

Decisions on invalid tax sales, note to § 6018.

Property must be assessed at its fair cash value; the price for which it would sell in the open market.

State v. Thomas, 16 U. 86; 50 P. 615.

State ex rel. v. Armstrong, 19 U. 117; 56 P. 1076.

Home Fire Ins. Co. v. Lynch, 19 U. 189; 56 P. 681.

Under a U. S. statute requiring all banks, associations, corporations, and individuals issuing notes or bills for circulation as currency to pay a tax thereon, Z. C. M. I. merchandise orders held not taxable.

Z. C. M. I. v. Hollister, 3 U. 292; 3 P. 87; affirmed 111 U. S. 62.

A statute imposing taxes should be clear and unambiguous, and when it clearly imposes a tax on a particular class of property it should not be given a forced construction to include other property.

Id.

The fifth amendment to the U. S. constitution, declaring that private property shall not be taken for public use without just compensation, should be applied to the appropriation of private property under the right of taxation as well as to its appropriation under the right of eminent domain.

People v. Daniels, 6 U. 288; 22 P. 159.

A mortgage being a species of property distinct from other property, the holder or owner of it, when residing within the state, is assessed and taxed as the owner of money in use and not upon an interest in land.

Judge v. Spencer, 15 U. 242; 48 P. 1097.

Chap. 48, laws '92, exempting mortgages from taxation, is in conflict with Con. art. 13, sec. 2, and the provisions of this chapter, and is repealed by implication.

Id.

Where a non-resident kept money on deposit in banks of this state, and for which certificates of deposit are issued, it is subject to levy for taxes.

In re Thourot's Etstae, 51 U. —; 172 P. 769.

By amendment to the constitution in 1906, mortgages are no longer taxable, Con. art. 13, secs. 3, 12.

5862. (2502.) Land, except improvements, etc., non-taxable while title is in state. No tax shall be levied upon lands the title to which remains in the state, held or occupied by any person under a contract of sale or lease from the territory or state of Utah, but this provision shall not be construed to prevent the taxation of improvements on such lands and the interest in the land

to the extent of money paid prior to the levying such tax in part payment of the purchase price thereof.

List of lands sold, etc., by state to be furnished to assessor, § 5917.

5863. (2503.) Property exempt. The property of the United States, of the state, counties, cities, towns, school districts, and public libraries, and lots with the buildings thereon used exclusively for either religious worship or charitable purposes, and places of burial not held or used for private or corporate benefit shall be exempt from taxation. Ditches, canals, flumes, and pumping plants, owned and used by individuals or corporations for irrigating lands owned by such individuals or corporations, or the individual members thereof, shall not be separately taxed so long as they shall be owned and used exclusively for such purposes. Am'd '09, p. 207.

Property exempt under the constitution, and decisions thereunder, Con. art. 13, sec. 3, and note.

Exemptions reserved to U. S. in enabling act, sec. 3.

Exemptions must be in express terms, note to Con. art. 13, sec. 3.

Since this section was enacted, in 1898, Con. art. 13, sec. 3, has been amended to include further exemptions.

The water system for selling water to the inhabitants of a city, and used in conveying the water from the river to such city, is not exempt from taxation.

Bear River Irr. Co. v. Ogden City, 8 U. 494; 33 P. 135.

5864. (2504.) Mines and net proceeds taxable. All mines and mining claims, both placer and rock in place, containing or bearing gold, silver, copper, lead, coal, or other valuable mineral deposits, after purchase thereof from the United States, shall be taxed at the price paid the United States therefor, unless surface ground, or some part thereof, of such mine or claim is used for other than mining purposes, and has a separate and independent value for such other purposes; in which case said surface ground, or any part thereof, so used for other than mining purposes shall be taxed at its value for such other purposes; and all the machinery used in mining, and all property and surface improvements upon or appurtenant to mines and mining claims, which have a value separate and independent of such mines or mining claims, and the net annual proceeds of all mines and mining claims, and also the net annual proceeds of coke made from coal, or bullion or matte made from ore not taxed, which is deemed a product of the mines, shall be taxed as other personal property. Am'd '03, p. 76.

Taxation of mines under authority of the constitution, and decisions thereunder, Con. art. 13, sec. 4, and note.

Assessment of net proceeds of mines, §§ 5929-5936.

List of mining patents to be furnished, § 5916.

The surface and improvements thereon used for other than mining purposes are taxable, and one occupying and paying taxes may acquire adverse possession thereto.

Utah Copper Co. v. Chandler, 45 U. 85; 142 P. 1119.

Utah Copper Co. v. Eckman, 47 U. 165; 152 P. 178

Even against the owner who pays taxes on mining claims.

Utah Copper Co. v. Eckman, 47 U. 165; 152 P. 178.

A tax assessed upon a drain tunnel used to drain a mine was unauthorized where it appeared that the tunnel had no separate and independent value, though used by adjoining mines for a consideration, but that its value was inseparably connected with the operation of the mine.

Ontario S. M. Co. v. Hixon, 49 U. 359; 164 P. 498.

This section prohibits a blanket assessment on all coal lands in the county at a flat rate.

Ririe, State Auditor, v. Randolph, 50 U. —; 169 P. 941.

CHAPTER 2.

DEFINITIONS.

5865. (2505.) Terms used in this title defined. Whenever the terms mentioned in this section are employed in this title, they are employed in the sense hereafter affixed to them, to wit:

1. The term "property" includes moneys, credits, bonds, stocks, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership; but this shall not be so construed as to authorize the taxation of the stocks of any company or corporation, when the property of such company or corporation, represented by such stocks, has been taxed;

2. The term "real estate" includes:

First. The possession of, claim to, ownership of, or right to, the possession of land;

Second. All mines, minerals, and quarries in and under the land subject to the provisions of § 5864, all timber belonging to individuals or corporations, growing or being on the lands of the state or the United States, and all rights and privileges appertaining thereto;

Third. Improvements;

3. The term "improvements" includes all buildings, structures, fixtures, fences, and improvements erected upon or affixed to the land, whether the title has been acquired to said lands or not;

4. The term "personal property" includes everything which is the subject of ownership not included within the meaning of the terms "real estate" and "improvements;"

5. The terms "value" and "full cash value" mean the amount at which the property would be taken in payment of a just debt due from a solvent debtor;

6. The term "credit" means those solvent debts, secured or unsecured, owing to a person;

7. The term "debts" means those secured or unsecured liabilities owing by a person;

8. The term "person" as used in this title shall be construed to include partnerships, corporations, and associations of persons.

Word "property" defined, Con. art. 13, sec. 2.
Construction of terms generally, § 5848.
The test of "full cash value" is the price obtainable in the open market.
State v. Thomas, 16 U. 86; 50 P. 615.
Sub. 1 construed. McCormick v. Bassett, 49 U. 444; 164 P. 852.

CHAPTER 3.

ASSESSMENT OF PROPERTY.

5866. (2506.) Cash value. Land and improvements separately. All taxable property must be assessed at its full cash value. Land and the improvements thereon must be separately assessed.

Property to be assessed according to its value in money, Con. art. 13, sec. 2.
The test of "full cash value" is the price obtainable in the open market.
State v. Thomas, 16 U. 86; 50 P. 615.
"Moneyed capital" means shares of stock or other interest in enterprises in which the capital employed in carrying on the business is money, and the object of the business is the making of a profit by the use of money. Inequality in assessment results when taxing officials assess property of one person or class of persons or a particular class of property at a valuation greater in proportion to its real or cash value than is placed on the mass of other taxable property.
First Natl. Bank of Nephi v. Christensen, 39 U. 568; 118 P. 778.

5867. (2507.) Bank stock. Verified statement. The stockholders in every bank or banking association, organized under the authority of this state or of the United States, must be assessed and taxed on the value of their shares of stock therein, in the county, town, city, or district where such bank or banking association is located, and not elsewhere, whether such stockholders reside in such place or not. To aid the assessor in determining the value of such shares of stock, the cashier or other accounting officer of every such bank must furnish a verified statement to the assessor showing the amount and number of shares of the capital stock of each bank, the amount of its surplus or reserve fund or undivided profits, the amount of investments in real estate, which real estate must be assessed to said bank and taxed as other real estate, and the names and places of residence of its stockholders, together with the number of shares held by each.

In the absence of express permission of congress, neither a national bank, nor U. S. bonds, constituting any part of its capital stock, can be taxed by authority of a state. Nor can a state tax a national bank which is the financial agent or public depository of the federal government. But a tax on the capital of such a bank is not the same as a tax on the shares of which the capital is composed; and there is no provision of law which precludes the territorial legislature from taxing the banking franchise by taxing the individual shares of stockholders in national banks.
S. L. C. Nat. Bank v. Golding, 2 U. 1.
Under provisions of this section, and Con. art. 13, secs. 2, 3, and §§ 5866-5868, the only deductions authorized in the assessment for taxes of the shares of stock of any national bank or other corporation organized and doing business in this state are deductions from the value of such shares, of the value of the real estate of such corporation within this state

which has been assessed, and deductions of bona fide debts from creditors.

Com'l Nat'l Bk. v. Chambers, 21 U. 324; 61 P. 560; affirmed 182 U. S. 556.

Stocks are not credits, and credits are not stocks within the meaning of the revenue act.

Id.

The individual debts of a shareholder are not required to be deducted from the value of his stock, debts disconnected from the business of such corporation cannot be deducted from the amount of the capital, and the shares of stock cannot be treated as credits.

Id.

Taxation of a bank's capital stock without deducting value of realty owned by building company of which bank held all stock representing one-half of bank's capital, which realty was taxed to building company, was double taxation, prohibited by Con. art. 13, secs. 2 and 3.

McCornick v. Bassett, 49 U. 444; 164 P. 852.

5868. (2508.) Id. Deductions. In the assessment of the shares of stock mentioned in the next preceding section, each stockholder must be allowed all the deductions and exemptions allowed by law in assessing the value of other taxable personal property owned by individual citizens of this state, and the assessment and taxation must not be at a greater rate than is made or assessed upon other moneyed capital in the hands of individual citizens of this state.

What deductions allowed generally, § 5878.

5869. (2509.) Id. In making such assessment, there must also be deducted from the value of such shares such sum as is in the same proportion to such value as the assessed value of the real estate of such bank or banking association in which such shares are held bears to the whole amount of the capital stock, surplus, reserve, and undivided profits of such bank or banking association.

Stock not to be taxed when property represented by such stock has been taxed, Con. art 13, sec. 2.

5870. (2510.) National banks not in Utah. The shares of the capital stock of banks organized under the laws of the United States, not located in this state, owned by residents of this state, are not subject to taxation.

5871. (2511.) Bank to pay tax on stock. Lien. All taxes levied under the provisions of this title upon the shares of stock of banking corporations or associations must be paid by the corporation or association, and the amount of any such tax paid may be retained and deducted by the bank out of the dividends upon the stock or out of any other funds of the stockholder then or thereafter in its hands, and a paramount lien is hereby given to the bank against the stock upon which the tax is so paid to enforce the repayment or refunding of said tax; and no transfer or incumbrance of the said stock shall be made or permitted to be made by the bank, so long as the tax remains due and unpaid.

Taxation of national banks; deductions, note to § 5867.

5872. (2512.) Private bankers, brokers, and foreign banks. Statement. Every corporation doing a banking business in this state, which is organized under the laws of another state or of any foreign country, and every private banker, broker, or dealer in stocks must make out and deliver to the assessor, when required to list personal property, a verified statement upon blanks furnished by the assessor, showing:

1. The amount of money on hand or in transit;
2. The amount of funds in the hands of other banks, brokers, or others, subject to draft;
3. The amount of checks or cash items not included in either of the preceding items;
4. The amount of bills receivable, discounted or purchased, and other credits due or to become due, and amounts receivable;
5. All other property appertaining to said business, other than real estate, which real estate must be listed and assessed as other real estate is listed and assessed under this title;
6. The aggregate amount of all deposits;
7. The amount of all accounts payable other than current deposit accounts.

Such corporation, private banker, broker, or dealer in stocks shall be permitted to deduct from the credits the amount of his liabilities as provided in § 5878 and sub. 6 of § 5877. The statement required in this section must be shown to be derived from the books of entry and account ordinarily

in use in the business of the person furnishing the statement, and the amount shown therein must be an average of the corresponding amounts as shown by said books of entry and account for a period of ninety days next preceding the furnishing of such statement. The verification required must be made by the highest officer or employe in the county where the assessment is made, or by the banker, broker, or dealer in stocks in person.

National banks, §§ 5867-5870.

5873. (2513.) Railroads, etc., operating in more than one county. Other franchises. Mines, mining property, and net proceeds of mines. All property and franchises owned by railroads, street railroads, car, telegraph and telephone, electric light, pipe line, power, canal, irrigating, and express companies operated in more than one county in this state, and all the machinery used in mining, and all property and surface improvements upon or appurtenant to mines and mining claims, which have a value separate and independent of all such mines or mining claims, and the net annual proceeds of all such mines and mining claims in this state must be assessed by the state board of equalization as hereinafter provided. Other franchises, if granted by the authorities of a county or city, must be assessed in the county or city within which they are granted; if granted by any other authority, they must be assessed in the county in which the corporations, firms, or persons owning or holding them have their principal place of business.

Am'd '99, p. 102; '07, p. 9; '09, p. 93.

Companies operating in more than one country, § 5922.

Duties of state board of equalization, Con. art. 13, sec. 11; §§ 5922-5928, 5983-5991.

Assessment by county assessor when operated wholly in one county, § 5895.

Assessment of capital stock and franchises, § 5890.

Collection of taxes from car companies, §§ 6010, 6016.

The provisions of this section impose upon the state board of equalization the duty of assessing all property and franchises of railroads and other companies operating in more than one county.

Salt Lake Co. v. Board of Equalization, 18 U. 172; 55 P. 378.

The provisions of the amendment of 1899, that property and franchises owned by railroad and other companies must be assessed by state board of equalization, in so far as they confer power on such board to assess property wholly within one county, violate Con. art. 13, sec. 11, and are void.

State ex rel. v. Eldredge, 27 U. 477; 76 P. 337.

5874. (2514.) Railway lands to be assessed by county assessor. All railroad lands in this state not actually used as a road bed or right of way, or for depot, yard, or other necessary railroad purposes, shall be assessed by the assessor of the county in which said lands are situated.

5875. (2515.) Property, where assessed. Land, how assessed. All taxable property must be assessed in the county, city, town, or district in which it is situated. Land must be assessed in parcels or subdivisions not exceeding 640 acres each, and tracts of land containing more than 640 acres, which have been sectionized by the United States government, must be assessed by sections or fractions of sections.

Property assessed where situated, §§ 5888, 5906.

Property must be treated as it exists within the jurisdiction of such taxing power, and without reference to the power of another state over which there is no jurisdiction whatever.

Com. Nat. Bank v. Chambers, 21 U. 324; 61 P. 560.

A band of sheep could not be taxed by city in which the owner lived when the sheep had never been within the city limits.

Murdock v. Murdock, 38 U. 373; 113 P. 330.

DUTIES OF ASSESSOR.

5876. (2516.) Property assessed as of 1st day of January. The assessor must, before the first Monday of May of each year, ascertain the names of all taxable inhabitants, and all property in the county subject to taxation, except such as is required to be assessed by the state board of equalization, and must assess such property to the person by whom it was owned or claimed, or in whose possession or control it was at twelve o'clock m. of the 1st day of January next preceding, and at its value on that date. Credits must be assessed as provided in § 5878 and sub. 6 of § 5877. No mistake in the name of the owner or supposed owner of property renders the assessment thereof invalid. In order that the assessors, as provided in § 5086, shall have their offices fully acquainted with all the property in the respective counties, they shall be required to visit each separate district or precinct, either in person or by deputy, annually, and in person or by deputy annually inspect the property they are required to assess. The intent of the last two provisions is to

require assessors to acquire as full knowledge as possible of the property that should be entered upon the assessment roll in their respective counties, so that all property shall be assessed and bear its share of the burden of taxation. Am'd '05, p. 239; '07, p. 45; '09, p. 93.

The tax becomes a lien on personalty first day of January, § 5996; on realty, second Monday in January, § 5997.

Property brought into county after first Monday in May, § 5921.

Action of assessor if owner likely to dispose of property, etc., § 6057.

Duties of state board of equalization, §§ 5922-5928.

Limitations on assessment of insurance companies, § 1136.

County assessor assesses for special school tax, § 4626; city school taxes, § 4704; county school districts of first class, § 4624.

State geologist to assist, §§ 5779, 5782.

Under § 14, chap. 129, laws of 1896, it is competent for the assessor to assess personal property at any time before the first Monday in March, in case he has cause to believe the owner is likely to avoid the payment of the tax by disposition of the property or removal from the state.

Taylor v. Robertson, 16 U. 330; 52 P. 1.

Where real estate within the limits of a city has been assessed, but before the rate had been fixed, or levy made, a judgment was rendered disconnecting the property from the city and providing that it should not longer be subject to taxes, the tax did not became a lien upon the property so severed.

Gillmor v. Dale, 27 U. 372; 75 P. 932.

A tax or assessment cannot exist so as to become a lien or incumbrance on real estate until the amount thereof is ascertained.

Id.

Prior to the amendment of '09, a tax lien was an encumbrance within a covenant against encumbrance upon realty purchased after the second Monday in January.

George A. Lowe Co. v. Simmons Warehouse Co., 39 U. 395; 117 P. 874.

5877. (2517.) Assessor may require statement from taxpayer. He may require from any person a statement under oath setting forth specifically all the real and personal property owned by such person, or in his possession or under his control, at twelve o'clock M. on the 1st day of January. Such statement must be in writing, showing separately:

1. All property belonging to, claimed by, or in the possession or under the control or management of such person;

2. All property belonging to, claimed by, or in the possession or under the control or management of any firm of which such person is a member;

3. All property belonging to, or claimed by, or in the possession of, or under the control or management of any corporation of which such person is president, secretary, cashier, or managing agent;

4. The county in which such property is situated or in which it is liable to taxation, and is liable to taxation in the county in which the statement was made, also the city, town, school district, road district, or other revenue district in which it is situated;

5. A statement of all lands in parcels or subdivisions, not exceeding 640 acres each, and the sections and fractional sections of all tracts of land containing more than 640 acres which have been sectionized by the United States government; improvements, and personal property, including all vessels, steamers, and other water craft, and all taxable state, county, city, or other municipal or public bonds, and the taxable bonds of any person, firm, or corporation, and the deposited money, gold dust, and other valuables, and the names of the persons with whom such deposits are made, and the places in which they may be found; all mortgages, deeds of trust, contracts, and other obligations by which a debt is secured, and the property affected thereby;

6. All solvent credits, secured or unsecured, due or owing to such persons, or to any firm of which he is a member, or due or owing to any corporation of which he is president, secretary, cashier, or managing agent, deducting from the sum total of such credits only such debts, secured or unsecured, as may be owing by such person, firm or corporation; *provided,* that mutual benefit building societies incorporated under the laws of this state or of the territory of Utah shall be allowed to deduct from their taxable credits the amount due to the stockholders of such societeis.

Am'd '05, p. 239; '09, p. 93.

This form to be furnished; affidavit thereto, §§ 5879-5881.

5878. (2518.) What debts deducted from credits. In making up the amount of credits which any person is required to list, he will be entitled to deduct from the gross amount of such credits the amount of all bona fide debts owing by him, but no acknowledgment of indebtedness not founded on actual consideration, no such acknowledgment made for the purpose of being

so deducted, must be considered a debt within the intent of this section; and no person is entitled to a deduction on account of an obligation of any kind given to an insurance company for the premium of insurance, nor on account of any unpaid subscription to any institution or society, nor on account of a subscription to, or instalment payable on, the capital stock of any company or corporation; and no liability of any person or persons, company or corporation, as surety for another must be deducted; and no other liability of any person or persons, company, or corporation, on any bond or undertaking must be deducted; and no deduction must be made in any case unless the party claiming such deduction discloses to the assessor, under oath, the name or names of the persons to whom such party is indebted, and the amount of such indebtedness to each, and also that such indebtedness is not barred by the statute of limitations, or, in case such indebtedness is so barred, acknowledges such indebtedness in writing, duly subscribed. No debt is to be deducted unless the statement shows the amount of such debt, as stated under oath in the aggregate. Whenever one member of a firm or one of the proper officers of a corporation has made a statement showing the property of the firm or corporation, another member of the firm or another officer need not include such property in the statement made by him; but this statement must show the name of the person or officer who made the statement in which such property is included. The fact that such statement is not required, or that a person has not made such statement under oath, or otherwise, does not relieve the property from taxation.

A deduction of debts from credits may be authorized, Con. art. 13, sec. 3.

What deductions allowed on assessment of bank stock, note to § 5867.

An insurance company is not entitled to deduct from its credits debts for fire lossses or policy cancellations which may thereafter occur and which, as a matter of fact, do occur before the taxes become delinquent.

Home Fire Ins. Co. v. Lynch, 19 U. 189; 56 P. 681.

Notes and accounts of policy holders representing portions of unearned premiums of an insurance company, although likely to be defeated upon the happening of a contingency, must be assessed at their full value.

Id.

5879. (2519.) Blank statements to be furnished assessors. The state board of equalization must furnish the assessor of each county with blank forms of statements provided for in § 5877, affixing thereto an affidavit, which must be substantially as follows:

I, ..., do swear that I am a resident of the county of ....., and that my postoffice address is .....; that the above list contains a full and correct statement of all property subject to taxation, which I, or any firm of which I am a member, or any corporation, association, or company of which I am president, cashier, secretary, or managing agent, owned, claimed, possessed, or controlled, at twelve o'clock m. on the second Monday of January last, and which is not already assessed this year; and that I have not in any manner whatsoever transferred or disposed of any property, or placed any property out of said county or out of my possession for the purpose of avoiding any assessment upon the same, or making this statement; and that the debts therein stated as owing by me are justly due and owing to others.

The affidavit to the statement on behalf of the firm or corporation must state the principal place of business of the firm or corporation, and in other respects must conform substantially to the preceding form. The time when taxes become delinquent, and the time of the meeting of the county board of equalization must be stated in such form. Am'd '05, p. 240.

5880. (2520.) Id. To taxpayer. Return. Corrections. The blank form of statement must be furnished to the taxpayer by mail or left at his residence or usual place of business, or may be delivered to him personally. The assessor may fill out the statement at the time he presents it, or he may require the taxpayer, within an appointed time, not less than twenty days, to return the same to him, properly filled out. The assessor must, either in person or by mail, deliver to the person making the statement a copy of the same, if corrections are made, showing such corrections.

Form of statement, § 5877; affidavit thereto, § 5879.

5881. (2521.) Assessor may require affidavit. Witnesses. Penalty. Every assessor has power:

1. To require any person found within such assessor's county to make and subscribe an affidavit respecting his property, giving his name and place of residence, and postoffice address;

2. To subpœna and examine any person in relation to any statement furnished by him, or which discloses property which is assessable in the county; and he may exercise this power in any county where the person whom he desires to examine may be found, but has no power to require such person to appear before him in any other county than that in which the subpœna is served.

Every person who wilfully refuses to furnish the statement hereinbefore required, or to make and subscribe such affidavit respecting his name and place of residence, or to appear and testify when requested so to do by the assessor, as above provided, for each and every refusal, and as often as the same is repeated, shall forfeit to the county the sum of $100, to be recovered by action brought in the name of the assessor in a justice's court. In case such affidavit shows the residence of the person making the same to be in any county other than that in which it is taken, or the statement discloses property in any county other than that in which it is made, the assessor must file the affidavit or statement in his office, and transmit a copy of the same, certified by him, to the assessor of the county in which such residence or property is therein shown to be. All money recovered by any assessor under the provisions of this section must be by him paid into the treasury of his county.

Affidavit of taxpayer, § 5879.

5882. (2522.) Refusal to make statement. If any person, after demand made by the assessor, neglects or refuses to give, under oath, the statement herein provided for, or to comply with the other requirements of this title, the assessor must note the refusal on the assessment book opposite his name, and must make an estimate of the value of the property of such person, and the value so fixed by the assessor shall not be reduced by the board of county commissioners.

5883. (2523.) Absent owner. Estimate. If the owner or claimant of any property not listed by any other person is absent or unknown, the assessor must make an estimate of the value of such property.

5884. (2524.) Id. Where known. Where unknown. If the name of the absent owner is known to the assessor, or if it appears of record in the office of the county recorder where the property is situated, the property must be assessed to such name. If unknown to the assessor, and if it does not appear of record as aforesaid, the property must be assessed to "unknown owners."

Cal. Sup. (1893) p. 249, § 3636.

County treasurer to mail notice of amount of tax, § 6010.

Where property was owned jointly by W. and H., an assessment to "W. et al." was erroneous.

Asper v. Moon, 24 U. 241; 67 P. 409.

But an assessment to "S. P. R. et al.," S. P. R. being one of the heirs of the deceased owner was sufficient.

O. S. L. R. Co. v. Hallock, 41 U. 378; 126 P. 394.

If name of owner unknown property must be assessed to "unknown owner." If name of owner appears of record, assessment to "unknown owner" is void.

Jungk v. Snyder, 28 U. 1; 78 P. 168.

5885. (2525.) Statement of property in other counties. The assessor, as soon as he receives a statement of any taxable property situated in another county, must make a copy of such statement for each county in which the same is situated, and transmit the same, by mail, to the assessor of the proper county, who must assess the same as other taxable property therein.

5886. (2526.) Goods consigned. All personal property consigned for sale to any person within this state from any place out of the state must be assessed as any other property.

Assessment of merchandise, § 5891.

5887. (2527.) Person assessed as agent, etc. When a person is assessed as agent, trustee, bailee, guardian, executor, or administrator, his representative designation must be added to his name and the assessment entered on a separate line from his individual assessment.

Property in litigation, § 5906.

5888. (2528.) Firm or corporate property, where assessed. The property of every firm and corporation must be assessed in the county where the property is situated, and must be assessed in the name of the firm or corporation.

Property assessed where situated, §§ 5875, 2526.

5889. (2529.) Decedents' estates. The undistributed or unpartitioned property of deceased persons may be assessed to their heirs, guardians, executors, or administrators, or any one of them, and the payment of taxes made by either binds all the parties in interest for their equal proportion.

Tax on estates must be ordered paid, §§ 6013, 7767.

Evidence that in the partition property "was assessed to S. P. R., et al., S. P. R. being one of the heirs of the deceased owner, was sufficient to sustain a finding that the property was properly assessed and the taxes properly levied so as to create a lien thereon.
O. S. L. R. Co. v. Hallock, 41 U. 378; 126 P. 394.

5890. (2530.) Corporate franchise and stock, where assessed. The capital stock and franchises of corporations and persons, except as may be otherwise provided, must be listed and taxed in the county, city, town, or district where the principal office or place of business of such corporation or person is located; if there be no principal office or place of business in the state, then at the place in the state where any such corporation or person transacts business.

Franchises, where assessed, § 5873.

5891. (2532.) Where assessed. Merchants and manufacturers. The personal property belonging to the business of a merchant or manufacturer must be listed in the city, town, or district where such property is situated.

Goods consigned for sale, assessment, § 5886.

5892. (2533.) Id. Express and stage companies, etc. The personal property of express, transportation, and stage companies, steamboats, vessels, and other water craft must be listed and assessed in the county, city, town, or district where such property is usually kept.

5893. (2534.) Id. Gas and water companies. The personal property and franchises of gas and water companies must be listed and assessed in the county, city, town, or district where the principal works are located. Gas and water mains and pipes laid in roads, streets, or alleys are personal property.

5894. (2535.) Id. Bridges and ferries. Bridges and ferries and their franchises owned by persons or corporations must be listed and assessed in the county, city, town, or district where such property, or any portion thereof, is located, and such bridges are personal property.

5895. (2536.) Id. Railroad, telegraph, etc., lines, wholly in one county. Railroads, street railroads, car, telegraph, and telephone lines operated wholly in one county, and electric light lines, and similar improvements, and the franchises; canals, ditches, and flumes, and the franchises of the same, when separately taxable, must be listed and assessed in the county in which such property is located, and the assessor must require the owner of such property, or his agent, or any officer of a corporation owning the same, to make a verified statement, containing a list of the number of miles such property is operated in the county, and the value thereof.

Assessment by state board of equalization if operated in more than one county, §§ 5873, 5984, sub. 5.

State board cannot assess railroad property, etc., situated wholly in one county.
State ex rel. v. Eldredge, 27 U. 477; 76 P. 337.

TRANSIENT STOCK.

('09, p. 272; '11, p. 90; '15, p. 92.)

5896. (2537.) "Transient stock" defined. For the purpose of taxation as hereinafter provided, transient stock shall be deemed to be:

1. All stock brought into the state by any person or persons for the purpose of being grazed or fed for any length of time exceeding twenty days.

2. All stock which is driven or removed from one county to another, or from this state to any other state, for the purpose of being grazed or fed for any length of time exceeding twenty days.

R. S. '98, § 2537; '99, p. 62; '01, p. 103; '07, p. 60; '09, p. 272; '15, p. 92.

5897. (2539.) Certificate of herd to be filed with assessor. Contents. Form. It shall be the duty of every person or persons within twenty days after bringing transient live stock into any county of the state from any other state or from any county of the state, to set out certificates of each herd signed by such person or persons or their agents, showing the number and kind of live stock, with the mark and brands on same, and file said certificate with the county assessor of the county into which said live stock shall be brought, which certificate shall be substantially in the following form:

State of Utah, county of ....., ss.

I hereby certify that on the ..... day of ....., I brought into the county of ..... from ....., ... head of ....., branded ....., on the ..... and marked .....

Dated this ..... day of ....., 19.....

Signed.....

By....., Agent.

R. S. '98, §§ 2537, 2542; '99, p. 62; '01, p. 105; '07, p. 60; '09, p. 272; '11, p. 90; '15, p. 92.

5898. (2538.) Duty of assessor. Certificate of assessment. It shall be the duty of the assessor to procure said certificates and, upon the filing thereof, to keep an index in his office, and provided such transient stock have not been previously assessed, enter an abstract of such certificates on the assessment roll for the current year, and issue any further certificates of assessment of such herd showing the time and place, number and description of the animals assessed, whether the taxes were paid in advance or a bond given, which certificates shall be substantially in the following form:

State of Utah, county of ....., ss.

I hereby certify that I have this day assessed ..... head of ....., branded ..... on ....., and marked as follows ....., property of ....., a resident of ..... county, state of .....

The owner has given bond to secure taxes. Paid taxes in advance for the year .....

Dated this ..... day of ....., 19.....

..... Assessor.

..... Deputy.

'09, p. 274; '11, p. 91.

Where assessor gives the owner a certificate showing the assessment of stock in the county where he resides, such certificate, upon being delivered to the assessor of another county where the stock may thereafter be, exempts such stock from further assessment for that year, and, if the latter assessor again assesses the stock and sells it for taxes, he is liable in damages.

Taylor v. Robertson, 16 U. 330; 52 P. 1.

5899. Rate of taxation, how computed. Collection of taxes. The state, state school, county, county school, and district school taxes on all transient live stock assessed shall be computed on the rates of the previous year, and collected in advance by the assessor of any county in the state in which said liv stock are first found on or after January 1 of each year; *provided,* that the owner or agent in charge of any such live stock may, in lieu of paying said taxes in advance, execute a bond to the county in which he is assessed, with two or more sureties to be approved by the assessor, and filed with the treasurer, conditioned that he will regularly and punctually pay all taxes which may become due thereon during the year, which taxes shall thereafter be computed under the levies of the current year, instead of on the basis of those of the previous year.

5900. Exemption from additional taxation, when. Whenever the owner of any transient stock or his agent shall thereafter drive or remove any such stock into another county, he shall not be required to pay any additional taxes to such county; *provided,* that such owner or his agent shall have complied with § 5897, and filed said certificate within twenty days from the date of entry in each county into which said stock are driven or removed.

5901. (2542x3.) Tax moneys to be pro-rated. Exceptions. Appor-

tionment to certain funds. It shall be the duty of the county commissinoers of each county wherein such certificates have been filed to make a demand during the month of January upon the commissioners of the county where the entire tax of the previous year on the transient live stock represented by such certificates was collected, claiming from such county such proportion of the taxes as the time during which such live stock ranged in said county would bear to the whole of the year, which claim, after deducting therefrom the cost of assessing and collecting the same, which shall not exceed 5 per cent of the amount claimed, shall be paid by the county receiving the entire tax; *provided,* that no portion of the tax collected for state or state school or state bounty purposes shall be considered in this connection. Said demand shall be accompanied by certified copies of the certificates upon which said sums are based. All district school funds received hereunder by any county participating in the distribution of taxes on transient stock, other than one county where such stock are assessed, shall be apportioned to the several school districts of the county in the same manner as the county school fund is apportioned.

5902. When full number is not assessed. If the assessment in the county where first made is not for the full number, then the assessor of any other county in which said transient stock may be ranging is authorized to assess such stock to the number omitted on the previous assessment, and the taxes on the additional number so assessed shall be subject to distribution among the several counties in which such transient stock are ranged.

5903. Penalty. Forfeiture. Action to recover. Any person who shall bring any live stock into the state as owner or agent, or who shall remove any transient live stock from one county of the state to another, and shall keep or herd the same therein for twenty days without filing the certificate provided for in § 5897, or who shall fail or refuse to pay the taxes or give the bond for the payment of same as required herein, shall be fined in a sum not less than $10 nor more than $300, and shall further forfeit and pay the taxes of the current year, which taxes shall be collected by civil action in the name of the county in which said live stock were so kept and herded. In any such action it shall be lawful to make any person having care and custody of such live stock the defendant in such action, and the service of the summons upon such agent or person having the care of such live stock shall be considered and held to be personal service on the owner thereof.

5904. Evasion of tax payment. Penalty. Writ of attachment. If any person having the care or custody of such live stock shall, pending an action instituted as provided in the last section, drive or move said live stock out of the county with intent to move the same out of the state, or with intent to evade the payment of any tax or fine mentioned herein, upon affidavit to that effect being made and filed in this action, being brought to recover said tax or fine herein provided, writs of attachment may issue as in civil action, and proceedings therein shall be as in other cases, except that no undertaking or attachment shall be required; and in addition thereto, any person so driving or moving such live stock shall be punished by a fine of not less than $10 or more than $300, or by imprisonment in the county jail for not exceeding three months, or by both such fine and imprisonment, for each and every offense.

5905. (2542x2.) Manner of assessment on stock brought in and removed from state. Credit allowed. All transient live stock brought into this state from any other state for the purpose of being grazed, fed, or ranged in this state a portion of the year, such live stock having been assessed or taxes having been paid thereon in such other state for the same year, upon satisfactory proof being made to the county treasurer of the county in which such live stock is assessable, that taxes have become due or have been paid thereon in such other state, shall be assessable at the full number and value thereof and taxed at the rate provided in this chapter; *provided,* that the en-

tire tax so assessed shall be credited to an amount that shall be in the same proportion to the entire tax as the time such property was out of the state bears to the whole year, but such credits shall not in any instance be for more than one-half of the total tax charged for the year. Where transient live stock located in the state at the beginning of the year is, subsequent to the assessment, removed to another state for the purpose of being grazed or fed for a period exceeding twenty days, and not for the purpose of being sold or marketed, the county treasurer of the county in which such live stock is assessable, upon satisfactory proof of such removal and of the time during which such live stock has been out of the state, and of the fact that taxes have been paid on such live stock for a period at least equal to the time such live stock has been out of the state, shall credit the tax chargeable under such assessment pursuant to the provisions of this section, providing for the assessment of transient live stock brought into this state. Am'd '17, p. 104.

OTHER PROPERTY ASSESSABLE.

5906. (2543.) Property in litigation in hands of receiver, etc. Money and property in litigation in possession of a county treasurer or of a court or a clerk thereof, or a receiver, must be assessed to such treasurer, clerk, or receiver, and the taxes paid thereon under the direction of the court.

Property in the hands of executors, guardians, etc., §§ 5887, 5889, 7767.

5907. (2544.) Property concealed, etc., doubly taxed. Any property wilfully concealed, removed, transferred, or misrepresented by the owner or agent thereof, to evade taxation, upon discovery must be assessed at double its value, and the assessment so made must not be reduced by the board of county commissioners.

5908. (2545.) Property escaping assessment. Any property discovered by the assessor to have escaped assessment may be assessed at any time, and when so assessed shall be reported by the assessor to the auditor, and the auditor shall charge the county treasurer with the taxes on such property, and the treasurer shall give notice to the party assessed therewith.

The assessor properly assessed for taxes money on deposit in this state, where the depositor resides in another state.
In re Thourot's Estate, 51 U. —; 172 P. 679.

ASSESSMENT BOOK.

5909. (2546.) State board of equalization must furnish form of assessment book. The state board of equalization must prepare and furnish to each county an assessment book with appropriate headings, in which must be listed by the county assessor of each county all property within the county, and in which must be specified in separate columns under the appropriate head:

1. The name of the person to whom the property is assessed, together with his postoffice address, giving the street and number or the number of lot and block so far as possible to obtain same from taxpayers' statements, county records, or otherwise;
2. Land by township, range, section, or fractional section or lot; and when such land is not a United States land division or subdivision, by metes and bounds, or other description sufficient to identify it, giving an estimate of the number of acres (not exceeding in each and every tract 640 acres), locality, and the improvements thereon;
3. City and town lots, naming the city or town, and number of the lot and block according to the system of numbering in such city or town, and the improvements thereon;
4. Mines and mining claims by name and number of lot;
5. All personal property, showing the number, kind, amount, and quality; but a failure to enumerate in detail such personal property does not invalidate the assessment;
6. The cash value of real estate other than city or town lots;
7. The cash value of improvements on such real estate;
8. The cash value of city and town lots;
9. The cash value of improvements on city and town lots;

10. The cash value of improvements on real estate assessed to persons other than the owners of the real estate;

11. The cash value of all personal property exclusive of money;

12. The purchase price per acre paid the government for mines and mining claims;

13. The amount of money;

14. Taxable improvements owned by the person, firm, association, or corporation located upon land exempt from taxation must, as to the manner of assessment, be assessed as other real estate upon the assessment roll. No value, however, must be assessed against the exempt land, nor under any circumstances must the land be charged with or become responsible for the assessment made against any taxable improvements located thereon;

15. The total value of all property;

16. Such other things as the state board of equalization may require; *provided,* that all assessments made on property within this state prior to the taking effect of this title, so far as the same have been made in accordance with law, are hereby validated and confirmed; and, *provided, further,* that the state board of equalization is empowered, whenever it may deem it necessary, to furnish the assessment book required by this section, in two books, viz., one book for the listing of all real estate, improvements, mines, and mining claims, and one book for the listing of all personal property. Am'd '01, p. 124.

If description is not certain no title passes by tax sale, note to § 6018.

5910. (2547.) Completion of assessor's book. Affidavit. On or before the first Monday of May in each year the assessor must complete his assessment book. He must take and subscribe an affidavit in the assessment book, to be substantially as follows:

I, ..., the assessor of ..... county, do swear that before the first Monday in May, 19....., I made diligent inquiry and examination, and visited and inspected, either personally or by deputy, all of the property within the county subject to assessment by me; that the same has been assessed on the assessment book equally and uniformly, according to the best of my judgment, information, and belief, at its full cash value; that I have faithfully complied with all the duties imposed on the assessor under the revenue laws; and that I have not imposed any unjust or double assessments through malice or ill will or otherwise, or allowed any one to escape a just and equal assessment through favor or reward, or otherwise.

The assessor shall not be paid or draw any compensation for services after the first Monday in May of each year, until said affidavit is taken and subscribed. A failure to take or subscribe such affidavit, or any affidavit, will not in any manner affect the validity of the assessment. Am'd '07, p. 46.

5911. (2548.) Assessor's plats. The assessor must, when directed so to do by the board of county commissioners, make in a map book a plat of the various blocks within any county, city, or town, and mark thereon in each subdivision the name of the person to whom it is assessed.

County surveyor shall make maps for assessors, 1618. Present ownership maps, §§ 1596-1598.

5912. (2549.) Assessment book delivered to treasurer. On or before the second Monday of May the assessment book, together with the map book and statements, must be delivered to the county treasurer, who shall furnish to each taxpayer by mail to addresses noted, postage prepaid, or leave at his residence or usual place of business, if known, a notice of the kind and valuation of property assessed to him, also notice of tax sale or sales of preceding year of said property, or any portion thereof, if any, from which the same, as shown by the records, remains unredeemed, and of the day fixed by the board of equalization for hearing complaints. The notice of assessed valuation shall be mailed at least ten days before the first day of said hearing, and the treasurer shall then return said assessment book, map book and statements to the board of county commissioners, who shall constitute a county board of equalization, as hereinafter provided. This notice of tax sales may be incorporated in the assessed valuation notice or the final tax notice, or

may be given in a separate statement, and it may be mailed at any time before the 15th day of September in each year. Am'd '09, p. 199.

5913. (2550.) Assessor to furnish information to state board. The county assessor shall furnish to the state board of equalization, promptly upon demand, any information it may require as to the several kinds of personal and real property, and the assessed value thereof, assessed in the county. He shall also, on the first Monday of March in each year, furnish to the state board of equalization, upon blanks to be furnished him by the board at the same time that the assessment rolls are furnished, a complete list and description in detail of all machinery used in mining, and all property and surface improvements upon or appurtenant to mines and mining claims, which have a value separate and independent of all such mines or mining claims, situate in his county, and note thereon in his judgment the value of such property, for the use of the state board of equalization in making the assessment. Am'd '09, p. 94.

5914. (2551.) Failure of assessor to deliver assessment book, etc. Penalties. Every assessor who fails to complete and deliver his assessment book to the county treasurer within the time prescribed by law, or who fails to transmit the information mentioned in the preceding section to the state board of equalization, shall forfeit the sum of $1000, to be recovered on his official bond, for the use of the county, or to be deducted from his salary by the board of county commissioners.

5915. (2552.) Claimant of land assessed to another. Lands once described on the assessment book need not be described a second time, but any person claiming the same and desiring to be assessed therefor may have his name inserted with that of the person to whom such land is assessed.

MAPS, PLATS, AND MINING PATENTS.

5916. (2553.) List of mining patents. Maps and plats. The state board of equalization shall furnish the county assessor, annually, by February 1, a list of all patents of mining locations and of coal lands, and the number of acres in each, and all lands for which receivers' final receipts have been issued for which patents have not been issued, not previously reported. The board of county commissioners must, on or before the first Monday after the first Tuesday of January of each year, provide maps, corrected and revised to the 1st day of January at 12 m. next preceding, for the use of the assessor, showing the private lands owned or claimed in the county, and, if surveyed under the authority of the United States, the divisions and subdivisions of the surveys. Maps of cities and towns or school districts may in like manner be provided. The cost of making such maps where they have not already been made, or of revising the same, shall be paid for, one-half by the state and one-half by the county. Am'd '09, p. 95.

Mines and net proceeds taxable, § 5864.
County surveyor to make maps, § 1618.
Present ownership maps, §§ 1596-1598.
Query, whether this section affected by amendment of § 1618, which also purports to amend § 5916, '01, p. 101.

5917. (2554.) List of state lands sold transmitted to assessor. On or before the first Monday in February of each year, the secretary of the state board of land commissioners must make out and transmit to the assessor of each county where lands or lots lie that may have been sold by the state, for which certificates of purchase, patents, or deeds have issued during the year preceding, certified lists of such lands or lots, giving a description thereof, by divisions or subdivisions or lots and blocks, together with the names of the purchasers thereof.

No tax to be levied upon lands while title remains in the state, except to extent of purchase money paid, § 5862.

ASSESSOR LIABLE FOR FAILURE OF DUTY.

5918. (2555.) Assessor liable for taxes, when. The assessor and his sureties are liable on his official bond for all taxes on property within the county which, through his wilful failure or neglect, is unassessed or which has been by him wilfully assessed at less than its cash value.

5919. (2556.) Id. Action on bond. The county attorney must, after the assessor completes the assessment book for the year, commence an action upon the assessor's bond for all taxes lost from such wilful failure or neglect.

5920. (2557.) Id. Evidence and judgment. On the trial of such action, the value of the property unassessed being shown, judgment for the amount of taxes that should have been collected thereon and remaining uncollected must be entered.

5921. (2558.) Property brought into county after first Monday in May. When any personal property liable to taxation is brought into a county at any time after the first Monday in May, and such property has not been assessed for that year, it must be listed and assessed the same as if it had been in the county at the time of the regular assessment, and such assessment shall be reported by the assessor to the auditor, who shall charge the treasurer with the taxes thereon, and the tax must be collected by the treasurer as provided in this title.

ASSESSMENT BY STATE BOARD.

5922. (2559.) Statement of railroads, etc., to state board. The president, secretary, superintendent, or managing agent, or such other officer as the state board of equalization may designate, of any corporation, and each person or association of persons, owning or operating any railroad, street railroad, car, telegraph, telephone, electric light, pipe line, power, canal, irrigating, or express companies in more than one county in this state, must, on or before the second Monday in February in each year, furnish the said board a statement signed and sworn to by one of such officers, or by the person or one of the persons forming such association, showing in detail for the year ending at 12 o'clock m. on the 1st day of January in each year, all property, real, personal, or otherwise, owned by said corporation, person, or association of persons in the state, including a statement of mileage in each county, as valued at 12 o'clock m. on the 1st day of January of each year, and such other information as the board may require. And the owner or owners of all mines or mining claims in the state must, on or before the second Monday in February in each year, furnish a statement in detail showing the net proceeds of such mines or mining claims for the year ending at 12 o'clock M. on the 1st day of January next preceding and a statement in detail showing all the machinery used in mining and all property and surface improvements upon or appurtenant to such mines or mining claims which have a value separate and independent of all such mines or mining claims as valued at 12 o'clock m. on the 1st day of January of each year, which must be sworn to by the president, secretary, superintendent, or managing agent, or such other officer as the state board of equalization may designate, or by the owners of such mines or mining claims. Any officer of a railroad, street railroad, car, telegraph, telephone, electric light, pipe line, power, canal, irrigating, or express company, or any owner or owners of mines and mining claims, or officers or companies owning mines or mining claims, failing on demand to furnish the statement required, shall be subject to the penalty provided in § 5881. Am'd '99, p. 102; '07, p. 9; '09, p. 96.

No tax to be levied upon lands while title remains in the state except to extent of purchase money paid, § 5862.

Franchises, etc., operating in more than one county, § 5873.

Under this section and §§ 5923, 5924 (prior to amendment of 1907), each county through which a railroad is operated was entitled to a tax upon the average per cent of its rolling stock used within the county, though the principal place of business may be located in another county.

S. L. Co. v. Bd. of Ed., 18 U. 172; 55 P. 378.

The state board has authority to demand and obtain all facts necessary to enable it to make a just assessment and apportionment of the tax upon rolling stock among the various counties, and may reconvene for that purpose.

Id.

State board cannot assess property or franchise situated wholly within one county; law giving such authority is contrary to Con. art 13, sec. 11.

State ex rel. v. Eldredge, 27 U. 477; 76 P. 337.

5923. (2560.) Sessions of board. Assessments. Apportionment. The state board of equalization must meet at the state capital on the first Monday in March and continue in open session at the state capital, or at such other place in the state as the board may determine, until the first Monday in May,

and later if the business of the board requires it, and at such meetings assess at their actual value at 12 o'clock m. on the 1st day in January of each year all the property and franchises of railroad, car, street railroad, telegraph, telephone, electric light, pipe line, power, canal, irrigating, and express companies operating in more than one county of this state; and all the machinery used in mining, and all property and surface improvements upon or appurtenant to mines and mining claims, which have a value separate and independent of all such mines or mining claims, and the net annual proceeds of all mines or mining claims, but franchises derived from the United States must not be assessed. All such property must be assessed in the name of the owner, person, corporation, or association owning, leasing, or using the same. As soon as such assessment is completed a copy of same must be furnished to the owner. On the 3rd Monday in May, the board shall again reconvene in open session at the state capital, and continue in session not later than the 3rd Monday in June, and at such session the owner of any property assessed by the state board of equalization may apply to have the same corrected in any particular, and the board may correct and increase or lower the assessment made by it. After all applications for corrections are disposed of, the board must apportion the total assessment of all property and franchises of such companies, mines, and mining claims to the several counties through or into which the property of such companies extends or operates, or in which the mines or mining claims are situated, as follows:

1. All the property of railroads, street railroads, telegraph, telephone, electric light, pipe line, power, canal, irrigating, and express companies, other than franchises and rolling stock, and all the property of mines and mining claims to each county through which said railroad, street railroad, telegraph, telephone, electric light, pipe line, power, canal, irrigating, or express company operates, or in which said mines or mining claims are situated, in proportion to the value thereof in each county;

2. The franchises and rolling stock of all railroads and street railroads to the county through which said railroads or street railroads operate in the proportion that the length of the main tracks, side tracks, passing tracks, switches, and tramways of such railroad or street railroad companies respectively in each county bear to the total length of the main tracks, passing tracks, and side tracks, switches, and tramways thereof in the state. Rolling stock of standard and narrow gauge railroad of said companies shall be apportioned to their standard and narrow gauge lines respectively;

3. The franchises of telegraph, telephone, electric light, pipe line, power, canal, irrigating, and express companies to each county in the proportion that the value of the property of said business in each county bears to the total property of said business in the state;

4. The assessment of property of car companies shall be apportioned to the several counties of the state in which railroads are operated in the proportion that the length of main tracks, passing tracks, side tracks, switches, and tramways of all railroads in each county bear to the total length of the main tracks, passing tracks, side tracks, switches, and tramways of all the railroads in the state; *provided,* that the railroads mentioned in this subdivision are the railroads assessed by the state board of equalization;

5. The net proceeds of all mines and mining claims shall be apportioned respectively to the county in which the mines or mining claims assessed for same are situated.

On the first Monday in July the board shall again reconvene at the state capital, or at such other place as it may determine, and at such session shall examine and compare the reports of the county auditors made on the first Monday in July for the purpose of equalizing the taxable property of the several counties in the state for the purpose of taxation; make the annual state tax levy, and remain in session until the fourth Monday in July, and later if the business of the board be not completed.

Am'd '99, p. 102; '07, p. 10; '09, p. 97.

See amendment to Art. 22, sec. 4, constitution of Utah, adopted Nov. 5, 1918, page 94a.

State board to assess property of railroads, etc., operating in more than one county, §§ 5873, 5922.

Assessor to assess such property where operated in one county, §§ 5873, 5874, 5895.

Organization and power of state board, Con. art. 13, sec. 11; §§ 5983-5990.

State board to furnish blanks and assessment book, § 5909.

Where a mining company incorrectly reported to the state board of equalization the gross yield of certain mines as located in Utah county when they were largely located in Juab county, and under such report the assessed valuation was apportioned to Utah county, plaintiff, Juab county, after such apportionment, and the rate of taxation had been fixed in accordance therewith and all levies had been completed, could not maintain mandamus to compel the state board of equalization to grant a hearing and reapportion the assessed value of such mining properties to the plaintiff.

Juab County v. Bailey, 44 U. 377; 140 P. 764.

The determination by the state board of equalization, in order to apportion railroad property for taxation, as to the boundary line between two counties, is conclusive for the current year, and the board, even though it apportions all railroad property to one county in May, has power to make a reapportionment of the property to another county on the 3rd of August in the same year.

Union Pac. R. R. Co. v. Summit County, 48 U. 540; 161 P. 463.

The board's determination in apportioning property to counties becomes conclusive for the current year when all the apportionments, including those to lesser taxing units, have been made and the taxes have been levied for the year.

Rich County v. Bailey, 47 U. 378; 154 P. 773.

Where the state board by mistake apportioned to a county railroad property which it afterwards became satisfied should have been apportioned to a different county, it had jurisdiction at any time before the second Monday in August to correct the error.

Id.

5924. (2561.) Entry of assessments. County board cannot change. The state board of equalization shall, before the fourth Monday of June, transmit by mail to the county auditor of each county to which such apportionment has been made, a statement showing the property assessed and the assessed value of same, as fixed and apportioned to the county. The county auditor must enter the statement on the assessment roll or book of the county, and enter the amount of the assessment apportioned to the county in the column of the assessment book or roll, as aforesaid, which shows the total value of all property for taxation of the county. No board of county commissioners or county board of equalization has power to change any assessment fixed by the state board of equalization. Am'd '09, p. 98.

APPORTIONMENT BY COUNTY BOARD.

5925. (2562.) County board to apportion among cities, towns, etc. On the second Monday in August the board of county commissioners of each county must take and cause to be entered in the proper record an order stating and declaring the property assessed by the state board of equalization apportioned to such county; and the said board of county commissioners, acting as a board of equalization for said county, shall in like manner apportion the assessed valuation of all the property and franchises of railroad, car, street railway, telegraph, telephone, electric light, pipe line, power, canal, irrigating, and express companies, so apportioned to said county by the state board of equalization, to the several city, town, school, road, or other lesser taxing districts in the county through or into which said property extends; and the county auditor must transmit to the city or town council, or the trustees or other legislative bodies of incorporated cities or towns, the trustees of each school district, and the legal authorities of other taxing districts in which said property is situated, a copy of the order of the county board of equalization making said apportionment. All such property is taxable upon said assessment at the same rate, by the same officers, and for the same purposes as the property of individuals within such city, town, school, road, or other taxing districts, respectively, and such taxes, except the taxes on car companies, must be collected in the same manner and by the same officers as other taxes are collected. The county board of equalization, after making apportionment of the property assessed by the state board of equalization to the several city, town, school, road, or other lesser taxing districts, shall transmit a copy of such apportionment relating to car companies to the secretary of the state board of equalization, in which shall be set forth the apportioned valuation of each car company and the rate of tax levy for all purposes in each taxing district. Am'd '99, p. 103; '01, p. 147; '07, p. 10; '09, p. 98.

Levy by county commissioners, § 5993.

5926. (2563.) Application to state board to change assessment. If the owner of any property assessed by the state board of equalization is dissatisfied with the assessment made by such board, such owner may, between the third Monday in May and the second Monday in June, apply to the board to

have the same corrected in any particular, and the board may correct and increase or lower the assessment made by it, so as to equalize the same with the assessment of other property in the state. Am'd '09, p. 99.

May change valuations, §§ 5984, 5985.

Under Con. art. 13, sec. 11, the state board of equalization has power, if necessary for the purpose of equalization, either to raise or lower the total valuation of the property of any county fixed by the county board and assessor, even though it may by such action raise or lower the aggregate valuation of all the counties in the state; but it cannot encroach upon the domain of the county boards in an attempt to adjust and equalize valuations of property within the county, as between individuals.

State v. Thomas, 16 U. 86; 50 P. 615.

5927. (2564.) State board to prepare record of assessment of railroads, etc. The state board of equalization must prepare each year a book, to be called "Record Assessment of Railroad and other Companies," in which must be entered each assessment made by the board, either in writing or both writing and printing. Each assessment so entered must be signed by the president and the secretary of the board. The record of the apportionment of the assessment made by the board to the counties must be made in a separate book, to be called "Record of Apportionment of Assessments." In such last described book must be entered the names of the railroad and other lines assessed by the board, the names of the corporations to which, or the name of the person or association to whom, the same were assessed, the whole number of miles of the railroad, car, street railroad, telegraph, and telephone lines in the state, the number of miles in each county, the total assessment of all such property, and the amount of the apportionment of such total assessments to each county. There must be also entered in detail the names of the mines or mining claims whose machinery, and whose property and surface improvements which have a value separate and independent of all such mines or mining claims, which have been assessed by the board, also the name of the owners of the same. Am'd '09, p. 99.

5928. (2565.) County and state assessments the only basis of taxation. The assessment made by the county assessor, and that of the state board of equalization, as apportioned by the board of county commissioners to each city, town, school, road, or other district in their respective counties, is the only basis of taxation for the county or any subdivision thereof, and for incorporated cities and towns. All taxes upon road, school, or other local districts, and all general city, city school, and town taxes must be assessed in the same manner and by the same officers as county taxes, and all such taxes, except the municipal taxes of cities of the third class and of towns, shall be collected in the same manner and by the same officers as county taxes.

Assessment for cities and towns, § 6100. Collection of city and town taxes, § 6105.

ASSESSMENT OF NET PROCEEDS OF MINES.

5929. (2566.) Net proceeds of mines. Every person, corporation, or association engaged in mining upon a vein or lode, or placer mining claim, containing any gold, silver, coal, or other valuable mineral deposits, must each year make out a statement of the gross yield of the above named metals or minerals from each mine owned or worked by such person, corporation, or association during the year next preceding the first Monday in January, and the value thereof, which statement shall give the fine ounces of gold and sliver, and pounds of lead and copper, also the net annual proceeds of coke made from coal, or bullion or matte made from ore not taxed which is deemed a product of mines. Also a statement showing all the machinery used in mining, and all property and surface improvements upon or appurtenant to each mine or mining claim, which have a value separate and independent of all such mines or mining claims owned or worked by such person, corporation, or association during the year preceding the 1st day of January, and the value of the same at 12 o'clock on the 1st day of January. Such statement must be verified by the oath of such person, or by the president, secretary, superintendent, or managing agent of such corporation or association, who must furnish the same to the state board of equalization on or before the second Monday of February in each year. The owner or owners of any mines, dissatisfied with the assessment made upon its net proceeds or other

property, may, between the third Monday in May and the second Monday in June, apply to the board to have the same corrected in any particular, and the board may correct and increase or lower the assessment made by it to equalize the same with the assessment of other property. Am'd '99, p. 103; '09, p. 99.

Authority to tax mines, etc., Con. art. 13, sec. 4, and note; also § 5864.

Occupation and privilege tax on mines, §§ 5945-5962.

The fiscal year for the assessment of the net, annual product of mines, under revenue act of 1896, commenced June 1st. Such net product from June 1st to December 31, 1896, was not assessable or taxable until ascertained in June of following year, but could be included in tax of 1897. See Con. art. 13, sec. 4, the provisions of which are held to be not self-executing.

Mercur G. M. & M. Co. v. Spry, 16 U. 222; 52 P. 382.

Prior to the going into effect of laws 1896, p. 423, the net annual proceeds of mines were not taxable.

Centennial-Eureka M. Co. v. Juab Co., 22 U. 395; 62 P. 1024.

The net proceeds of mines are taxable at the place where the ores are taken to the surface through the main workings, and, being personal property should be taxed as other personalty.

Eureka H. M. Co. v. Eureka City, 22 U. 447; 63 P. 654.

Query: Does the failure to make application for reduction between the first and third Monday in June defeat the right?

Bassett v. Utah Copper Co., 219 Fed. 811.

Where ore, thrown in the dump during previous years, is shipped and reduced, the net to be taxed is the gross received less the cost of handling for the particular year for which taxed.

Mammoth M. Co. v. Juab County, 50 U. —; 170 P. 78.

5930. (2567.) Id. What to contain. The statement mentioned in the preceding section as to net proceeds of mines must contain a true and correct account of the actual expenditures of money and labor in extracting the ore or mineral from the mine, transporting the same to the mill or reduction works, and the reduction of the ore and the conversion of the same into money, or its equivalent, during the year. Am'd '09, p. 100.

5931. (2568.) Id. Expenditures allowed. In making the statement of the expenditures mentioned in the preceding section there must be allowed all money expended for necessary labor, machinery, and supplies needed and used in the mining operations, for improvements necessary in and about the workings of the mine for reducing the ore, for the construction of mills and reduction works used and operated in connection with the mine, for transporting the ore, and for extracting the metals and minerals therefrom; but the money invested in the mines or improvements during any year except the year immediately preceding such statement must not be included therein. Such expenditures shall not include the salaries or any portion thereof of any person or officers not actually engaged in the work of the mine, or personally superintending the management thereof. Am'd '09, p. 100.

It is not intended by this section that the state should take over the management of the mine and say that this shaft is unwise or this stripping improper.

Bassett v. Utah Copper Co., 219 Fed. 811.

Money expended for the enlargement of mills used solely in connection with the mine owned by the company should be allowed as a deduction, but expenditures for bunk houses, mess house, and dormitory at the mills should not be allowed.

Id.

5932. (2569.) Id. Special assessment, book for. The state board of equalization must, at its meeting commencing on the first Monday in March, assess the net proceeds of mines, and before the third Monday in June apportion the total assessment of the net proceeds of mines to the several counties in which the mines are located. The state board of equalization must prepare each year a book to be called the "Assessment Book of the Net Proceeds of Mines" in which must be listed the net proceeds of all mines in the state, and in which must be specified, in separate columns, and under the appropriate head:

1. Owner of the mine;
2. Name and description and location of the mine;
3. County in which it is situated;
4. Number of tons extracted during the year;
5. Gross yield in dollars;
6. Actual cost of extracting same from the mine;
7. Actual cost of transportation to place of reduction or sale;
8. Actual cost of reduction or sale;
9. Cost of construction and repairs of mine and reduction work;
10. Net proceeds in dollars;
11. Fine ounces of gold and silver, pounds of lead and copper stated separately. Am'd '99, p. 104; '09, p. 101.

5933. (2570.) Duties of state board of equalization and county auditors. The duties of the state board of equalization and county auditors as to the assessment of the net proceeds of mines, and the property of mines and mining claims, the statement and returns to be made, the equalization thereof, and the official acts, are the same as those mentioned in this chapter for the assessment of railroads, street railroad, car, telegraph, telephone, electric light, pipe line, power, canal, irrigating, and express companies. Am'd '99, p. 104; '09, p. 101.

State geologist to assist, §§ 5779, 5782.

5934. (2571.) Id. Refusal to Furnish Statement. If any person, corporation, or association engaged in mining, as mentioned herein, refuses or neglects to make and deliver to the state board of equalization the statement mentioned in this chapter, the state board of equalization must assess and list the property, and assess the net proceeds of mines from the best information and knowledge it can obtain. Such person, corporation, or association refusing, upon demand, to furnish such statement to the state board of equalization, shall be subject to a like penalty as is provided in sub. 2, § 5881, and in § 5882 for failure to furnish statement to a county assessor. Am'd '09, p. 101.

5935. (2572.) Id. Mining improvements, machinery, etc., not exempt. Nothing in this title contained shall be construed to exempt from taxation the improvements, buildings, erections, structures, or machinery placed upon any mine or mining claim, or used in connection therewith, which have a value separate and independent of such mine or mining claim, or supplies used either in mills, reduction works, or mines, but such property must be assessed as provided by law. Am'd '09, p. 101.

5936. (2573.) Id. Collection. Lien. The tax mentioned in the preceding sections shall be collected and the payment thereof enforced in the manner provided for the collection and enforcement of other taxes; and every tax is a lien upon the mines or mining claims upon which such mining machinery and improvements are erected, and from which the ores or minerals are extracted, which lien attaches on the 1st day of January in each year, and the sale thereof for delinquent taxes may be made as provided for the sale of real estate for delinquent taxes. Am'd '09, p. 101.

CHAPTER 4.

OCCUPATION AND PRIVILEGE TAX ON MINING.

('17, p. 280.)

5945. Classifications. Levy and collection. Exceptions. An occupation, tax, as provided for in this chapter, shall be levied upon, collected from, and paid by all persons, corporations, or associations carrying on the business of mining or engaged in working or operating any mines or mining claims within the state of Utah, whether such person, corporation, or association shall carry on such operations as owner, lessee, trustee, possessor, or in any other capacity, or whether such mines or mining claims be metallic or non-metallic, placer or rock-in-place; *provided,* that nothing contained in this chapter shall be construed as requiring laborers or employes hired or employed by any person, corporation, or association to mine or work in or about or in connection with any mining business or property, to pay an occupation tax; nor shall any discovery work required to be done in locating any mining claim, or any annual assessment work or work required in the obtaining of a title to mining property from the United States or required by the laws of the state of Utah or by the laws of the United States in order to hold possessory title to any mining claim, be considered a mining occupation or business as meant by this chapter; *provided, however,* that where such discovery, annual assessment work, or other work necessary in obtaining title amounts in value

to a sum exceeding $500 per mining claim, whether done on different claims or on one claim, the same shall be considered to be work, occupation, or business as meant by this chapter. Any person, corporation, or association, either as lessor or lessee, who shall lease mining property in consideration of a royalty, charged on a basis of the output or yield of any mine or mining claim, shall be considered as engaged in the mining business within the meaning of this chapter.

Tax on mines, § 5864. Tax on improvements on mines, § 5935.

5946. Time and rate. Every such person, corporation, or association engaged in the year 1917, and any year thereafter, as specified in § 5945, shall be taxed the sum of $1 for each year in which such person, corporation, or association engaged in working or operating mines or mining claims, and in addition thereto, a sum for each such year equal to 2 per cent of the total net proceeds derived from the business, occupation, or working of such mines or mining claims in the year in which such work was done; *provided, however,* that the occupation tax for the year 1917, to be collected in the year 1918, shall be 3 per cent of the total net proceeds derived from the business, occupation, or working of mines or mining claims during the calendar year of 1917.

5947. Statements of gross yield. Time. Deductions. Exceptions. Every person, corporation, or association engaged as specified in § 5945, must, each year beginning with the year 1918, make out a statement of the gross yield of all metals or minerals from each mine or mining claim worked or operated by such person, corporation, or association during the calendar year next preceding the first Monday in January of 1918, and every year thereafter, which statement shall contain all the data and information in regard to the net and gross yield of mines required by § 5929; *provided, however,* that the same statement required by § 5929, if it contain also all the information required by this chapter, may be filed for both the purposes of said section and of this chapter. Said statement must be verified by the oath of the person or by the president, secretary, superintendent, or managing agent of every corporation or association who shall engage in mining as specified in § 5945. Such statement must be furnished to the state board of equalization on or before the second Monday of February in each year. Such statement must contain a true and correct account of the actual expenditures of money and labor in extracting the ore or mineral from the mine, transporting the same to the mill or reduction works, and the reduction of the ore and conversion of the same into money, or its equivalent, during the year. In making the statement of expenditures herein mentioned there shall be allowed a deduction of all money expended for necessary labor, taxes, machinery, and supplies needed and used in the mining operations, for improvements necessary in and about the workings of the mine for reducing the ore, for the construction of mills and reduction works used and operated in connection with the mine, for transporting the ore, and for extracting the metals and minerals therefrom; but the money invested in the mines or improvements during any year except the year immediately preceding such statement must not be included therein. Such expenditures shall not include the salaries, or any portion thereof, of any person or officers not actually engaged in the work of the mine, or personally superintending the management thereof.

5948. Failure to make statements. Duty of board of equalization. Penalty. If any person, corporation, or association engaged as specified in § 5945, refuses or neglects to make and deliver to the state board of equalization the statement mentioned in this chapter, the state board of equalization must estimate the net proceeds derived from the work and business of such person, corporation, or association from the best information and knowledge obtainable from the state board of equalization. Such statement to the state board of equalization shall be subject to a like penalty as is provided in sub. 2, § 5881, and in § 5882, for failure to furnish statement to a county assessor.

5949. Tax book. Contents. Date of assessments. The state board of equalization must prepare and keep each year a book to be known as the tax

book of the occupation and business of mining, in which must be listed in separate columns, under the appropriate heads, the following:

1. Owner of the mine;
2. Name and description and location of the mine;
3. County in which it is situated;
4. Number of tons extracted during the year;
5. Gross yield in dollars;
6. Actual cost of extracting same from the mine;
7. Actual cost of transportation to place of reduction or sale;
8. Actual cost of reduction or sale;
9. Cost of construction and repairs of mine and reduction work;
10. Net proceeds in dollars;
11. Amount of levy;
12. Amount of tax.

The state board of equalization shall assess the tax on occupations and businesses, as specified in this chapter, at its meeting commencing in March. Said tax shall be set out in the tax book above mentioned in the column headed "Amount of Tax," and shall include the $1 and the percentage on the net proceeds, if any, provided for in this chapter.

5950. Notice of levy. Hearings by board. Powers. A statement of the amount of the tax, after being so entered in the proper column, shall be sent to each person, corporation, or association liable therefor. On the first Monday in May the board shall again reconvene in open session at the state capitol and continue in session not later than the first Monday in June, and at such session the person, corporation, or association whose mining occupation has been taxed for the privilege of carrying on a mining occupation, if dissatisfied, may apply to the state board of equalization to have the tax corrected in any particular, and the board may correct any error in the amount of said tax.

5951. Lists certified to state treasurer. After all applications for correction are disposed of, the state board of equalization shall certify to the state treasurer a list of the names of each person, corporation, or association liable for such tax, together with the addresses of such persons, corporations, or associations, and the amount to be paid by each.

5952. Notice of taxes due. Collections and delinquents. The state treasurer shall proceed to collect the occupation taxes, and shall furnish to each person, corporation, or association liable therefor, by mail, postage prepaid, a notice of the tax due and when and where the same is payable, and that such tax will be delinquent at twelve o'clock noon on Saturday next prior to the first Monday in December.

5953. Taxes due. Delinquent. Liens. Dates. All taxes provided for in this chapter shall be due on the third Monday in September in each year, and all unpaid taxes are delinquent at 12 o'clock noon on the Saturday next prior to the first Monday in December of the same year. The tax mentioned in this chapter shall be a lien upon the property upon which, or in reference to which, the mining work, occupation, or business has been done. Such lien shall attach to said property owned at 12 o'clock noon on the Saturday next prior to the first Monday in December in the year when such taxes are payable.

5954. Publication of delinquent list. Contents. Notices of sale. On or before the second Monday in December of each year, the state treasurer shall publish the delinquent list, which must contain the names of the persons, corporations, or associations which have worked or operated mines or mining claims, whose taxes have been unpaid, when known, and a description of the property subject to lien, as provided in this chapter. If the property subject to lien consists of rights under a lease or a possessory right merely, this fact, if known, shall also be published, together with the name of the lessee, or person entitled or claiming possession of the mine or mining claim. The state treasurer must publish with such list a notice that unless the delinquent taxes,

together with the penalty, are paid before the third Monday of December next thereafter, the property upon which said taxes are a lien will be sold for taxes, penalty, and costs at the front door of the capitol at Salt Lake City, Utah. The delinquent list shall be published three times in a daily newspaper with a general circulation throughout the state.

5955. Sales for delinquent taxes. Dates. Bids. Record. Receipts. On the third Monday of December of each year, the state treasurer shall expose for sale between the hours of 10 a. m. and 3 p. m. sufficient of the property on which the tax has become a lien to pay the taxes, penalty, and costs at public auction at the front door of the state capitol, and shall sell the same to the highest responsible bidder for cash, and the treasurer shall continue to sell from day to day between such hours until the property of all delinquents is exhausted, or the taxes, penalties, and costs are paid. In offering such property for sale, the treasurer shall offer the entire property on which said taxes are a lien, and the first bid received in an amount sufficient to pay the taxes and costs shall be accepted, unless a further bid in the same amount for less than the entire property be received. The highest and best bid shall be construed to mean the bid of that bidder who will pay the full amount of the taxes and costs for the smallest undivided portion of said property. The state treasurer shall make a record of all sales of property in a book to be kept by him for that purpose, therein describing the several parcels of property on which the taxes and costs were paid by the purchaser, on file in his office, stating in separate columns the amount of taxes and costs due. Purchaser shall not be required to pay the treasurer the amount of the penalty, but the same shall accrue for the benefit of the purchaser. When all sales have been made the treasurer shall file the record in his office. It shall be the duty of the state treasurer to issue a receipt to any person paying taxes on an undivided interest in property showing the property on which the taxes are paid, and in case any portion of the taxes on such property remain unpaid, it shall be the duty of the treasurer to issue a receipt to any person paying taxes and costs as in this chapter imposed.

5956. Certificates of sales. Fees. When property is sold for taxes under this chapter, the treasurer shall make out, sign, and deliver to the purchaser of such property a certificate of sale, describing the property sold for such taxes and costs. The treasurer shall collect $1 for each certificate of sale in full for his services, which sum shall be paid by him into the general fund of the state treasury.

5957. Sales to the state. Certificate to auditor. Credits. If at any tax sale under this chapter no person shall buy and pay the treasurer the amount of taxes and costs required to be paid, as aforesaid, on any property, the treasurer shall make to the state a certificate of sale and deliver the same to the state auditor, and such sale to the state shall have the same effect as if made to an individual, and the state auditor shall credit the treasurer with the amount of tax due thereon.

5958. Forms. Evidence. Copies for recorders. Credits on sales to state. Redemptions. The certificates of sale, when the property is sold to the state, shall be substantially in the following form:

This certifies that, on the ..... day of ....., 19....., in pursuance of law, I, as treasurer of the state of Utah, offered for sale, subject to redemption, as provided by law, the property situated in the county of ....., state of Utah, hereinafter described, for delinquent occupation tax, which tax is a lien on said property, said tax being assessed on the mining, occupation and business of ..... for the year ....., together with the penalty provided by law, and the costs of sale; that a description of the property sold is as follows, to-wit: .....; that the amount of taxes due is .....; that the penalty is ..... and the costs are ..... That pursuant to said offer no person offered to bid and pay the treasurer the amount of taxes and

costs required to be paid as aforesaid; therefore, pursuant to law, said property was sold to the state, and this certificate issued as evidence thereof.

Dated ....., 19.....

.....

Treasurer of the state of Utah.

The certificate of sale to be delivered to a purchaser other than the state shall be substantially in like form, with appropriate changes. Such certificate shall be prima facie evidence of the regularity of all proceedings connected with the assessment notice, levy, advertisement, and sale of the property therein described, and the burden of showing any irregularity in any of the proceedings, resulting in the sale of the property for the non-payment of delinquent taxes, shall be on him who asserts it. The state treasurer shall send by registered mail to the county recorder of every county in which is located property described in said certificate, a copy of said certificate. While a certificate of sale is held by the state, the treasurer shall not sell the property covered by such certificate for taxes, but the state auditor shall credit the treasurer with the amount of any additional taxes due for any occupation specified in this chapter, carried on or pursued in any subsequent year thereafter, and remaining unpaid. In any case the party redeeming shall pay all taxes that may be due, and interest, penalties, and costs that may accrue against any person, corporation, or association subsequently carrying on mining operations upon or in connection with the property sold for any prior delinquent occupation tax.

5959. Additional penalty. Interest. Costs. If any tax provided for by this chapter shall remain unpaid after the time for which said tax shall be delinquent, said tax shall be subject to a penalty of 5 per cent thereof, and shall, in addition, draw interest at the rate of 12 per cent per annum, and shall be subject to all costs incurred in connection with the advertising and sale of the property upon which said tax shall have become a lien.

5960. Redemptions similar. Property sold under the provisions of this chapter shall be subject to redemption in the same manner as property which has been sold for unpaid taxes levied against said property for general purposes.

5961. Suits by state treasurer. Judgments. Application of proceeds. Attorneys for state. The state treasurer shall have the power to bring an action against any person, corporation, or association, in the district court of any county in which said person, corporation, or association shall have been operating mines or mining claims, or carrying on mining business, or in which such person, corporation, or association shall have their principal office or place of business, for any tax due under the provisions of this chapter and remaining unpaid and delinquent. And the state treasurer may bring such action, regardless of whether any property upon which said taxes are a lien has been sold for said taxes, either before or after the time when said property may be sold for said taxes as in this chapter provided. In case judgment shall have been recovered against any person, corporation, or association for said taxes, such judgment shall, in case the same is rendered after the sale of any property upon which said taxes shall have been a lien, include the costs of advertising and sale of said property, and in all cases such judgment shall include the penalty provided by this chapter for failure to pay said taxes before delinquency. If such judgment shall have been collected and satisfied, the amount obtained therefrom shall, in case any property, upon which said tax shall be a lien, shall have been sold for such taxes, be used to redeem said property, the same as if the owner or person entitled to said property shall have redeemed the same. In case an action is brought for such taxes, as provided for in this chapter, the district attorney of any district in which the action is brought, or any county attorney of any county of the district in which such action is brought, or the attorney-general, shall represent the state; *provided, however,* that the attorney-general may authorize and des-

ignate any county or district attorney in the state to bring and prosecute said action.

5962. Apportionment of funds collected hereunder. Of the funds collected under this chapter, seven-sixteenths thereof shall be covered into the state school fund and shall be apportioned to the several school districts as provided by law; the remaining nine-sixteenths to go to the general fund, and shall be distributed to the University of Utah and to the Agricultural College and to the branch of the Agricultural College at Cedar City in the proportions set forth in §§ 5214-5221. '17, p. 280.

CHAPTER 5.

EQUALIZATION OF TAXES.

5974. (2574.) County board of equalization. Sessions. The board of county commissioners is the county board of equalization, and must meet on the third Monday of May in each year to examine the assessment books and equalize the assessment of property in the county. It must continue in session for that purpose from time to time until the business of equalizing is disposed of, but not later than the second Monday in June. Am'd '15, p. 32.

Duty of the county board of equalization, Con. art. 13, sec. 11; § 1400x38.

To equalize city and town taxes, § 6104.

5975. (2575.) Powers of board. The board has power, after giving notice in such manner as it may by rule prescribe, to increase or lower any assessment contained in any assessment book, so as to equalize the assessment of the property contained therein, and make the assessment conform to the true value of such property in money. Said board may remit the taxes of indigent persons to an amount not exceeding $10 for the current year. Am'd '01, p. 94.

Remission of taxes of indigents authorized, Con. art. 13, sec. 2.

Similar provision as to indigents, etc., § 5979.

A tax law which fails to secure the equality and impartiality of the tax, or to provide for the equalization of the assessments, and for the appropriation of the tax to the purpose for which it is levied, is void.

Kerr v. Woolley, 3 U. 456; 24 P. 831.

Our method of equalizing and collecting taxes has always been considered due process of law.

S. L. City v. Armstrong, 15 U. 472; 49 P. 641.

State v. Armstrong, 19 U. 117; 56 P. 1076.

State v. Thomas, 16 U. 86; 50 P. 615.

A county board of equalization has power to equalize the valuation of property within its county between individuals and between localities.

State v. Thomas, 16 U. 86; 50 P. 615.

This section applies only to cases where individual assessments are affected, not to those involving the property of an entire district or locality. No notice necessary.

State ex rel. v. Armstrong, 19 U. 117; 56 P. 1076.

S. L. City v. Armstrong, 15 U. 472; 49 P. 641.

5976. (2576.) Reductions. Application. No reduction must be made in the valuation of property unless the party affected thereby or his agent makes and files with the board a written application therefor, verified by his oath, or shall appear before the county board of equalization and show facts upon which it is claimed such reduction should be made.

The word "complaint" as applied to boards of equalization is not used in the technical sense in which the word "complaint" is used in the code of civil procedure, and it is not necessary that a formal allegation of the charge in writing should be filed in a case in order to confer jurisdiction upon the board.

Where persons appear before a board of equalization in response to a notice, and are afforded an opportunity to be heard, objections to the form of the notice are waived.

C. P. Railroad Company v. Standing, 13 U. 488; 45 P. 344.

5977. (2577.) Id. Examination of person asking. Before the board grants the application or makes any reduction applied for, it may examine on oath the person or agent making the application touching the value of the property of such person. No reduction must be made unless such person or the agent making the application, if required, attends and answers all questions pertinent to the inquiry.

5978. (2578.) Id. Witnesses. Upon the hearing of the application the board may subpœna such witnesses, and hear and take such evidence in relation to the subject pending as in its discretion it may deem proper.

5979. (2579.) Id. Assessor to be present. Remission or abatement of

taxes. During the session of the board, the assessor and any deputy whose testimony is needed must be present, and may make any statement or introduce and examine witnesses on questions before the board. The board may remit or abate the taxes of any insane, idiotic, infirm, or indigent person to an amount not exceeding $10 for the current year.

Remission of taxes of indigents in cities of third class and towns, § 6104.

Remission of taxes of indigents authorized Con. art. 13, sec. 2.

Similar provision, § 5975.

The provisions of this section for the remission or abatement of taxes of certain persons were in conflict with Con. art. 13, secs. 2 and 3, prior to amendment of 1900, and void. State v. Armstrong, 17 U. 166; 53 P. 981.

5980. (2580.) County board may enter omitted property. Effect. The board of county commissioners must use the abstract hereinbefore provided for and all other information it may gain from the records of the county recorder or elsewhere in equalizing the assessment of the property in the county, and may require the assessor to enter upon the assessment book any property which has not been assessed; and any assessment made as prescribed in this section has the same force and effect as if made by the assessor before the delivery of the assessment book to the county treasurer.

5981. (2581.) Id. May correct false or incomplete assessments. During the session of the board of county commissioners, it may direct the assessor to assess any taxable property that has escaped assessment, or to add to the amount, number, or quantity of property when a false or incomplete list has been rendered, and to make and enter new assessments (at the same time canceling previous entries) when any assessment made by him is deemed by the board so incomplete as to render doubtful the collection of the tax; but the auditor, who is hereby made the clerk of the board of equalization, must notify all persons interested, by letter deposited in the postoffice, postpaid, and addressed to the person interested, at least five days before the action is taken, of the day fixed for the investigation of the matter.

5982. (2582.) Id. Record of changes. Entry. Affidavit. The county auditor must record, in a book to be kept for that purpose, all changes, corrections, and orders made by the board; and during its session, or as soon as possible after its adjournment, must enter upon the assessment book all changes and corrections made by the board, and on or before the first Monday of July must affix his affidavit thereto, subscribed by him, as follows:

I, ..., do swear that, as county auditor of ..... county, I have kept correct minutes of all the acts of the board of county commissioners touching alterations in the assessment book; that all alterations agreed to or directed to be made have been made and entered in the book, and that no changes or alterations have been made therein except those authorized.

STATE BOARD OF EQUALIZATION; APPOINTMENT; DUTIES.

5983. (2583.) Appointment. Term. Duties. The governor shall nominate and, by and with the consent of the senate, appoint four residents of the state of Utah to constitute the state board of equalization, not more than two of whom shall belong to the same political party. Of the members first appointed, two shall hold office for a term of two years and two for a term of four years, and thereafter each shall hold his office for four years, and until his successor is appointed and qualified, and each shall receive an annual salary of $1500, payable quarterly out of the state treasury. They shall elect a president and secretary from among the number, and shall, as a board or by committee thereof, in addition to other duties required by law, inspect and examine annually all property it is required to assess, visit each county in the state annually, and examine all the assessment books and all other books in relation to taxation in each county. The terms of office of the members of the state board of equalization, heretofore appointed, shall terminate and cease upon May 13, 1907. Am'd '01, p. 66; '07, p. 31.

Compensation of secretary of board as collector of taxes from car companies, § 6017.

In view of the fact that the requirement as to inspection, while not expressed in the original section, was clearly implied from the character of the board, and that the provision was directory merely though mandatory in form, the assessment being valid without the inspection, the provision for inspection in the amendatory statute was immaterial, and did not render the statute objectionable, as embracing a plurality of subjects. State ex rel. Edler v. Edwards, 34 U. 13; 95 P. 367.

5984. (2584.) Powers and duties. The powers and duties of the state board of equalization are as follows:

1. To prescribe rules for its own government and for the transaction of its business;

2. To prescribe such rules and regulations as the board may deem necessary not in conflict with the constitution and laws of the state, to govern county commissioners when equalizing and assessors when assessing;

3. To make out and prepare and enforce the use of forms in relation to the assessment of property;

4. To hold regular meetings as provided by law and the rules of the board, and such special meetings as may be called by the president or a majority of its members;

5. To annually assess the property, franchises, and roadway of all railroad, street railroad, car, telegraph, telephone, electric light, pipe line, power, canal, irrigating, and express companies, operating in more than one county in the state, and all the machinery used in mining and all the properties and surface improvements upon or appurtenant to mines and mining claims which have a value separate and independent of all such mines or mining claims, and the net annual proceeds of all mines and mining claims;

6. To transmit on or before the fourth Monday in June, to the county auditor of each county its apportionment of the assessment made by such board upon the property and franchises of railroad, street railroad, car, telegraph, telephone, electric light, pipe line, power, canal, irrigating, and express companies operating in more than one county of the state, and upon all machinery used in mining, and all property and surface improvements upon or appurtenant to mines and mining claims, which have a value separate and independent of all such mines or mining claims, and to the state auditor a copy of the apportionment of the assessment made by the board upon the property of car companies;

7. To meet as heretofore provided in § 5923, as follows:

First. On the first Monday in March and continue in session until the first Monday in May, and later if the business of the board requires it;

Second. On the third Monday in May, and continue in session not later than the third Monday in June;

Third. On the first Monday in July, and continue in session until the last Monday in July and later if the business of the board requires it;

8. At its session commencing the first Monday in March, assess the property it is by law required to assess; at its session commencing the third Monday in May, hear and pass upon applications for corrections of assessments made by it, and to apportion the same to the various counties in the state; at its session commencing the first Monday in July, examine the report of county auditors and equalize the valuation of the taxable property of the several counties in this state for the purpose of taxation; and to that end, upon such notice to the county auditor of the county affected thereby as it may prescribe, by rule, to increase or lower any assessment contained in the assessment books, so as to equalize the assessment of the property contained therein, and make assessment conform to the value in money of the property assessed;

9. To visit as a board, or by the individual members thereof, whenever deemed necessary, the several counties of the state, for the purpose of inspecting the property and learning the value thereof;

10. To call before it, or any member thereof, on such visit, any officers of the county, and to require them to produce any public records in their custody;

11. To issue subpœnas for the attendance of witnesses or production of books before the board, or any member thereof; which subpœnas must be signed by a member of the board and may be served by any person;

12. To report biennially to the legislature a statement showing:

First. The assessed acreage of each county in the state;

Second. The amount assessed per acre;

Third. The aggregate value of town and city lots;

Fourth. The aggregate value of all real estate and mining claims stating each separately;

Fifth. The kind of personal property in each county, and the value of each kind;

Sixth. The aggregate value of all personal property in the state;

Seventh. Any further information or suggestion relative to the assessment of property and the collection of revenues;

13. To keep a record of all its proceedings;

14. To appoint a chief clerk, and assistant clerks, when necessary, who shall hold office during the pleasure of the board, the chief clerk to assist the secretary of the board and perform such other duties as the board may require; the assistant clerks to perform such duties as may be assigned to them by the secretary of the board or the chief clerk. The chief clerk shall receive a salary not to exceed $150 per month, and the assistant clerks a salary not to exceed $3 per diem;

15. To reconvene, whenever it may deem necessary, any county board of equalization; and it may, in its discretion, extend the time for which any county board of equalization may sit for the equalization of taxes. The county board of equalization, when thus reconvened, shall transact no business except for which it was reconvened, or such other business as the state board of equalization may call to its attention while in session;

16. To call upon any railroad company for information as to the private car companies operating over its own lines, and the number of cars hauled, and the mileage made by same.

Am'd '99, p. 104; '07, p. 11; '09, p. 102; '11, p. 122.

Duties and powers of state board, Con. art. 13, sec. 11; §§ 5922-5928.

Assess railroads and franchises operating in more than one county, §§ 5873, 5922.

To furnish form of assessment books, etc., § 5909.

Levy high school tax, § 4575.

Duties as to occupation and privilege tax on mining, §§ 5945-5962.

State geologist to assist, §§ 5779, 5782.

Not to assess property situate wholly in one county, § 5873, and note.

The provisions sub. 8, conferring power upon state board of equalization to raise or lower total valuation of property of any county fixed by county board and assessor, are not in conflict with Con. art. 13, sec. 11. But the state board cannot adjust individual valuations in counties.

State v. Thomas, 16 U. 86; 50 P. 615.

The legislature has power to authorize the state board of equalization to assess, for revenue purposes, property situated partly in one county and partly in another, or operated in two or more counties.

Salt Lake Co. v. State Board, 18 U. 172; 55 P. 378.

State ex rel. v. Eldredge, 27 U. 477; 76 U. 337.

Applicant's claim for deduction is not defeated by failure to fill in address at a blank left for it in the affidavit, where the address is properly given at another place and the tax agent making the verification is the managing agent of the corporation within the meaning of the statute.

Bassett v. Utah Copper Co., 219 Fed. 811.

Where it is difficult to determine the exact boundary between counties and the state board of equalization in good faith apportioned railroads in this locality to one of the counties, its act will not be reviewed by certiorari, especially where the application was made after the first Monday in August.

Rich County v. Bailey, 47 U. 378; 154 P. 773.

5985. (2585.) State board may change valuations. When, after a general investigation by the board, the property, or any class of property, in any county, is found to be assessed above or below its full cash value, the board may, without notice, so determine, and must add to or deduct from the valuation of all the property, or the following classes of property:

1. Real estate described as town or city lots;
2. Real estate acreage assessed as farm lands;
3. Real estate acreage assessed as fruit lands;
4. Real estate acreage assessed as grazing lands;
5. Real estate acreage assessed otherwise than as farm, fruit, or grazing lands;
6. Improvements on real estate assessed as town or city lots;
7. Improvements on real estate assessed as acreage;
8. Horses or mules assessed on range;
9. Horses or mules otherwise assessed;
10. Cattle assessed on range;
11. Cattle otherwise assessed;

12. Sheep or goats assessed on range;
13. Sheep or goats otherwise assessed;
14. Swine;
15. Banks;
16. Merchandise and trade fixtures;
17. Machinery, tools, implements, and supplies;
18. Personal property not otherwise enumerated.

Such per cent respectively as is sufficient to raise or reduce it to its full cash value. The intent of this section is for the purpose of equalizing, to divide the property assessed by the assessors into the eighteen classes mentioned in this section, and to hereby authorize the state board of equalization to raise or lower, as may be necessary to bring to its full cash value, any one or all of the eighteen mentioned classes of property.

Am'd '99, p. 106; '09, p. 100; '11, p. 119; '17, p. 201.

See notes under § 5984.

5986. (2586.) When auditor fails to report. If the county auditor fails to forward to the state board of equalization the statements provided for in § 6000, the board must obtain the statement, or so much thereof as is necessary, from other reliable sources.

5987. (2587.) Board to transmit statement of changes. When the equalization among the several counties is completed, the secretary of the board must transmit to each county auditor and to the state auditor a statement of the changes made by the board in the assessment book of the county or any assessment contained therein, and of the per cent to be added to or deducted from the valuation of such statement, which is prima facie evidence of the regularity of all proceedings of the board resulting in the action which is the subject matter of the statement.

5988. (2588.) Rate of annual levy for general state purposes. Before the last Monday of July of each year, the state board of equalization must determine the rate of state tax to be levied and collected upon the assessed valuation of the property of the state, which must be sufficient to raise the specified amount of revenue required to be raised by the legislature for state purposes; *provided,* that such levy does not exceed 2 mills on the dollar of assessed valuation for any one year. The board must immediately thereafter transmit to the county auditor of each county and to the state auditor a statement of such rate, and upon its receipt the county auditor, must, in writing, notify the state board of equalization of the receipt thereof.

Am'd '09, p. 105; '15, p. 197.

5989. (2589.) Disobeying subpœna or rules of board. Every person served with a subpœna by the state board of equalization or by any member thereof, or by any person directed to serve said subpœna, who fails or neglects without just excuse to obey it, and every officer who refuses to obey the rules and regulations prescribed by the board, or to perform the duties prescribed therein, shall forfeit to the state $500, to be recovered by an action in the name of the state, which action may be commenced and tried in any county in the state. Am'd '09, p. 105.

5990. (2590.) Prosecution of assessor for fraud. Whenever the state board of equalization is satisfied that the assessor or deputy assessor of any county has knowingly, fraudulently, or corruptly assessed any property below its actual cash value, it must immediately inform the county attorney of such county in writing of that fact, with the request that such assessor or deputy assessor be prosecuted, and the county attorney must at once comply with such request.

5991. (2591.) Member may administer oaths. The president, secretary, or any member of the state board of equalization may administer and certify oaths. Am'd '09, p. 105.

CHAPTER 6.

LEVY AND LIEN OF TAXES.

5992. (2592.) Fiscal year of state. The fiscal year of the state of Utah commences on the 1st day of December of each year. Am'd '05, p. 92.

Fiscal year to begin January 1st, unless changed by the legislature, Con. art. 13, sec. 1.

Similar section, § 5794.

5993. (2593.) Levy by commissioners. Date. Rate. Purposes. The board of county commissioners of each county must, between the last Monday in July and the second Monday in August each year, fix the rate of county taxes, and designate the number of mills on each dollar of valuation of property for each fund, and must levy taxes upon the taxable property of the county for general county purposes, for the care, maintenance, and relief of the indigent sick and otherwise dependent poor; *provided,* that the maximum levies for the above-mentioned purposes shall be as follows: In any county which has an assessed valuation for the current tax year of less than $2,000,000, the levy for general county purposes shall not exceed three and one-half mills on the dollar, and the levy for the care, maintenance, and relief of the indigent sick and otherwise dependent poor shall not exceed seven-tenths of one mill on the dollar; in counties which have an assessed valuation for the current tax year of more than $2,000,000 and less than $7,000,000, the levy for general county purposes shall not exceed two and one-half mills on the dollar, and the levy for the care, maintenance, and relief of the indigent sick and otherwise dependent poor shall not exceed five-tenths of a mill on the dollar; in the counties which have an assessed valuation for the current tax year of more than $7,000,000 and less than $12,000,000, the levy for general county purposes shall not exceed two mills on the dollar, and the levy for the care, maintenance, and relief of the indigent sick or otherwise dependent poor shall not exceed four-tenths of a mill on the dollar; in counties which have an assessed valuation for the current tax year of $12,000,000 or more, the levy for general county purposes shall not exceed one and eight-tenths mills on the dollar, and the levy for the care, maintenance, and relief of the indigent sick and otherwise dependent poor shall not exceed one-half mill on the dollar. Am'd '03, p. 180; '15, p. 192; '17, p. 432.

Rate of city and town taxes, how fixed, § 6103.

Assessment as fixed by state board, §§ 5873, 5925.

Legislature not to impose taxes for county purposes, Con. art. 13, sec. 5.

Levy for county school districts of first class, § 4624.

City and town taxes delinquent, when, § 6108.

Taxes due, when; delinquent, when, § 6015.

Levy for city school purposes, § 4704.

Levy for district school purposes, § 5998.

State board to determine rate, § 5988.

Compiled Laws of 1888 authorized counties to provide for the care and maintenance of the poor, and to levy the necessary tax therefor; an act of 1890 authorizes the county courts to levy for "county purposes" not to exceed three mills; held, that the latter act repealed the former act so far as it permitted a special levy for the care of the poor.

O. S. L. Ry. Co. v. Standing, 10 U. 452; 37 P. 687.

A levy to meet the expenditure provided in the dependent mothers act, §§ 3990-3998, is not in conflict with this section.

D. & R. G. R. R. Co. v. Grand County, —. U. —; 170 P. 74.

Under this section as amended in 1915, the commissioners may segregate the levy, and a designation of a levy for county road purposes is not improper where the entire levy for general county purposes does not exceed the amount authorized by law.

L. A. & S. L. R. R. Co. v. Richards, 51 U. —; 172 P. 474.

5994. (2594.) State levy. The action of the state board of equalization in fixing the rate of taxation for state purposes is a valid levy of the rate so fixed.

State board to determine rate of state tax, § 5988.

5995. (2595.) Effect of tax and lien. Every tax has the effect of a judgment against the person, and every lien created by this title has the force and effect of an execution duly levied against all personal property of the delinquent. The judgment is not satisfied nor the lien removed until the taxes are paid or the property sold for the payment thereof.

Lien of city and town taxes, § 6108.

5996. (2596.) Effect of tax and lien. Every tax upon personal property is a lien upon the real property of the owner thereof, from and after twelve o'clock m. of the 1st day in January of each year. Am'd '05, p. 241; '09, p. 106.

5997. (2597.) Real property. Every tax upon real property is a lien

against the property assessed; and every tax due upon improvements upon real estate assessed to others than the owner of the real estate is a lien upon the land and improvements; which several liens attach as of the second Monday in January in each year. Am'd '07, p. 2.

A tax lien is an incumbrance within a covenant against incumbrances upon realty purchased after the date it becomes a lien; and a contention that there was no breach of covenant until the tax became delinquent and the property was sold was untenable.
Geo. A. Lowe Co. v. Simmons Warehouse Co., 39 U. 395; 117 P. 874.

Under this section and § 5995, a person purchasing property at a tax sale and receiving a certificate of sale acquires by subrogation a lien on the property.
O. S. L. R. R. Co. v. Hallock, et al., 41 U. 378; 126 P. 394.

5998. (2598.) State levy for district school purposes. Limit. The state board of equalization is hereby authorized and directed to levy annually a state tax of not more than two and two-tenths mills on each dollar of valuation of the taxable property in the state, for district school purposes; and the levy and collection of said tax must be performed in the same manner and at the same time as other state taxes are levied and collected, and shall be apportioned to the several school districts as provided by law. Am'd '15, p. 197.

Apportionment by state superintendent of public instruction, § 4518.
Apportionment by county superintendent, § 4565.

CHAPTER 7.

COUNTY AUDITOR'S DUTY IN RELATION TO REVENUE.

5999. (2599.) Auditor to enter total valuations. The county auditor, immediately upon the completion of the work of the county board of equalization, must proceed to add up the valuations, and enter the total valuation of each kind of property, and the total valuation of all property, on the assessment book. The column of acres must show the total acreage of the county.
Yearly settlements made with county auditor, § 6089.

6000. (2600.) To prepare statement. The county auditor must, on or before the first Monday in July of each year, prepare from the "assessment book" of each year, as corrected by the board of county commissioners, a statement showing in separate columns:

1. The total value of all property;
2. The value of real estate, including patented mining claims, stated separately;
3. The value of the improvements thereon;
4. The value of personal property exclusive of money;
5. The amount of money;
6. The number of acres of land and the number of patented mining claims, stated separately;
7. The amount of taxes remitted.

6001. (2601.) To transmit same to state board. The county auditor must, as soon as such statement is prepared, transmit the same by mail to the state board of equalization.

6002. (2602.) To conform to changes made by state board. As soon as the county auditor receives from the state board of equalization a statement of the changes made by the board in the assessment book of the county, or of any assessment contained therein, he must make the corresponding changes in the assessment book, by entering the same in a column provided with the proper heading in the assessment book, counting any fractional sum when more than fifty cents as one dollar and omitting it when less than fifty cents, so that the value of any separate assessment shall contain no fractions of a dollar; but he must in all cases disregard any action of the board of county commissioners which is prohibited by § 5882.
Changes by state board, §§ 5926, 5984, sub. 8; § 5985.

6003. (2603.) County auditor to compute and enter taxes. The county auditor must then compute and enter in a separate money column in the assessment book, the aggregate sum in dollars and cents, rejecting the frac-

tions of a cent, to be paid as taxes on the property therein enumerated; *provided,* that taxes levied only on a certain kind or class of property for a special purpose, other than for state, county, city, town, and school purposes, etc., shall be separately set out, and shall foot up the column showing the total amount of such taxes, and the column of total value of property in the county, as corrected by the state board of equalization. Am'd '11, p. 192.

6004. (2604.) Classification and correction of assessment rolls. Statement. The county auditor must, on or before the second Monday of September of each year, prepare from the assessment rolls of such year, as corrected by the county board of equalization and by the state board of equalization, a statement showing the amount and value of all property in the county, as classified by the county assessment rolls, and the value of each class; the total amount of taxes remitted by the county board of equalization; the state's share of such taxes remitted; the county's share of such taxes remitted; the rate of county taxes, and such other information as the state auditor may request. Said statement shall be made in duplicate, upon blanks furnished by the state auditor, and as soon as prepared shall be transmitted, by mail, one copy to the state auditor and one copy to the state board of equalization. Am'd '15, p. 32.

6005. (2605.) To charge treasurer with taxes levied. Exception. On delivering the assessment book to the county treasurer, the county auditor must charge the treasurer with the full amount of taxes levied, except the municipal taxes of cities of the third class and of towns, and the taxes of car companies. Am'd '01, p. 147.

6006. (2606.) Id. To be delivered to county treasurer. Affidavit. On or before the third Monday of September, the county auditor must deliver the corrected assessment roll to the county treasurer, with an affidavit attached thereto, and by him subscribed, as follows:

I, ..., county auditor of the county of ....., do swear that I received the accompanying assessment roll of the taxable property of the county from the assessor, and that I have corrected it and made it conform to the requirements of the county and state boards of equalization; that I have reckoned the respective sums due as taxes and have added up the columns of valuations, taxes and acreage as required by law. Am'd '15, p. 32.

6007. (2608.) Statement to be verified. The county auditor must verify, by his affidavit attached thereto, all statements made by him under the provisions of this title.

6008. (2609.) Change of treasurers. The county auditor, if the assessment book or the delinquent tax list is transferred from one treasurer to another, must credit the one and charge the other with the amount then outstanding on the tax list.

CHAPTER 8.

COLLECTION OF TAXES.

6010. (2610.) Index to names. Notice to taxpayers. Collection of taxes from car companies. On receipt of the assessment roll, the county treasurer shall index, in one or more indexes (if more than one, the alphabet shall be so divided that no names shall appear in more than one place in such indexes, unless for lack of space transferred to some other place to be referred to), the names of all property owners shown by the assessment roll; and shall, opposite each name in the index, refer by number of assessment roll (if there be more than one), and by page and line, to all pieces of property standing upon the assessment roll in such names. He shall proceed to collect taxes, and shall furnish to each taxpayer, except car companies, by mail, postage prepaid, or leave at his residence or usual place of business, if known, a notice

of the amount of tax assessed against him upon all property, which shall set out the aggregate amount of taxes to be paid, for state, county, city, town, and school purposes, etc., and shall set out separately all taxes levied only on a certain kind or class of property for a special purpose or purposes, and shall have printed or stamped thereon the rate of taxation for each purpose for which taxes have been levied, when and where payable, and that such tax will be delinquent at 12 o'clock noon on the Saturday next prior to the first Monday in December next thereafter, and subject to the penalty provided by law, which shall be stated in the notice. The secretary of the state board of equalization is hereby made the collector of taxes from car companies. He shall, upon receipt of the apportionment of the property of car companies from the county board of equalization, proceed to collect the taxes from said car companies, and shall furnish each company, by mail, postage prepaid, a notice of the amount of the tax assessed against it, when and where payable, and that such tax will be delinquent at 12 o'clock noon on the Saturday next prior to the first Monday in December next thereafter, and subject to the penalty provided by law. On or before the first Monday in January following in each year, the collector of taxes from car companies shall remit to the state treasurer the taxes collected from car companies due the state, and to each county the taxes collected from car companies and due to said counties, and the various taxing districts included therein.

Am'd '99, p. 106; '01, p. 147; '11, p. 192; '15, p. 33.

Decisions on invalid tax sales, note to § 6018.

Property to be assessed in name of owner, if known; if unknown, to unknown owners, § 5884, and note.

County treasurer collects school district taxes, § 4585; city school taxes, § 4704; county school district of first class, § 4624.

Railway cars owned by a foreign corporation having no place of business in this state, but coming into, passing through and doing business in the state, are subject to taxation, although the cars may have been employed in interstate commerce.
Union R. T. Co. v. Lynch, 18 U. 378; 55 P. 639; affirmed 177 U. S. 149.

A tax deed is void where it is not shown that the collector received the warrant required by § 2029, C. L. U. 1888.
Asper v. Moon, 24 U. 241; 67 P. 409.

Failure to give statutory notice of assessment to taxpayer invalidates sale.
Olsen v. Bagley, 10 U. 492; 37 P. 739.
Eastman v. Gurrey, 15 U. 410; 49 P. 310.
Asper v. Moon, 24 U. 241; 67 P. 409.

6011. (2611.) Date of payment to be entered. The county treasurer must mark the date of the payment of any tax in the assessment book opposite the name of the person paying. The state treasurer must mark the date of the payment of any tax paid him by car companies in the record kept by him. Am'd '99, p. 107.

6012. (2612.) Receipts. Certain warrants receivable for taxes. The county treasurer must give a receipt to the person paying any taxes, specifying therein the amount of the assessment, the description and kind of property assessed, and the aggregate amount of taxes paid; *provided,* that taxes levied only on a certain kind or class of property for special purposes other than for state, county, city, town, and school purposes, etc., shall be separately set out; *provided, further,* that upon said receipt shall be printed the rate of taxation for each purpose for which taxes have been levied. County warrants shall be taken in payment of county taxes, city warrants in payment of city taxes, and school district warrants in payment of district school taxes; *provided,* that state school taxes, county school taxes, and sinking funds shall be paid in cash. Am'd '11, p. 193.

6013. (2613.) Decedents' estates. The district court must require every administrator or executor to pay out of the funds of the state all taxes due from such estate; and no order or decree for the distribution of any property of any decedent among the heirs or devisees shall be made until all taxes against the estate are paid.

Assessment of estates of deceased persons, § 5889.

Payment of taxes before distribution, § 7767.

Where a non-resident has money on deposit in banks of this state, dies, leaving a will which is probated in this state, there being no proceedings in his state, the estate is liable for taxes on the money.
In re Thourot's Estate, 51 U. —; 172 P. 679.

This section does not affect the necessity of presenting to the representatives of the deceased vendor of land by warranty deed a claim by the purchaser for reimbursement for taxes paid by him which were liens on the land at the time of the purchase.
Clayton v. Dinwoodey, 33 U. 251; 93 P. 723.

6014. (2614.) County treasurer's settlements. On the first Monday of March, of June, and of September, and the second Monday of December,

the county treasurer must settle with the board of county commissioners for all moneys collected by him, and on said day must deliver to and file in the office of the county auditor a statement under oath showing:

1. An account of all his transactions and receipts since his last settlement;

2. That all money collected by him is in the county treasury.

Settlements with state, § 6064; with cities, § 6107.

6015. (2615.) Taxes due and delinquent, when. Penalty. All taxes provided for in this title shall be due on the third Monday in September in each year, and at 12 o'clock noon on the Saturday next prior to the first Monday in December of each year, all unpaid taxes are delinquent, and the county treasurer shall then close his office for the receipt of taxes until he has prepared his delinquent list for publication. All delinquent taxes shall be subject to a penalty of 3 per cent of the amount of such taxes. Am'd '15, p. 97.

City and town taxes due, when, § 6108.

6016. (2620.) Publication of delinquent tax list. Notice of sale. Car companies. On or before the second Monday in December of each year, the county treasurer must, under the direction of the county commissioners, publish the delinquent list, which must contain the names of the owners, when known, and a description of the property delinquent or subject to lien of taxes, classified in towns and cities by addition, subdivision, plat, block, and lot, and other lands by range, township, and section, or legal subdivision thereof, with the amount of taxes due, exclusive of penalty. The county treasurer must publish with such list a notice that unless the delinquent taxes, together with the penalty, are paid before the third Monday of December next thereafter, the real property upon which such taxes are a lien will be sold for taxes, penalty, and costs, excepting only such property as is held by the county under certificate of tax sale, beginning on said date, at the front door of the county court house. The delinquent list shall be published three times if in a daily newspaper, twice in a semi-weekly, and once if in a weekly paper, commencing on or before the second Monday in December. On or before the second Monday of December of each year, the collector of taxes from car companies shall publish in a newspaper having general circulation in the state the list of the car companies delinquent for taxes, which must contain the names of the owners, when known, and a description of the property delinquent or subject to a lien of taxes. The collector of taxes from car companies shall publish with such list a notice that unless the delinquent taxes, together with the penalty, are paid before the third Monday of December next thereafter, the property upon which such taxes are a lien will be attached and sold for taxes and costs, such sale to be made at the discretion of the collector of taxes from car companies. It is hereby made the duty of all railroads and railways doing business in the state to furnish the collector of taxes from car companies with any information he may desire, and within the knowledge of said railroad or railway companies, that will aid the said collector in the performance of his duties. The laws set forth in this chapter for the sale, redemption, etc., of property delinquent for taxes are hereby made to apply to the sale of property of car companies delinquent for taxes. After all sales are made, the collector of taxes from car companies must, without delay, pay to the state treasurer the amount of taxes due the state, and to the various counties the amounts due such counties, together with the amounts due the various taxing districts in such counties.

Am'd '99, p. 107; '01, pp. 76, 148; '15, p. 34.

Correction of errors, republication, §§ 6083-6085.

Notice to car companies by secretary of state board of equalization, § 6010.

Taxes due, when; delinquent, when, § 6015.

Where property was owned by W. and H., jointly, the publication of a delinquent tax list, in which the names of the owners were stated as "W. et al.," was insufficient under a statute requiring such publication to state the "names of the owners" of such property.
Asper v. Moon, 24 U. 241; 67 P. 409.

If name of owner unknown property must be assessed to "unknown owner."
Jungk v. Snyder, 28 U. 1; 78 P. 168.

6017. (2620x.) Salary of collector of taxes from car companies. The

annual salary of the collector of taxes due from car companies is hereby fixed at $300. '01, p. 149.

Secretary of state board of equalization is collector of taxes from car companies, § 600.

Salary of members of state board of equalization, § 5983.

6018. (2621.) Sales for delinquency. Date and manner. Record. Penalty. Duties of auditor and treasurer. On the third Monday of December of each year the county treasurer shall expose for sale, between the hours of 10 a. m. and 3 p. m., sufficient of all delinquent real estate to pay the taxes, penalty, and costs for which such real estate is liable, at public auction, at the front door of the county court house, and sell the same to the highest responsible bidder for cash, and the treasurer shall continue to sell from day to day between such hours until the property of all delinquents is exhausted, or the taxes, penalty, and costs are paid. In offering such real estate for sale, the treasurer shall offer the entire tract assessed, and the first bid received in an amount sufficient to pay the taxes and costs shall be accepted, unless a further bid in the same amount for less than the entire tract shall be received; and the highest and best bid shall be construed to mean the bid of that bidder who will pay the full amount of the taxes and costs for the smallest undivided portion of said real estate. After receiving a bid for the full amount of the taxes and costs, it shall not be the duty of the treasurer to attempt to secure a higher bid, but he shall accept it if made. The treasurer shall make a record of all sales of real property in a book to be kept by him for that purpose, therein describing the several parcels of real property on which the taxes and costs were paid by the purchasers, in the same order as the published list of delinquent sales contained in the list of advertisements on file in his office, stating in separate columns the amount, as obtained from the tax list, due each taxing fund. Separate columns shall also be provided in said record in which the treasurer shall enter the description of any tract sold that is less than the entire tract on which the taxes are due, the date of sale, to whom sold, the penalty, and costs, and the date of the redemption. The purchaser shall be required to pay the penalty to the treasurer, which penalty shall in all cases accrue to the benefit of the county. When all sales have been made, the treasurer shall file the record in his office; *provided,* that in all counties there shall be adopted a uniform system of tax sale record, which shall be recommended by the state auditor, and that a duplicate of said record of each county, so far as it related to sales to the county, shall be furnished by the county treasurer to the state auditor, in loose leaf or bound form, as may be directed by the state auditor, and to which shall be added the subsequent taxes of each succeeding year, together with the redemptions as reported to the state auditor by the treasurers of the various counties, upon blanks to be prescribed by the state auditor. It shall be the duty of the county treasurer to issue a receipt to any person paying taxes on an undivided interest in real estate, showing the interest on which taxes are paid, and in case any portion of the taxes on such real estate remains unpaid, it shall be the duty of the treasurer to sell only such undivided interest in said real estate as belongs to the co-owners who have not paid their portion of the tax.

Am'd '03, p. 87; '11, p. 187; '15, p. 138; '17, p. 389.

Settlement tax sale accounts, §§ 6073, 6077.
Collection of taxes by suit, §§ 6047, 6090-6092, and notes.
Erroneous and illegal taxes refunded, §§ 6043, 6095.
Informality or delay does not invalidate, § 6087.
Correction of errors before sale, § 6083.
Description of property required on assessment roll, § 5909.
Assessment in name of owner or owners, § 5884, and note.
Owner must have proper notice of levy, etc., § 6010, and note.

DESCRIPTION OF PROPERTY:

Description as "W.'s, 80 acres in N. W. ¼ of sec. 23, T. 2 S., R. 1 E." is insufficient, and sale under such assessment is void.
Olsen v. Bagley, 10 U. 492; 37 P. 739.

Where, in a deed for land sold for taxes, it appears the description does not correspond with all its immediate antecedents, where the recitals are not true and do not correctly describe the land referred to in the notice of sale, and where the description in the notice of sale is erroneous and does not correctly describe the property, nor the property described in the tax sale, and it does not affirmatively appear from the notice that defendant had notice of the amount of taxes assessed against him, or when or where the same was payable, as provided by ordinance and law, and where it appears that property was sold for $10.20 more than the amount of the taxes, but nowhere appears what the $10.20 was for, or what the costs of sale were; held, that such tax sale is illegal. (Expressly overruling Hamer v. Weber Co., 11 U. 1; 37 P. 741, and holding that the dissenting opinion in that case states

the law correctly. The case of Ogden City v. Hamer, 12 U. 347; 22 P. 1113, is overruled in so far as it conflicts with this opinion, and the opinion in Olsen v. Bagley, 10 U. 492; 37 P. 739.)

Eastman v. Gurrey, 15 U. 410; 49 P. 310.

A description of lots in an assessment roll and published list of delinquent taxes as being in a certain addition, without naming the city of which the addition is a part, is fatally defective.

Asper v. Moon, 24 U. 241; 67 P. 409.

An assessment of land for taxation describing it as "pt. N. E. ¼," and in "N. W. ¼ of N. E. ¼," etc., containing 7 acres, was insufficient, since the tract purporting to be assessed might have been located in any part of the larger tract described.

Moon v. Salt Lake Co., 27 U. 435; 76 P. 222.
Allen v. Fitzgerald, 23 U. 597; 65 P. 592.

OVERCHARGES:

An overcharge for a certificate of sale included in the amount for which the sale is made renders the sale void to the purchaser.

Olsen v. Bagley, 10 U. 492; 37 P. 739.
Eastman v. Gurrey, 15 U. 410; 49 P. 310.

Where, on sale of two tracts of land for non-payment of taxes, the officers collected fees for certificates in excess of those allowed by law, the sales were void.

Moon v. Salt Lake Co., 27 U. 435; 76 P. 222.

Collector was not entitled to prepare a certificate which, by reason of unnecessary repetition, etc., contained twelve folios, and charge for the same at the rate of twenty-five cents per folio.

Id.

STRICT COMPLIANCE WITH STATUTE:

Tax sales being made exclusively under statutory authority, the provisions of the statute conferring such authority must be fully complied with, and any substantial departure therefrom, prejudicial to the owner of the property, will invalidate the sale.

Jungk v. Snyder, 28 U. 1; 78 P. 168.
Moon v. S. L. County, 27 U. 435; 76 P. 222.
Asper v. Moon, 24 U. 241; 67 P. 409.
Eastman v. Gurrey, 15 U. 410; 49 P. 310.
Olsen v. Bagley, 10 U. 492; 37 P. 739.

THE CERTIFICATE AND DEED:

Where land was sold for taxes for the year 1901 a certificate of sale issued therefor was not invalid because issuance of it was delayed so that it was upon a form not printed until 1904; the certificate sale not being jurisdictional as to a tax deed, the book or records of delinquent sales, and not the certificate, controls.

Bruno v. Madsen, 38 U. 485; 113 P. 1030.

A plea in an action to quiet title alleging that the property had been sold for taxes, that it had not been redeemed, that a tax deed was issued to the purchaser without touching or referring to the recital of the tax deed itself, was insufficient as a plea of tax title.

Bean v. Fairbanks, 46 U. 513; 151 P. 338.

Where a deed recites that the treasurer offered to sell the property, or sufficient thereof to pay taxes and costs, it shows that he offered the whole property for sale and not sufficient to pay the taxes and costs as required by § 6018, and thereby affirmatively shows want of authority to issue the deed, and it is void on its face.

Wall v. Kaighn, 45 U. 244; 144 P. 1100.

On a sale of land to the county for delinquent taxes, enough of the proceedings must be recited in the certificate or deed to show authority to sell the land and issue certificate to it.

Wall v. Kaighn, 45 U. 244, 144 P. 1100.

A tax deed which recites that property was struck off to the county, which was the highest and best bidder therefor, is void on its face, since the county cannot engage in competitive bidding.

Lawrence v. Murphy, 45 U. 572; 147 P. 903.
Wall v. Kaihn, 45 U. 244, 144 P. 1100.

A certificate of sale, which merely recites that the treasurer sold the whole of the property to the county for the delinquent taxes and costs, is consistent with recitals in the deed that the county was a competitive bidder and a voluntary purchaser, and does not show a valid sale to the county or any right in it to be any kind of a purchaser.

Wall v. Kaighn, 45 U. 244; 144 P. 1100.

6019. (2622.) Fee for certificate of sale. The treasurer shall collect 50 cents for each certificate of sale in full for all his services, which sum shall be paid by him into the county treasury. Am'd '15, p. 139.

6020. (2623.) Treasurer to issue certificate of sale. Description. When real estate is sold for taxes, the treasurer shall make out, sign, and deliver to the purchaser of any real estate sold for the payment of taxes, as aforesaid, a certificate of sale, describing the property on which the taxes and costs were paid by the purchaser, as the same was described in the record of sales; also the description of each tract or lot sold, and stating the amount due each taxing fund, together with the penalty and costs for which the same was sold, as described in the record of sales, and that payment has been made therefor. Am'd '15, p. 139.

Decisions on invalid tax sales for imperfect descriptions, excessive charges for certificates, etc., note to § 6018.

6021. (2624.) Form of certificate. How recorded. Sale to county. Certificate is prima facie evidence of regularity of proceedings. The certificate of sale, when the sale is made to any person other than the county, shall be substantially in the following form, and may be recorded in the office of the county recorder without acknowledgment:

This certifies that on the ..... day of ....., 19....., in pursuance of law, I, as treasurer of ..... county, Utah, sold to ....., subject to redemption, as provided by law, the property situated in the county of ....., state of Utah, hereinafter described, for the delinquent state, state school, state high school, county, city, city school, ..., and district school taxes, for which said property is liable, assessed in the name of ..... as owner, for the year ....., and the costs of sale; that the penalty assessed against

the owner for the non-payment of such taxes is $.....; that a description of the property named is as follows, to-wit: ..... That the amount of taxes due the several taxing funds and the costs for which said property was sold are as follows, to-wit:

State, State School, State High School Taxes	County Taxes	Town or City Taxes	City School Taxes	District School Taxes				Penalty	Costs of Sale	Total
$	$	$	$	$	$	$	$	$	$	$

and that payment has been made therefor.

Dated ....., 19.....

.....,

Treasurer of ..... county, Utah.

If at any tax sale, no person shall bid and pay the treasurer the amount of tax and costs required to be paid, as aforesaid, on any property, the treasurer shall make to the county a certificate substantially in the form hereinafter prescribed, and deliver the same to the county auditor, and such sale to the county shall have the same effect as if made to an individual, and the county auditor shall credit the treasurer with the amount of the tax due thereon. The certificate of sale, when the property is sold to the county, shall be substantially in the following form, and may be recorded in the office of the county recorder without acknowledgment:

This certifies that on the ..... day of ....., 19....., in pursuance of law, I, as treasurer of ..... county, Utah, offered for sale subject to redemption as provided by law, the property situated in the county of ....., state of Utah, hereinafter described, for the delinquent state, state school, state high school, county, city, city school, ..., and district school taxes, for which said property is liable, assessed in the name of ..... as owner, for the year ....., together with the penalty provided by law and the costs of sale; that a description of the property named is as follows, to-wit: ..... That the amount of taxes due the several taxing funds, penalty and the costs for which the same was offered are as follows, to-wit:

State, State School, State High School Taxes	County Taxes	Town or City Taxes	City School Taxes	District School Taxes				Penalty	Costs of Sale	Total
$	$	$	$	$	$	$	$	$	$	$

That pursuant to said offer no person offered to bid and pay the treasurer the amount of the tax and costs required to be paid, as aforesaid; therefore, pursuant to law, said property was sold to ..... county, and this certificate issued as evidence thereof.

Dated ....., 19.....

.....,

Treasurer of ..... county, Utah.

The certificate of sale herein provided for, when signed by the county treasurer and delivered to the purchaser, whether the same be the county or an individual, shall be prima facie evidence of the regularity of all proceedings connected with the assessment notice, equalization, levies, advertisement, and sale of the property therein described, and the burden of showing any irregularity in any of the proceedings, resulting in the sale of property for the non-payment of delinquent taxes, shall be on him who asserts it. While a

certificate of sale is held by the county, the treasurer shall not sell the property covered by such certificate for taxes, but the county auditor shall credit the treasurer with the amount of tax due thereon. In any case the party redeeming shall pay all taxes that may be assessed, and interest, penalty, and costs that may accrue upon land subsequent to the sale. Am'd '15, p. 139.

6022. (2625.) Default of purchaser. If the purchaser does not pay the tax and costs before five o'clock p. m. of the day following the sale, the property, on the next sale day, before the regular sale, must be resold for taxes and costs. The bid of any person refusing to make the payment for the property purchased by him must not be received on the sale of any other property advertised in the delinquent tax list of that year.

Mont. Pol. C., §§ 3883, 3884*.

6023. (2626.) Property bought by county to be sold at private sale, when. At any time after the sale shall have closed and before the time for redemption has expired, the county treasurer is authorized and required, at private sale, at his office, to sell and assign the interest of the county in any of the real estate sold to the county for delinquency, to any person who will pay the amount of the delinquent taxes, interest, penalty, and costs thereon for the same, and to make out duplicate receipts for the purchaser of such real estate, on which he shall write "sold for taxes at private sale" and deliver such receipts to the purchaser. Upon presentation of one of such receipts to the county auditor, he shall make out and deliver to the purchaser an assignment of the certificate of sale made to the county. Real estate sold to the county and afterward assigned shall be subject to redemption at any time within four years after the date of the original sale, as provided in § 6024, except that the interest charged shall be 1 per cent per month from and after assignment of the certificate by the county. Am'd '15, p. 30.

N. Dak. (1895) § 1263*. Sale of such property at auction, 6056.

6024. (2627.) Manner of redemption from tax sale. Real estate sold for taxes may be redeemed by any person interested therein, at any time within four years after the date of the sale thereof, by such person paying into the county treasury for the use of the purchaser or his legal representatives the amount paid by such purchaser, and all penalties and costs as aforesaid, together with the sum of 50 cents for a redemption certificate, and all taxes that have accrued thereon and which have been paid by the purchaser after his purchase to the time of redemption, together with interest at the rate of 1 per cent per month on the whole from the date of payment to the day of redemption; *provided,* that when two or more parties are interested in a piece of property which has been sold for taxes, either party may redeem the property in which he is interested, upon a payment of that portion of the taxes, interest, penalties, and costs which his property bears to the whole, together with the sum of 50 cents for redemption certificate.

Am'd '01, p. 122; '15, p. 30.

Possession under a tax sale certificate, during the period of redemption, is an admission that the possession is subject to the owner's right of redemption, and is not adverse to the true owner.
S. L. Inv. Co. v. Fox, 32 U. 301; 90 P. 564.

6025. (2628.) Id. Entry and certificate. The county treasurer shall, when any property is redeemed, make the proper entry in the record of tax sales filed in his office, and issue a certificate of redemption, which entry or such certificate of the fact of the redemption properly certified by the treasurer shall be prima facie evidence of such redemption, and may be recorded in the office of the county recorder without acknowledgment.

6026. (2628x.) Certified record of unredeemed tax sales. Contents of record. The county treasurer shall, on or before the 1st day of July, A. D. 1899, prepare and transmit to the county recorder a certified record of all unredeemed tax sales made by the county collectors or the county treasurers, as the case may be, for the years 1895, 1896, 1897, and 1898, and of all other matter at such time constituting liens upon real estate in the county, a record of which is contained in the treasurer's office; which record shall show in separate columns, the name of the person to whom assessed, the description

of the tract sold, the date of sale, and to whom sold; also a column to show date of redemption and by whom redeemed; also a column to show date and to whom sold at private sale by county treasurer, and each line on each page shall be numbered consecutively; and the county recorder shall, with all due diligence, enter all such items in the abstract records in his office. '99, p. 116.

6027. (2628x1.) Record of tax sales. The county treasurer shall, on or before the 15th day of March, 1900, and of each year thereafter, transmit to the county recorder a certified record, in form prescribed in § 6026, showing all tax sales made by him for delinquent taxes of the preceding year, together with the record of the delinquent tax upon all property not sold for the reason that the county held tax lien thereon for delinquent tax of some preceding year; and the county recorder shall enter all items shown by such record in the abstract books in his office. '99, p. 116.

6028. (2628x2.) Report of redemptions made. The county treasurer shall transmit to the county recorder daily (if he has any matter as hereinafter provided to report) a transcript of redemptions made, or private sales made by him; which transcript shall make reference to the book, page, and line of the tax sale record where original sale is listed, the name of the person in whose name sold, the lot, block, plat, and survey, or the quarter section, section, township, and range, as the case may be; together with the name of the person making such redemption or making such purchase at private sale; and the county recorder shall enter the items contained in such transcript in the proper place in the tax sale records to which they refer. '99, p. 116.

6029. (2628x3.) Tax sale records kept in recorder's office. The tax sale records hereinbefore provided for shall be transmitted to and kept in the county recorder's office, and shall be considered the official record of tax sales. '99, p. 117.

6030. (2629.) Property not redeemed. Deed to purchaser. If any property sold as aforesaid be not redeemed within the time and in the manner aforesaid, the treasurer shall deposit the record of tax sales in the office of the county auditor, who shall, on presentation of the treasurer's certificate of sale, make out a deed conveying the property therein described to the purchaser, his heirs, or assigns, as the case may be. If any person shall be entitled to receive deeds for more than one parcel of property, he may have the whole included in one deed, but each parcel shall be separately described. Said auditor shall also, as soon as may be after the filing of said record, make out a deed conveying to the county all property purchased by the county and not redeemed, and cause the same to be recorded in the name of the county. Deeds issued by the county auditor in pursuance hereof shall recite substantially the amount of the tax for which the property was sold, the year for which it was assessed, the day and year of sale, the amount for which the real estate was sold, a full description of the property, and the name of the purchaser or assignee; and when attested by the county auditor shall be prima facie evidence of the facts recited therein.

Sufficiency of deed, note to § 6018.

6031. (2630.) Fees. The county auditor shall make and keep on file in his office a record of all tax deeds issued, and shall collect $2 for each deed issued for the first description of property contained in such deed, and for each additional description of property in such deed, one dollar, and pay the same into the county treasury. The acknowledgment of all such deeds shall be taken by the county recorder, or other county officer authorized to take acknowledgments, free of charge. No charge must be made by the county auditor for the making of any such deed where the county is the purchaser.

6032. (2631.) Taxes on personal property, how collected. The treasurer may collect the taxes delinquent on personal property, except when the real estate is liable therefor, by seizure and sale of any personal property owned by the delinquent.

Tax lien, §§ 5995-5997.

6033. (2632.) Sale of property seized. The sale must be at public auc-

tion, and of a sufficient amount of property to pay the taxes and costs, and when practicable must be made in the justice's precinct where seized.

Sale of real property, § 6018, and note.
Sale of sheep for taxes is irregular where sheep sold are not separated from herd.
Taylor v. Robertson, 16 U. 330; 52 P. 1.

6034. (2633.) Id. Notice. The sale must be made after one week's notice of the time and place thereof, given by publication in a newspaper published in the county, or by posting in three public places in the county.

6035. (2634.) Id. Fees. Expenses. For seizing or selling personal property, the treasurer may charge in each case the sum of $3, for the use of the county, and actual and necessary expenses for travel, seizing, handling, keeping, or caring for property so seized or sold.

6036. (2635.) Id. Delivery. Bill of sale. On payment of the price bid for any personal property sold, the delivery thereof, with a bill of sale, vests the title thereto in the purchaser.

6037. (2636.) Id. Excess of proceeds. All excess over the taxes and costs of the proceeds of any such sale must be returned to the owner of the property sold, and until claimed must be deposited in the county treasury, subject to the order of the owner, or his heirs, or assigns.

6038. (2637.) Id. Unsold portion. The unsold portion of any property may be left at the place of sale at the risk of the owner.

6039. (2638.) Auditor to compare delinquent with assessment list. The county treasurer must annually, on the third Monday of February, attend at the office of the county auditor with the delinquent list and the assessment book, and the county auditor must then carefully compare the list with the assessments of persons and property not marked as paid on the assessment book.

6040. (2639.) Id. Oath of treasurer. The county auditor must then administer to the county treasurer an oath, to be written and subscribed in the delinquent list, that every person and all property assessed in the delinquent list, on which taxes have been paid, has been credited in the list with such payment.

6041. (2640.) Id. Final settlement with treasurer. The county auditor must then foot up the amount of taxes remaining unpaid, and credit the treasurer with the amount, and have a final settlement with him, and thereafter the delinquent list must remain in the county auditor's office.

6042. (2641.) Id. Affidavit of treasurer. At the time mentioned in § 6039, the treasurer must make an affidavit, indorsed on the list, that the taxes not marked as paid have not been paid, and that he has not been able to discover any property belonging to or in possession of the persons liable to pay the sum, whereof to collect them.

6043. (2642.) Erroneous and illegal taxes refunded. Any taxes, interest, and costs paid more than once, or erroneously or illegally collected, may, by order of the board of county commissioners, be refunded by the county treasurer, and the portion of such taxes, interest, and cost of the state, cities, and school districts must be refunded to the county, and the proper officer must draw his warrant therefor in favor of the county; *provided,* that the board of county commissioners, upon sufficient evidence being produced that property has been erroneously or illegally assessed, may order the county treasurer to allow the taxes on that part of property erroneously or illegally assessed to be deducted before payment of the said taxes. Am'd '11, p. 188.

Refunding taxes illegally collected, § 6095.
Action brought for refund of taxes collected on property not subject to taxation is authorized by this section, and payment of such taxes need not be made under protest to compel a refund; but notice of such illegal collection and demand for refund must be made to the board of county commissioners by the taxpayer.
Neilsen v. Sanpete County, 40 U. 560; 123 P. 334.

6044. (2643.) Double assessments. When the treasurer discovers that any property has been assessed more than once for the same year, he must collect only the tax justly due and make a return of the facts, under affidavit, to the county auditor.

6045. (2644.) Sale omitted for irregularity. If the treasurer discovers before the sale that on account of any irregular assessment or of any other error any land ought not to be sold, he must not offer that land for sale; and the board of county commissioners must cause the assessor to enter the uncollected taxes upon the assessment book of the next succeeding year, on the basis of the valuation and rates of the year for which it was erroneously assessed, to be collected as other taxes are collected thereon. Am'd '11, p. 188.

6046. (2645.) Misnomer does not affect sale. When land is sold for taxes, correctly imposed, as the property of a particular person, no misnomer of the owner or supposed owner, or other mistake relating to the ownership thereof, affects the sale or renders it void or voidable.

6047. (2646.) Suit for taxes, when taxpayer removes. If any person removes from one county to another, after being assessed on personal property, the treasurer of the county in which he was assessed may sue for and collect the same in the name of the county where the assessment was made.

Collection of taxes by suit, §§ 6090-6092.

6048. (2647.) Id. Evidence. Judgment. On the trial, a certified copy of the assessment signed by the county auditor of the county where the same was made, with the affidavit of the treasurer thereto attached, that the tax has not been paid, describing it as on the assessment book, or delinquent list, is prima facie evidence that such tax and the interest are due, and entitles him to judgment, unless the defendant proves that the tax was paid.

6049. (2648.) Id. Expenses. The treasurer and the county auditor must allow the expenses of collecting such tax, and permit a deduction thereof from the amount collected, if they do not exceed one-third of the amount of the tax collected.

6050. (2649.) Tax void in part. Sale valid unless taxpayer protests. Whenever property is advertised for sale for the non-payment of delinquent taxes, and the assessment is valid in part, and void for the excess, the sale must not for that cause be deemed invalid, nor any grant subsequently made thereunder be held insufficient to pass a title to the grantee, unless the owner of the property, or his agent, not less than six days before the time at which the property is advertised to be sold, delivers to the treasurer a protest in writing signed by the owner or agent, specifying the portion of the tax which he claims to be invalid, and the ground upon which such claim is based.

Repayment of taxes paid under protest, § 6095.

6051. (2650.) Id. Duty of assessor in case of protest. In case any owner of property advertised to be sold for delinquent taxes, at least six days before the time advertised for the sale to take place, delivers to the county treasurer his protest in writing against such sale, signed by himself or his agent, claiming that the assessment is void, in whole or in part, and if in part only, for what portion, and in either case specifying the ground upon which such claim is founded, it is the duty of the treasurer, either to sell the property assessed for the whole amount appearing upon the assessment book, or to withdraw the property from sale, and report the case to the board of county commissioners for its directions in the premises, and in such case the board may either direct the foreclosure of the lien of such tax by action, which proceeding is hereby authorized to be had, or direct the treasurer to proceed with the sale.

6052. (2651.) Assessment and sale of property bought by county. In case property assessed for taxes is purchased by the county, pursuant to the provisions of this title, it must be assessed in subsequent years for taxes in the same manner as if it had not been purchased. But it must not be exposed for sale so long as the county holds the certificate of the sale thereof, and the sale under any such assessment must be adjourned until the time of redemption under the previous sale shall have expired.

Property bought by county to be sold at private sale, §§ 6023; 6056.

6053. (2652.) Id. In case an assessment is made under the provisions of the preceding section, and the lands are not redeemed from a previous sale,

had under § 6020 as provided by law, no sale must be had under the assessment authorized by the next preceding section so long as the county holds the certificate of sale, unless directed by the board.

6054. (2653.) Redemption. Terms. In case property is sold to the county as purchaser pursuant to the provisions of law, and is subsequently assessed, no person must be permitted to redeem from such sale except upon payment also of the amount of such subsequent assessment, interest, penalty, and costs, unless, in the judgment of the county commissioners, the interest of the state and the county will be subserved by accepting a less sum than the amount due for taxes, interest, penalty, and costs. Am'd '11, p. 188; '15, p. 30.

6055. (2654.) Distribution of moneys received from redemption. Whenever property sold to the county pursuant to the provisions of this title is redeemed or the certificate of sale is assigned as herein provided the moneys received on account of such redemption or assignment must be distributed as follows: The original and subsequent taxes, and 40 per cent of interest, penalty, and costs of sale received must be apportioned to the state, county, city, town, school district, and other taxing districts interested, in the proportion of their respective taxes, and the balance must be paid to the county; *provided,* that in all cases where a sum less than the taxes, interest, penalty, and costs is accepted in settlement, the proceeds of such settlement shall be applied, first to the payment of the original and subsequent taxes, and the remainder, if any there be, to the payment of interest, penalty, and costs. The county treasurer must keep an accurate account of all moneys paid in redemptions of property sold to the county and for assignments of certificates of sale thereof, and must, on the first Monday of March of each year, or at such other time as the state auditor may direct, make a detailed report, verified by his affidavit of each account year for year, to the state auditor, in such form as the state auditor may desire. Whenever the county receives from the county auditor any grant of property so sold for taxes, the same shall be recorded, at the request of the county auditor, free of charge by the county recorder, and shall be immediately reported by the county auditor to the board of county commissioners. Am'd '11, p. 184; '15, p. 30.

Delinquent taxes, etc., to be paid to boards of education as fast as collected, § 4705.

6056. (2655.) Real estate deeded to county to be sold at auction. Whenever a county has received a tax deed for any real estate sold for delinquent taxes, the board of county commissioners shall, during the month of May in each year, after giving the statutory notice, offer for sale at the front door of the county court house, at the time specified in the notice, all such real property not heretofore sold or redeemed; *provided,* that in cases where the description of such real estate is so defective as to convey no title, such real estate shall not be so offered. The county clerk is authorized to execute deeds therefor in the name of the county and attested by his seal, vesting in the purchaser all of the title of the state, of the county, and of each city, town, school, or other taxing district interested in the real estate so sold. The money arising from such sale must be paid into the county treasury, and the treasurer must settle for the same as in the case of money received for redemption, as provided in the next preceding section. The board of county commissioners may, at any time after the period of redemption has expired and before the sale as herein provided, permit a redemption from any sale where the property has been sold to the county. All property for which there is no purchaser at the sale provided for in this section shall thereafter be disposed of on the day of the first regular meeting of the board of county commissioners in any month, at either public or private sale, as the said board may determine, and the money received therefor shall be apportioned as in the manner of tax sale redemptions. Am'd '11 p. 190.

May be sold at private sale, § 6023.
Assessment and sale, § 6052.
County commissioners have the right to fix the minimum sum to be received for property sold at tax sale at a sum equal to the amount of taxes, interest, and costs due at date of sale.
Heywood v. Co. Com'rs, 18 U. 57; 55 P. 79.

COLLECTIONS BY ASSESSOR IN CERTAIN CASES.

6057. (2656.) Seizure for taxes not due. Security. Sale. At the time of making the assessment, or at any time thereafter, the assessor may collect the taxes by seizure and sale of any personal property owned by the person against whom the tax is assessed, in case he has cause to believe that the owner of such personal property is likely to avoid payment of the tax by disposing of the property or by removal thereof from the county, unless such person gives security to pay the same when due. The provisions of §§ 6033-6038 apply to such seizure and sale.

Assessment when owner likely to remove, § 5876, and note.

6058. (2657.) Id. Amount collected. The assessor shall be governed, as to the amount of taxes to be by him collected on such personal property, by the state, city, town, school, and county rate of the previous year.

6059. (2658.) Id. Excess collection. When the rate is fixed for the year in which such collection is made, then, if a sum in excess of the rate has been collected, such excess shall not be apportioned to the state, but the whole thereof shall remain in the county treasury, and must be repaid by the county treasurer to the person from whom the collection was made or to his assignee on demand therefor.

6060. (2659.) Id. Deficiency. If a sum less than the rate fixed has been collected, the deficiency must be collected as other taxes on personal property are collected.

Taxes on personal property, how collected, §§ 6032-6038.

6061. (2660.) Id. Settlement with county auditor. The assessor, on the first Monday of each month, must make a settlement with the county auditor, and must pay into the county treasury all moneys collected by him for such taxes during the preceding month.

6062. (2661.) Id. Entry of payment. The assessor must note on the assessment book, opposite the names of each person from whom taxes have been collected by him, the amount thereof.

6063. (2662.) Id. Auditor to certify excess, etc. As soon as the rate of taxation for the year is fixed, the county auditor must note, in connection with the entry made under the provisions of the preceding section, the amount of the excess or deficiency.

CHAPTER 9.

SETTLEMENTS WITH STATE.

6064. (2663.) County treasurers to settle with state treasurer, when. The treasurers of the respective counties must at any time, upon the order of the state auditor and state treasurer, settle with the state auditor and pay over to the state treasurer all moneys in their possession belonging to the state, and must, without such order, settle and pay over the moneys on the first Monday of January, April, October, November, and December in each year.

6065. (2664.) Id. Penalty for neglecting to settle. Every county treasurer who neglects or refuses to settle or make payment as herein required shall forfeit three months' salary, and upon notice from the state auditor to the county commissioners that said settlement has not been made, the county commissioners must withhold such compensation. Am'd '05, p. 59.

6066. (2665.) County auditor reports to state auditor. The county auditor of each county, between the 1st and 10th days of each month in which the treasurer of his county is required to settle with the state auditor, must make, in triplicate, in such form as the state auditor may desire, a report showing specifically the amount due the state from each particular source of revenue at the close of business of the last day of the preceding month.

6067. (2666.) Id. Report to state treasurer. The county auditor must at once transmit by mail one copy of the report to the state auditor, one copy to the state treasurer, and must deliver the other copy to the treasurer of his county. Am'd '99, p. 114.

6068. (2667.) Id. Failure to transmit. Every county auditor who fails to make and transmit any report or statement required by this title shall forfeit three months' salary, and the county commissioners must withhold such compensation.

CHAPTER 10.

SETTLEMENT OF TAX SALE ACCOUNTS.

('11, p. 190.)

6073. Classification of unredeemed tax sales. For the purpose of making a settlement of tax sale accounts between the state and the various counties thereof, the county commissioners of each county in the state are hereby directed to make an investigation of the tax sale records of their respective counties, and by and with the assistance of their respective county auditors and county treasurers to classify all unredeemed tax sales, and all sales upon which redemptions have been permitted for a less amount than the taxes, costs, and interest made by their respective counties since 1896, and shall show:

1. (a) The state's equity in proceeds of sale of property acquired by the county under auditor's tax deed; (b) the state's equity in the taxes, interest, and cost in that portion of the property held by the county auditor's tax deed upon which no sale has been made or distribution of funds;

2. The sate's portion of taxes, interest, and costs (stated separately) on sales of property regularly made to the county, under the provisions of law, upon which redemptions have been made for the full amount of taxes, interest, and costs;

3. The state's equity in tax sale redemptions allowed for a less amount than the taxes, costs, and interest, showing separately the amount received and the amount discounted;

4. The state's equity in tax sales canceled by reason of defective description, or other failure to comply with the law;

5. The state's equity in all unredeemed tax sales for which the county holds certificates of tax sale, and for which no auditor's tax deed has been executed;

6. All remittances made to the state since 1896 for redemptions made, showing separately the amount to be credited as taxes, the amount to be credited as interest and costs.

6074. Compromise settlements authorized. After the classification provided for in § 6073 has been completed, said county commissioners are hereby further directed to make diligent effort to secure the settlement of all unsettled tax sales in whatever form the same may exist, made prior to the taking effect of this chapter, and in such settlement such county commissioners are hereby authorized, if in their judgment the interest of the state and the county will be subserved thereby, to accept in settlement of any such tax sale, and any subsequent unpaid taxes, a sum less than the amount due for taxes, interest, and costs.

6075. Cancellation and reassessment. Whenever settlement of tax sales shall be made as provided in § 6074, and in all cases where taxes have not been collected because of defective description or other failure to comply with the law, the county commissioners are hereby authorized and directed to order by resolution the county auditor to cancel all such unpaid tax sales, and to order the county assessor to reassess in correct and proper manner the

property so released, for each and every year, and at the respective valuations and rates that have prevailed during which said property has escaped taxation.

6076. County auditors to report to state auditor. The various county auditors are hereby required to report to the state auditor on or before December 1, 1911, the proceedings of the county commissioners under the provisions of this chapter, making settlement for collections made, and claiming credits for all cancellations made by order of the county commissioners, and report the amount chargeable to the county treasurer under all new assessments made as required by § 6075.

6077. State auditor to co-operate. The state auditor is hereby authorized and directed to advise and co-operate with the various county officials in the matter of settlement of tax sale accounts provided for in this chapter and shall submit all reports received hereunder to the state board of examiners, whose approval shall be his warrant for entering credits on all settlements provided for in this chapter.

CHAPTER 11.

MISCELLANEOUS PROVISIONS.

6080. (2670.) Examination of books by state. The state auditor, as well as any member of the state board of examiners, or any person designated by said board, may examine the books of any officer charged with the collection and receipt of state taxes.

6081. (2671.) Id. Action for fraud or neglect. If on examination it is found that any officer has been guilty of defrauding the state of revenue or has neglected or refused to perform any duty relating to revenue, the state auditor may direct the attorney general to prosecute the delinquent.

6082. (2672.) Id. Counsel to assist. The state board of examiners may employ counsel to assist in such prosecution, and the expenses must be paid out of the state treasury.

6083. (2673.) Assessor may correct errors before sale. Omissions, errors, or defects in form in the assessment book, when it can be ascertained therefrom what was intended, may, with the consent of the county attorney, be supplied or corrected by the assessor at any time prior to the sale for delinquent taxes and after the original assessment was made.

Informality not fatal, § 6087.

6084. (2674.) Id. Republication. When the omission, error, or defect has been carried into a delinquent list or any publication, the list or publication may be republished as amended, or notice of the correction may be given in a supplementary publication.

6085. (2675.) Id. The publication must be made in the same manner as the original publication, for not less than one week.

6086. (2676.) Use of abbreviations. In the assessment of land or the advertisement and sale thereof for taxes, initial letters, abbreviations, and figures may be used to designate the township, range, section, or parts of sections.

6087. (2677.) Informality or delay does not invalidate tax. No assessment or act relating to assessment or collection of taxes is illegal on account of informality or because the same was not completed within the time required by law.

Delay in issuance of tax certificate does not make tax sale invalid. Bruno v. Madsen et al., 38 U. 485; 113 P. 1030.

6088. (2678.) Penalties, to whom paid. The fines, forfeitures, and penalties incurred by violation of any of the provisions of this title must be paid into the treasury for the use of the county where the person against whom the recovery is had resides.

6089. (2679.) County officers to settle with auditor. Every assessor, county attorney, and county treasurer must annually, on the first Monday in January, make a settlement with the county auditor of all transactions connected with the revenue for the previous year, and every county treasurer, on the expiration of his office, must make such settlement.

6090. (2680.) Civil action for certain taxes. The state auditor may, at any time after a delinquent list has been delivered to the county treasurer, direct such treasurer not to proceed in the collection of any tax on the said list amounting to $300 or more, further than to offer for sale but once any property upon which such tax is a lien. Upon such direction, the county treasurer, after offering the property for sale once, and there being no purchaser in this state, must make out and deliver to the state auditor a certified copy of the entries upon the delinquent list relative to such tax; and the county treasurer, or state auditor in case the county treasurer refuses or neglects for fifteen days after being directed to bring suit for collection by the state auditor, may proceed by civil action in the proper court in the name of the state to collect such tax and costs.

Suit for taxes when taxpayer removes, § 6047.

Suit is not the proper remedy for the collection of a tax unless expressly given by statute.
Kerr v. Woolley, 3 U. 456; 24 P. 831.

A tax collector who sues for delinquent taxes is, as far as the money due from the delinquent taxpayer is concerned, a trustee for no one, and in bringing suit he acts in his own right, and, in taking an appeal, unless an undertaking is filed, the same will be dismissed.
Collector v. Bingham Co., 3 U. 249; 2 P. 208.

Under §§ 2012, 2028, 2030, 2039, C. L. 1888, the remedy given to the collector by suit is cumulative to the remedy of levy and sale.
Little v. Gibbs, 8 U. 261; 30 P. 986.

6091. (2681.) Id. Complaint. In such action, a complaint in the following form is sufficient:

[Title of court.]

The State of Utah, plaintiff, vs. (naming the defendant), defendant.

The plaintiff avers that defendant is indebted to plaintiff in the sum of $....., state, city, town, school, and county taxes for the fiscal year 19....., and $....., interest and cost of collection to date.

The plaintiff demands judgment for said several sums and for costs of suit, and prays that a writ of attachment may issue in form as prescribed by law. (Signed by the county treasurer or state auditor, or his attorney.)

6092. (2682.) Id. Proceedings. On the filing of such complaint, the clerk must issue a summons and a writ of attachment prayed for, and such proceedings shall be had thereunder as under writs of attachment issued in civil actions. If, in such action, the plaintiff recovers judgment, there shall be included in such judgment an attorney's fee of ten per cent on the amount of the judgment. In such action, a certified copy mentioned in § 6090, made by the treasurer and delivered to the state auditor, is prima facie evidence that the person against whose property the tax was levied is indebted to the state of Utah in the amount of such tax, interest, and costs. In case of payment, after suit as above mentioned shall have been commenced or after the recovery of judgment, such payment must be made to the county treasurer of the county in which such taxes are due, whereupon the treasurer, after distributing to the several funds of the county the portions belonging to them, and paying to the state auditor or his attorney the portion received as attorney's fee and other costs, must pay the remainder to the state treasurer at the times and in the manner prescribed by law for the payment of other state taxes.

6093. (2683.) Injunction to restrain collection of tax. No injunction shall be granted by any court or judge to restrain the collection of any tax or any part thereof, nor to restrain the sale of any property for the non-payment of the tax, except where the tax, or some part thereof sought to be enjoined, is illegal, or is not authorized by law, or the property is exempt from taxation. If the payment of a part of a tax is sought to be enjoined, the other part must be paid or tendered before action can be commenced.

No act, or assessment is illegal on account of informality, etc., §§ 6083, 6087.

Property owners may resort to equity to enjoin the collection of a special tax under a void assessment.
Armstrong v. Ogden City, 12 U. 476; 43 P. 119.
Mercur G. M. &. M. Co. v. Spry, 16 U. 222; 50 P. 382.

6094. (2684.) Payments under protest. Action. In all cases of levy of taxes, licenses, or other demands for public revenue which is deemed unlawful by the party whose property is thus taxed, or from whom such tax or license is demanded or enforced, such party may pay under protest such tax or license, or any part thereof deemed unlawful, to the officers designated and authorized by law to collect the same; and thereupon the party so paying or his legal representative may bring an action in any court of competent jurisdiction against the officer to whom said tax or license was paid, or against the county or municipality on whose behalf the same was collected, to recover said tax or license or any portion thereof paid under protest.

When sale valid unless protest made, § 6050.
Cited in Bassett v. Utah Copper Co., 219 Fed. 811.

Taxes paid after levy and under protest can be recovered where the tax was unlawful.
S. L. C. Nat. Bank v. Golding, 2 U. 1.

In an action to recover a tax paid under protest, it is not necessary for plaintiff to establish a payment made under duress.
Centennial-Eureka M. Co. v. Juab Co., 22 U. 395; 62 P. 1024.

A cause of action accrues at once in favor of a party who pays an unlawful tax under protest, and the statute of limitations begins to run from the date of such payment, and the limitation under this section is four years. No presentation of claim to the county court is necessary as a prerequisite to the commencement of the action.
Id.

It is not required that the protest be in writing or in any particular form; it is sufficient if payment is made under an oral protest made to collector at time of payment and by him entered or noted on the records.
Murdock v. Murdock et al., 38 U. 373; 113 P. 330.

An action for a refund of taxes collected on property not subject to taxation not authorized under this section but under § 6043.
Neilsen v. Sanpete County, 40 U. 560; 123 P. 334.

Where a liquor license fee was not imposed without authority or contrary to law, payment of the fee under protest is not within this section, and evidence held to support a finding that a payment was not made under protest.
Williams v. Summit County, 41 U. 72; 128 P. 938.

6095. (2685.) Id. Judgment for plaintiff. Repayment. In case it be determined in such action that said tax or license, or any portion thereof, so paid under protest was unlawfully collected, judgment for recovery thereof and lawful interest thereon, together with costs of action shall be entered in favor of the plaintiff, and upon being presented with a duly authenticated copy of such judgment, the proper officer or officers of the county or municipality whose officers collected or received such tax or license shall audit and allow such judgment, and cause a warrant to be drawn on the treasurer of that county or municipality for the amount recovered by said judgment in favor of the legal holder thereof; and when any such judgment has been or may hereafter be obtained against a county, and any portion of the taxes included in the judgment, were state, state school, county school, or district school taxes which have been or may hereafter be paid over to the state, state school, county school, or to any school district, by such county, the proper officer or officers of the state, state school, county school, or any school district shall, upon demand by such county, cause a warrant to be drawn upon the treasurer of the funds of the state, state school, county school, or any school district, and in favor of such county, for the amount of such taxes received by the state, state school, county school, or any school district, together with legal interest thereon and an equitable portion of the costs of the action.

Am'd '01, p. 77.

Payment of judgment against county, § 1430.
Refunding of taxes illegally collected, etc., §§ 6043, 6097.

6096. (2686.) Remedy herein provided supersedes others. The remedy hereby provided shall supersede the remedy of injunction and all other remedies which might be invoked to prevent the collection of taxes or licenses alleged to be irregularly levied or demanded, except in unusual cases where the remedy hereby provided is deemed by the court to be inadequate.

6097. (2686x.) When judgment recovered for taxes unlawfully collected, state and school districts liable for their proportion. When taxes have been or may hereafter be collected by the authorized officer of any county, and judgment has been or may hereafter be obtained against such county or its authorized officer, determining such taxes to have been unlawfully collected, and any portion of such taxes are state taxes or state school taxes or district school taxes or county school taxes which have been paid over to

the state or to any school district by such county or its authorized officer, the state and any school district which has received the same or any part thereof shall be liable to the judgment debtor for the amount so received and lawful interest thereon from the time of receiving the same, and for an equitable portion of the costs of action. '01, p. 121.

CHAPTER 12.

CITY AND TOWN TAXES.

6100. (2687.) Assessment for cities, etc., made by county assessor. Assessments for the taxes of each incorporated city and town in this state shall be made by the county assessor of the county in which such incorporated city or town is situated, at the same time that assessments for state and county taxes are made, and the list of the property in each incorporated city and town in his county, and the valuation thereof, shall be so made by the county assessor that the property in each and the valuation thereof can be separately shown.

Assessment and collection of city and other taxes, §§ 5928, 6105.

6101. (2688.) Assessor's statement. Copy of rolls, when furnished. On or before the first Monday of June in each year, the county assessor of each county in which there is situated any incorporated city or town shall deliver to the clerk or recorder of each city and to the clerk or president of the board of trustees of each town a statement showing the aggregate valuation of all taxable property in such city or town. Am'd '03, p. 184.

Under this section and §§ 5864, 5929, 5931, 5932, it is the duty of the county assessor to assess the taxable property in an incorporated city and deliver a copy of that part of his assessment roll to the city auditor for use of city authorities in levying taxes for city purposes; and the acts of such officer and authorities are presumed to be valid until the contrary is shown.

Eureka Hill M. Co. v. Eureka City, 22 U. 447; 63 P. 654.

6102. City of first class. Date of levy. Purposes. Limitations. During the month of July of each year, the city council or city commission in cities of the first class at a regular meeting thereof shall, by ordinance or resolution, levy on the real and personal property within the city made taxable by law:

1. Not to exceed five mills on the dollar to defray contingent expenses;
2. Not to exceed one and one-half mills on the dollar to purchase water sources, streams, and the land upon which said streams are appropriated, and canals; to construct waterworks, and to supply water for irrigation and other purposes;
3. Not to exceed four mills on the dollar to open, improve, and repair the streets and sidewalks;
4. Not to exceed one mill on the dollar to construct and repair sewers and drains;
5. Not to exceed two mills on the dollar to construct and maintain gas works, electric light works, telephone lines, street railways, or bath houses. '17, p. 433.

6103. (2689.) Rate, when fixed. Levy. Certification. The city council of each city and the board of trustees of each town shall, during the month of July in each year, determine the rate of the general city or town tax, levy the same, and shall certify the rate and levy to the county auditor of the county in which such city or town is situate. Am'd '03, pp. 10, 184.

Legislature prohibited from imposing taxes for municipal purposes, Con., art. 13, sec. 5.

Levy for city school purposes, § 4704.

City and town taxes delinquent, when, § 6108.

Levy and lien of taxes generally, §§ 5993-5998.

All property in city limits subject to tax, note to § 671.

Under the provisions of this section, and § 570x3, and §§ 671, 5876, 5995-5997, 6108, and Con. art. 13, sec. 10, where real estate within the limits of a city had been assessed, but before the rate had been fixed or levy made, a judgment was rendered disconnecting the property from the city and providing that it should no longer be subject to taxes, the tax did not become a lien upon the property so severed.

Gillmor v. Dale, 27 U. 372; 75 P. 932.

6104. (2690.) Equalization of taxes. The county commissioners of each county, as a board of equalization, shall equalize the assessment roll of the whole county, including the assessment for general taxes of all cities and incorporated towns situated in the county, at the times and in the manner provided by law for equalizing assessments for state and county taxes. Am'd '03, p. 184.

Duties and powers of county board, §§ 5974-5982.

6105. (2691.) City and town taxes on general roll. The general city and town tax of each city and incorporated town shall be extended on the general roll by the county auditor, in a separate column, at the rate certified by the city council or town board of trustees, at the time the state and county taxes are extended, and the whole tax shall be carried into a column of aggregates, and shall be collected by the county treasurer at the times and in the manner provided by law for collecting state and county taxes, and the warrant to the county treasurer shall include such city and town taxes, and confer on him the same powers respecting the collection of said taxes and sale of delinquent property as are conferred respecting the collection of state and county taxes. Am'd '03, p. 185.

The assessor and collector for a city, under the provisions of laws of 1892, p. 44, are the county assessor and collector, and the assessment roll is that on which city taxes are extended under the provisions of this act. Board of Education v. Brown, 12 U. 251; 42 P. 1109.

Laws of 1892, p. 131, do not delegate to the assessor and collector the power to levy the tax hereunder. The acts prescribed to be done by the board of education constitute such levy. Id.

6106. (2692.) County officers liable on bonds. County officers intrusted with the assessment, collection, or custody of city or school district taxes, and their sureties, shall be liable upon their official bonds for the faithful performance of their duties in the assessment, collection, and safe keeping of said city and school district taxes.

6107. (2693.) County treasurer's settlement with cities. It shall be the duty of the county treasurer to pay to the treasurer of each city and incorporated town in the county, on the 1st day of October in each year, and on the first day of each succeeding month until final settlement, all moneys in his hands collected for city or town taxes, and on or before the 1st day of March in each year to make final settlement with the treasurer of each such city or town respecting the city and town taxes, and pay over all money then due the city or town. The county treasurer shall pay over to the treasurer of each city and town, as fast as collected or realized, their proportionate amount of delinquent taxes, interest, and costs on all tax sales and redemptions therefrom. The city or town treasurer shall give said county treasurer duplicate receipts for each payment, and the county treasurer shall give one to the city auditor, city recorder, or town clerk, as the case may be, and the other shall be an acquittance to such county treasurer in settling with the county auditor to the extent of the payment shown. Am'd '03, p. 185.

Payment by city for collection, §§ 1559-1561.

6108. (2694.) Municipal taxes due and delinquent, when. Lien attaches. All general city or town taxes levied and assessed under the provisions of this chapter shall become due and delinquent, and shall attach to and become a lien on the real and personal property assessed, at the same time as state and county taxes; and all the provisions of this title in aid of assessing and collecting state and county taxes are hereby made applicable to the assessment and collection of such city and town taxes.

Levy of city and town taxes, § 6103.
Taxes due, when; delinquent, when, § 6015.
Lien of taxes, §§ 5995, 5997.

Where both county and city buy in land by successive delinquent sales, both public corporations have perpetual liens of equal rank. Ogden City v. Hamer, 12 U. 337; 42 P. 1113.

Where property was disconnected from city before levy, the tax did not become a lien. Gillmor v. Dale, 27 U. 372; 75 P. 932.

6109. (2696.) Special taxes. In cities and towns, special taxes shall be levied and collected in the manner and form, and by such officers as are or may hereafter be provided by law and the ordinances of such city or town.

TITLE 107.

TELEGRAPHIC TRANSACTIONS.

6117. (2697.) Notice by telegraph or telephone. Effect. Whenever any notice, information, or intelligence, written or otherwise, is required to be given, the same may be given by telegraph or telephone; *provided,* that the dispatch containing the same, if sent by telegraph, be delivered in writing to the person entitled thereto or to his agent or attorney, and if sent by telephone, be certified to by an officer or employe of the telephone company. Notice by telegraph or telephone shall be deemed actual notice. All information or intelligence to be transmitted by telegraph or telephone shall be delivered to the telegraph or telephone operator in writing, and delivered to the person for whom it is intended, or his agent or attorney, in writing by the operator at the receiving office. Am'd '07, p. 22.

Summons, writ, order, etc., may be sent by telegraph, or telephone, § 7032.

See public utilities act, §§ 4775-4853.

6118. (2698.) Conveyances, etc., by telegraph or telephone. Any power of attorney or other instrument in writing duly proved or acknowledged and certified so as to be entitled to record may, together with the certificate of its proof or acknowledgment, be sent by telegraph or telephone, and the telegraphic or telephonic copy or duplicate thereof shall, prima facie, have the same force and effect, in all respects, and may be admitted to record and recorded in the same manner and with like effect as the original.

Am' '07, p. 22.

6119. (2699.) Checks, orders, etc., by telegraph. As evidence. Checks, due bills, promissory notes, bills of exchange, and all orders or agreements for the payment or delivery of money or other thing of value may be made or drawn by telegraph; and when so made or drawn shall have the same force and effect to charge the maker, drawer, indorser, or acceptor thereof, and shall create the same rights and equities in favor of the payee, drawee, indorsee, acceptor, holder, or bearer thereof, as if duly made or drawn and delivered in writing; but it shall not be lawful for any person, other than the maker or drawer thereof, to cause any such instrument to be sent by telegraph so as to charge any person thereby. Except as in the next succeeding section otherwise provided, whenever the genuineness or execution of any such instrument received by telegraph shall be denied on oath by or on behalf of the person sought to be charged thereby, it shall be incumbent upon the party claiming under or alleging the same to prove the existence and execution of the original writing from which the telegraphic copy or duplicate was transmitted. The original message shall in all cases be preserved in the telegraph office from which the same is sent.

Contracts by telegraph deemed contracts in writing, § 5820.

6120. (2700.) Certified instruments by telegraph or telephone. As evidence. Except as hereinbefore otherwise provided, any instrument in writing, duly certified under his hand and official seal by a notary public, commissioner of deeds, or clerk of a court of record, to be genuine within the personal knowledge of such officer, may, together with such certificate, be sent by telegraph or telephone, and the telegraphic or telephonic copy thereof shall, prima facie only, have the same force, effect, and validity in all respects whatsoever as the original, and the burden of proof shall rest with the party denying the genuineness or due execution of the original. Am'd '07, p. 23.

Seal, how described by telegraph or telephone, § 7032.

TITLE 108.

TOWNSITES.

6121. (2701.) Duty of mayor or district judge under act of congress. When the corporate authorities of any city or town, or the district judge of

any county in which any city or town may be situated, shall have entered at the proper land office the land or any part of the land settled and occupied as the site of such city or town, pursuant to and by virtue of the provisions of the act of congress, entitled "An act for the relief of the inhabitants of cities and towns upon the public lands," approved March 2, 1867, and acts amendatory thereto, it shall be the duty of such corporate authorities or judge, as the case may be, to dispose of and convey the title to such land, or to the several blocks, lots, parcels, or shares thereof, to the persons entitled thereto, who are to be ascertained as hereinafter prescribed.

Conveyance by mayor or by district judge, § 6127.

The mayor of Salt Lake City, whenever he enters land under the townsite law, holds legal title of the same in trust for the several use and benefit of the occupants thereof, according to their respective interests.

Pratt v. Young, 1 U. 347.

Stringfellow v. Cain, 99 U. S. 610.

U. S. v. Tithing Yard, 9 U. 273; 34 P. 55.

A claimant who was in the bona fide occupancy of a city lot prior to the entry thereof by the mayor, and was wrongfully ousted, should receive the legal title.

Pratt v. Young, 1 U. 347.

An "occupant," within the meaning of the townsite law, is one who is a settler or a resident of the town, and in the bona fide, actual possession of the lot at the time the entry is made.

Hussey v. Smith, 1 U. 129.

Cain Heirs v. Young, 1 U. 361.

Cooke v. Young, 2 U. 254.

Amy v. Amy, 12 U. 278; 42 P. 1121.

Drake v. Reggel, 10 U. 376; 37 P. 583.

Holland v. Buchanan, 19 U. 11; 56 P. 561.

City lots cannot be taken up by means of agents, but every claimant must himself be an actual settler or occupant.

Cooke v. Young, 2 U. 254.

A non-resident may, by purchase from an occupant, acquire such a right to the occupancy as would entitle him to a judgment for a conveyance under the trust.

Stringfellow v. Cain, 99 U. S. 610.

Under the townsite act, the rights of persons under disability not presented for adjudication will not be preserved.

Drake v. Reggel, 10 U. 376; 37 P. 583.

Amy v. Amy, 12 U. 278; 42 P. 1121.

The possession by the ancestor at his death is possession by the heirs, and minor heirs cannot give up or surrender possession except by proper suit to which they are parties.

Cain Heirs v. Young, 1 U. 361.

The widow and children of the occupant have an inchoate interest after the death of the occupant under the townsite law, which interest they lose by failing to retain possession of the land until entry by the municipal authorities.

West v. Child, 8 U. 223; 30 P. 755.

Stringfellow v. Cain, 99 U. S. 610.

An occupant in possession under the townsite law may sell his equitable right to a lot before patent.

Clawson v. Wallace, 16 U. 300; 52 P. 9.

Hussey v. Smith, 99 U. S. 20.

Stringfellow v. Cain, 99 U. S. 610.

A bona fide occupant may lease the ground and still retain his rights thereto.

Cain Heirs v. Young, 1 U. 361.

Under act of congress of March 2, 1867 (14 Stat. 541), the interests of the occupants attach simultaneously with the making of a townsite entry, and no person who was not a settler and occupant at the time of entry is a beneficiary under the act.

Lockwitz v. Larson, 16 U. 275; 52 P. 279.

By the term "entry" is meant the filing of an application by the proper officer with the register of the land office, and proof showing the performance of the statutory conditions respecting the settlement and occupancy of the land as a townsite.

Id.

Delay on the part of the government in allowing the entry can not affect the rights of those who were bona fide occupants at the time of filing the application and proof, or of those claiming through such occupants, providing the entry is ultimately made on the proof submitted with the application.

Id.

6122. (2702.) Public notice after entry. Within thirty days after the entry of any such lands, the corporate authorities or judge entering the same shall give public notice of the entry in at least five public places within such city or town, and shall publish the notice in some newspaper printed and published in this state, and having a general circulation in such city or town. The notice shall be published once a week for at least three successive months, and shall contain an accurate description of the lands so entered as stated in the certificate of entry or the duplicate receipt received from the officer of the land office.

The intention of this section is to require the notice therein prescribed to be given within thirty days after the issuance of final certificate of entry.

Holland v. Buchanan, 19 U. 11; 56 P. 561.

6123. (2703.) Claims, when and where filed. Effect. Each person claiming any lot or parcel of such land shall, within six months after the first publication of the notice, in person or by his agent or attorney, sign a statement in writing containing an accurate description of the particular lot or parcel of land in which he claims to have an interest, and the specific right, interest, or estate therein which he claims to be entitled to receive, and he shall deliver the same to the clerk of the district court of the county in which such city or town is situated. The clerk of said court shall enter the statements in a book to be kept for that purpose, and shall file and preserve them in his office, noting the day of filing. The filing of each statement shall be considered notice to all persons claiming any interest in the lands described therein, of the claim of the party filing the same; and any person failing to make and deliver a statement within the time limited in this section shall

be forever barred the right of claiming or recovering such land, or any interest or estate therein, or in any part thereof, in any court; *provided,* that when good cause is shown why such statement could not be filed within the time herein specified, the judge may extend the time, not exceeding one year from the first publication of such notice.

Extending time to make application, § 6124.

An applicant for a deed under the townsite act has the right to amend his application, so as to change the number of the lot applied for. Such amendment, although more than one year after the first publication of the notice as provided for in said act, is within time.

In re Faust, 1 U. 197.

When the statement in writing required is signed by an attorney in fact in his own name without disclosing his principal, it is proper to allow an amendment in accordance with the fact, if adverse claimants are not prejudiced thereby.

Clark v. Kirby, 18 U. 258; 55 P. 372.

Where a claim was filed after the expiration of the six months limited by law, and on the same was indorsed the words "by permission, cause considered sufficient;" held, that it would be presumed that the court allowed the filing.

Kinney v. Lewis, 2 U. 512.

The failure of a life tenant, who is also trustee of the remaindermen, to file a statement hereunder showing the interest of the cestuis qui trust bars them from afterward claiming their interest, though some were not born at the time and others were minors; held, the trustee thereby acquired a fee to the land.

Drake v. Reggel, 10 U. 376; 37 P. 583.

6124. (2703x.) Extending time for application. Exception. Any claimant of any lot, block, or parcel of land in any town or city as defined in this title who shall have failed or neglected to make application for said lot, block, or parcel within the time provided by law, may, at any time within five years after the approval of this section, make and file the application provided for in said title; *provided,* that in no case shall such application be received or entertained by a court of competent jurisdiction if it appears that the title to the lot, block, or parcel shall have been theretofore transferred in any manner by such town or city, adjudged or decreed to any prior claimant by said court; and the same shall be heard and determined in the same manner and with like effect as if made within the time prescribed in said original title; *provided, further,* that nothing in this section shall be so construed as to enlarge or extend the rights of parties in contest cases now pending in any court. Am'd '05, p. 22; '09, p. 46; '17, p. 47.

Decisions as to filing after six months, note to § 6123.

6125. (2704.) Adverse claims. Proceedings. If at the expiration of six months after the first publication of the notice as aforesaid, it shall be found by the statements filed that there are adverse claimants to any lot or parcel of land, it shall be the duty of the district judge, taking up each case in the order of filing, to cause notice to be served upon the claimants thereto, or their agents or attorneys, to appear before the district court, and prosecute their claims upon a day to be appointed by the court, not less than five nor more than thirty days from the service of such notice. The statements filed as aforesaid shall stand in the place of pleadings, and an issue shall be made thereon. On the day set for the hearing, the judge shall proceed to hear the evidence adduced in support of the allegations of the parties, and shall decide according to the justice of the case.

6126. (2705.) No adverse claims. Proof of statement. After the expiration of the six months for filing statements, and where there are no adverse claimants, the court, taking up the cases in the order of filing, shall cause a summons to be issued and served upon each party filing a statement, or his agent, requiring him, or his agent or attorney, to appear before the court upon a day designated, not less than three nor more than ten days from the service of such summons, and make proof of his statement.

6127. (2706.) Conveyance made by district judge or by mayor. Where the entry of the townsite shall have been made by the district judge, the conveyance shall be made by him in accordance with the judgment entered. Where the corporate authorities shall have made the entry, the court shall certify its judgment to the mayor of the city, or the president of the board of trustees of the town, who shall accordingly make to the party claimant the proper deed.

Validation of conveyances under townsite law, §§ 4908-4911.

The mayor's deed under the townsite act need not be witnessed, and is prima facie evidence of title in the grantee.

Kinney v. Lewis, 2 U. 512.

Townsend v. Hooper, 2 U. 548.

Where an adjudication is made in the probate court under the townsite law, such adjudication has the force and effect of a judgment which cannot be collaterally attacked.

Rogers v. Thompson, 9 U. 46; 33 P. 234.

West v. Utah Nat. Bank, 8 U. 374; 31 P. 987.

Amy v. Amy, 12 U. 278; 42 P. 1121.

Where title comes through a mayor's deed or U. S. patent, a purchaser may presume that such deed or patent has been rightfully issued, and need not, at his peril, investigate the preliminary steps.
Drake v. Reggel, 10 U. 376; 39 P. 583.

6128. (2707.) When judge is a claimant. If the district judge shall be a claimant of lands in any city or town in his county, he may file the statement required in § 6123, in the district court of an adjoining district, and a copy of the statement in that of his own county. The judge of the district court of the adjoining county shall then proceed as provided for in § 6125 or § 6126, as the case may be; and he shall, moreover, give notice to the mayor of such city, or the president of the board of trustees of such town, or, in case of an unincorporated town, to the justice of the peace of the precinct in which such town may be situated. The court shall thereafter proceed as in other cases provided for in this chapter, and a deed to the land shall be made to the party entitled thereto.

6129. (2708.) Appeals. Judgment. From the decision of the court in any case under the provisions of this title, appeals shall be allowed as in other cases. In case of appeal, the final judgment thereon shall authorize the mayor, the president of the board of trustees, or the judge to make or withhold a conveyance, as the case may be.
No collateral attack, note to § 6127.

6130. (2709.) When mayor is a claimant. If the mayor of any city or the president of the board of trustees of any town shall be a claimant of lands in such city or town, the recorder or the clerk thereof, as the case may be, shall, upon the certificate of the district court, made as in the case of other claimants, execute a deed of conveyance to such mayor or president of the board for the lands finally adjudged to him by the court.

6131. (2710.) Change of venue. A change of venue as in suits at law shall be allowed in all cases arising under this title.

6132. (2711.) Authorities to make statement of expenses. Within thirty days after the expiration of the six months prescribed in § 6123 for filing statements, the corporate authorities, or the judge and the board of county commissioners shall render in writing a true account of all money expended in the acquisition of the title to the land and in the administration or execution of the trust up to that time, including purchase money, necessary traveling expenses, and the costs for posting and publishing notices. Such account shall be filed in the office of the clerk of the district court of the county in which such city or town may be situated, and shall during ordinary business hours be open for inspection to all persons interested.

6133. (2712.) Payments before conveyance. Before the corporate authorities or judge shall be required to execute, acknowledge, or deliver any deed of conveyance to any person adjudged to be entitled thereto, such person shall pay or tender to the mayor, the president of the board of trustees, or the judge, as the case may be, the sum of money chargeable on the land to be conveyed by such deed. To ascertain the sum chargeable, streets and public grounds must be deducted from all the land entered, and then such sums shall be the proportionate costs of the land conveyed and the proportionate expenses thereof, with interest, together with a reasonable charge for the preparation, execution, and acknowledgment of the deed.
Validation of conveyances under townsite law, § 4908-4911.

6134. (2713.) Payment within six months. Sale for non-payment. Full payment for land shall be made to the district judge, the mayor, or the president of the board of trustees, as the case may be, within six months after the certificate is issued to the claimant. In case of non-payment within the time herein specified, the amount due shall be deemed a judgment lien upon the land claimed, and the judge, the mayor, or the president of the board of trustees, as the case may be, shall proceed to sell it by sheriff's sale, in the same manner as land is sold under execution, subject, however, to redemption as provided by law.

6135. (2714.) Errors in measurement. Errors in measurement or computation shall not invalidate any proceedings under this title.

6136. (2715.) Death of judge, etc. In case of death or disability of the district judge, the mayor, or the president of the board of trustees, before the complete execution of his trust, the same shall vest in his successor in office.

6137. (2716.) Unclaimed lands, how disposed of. If there shall remain any unclaimed lands within such city or town, after the expiration of six months from the publication of the notice provided for in § 6122, the mayor, or the president of the board of trustees, in cases where lands have been entered for a municipal corporation, or the district judge in cases where lands have been entered in trust by him, shall cause the same to be surveyed and platted out into suitable blocks, lots, streets, roads, lanes, and alleys; and may sell or cause to be sold such blocks or lots at public auction to the highest bidder for cash, after public notice of the time and place of such sale, published at least forty days in some newspaper published in the county, if there be any, otherwise in a newspaper having general circulation in the county.

The act of 1869, p. 6, similar to this section, construed.
Linck v. S. L. City, 6 U. 109; 21 P. 459.

6138. (2717.) Id. If any of such lands remain unsold for want of a bidder, the mayor, the president of the board of trustees, or district judge, shall have power to sell or cause the same to be sold at public or private sale, on such terms as may be deemed for the best interest of the city or town; *provided,* that none of such lands shall be sold for less than $5 per acre.

6139. (2718.) Lands reserved for public uses. Lots or parcels of land necessary for streets, avenues, lanes, public squares, parks, schoolhouses, hospitals, asylums, fire engine and hose houses, pesthouses, state or other public buildings, or public use, may be reserved by the mayor, the president of the board of trustees, or the district judge, as the case may be; and he may execute and deliver to the proper party a deed for any property set aside for such purposes. A certified plat of such surveyed lands shall be filed for record in the office of the county recorder of the county.

6140. (2719.) Application of proceeds of sale. All moneys arising from the sale of lands, after deducting the costs and charges of such sales, shall be paid into the city or town treasury in cases where such lands have been entered in trust by corporate authority, or into the county treasury in cases where such lands have been entered in trust by the district judge; and the same shall be set apart and applied by the city council, or by the board of trustees of an incorporated town, or by the board of county commissioners, in case of an unincorporated town, to the improvement of public squares and streets, the construction of sewers and procuring a supply of water for the use and benefit of the inhabitants of the city or town. Such money shall be drawn for the purposes before specified, when ordered by the city council, the board of trustees, or the board of county commissioners, as the case may be, in the same manner as other money is drawn.

6141. Persons in possession of certain lands deemed the owners thereof. District judge to convey title. Whenever any lot, piece, or parcel of land shall have passed from the United States to the probate judge of any county in this state or the late territory of Utah, under and by virtue of the provisions of an act of congress entitled "An act for the relief of the inhabitants of cities and towns upon the public lands," approved March 2, 1867, or any amendments thereto, and there is no record of any conveyance from such probate judge or his successors in office to the claimants thereof, any person, who by himself or by or through his predecessors in interest shall have had continuous and exclusive possession of such lot, piece, or parcel of land for the period of ten years before the filing of the petition hereinafter mentioned, and shall have paid the taxes thereon during said time, shall be deemed the rightful owner of such land, and it shall be conclusively presumed that he has complied with all of the provisions of law for obtaining title thereto; and such person may at any time apply to the judge of the district court of the county wherein said land may be situated for a conveyance of the legal title

to such land to him, and the judge of the district court of such county is hereby vested with all powers and authority of such probate judge for the purpose of executing such conveyance and carrying out the trust reposed in such probate judge, and such district judge shall execute a conveyance to such person of such lot, piece, or parcel of land, without any expense to such person except the ordinary costs of court; and such conveyance, when so executed by any judge of the district court, shall pass to such person all the right, title, and interest held or enjoyed by such probate judge in and to the said lot, piece, or parcel of land to all intents and purposes and with the same effect as if a proper conveyance had been executed by such probate judge after proper proceedings in the manner provided by law. '15, p. 125.

TITLE 109.

TRADE MARKS.

CHAPTER 1.

GENERAL PROVISIONS.

6145. (2720.) Defined. The phrase "trade mark," as used in this chapter, includes every description of word, letter, device, emblem, stamp, imprint, brand, printed ticket, label, or wrapper usually affixed by any mechanic, manufacturer, druggist, merchant, tradesman, association, or union, whether incorporated or unincorporated, to denote any goods to be goods imported, manufactured, produced, compounded, or sold by him, or by such association or union, other than any name, word, or expression generally denoting any goods to be of some particular class or description.

Cal. Pol. C., § 3196*. Mont. Pol. C., § 3160*.
"Trade mark" defined, § 8475.
Brands of cans, bottles, etc., §§ 6150-6156, 8451, 8456.
Brands of closed packages of fruit, §§ 8458, 8461.

The number 888, used by a telephone company as a call for its trouble department, is not a trade mark or trade name, so as to deprive another company, subsequently organized, of the right of using the same number as the call for its trouble department.
R. M. Bell Tel. Co. v. Ind. Tel. Co., 31 U. 377; 88 P. 26.

6146. (2721.) Recorded with secretary of state. Any person, association, or union may record any trade mark or name by filing with the secretary of state his or its claim to the same, and a copy or description of such trade mark or name, with his affidavit attached thereto, certified to by any officer authorized to take acknowledgments of conveyances, setting forth that he, or the firm, corporation, association, or union of which he is a member, is the exclusive owner, or agent of the owner, of such trade mark or name.
Cal. Pol. C., § 3197*. Mont. Pol. C., § 3161*.

6147. (2722.) Record open to public. The secretary of state must keep for public examination a record of all trade marks or names filed in his office, with the date when filed and name of claimant; and must at the time of filing collect from each claimant the authorized fee.
Cal. Pol C., § 3198*. Mont. Pol. C., § 3162*.

6148. (2723.) Ownership. Transfer. Damages for infringement. Any person who has first adopted and used a trade mark or name, whether within or beyond the limits of this state, is its original owner. Such ownership may be transferred in the same manner as personal property, and is entitled to the same protection by suits at law; and any court of competent jurisdiction may restrain, by injunction, and award damages for, any use of trade marks or names in violation of this chapter.

Cal. Pol. C., § 3199. Mont. Pol. C. § 3163.
Illegal use of or counterfeiting trade mark, §§ 8472-8476.

In proceedings against one for a contempt in violating an injunction restraining him from infringing a trade mark, it was proper on a finding for plaintiff to award him a reasonable attorney's fee. Such proceedings are civil.
Davidson v. Munsey, 29 U. 181; 80 P. 743.

CHAPTER 2.

MARKING, STAMPING, AND BRANDING RECEPTACLES.

('11, p. 45.)

6150. Owners may adopt marks of ownership. Filing fee. All persons, companies, and corporations engaged in the transportation or manufacture of any dairy product, ice cream, or soda water, or in bottling milk, cream, or soda water for sale and use, may adopt a mark or marks of ownership to be stamped or marked on any can, bottle, cask, keg, barrel, or other receptacle used in the handling and transportation of any of said products, and may file in the office of the secretary of state a description of the name or marks so used by them or either of them, and the use to be made of any such can, bottle, cask, keg, barrel, or other receptacle, and cause the same to be published for two successive weeks in a weekly newspaper published and in general circulation in the state of Utah, and pay to the secretary of state a fee of $2 for filing the same.

6151. Selection of marks. The brand or mark so selected and adopted as herein provided may consist of a name, design, mark or marks, or some particular color of paint or enamel used upon the can, bottle, cask, keg, barrel, or other receptacle, or any part thereof.

6152. Unlawful to duplicate brands or marks. It shall be unlawful for any person, company, or corporation to adopt or use any brand or mark which has already been designated, appropriated, or obtained under the provisions of this chapter.

6153. Unlawful to use branded or marked receptacle. It shall be unlawful for any person other than the rightful owner thereof to use any can, bottle, cask, keg, barrel, or other receptacle marked or branded as herein provided, for any other purpose, or for the transportation or hauling of any other article or product than designated or provided for by such branding.

6154. Defacing of marks or brands unlawful. It shall be unlawful for any person other than the rightful owner thereof to deface or remove any such brand, mark, or stamp put upon any such can, bottle, cask, keg, barrel, or other receptacle as herein provided.

6155. Duty of dairy and food commissioner. For the purpose of preventing the use of said cans, bottles, casks, kegs, barrels, or other receptacles for any purpose other than that herein provided, and to insure the wholesomeness and high quality of said products and the sanitary condition of the receptacles in which the same are transported, it shall be the duty of the dairy and food commissioner to enforce the provisions of this chapter.

6156. Penalty. Whoever shall violate any of the provisions or sections of this chapter shall be guilty of a misdemeanor, and shall, upon conviction thereof, be punished by a fine of not more than $100, or by imprisonment in the county jail, not exceeding thirty days, or by both such fine and imprisonment, at the discretion of the court.

Marking casks, bottles, etc., §§ 8451-8456.

TITLE 110.

TRADING STAMPS.

CHAPTER 1.

SALE OF TRADING STAMPS.

('15, p. 211.)

6160. Unlawful to sell stamps, when. Penalty. It shall be unlawful for any person, firm, or corporation to sell, issue, transfer, or deliver to any other person, firm, or corporation within this state any trading stamp or stamps to be sold, issued, transferred, or delivered by such other person, firm, or corporation upon, in connection with, or as the result of a sale of any goods, wares, merchandise, or other commodity or thing of value, unless and until the person, firm, or corporation in the first instance so selling, issuing, transferring, or delivering the same shall have established an office within this state where all books of accounts relating to the sale, issue, transfer, or delivery of trading stamps in this state shall be kept, and shall have filed with the secretary of state an appointment of a process attorney upon whom process in all civil actions may be served, and shall also have filed with the secretary of state a good and sufficient bond as hereinafter specified. Any person, firm, or corporation violating any provision of this section shall be guilty of a misdemeanor.

6161. Bond required. Action against. Said bond shall be in the sum of $20,000, payable to the state of Utah, and shall be executed by the person, firm, or corporation furnishing the same, as principal, together with at least one corporate surety, and shall provide that the principal shall, upon presentation by the lawful holder of the required quantity of trading stamps in the proper form, redeem the same according to the terms of the contract under which they were issued, and that the said principal shall pay all taxes imposed by law and all fines and penalties imposed for a violation of any law of this state. Said bond shall be in such form and shall contain such other conditions and provisions as the secretary of state shall deem necessary to protect the state and all persons, firms, or corporations holding trading stamps for redemption. Whenever any such bond shall, for breach of any condition therein contained, become forfeited, any person injured thereby may sue thereupon, or all persons so injured may join in prosecuting one action, but any such action must be commenced within one year after the date upon which the cause of action accrued.

CHAPTER 2.

TAX ON TRADING STAMPS.

('15, p. 213.)

6165. Tax on sale of trading stamps. Amount. How computed. Evidence of payment. There is hereby imposed and levied and there shall immediately accrue and be collected a tax, as herein provided, of 50 cents on each and every sale, transfer, issue, or delivery of one thousand trading stamps, or fraction thereof, made to any person, firm or corporation with the intent or purpose that the same shall be by him, them, or it sold, transferred, issued, or delivered to another upon, in connection with, or as a result of, the sale of any goods, wares, merchandise, or other commodity or thing of value. The payment of such tax shall be evidenced by an adhesive stamp or stamps affixed as follows: If any such trading stamps are sold, transferred, issued, or delivered in books or pads, then the stamps shall be affixed to the

inner page of the front cover of the book or pad, or if such stamps are sold, transferred, issued, or delivered in any other container, then the stamps shall be affixed to the front of such container. All trading stamps so sold, transferred, issued, or delivered shall be put up in books, pads, or other containers, and the book, pad, or other container shall have printed on the front cover a statement of the number of trading stamps contained therein.

6166. Tax on trading stamps issued at time of sale of merchandise, etc. Proviso. There is also hereby imposed and levied and there shall immediately accrue and be collected a tax, as herein provided, of 50 cents on each and every sale, transfer, issue, or delivery of one thousand trading stamps, or fraction thereof, made to any person, firm, or corporation upon, in connection with, or as a result of, the sale of any goods, wares, merchandise, or any other commodity or thing of value. The payment of such tax shall be evidenced by an adhesive stamp or stamps affixed as required by § 6165; *provided,* that when a tax has been paid upon the sale, transfer, issue, or delivery of any such trading stamps at the time the same were purchased or received by the person selling, transferring, issuing, or delivering the same to another upon, in connection with, or as a result of, a sale of goods, wares, merchandise, or any other commodity or thing of value, and such payment is evidenced by stamps affixed as required by § 6165, then no tax shall be levied upon the sale, transfer, issue, or delivery of such trading stamps made upon, in connection with, or as a result of, a sale of goods, wares, merchandise, or other commodity or thing of value; it being the intent to levy a tax upon only one transfer of the same trading stamps.

6167. Failure to pay tax. Penalty. Any person, firm, or corporation who shall sell, transfer, issue, or deliver to another any trading stamp or stamps, and who shall fail to pay the tax levied by the provisions of this chapter, and evidence such payment by affixing and canceling stamps in the manner required herein, shall be guilty of a misdemeanor.

6168. Secretary of state to provide and sell tax stamps. Adhesive stamps for the purpose of paying the state tax provided for herein shall be prepared by the secretary of state in such form and of such denominations and in such quantities as he may from time to time prescribe, and shall be sold by him to the persons, firms, or corporations desiring to purchase the same. He shall make provisions for the sale of such stamps in such places and at such times as, in his judgment, he may deem necessary.

6169. Cancellation of tax stamps. Penalty for failure. In every case where an adhesive stamp shall be used to denote the payment of the state tax provided for by this chapter, the person, firm, or corporation using or affixing the same shall write or have written, stamp or have stamped, thereupon the initials of his or its name and the date upon which the same is attached or used, and shall cut or perforate the stamp in a substantial manner so that the stamp cannot be used again, and if any person, firm, or corporation fraudulently makes use of any adhesive stamp to denote the state tax imposed herein without so effectually canceling and obliterating the same, such person, firm, or corporation shall be deemed guilty of a misdemeanor.

6170. Custody of tax stamps, dies, and plates. The secretary of state shall be custodian of all stamps, dies, plates, or other materials or things used in the manufacture of such state tax stamps.

6171. Unlawful to wash or restore canceled tax stamp. Counterfeiting. Penalty. Any person who shall wilfully remove or cause to be removed, alter or cause to be altered, the canceling or defacing marks of any adhesive stamp provided for herein, with intent to use the same or to cause the use of the same after it shall have been once used, or shall knowingly and wilfully sell or buy any washed or restored stamps, or offer the same for sale, or give or expose the same to any person for use, or knowingly use the same or prepare the same with intent for the further use thereof, or shall wilfully use

any counterfeit stamp or any forged stamp, with intent to defraud the state of Utah, shall be guilty of a misdemeanor.

6172. Dealer to keep record of trading stamps issued. Inspection powers of secretary of state. Every person, firm, or corporation who sells, transfers, or delivers, and every person, firm, or corporation who purchases or receives, any trading stamps to be given or delivered by him or it to any other person, firm, or corporation upon or as a result of a sale of any goods, wares, merchandise, or other commodity or thing of value shall keep and maintain correct books of account in convenient form wherein shall be entered the date of such sale, transfer, delivery, or receipt, as the case may be, the name of the person, firm, or corporation to or by whom such stamps were sold, transferred, delivered, or received, as the case may be, and the number of books, pads, or other containers of stamps, and the quantity of stamps contained in each. Said books of account shall, at all business hours of the day, be open to inspection by the secretary of state, by himself, his agent, or assistant, and should he be refused the right of inspection of any of said books of account he may enforce the same by mandamus. Every person, firm, or corporation purchasing or receiving trading stamps to be by him or it given or delivered to any other person, firm, or corporation upon or as a result of the sale of any goods, wares, merchandise, or other thing or commodity of value, shall keep and carefully preserve the covers of the books, pads, or other containers in which the said stamps were sold or delivered, for a period of at least thirty months after the said sale or delivery, and the same shall, at all business hours of the day during said period, be open to inspection by the secretary of state by himself, his agent, or assistant, and should he be denied this right, he may enforce the same by mandamus.

6173. Unlawful to purchase or issue trading stamps unless tax is paid. Penalty. It shall be unlawful for any person, firm, or corporation to purchase or receive trading stamps which are to be by him or it sold, issued, transferred, or delivered to another upon or as a result of the sale of any goods, wares, merchandise, or other commodity or thing of value, unless or until the state stamp tax shall have been paid thereon and the adhesive stamp, as evidence of such payment, shall have been affixed in accordance with this chapter. Any person violating the provisions of this section shall be guilty of a misdemeanor.

6174. Trading stamps defined. For the purposes of this chapter, a trading stamp shall be deemed to be any stamp, voucher, scrip, coupon, ticket, or other device sold, given, transferred, issued, or delivered to any person, firm, or corporation with the intent or purpose that the same shall be sold, given, transferred, issued, or delivered to any other person, firm, or corporation upon, in connection with, or as a result of, the sale or exchange of any goods, wares, merchandise, or other commodity or thing of value, which shall entitle the person, firm, or corporation receiving the same, upon presentation and surrender, to receive any money or any goods, wares, merchandise, or other commodity or thing of value, free of charge or at less than the sale price thereof.

TITLE 111.

UNIFORMITY OF LEGISLATION.

6180. (2723x) Appointment of board. Term. Within ten days after March 13, 1907, the governor, by and with the advice and consent of the senate, shall appoint for a term of two years, three suitable persons, and they and their successors are hereby constituted the Utah board of commissioners for the promotion of uniformity of legislation in the United States. Any vacancy in said board caused by resignation, death, or otherwise, shall be filled by the appointment of a suitable person by the governor. '07, p. 35.

6181. (2723x1.) Duties of board. It shall be the duty of said board to examine the subjects of insolvency, the descent and distribution of property, the execution and probate of wills, and other subjects upon which uniformity of legislation in the various states and territories of the union is desirable, but which are outside the jurisdiction of the congress of the United States; to confer upon these matters with the commissioners appointed by other states for the same purpose; to consider and draft uniform laws to be submitted for approval and adoption by the several states; and generally, to devise and recommend such other or further course of action as shall accomplish the purposes of this title. '07, p. 36.

6182. (2723x2.) Record. Reports. The said board of commissioners shall keep a record of all its transactions, and shall, at each session of the legislature, make a report of its doings and of its recommendations. '07, p. 36.

6183. (2723x3.) Expenses paid. Report. No member of said board shall receive any compensation for his services, but each member shall be repaid from the state treasury, upon the warrant of the state auditor, the amount of his actual traveling and other necessary expenses incurred in the discharge of his official duty, after the itemized and verified account thereof has been audited, approved, and allowed by the state board of examiners. Said board of commissioners shall keep a full account of its expenditures, and shall report it in each biennial report. '07, p. 36.

TITLE 112.

VETERINARY MEDICAL EXAMINERS.

('11, p. 17.)

6185. (2723x5.) Appointment of board. Qualifications. Vacancies. Removal. The governor shall, as soon as practicable after this title goes into effect, appoint a board of examiners, said board to be known as the Utah state board of veterinary medical examiners. The board shall consist of three qualified veterinarians, each of whom shall be a graduate of a college or university recognized by the department of agriculture, Washington, D. C., and who shall be of good standing in the profession. One of these members shall be appointed for one year, one for two years, and one for three years, and each succeeding appointment shall be for three years. The members of said board shall qualify by taking the usual oath of office before any officer qualified to administer such oath. The governor shall fill any vacancy which may occur on the board, and may remove any member of said board for neglect of duty, for incompetency, unprofessional or dishonorable conduct.
Am'd '07, p. 164.

6186. (2723x6.) Organization. Books and stationery. Said board of examiners shall, within thirty days after appointment, meet and organize by the election of a president, a secretary, and a treasurer, from its own members, who shall be elected for a term of one year, and serve until their successors are elected and qualified, and shall perform the duties prescribed by the board. The board shall procure the necessary books and stationery for its use, the same to be paid for out of its treasury.

6187. (2723x7.) Meetings. Powers of board. The members of said board shall meet at least once a year, and shall hold such additional meetings at such time and place as they may elect, whenever two or more applicants desire to take the examination. At any meeting of the board a majority shall constitute a quorum to transact business. Said board may make by-laws and rules not inconsistent with law necessary to carry out the provisions of this title, and any member thereof shall have power to administer oaths and take testimony concerning all matters within its jurisdiction. It shall have power

to revoke or cancel any certificate issued for any of the causes to-wit: The employment of fraud or deception in applying for said license or certificate, or in passing examinations provided for in this title, conviction of crime involving moral turpitude, habitual intemperance, or in the use of ardent spirits, narcotics, or stimulants. Any person desiring to begin the practice of veterinary medicine within the state of Utah shall present to a member of the board his diploma, and if, in the opinion of said member of said board, the diploma is valid he shall issue a permit to practice until the date of the next examination. Am'd '07, p. 165.

6188. Unlawful practice. It shall be unlawful after July 1, 1911, for any person to practice veterinary medicine, veterinary surgery, or any branch thereof, including veterinary dentistry, in the state of Utah, without previously having obtained a certificate from the board of veterinary examiners, except as hereinafter provided.

6189. Applications, when filed. Applicants for certificates to practice veterinary medicine, veterinary surgery, or any branch thereof, including veterinary dentistry, in the state of Utah, shall file their applications with the secretary of the board of examiners. All applications shall be in writing.

6190. (2723x10.) Registration. Examination. All persons who are graduates of veterinary colleges recognized by the department of agriculture, Washington, D. C., and all persons who have practiced veterinary medicine within the state of Utah for a period of five years or more for compensation, prior to the passage of this title shall be entitled to registration. On and after July 1, 1911, all applicants for license to practice veterinary medicine, surgery, and dentistry in this state shall be required to pass a satisfactory examination in such subjects and topics, a knowledge of which is commonly and generally required of candidates for degrees in reputable veterinary colleges or universities in the United States. All examinations provided for in this title shall be conducted under rules and regulations prescribed by the board, which shall provide for fair and wholly impartial methods of examinations.

6191. Certificates, how used. Every certificate issued by the state board of veterinary examiners to practice veterinary surgery, medicine, or dentistry, as the case may be, shall state the provisions, whether graduate or non-graduate, and shall indicate the section of this title under which it is issued, and such certificate must be displayed in a conspicuous place in his place of business at all times; *provided,* that all veterinarians traveling from place to place shall carry said certificate for inspection in any locality where practicing, and, except when obtained by fraud, shall be conclusive evidence of the right of the holder to practice veterinary medicine, veterinary surgery, or veterinary dentistry in the state of Utah, and each veterinarian registered in the state shall pay to the secretary $1 annually as dues, to be applied to the veterinary fund. The failure to display such certificate or the failure of payment of such dues by the end of any fiscal year, January 31, by the holder of a certificate from such board shall render said certificate null and void.

To examine stallions and jacks, when, § 2890. Must report certain diseases, § 220. Limitations as to prescriptions of alcohol, § 3370; narcotics, § 4432.

6192. Must keep a register of certificates issued. It shall be the duty of the said board of examiners to keep a register of all practitioners to whom certificates are issued under the provisions of this title, and to register the name, age, and time spent in study and practice of veterinary medicine, veterinary surgery, or veterinary dentistry, as the case may be, and, if a graduate, the name and location of the school granting his diploma. Such record will be prima facie evidence of all matters therein recorded, and shall be open for public inspection at all times, within reasonable hours, at the office of the secretary of the board.

6193. Revocation of license. Any veterinary practitioner of the state of Utah convicted of malpractice shall have his license revoked.

Revoked for failure to report certain diseases, § 120

Revoked for prescribing alcohol, § 3371.

6194. Penalty for practicing without a certificate. Any person practicing veterinary medicine, veterinary surgery, or any branch thereof, including dentistry, in the state of Utah, from or after the 1st day of July, 1911, without having first obtained a certificate under the provisions of this title, shall be deemed guilty of a misdemeanor; *provided,* nothing in this section shall be construed to prohibit qualified veterinarians residing outside the state of Utah meeting in consultation with and rendering special assistance to qualified veterinarians of this state.

6195. Construction. Any person shall be regarded as practicing veterinary medicine, veterinary surgery, or veterinary dentistry, within the meaning of this title, who prescribes for or in any way treats a sick or injured animal or animals for compensation therefor; *provided,* that nothing in this title shall be construed to prohibit castrating, spaying, and dehorning of farm animals by any person for compensation, or of the treatment of sick or injured domestic animals by any persons free of charge, or to prohibit a veterinary student from prescribing under the direction of a preceptor, while actually attending a veterinary school or during a vacation not to exceed eighteen months; *provided, further,* that this title may not apply to any one in the employ of the United States in the department of agriculture or any officer in the United States army, in discharge of his official duties.

6196. Fee. Disposition of same. The board of examiners shall collect an examination fee of $5 from each applicant for examination and said money shall be paid prior to the examination, and said board shall receive no fees or salaries from the state, but the fees received from applicants for examinations and yearly dues shall defray all expenses of said board.

6197. Report. At the end of each year from and after the creation of this board, the secretary shall make a report to the board of the receipts and disbursements of the funds received during the year, and the president of the board shall forward to the governor a copy of the same, with a brief report of the work of the board during the year.

6198. Penalty for false swearing. Any person who shall swear falsely in any affidavit or oral testimony made or given by virtue of the provisions of this title or the regulations of said board of registration shall be deemed guilty of perjury.

TITLE 113.

WAREHOUSE RECEIPT ACT—LIENS, ETC.

('11, p. 271.)

6201. Warehouse receipts may be issued. Warehouse receipts may be issued by any warehouseman.

6202. What receipts must embody. Warehouse receipts need not be in any particular form, but every such receipt must embody within its written or printed terms:

1. The location of the warehouse where the goods are stored;
2. The date of issue of the receipt;
3. The consecutive number of the receipt;
4. A statement whether the goods received will be delivered to the bearer, to a specified person, or to a specified person or his order;
5. The rate of storage charges;
6. A description of the goods or of the packages containing them;

7. The signature of the warehouseman, which may be made by his authorized agent;

8. If the receipt is issued for goods of which the warehouseman is owner, either solely or jointly or in common with others, the fact of such ownership; and

9. A statement of the amount of advances made and of liabilities incurred for which the warehouseman claims a lien. If the precise amount of such advances made or of such liabilities incurred is, at the time of the issue of the receipt, unknown to the warehouseman or to his agent who issues it, a statement of the fact that advances have been made or liabilities incurred and the purpose thereof is sufficient.

A warehouseman shall be liable to any person injured hereby, for all damages caused by the omission from a negotiable receipt of any of the terms herein required.

6203. Terms and conditions. A warehouseman may insert in a receipt issued by him any other terms and conditions; *provided,* that such terms and conditions shall not:

1. Be contrary to the provisions of this title;

2. In any wise impair his obligation to exercise that degree of care in the safe keeping of the goods entrusted to him which a reasonably careful man would exercise in regard to similar goods of his own.

6204. Non-negotiable receipts. A receipt in which it is stated that the goods received will be delivered to the depositor, or to any other specified person, is a non-negotiable receipt.

6205. Negotiable receipts. A receipt in which it is stated that the goods received will be delivered to the bearer, or to the order of any person named in such receipt, is a negotiable receipt. No provision shall be inserted in a negotiable receipt that is non-negotiable. Such provision, if inserted, shall be void.

6206. Duplicates. When more than one negotiable receipt is issued for the same goods, the word "duplicate" shall be plainly placed upon the face of every such receipt, except the one first issued. A warehouseman shall be liable for all damages caused by his failure so to do to any one who purchased the subsequent receipt for value supposing it to be an original, even though the purchase be after the delivery of the goods by the warehouseman to the holder of the original receipt.

6207. Non-negotiable receipts to be so inscribed. A non-negotiable receipt shall have plainly placed upon its face by the warehouseman issuing it "non-negotiable," or "not negotiable." In case of the warehouseman's failure so to do, a holder of the receipt who purchased it for value supposing it to be negotiable, may, at his option, treat such receipt as imposing upon the warehouseman the same liabilities he would have incurred had the receipt been negotiable. This section shall not apply, however, to letters, memoranda, or written acknowledgments of an informal character.

6208. Delivery of goods. A warehouseman, in the absence of some lawful excuse provided by this act, is bound to deliver the goods upon demand made either by the holder of a receipt for the goods or by the depositor, if such demand is accompanied with:

1. An offer to satisfy the warehouseman's lien;

2. An offer to surrender the receipt if negotiable, with such indorsement as would be necessary for the negotiation of the receipt; and

3. A readiness and willingness to sign, when the goods are delivered, an acknowledgment that they have been delivered, if such signature is requested by the warehouseman.

In case the warehouseman refuses or fails to deliver the goods in compliance with a demand by the holder or depositor so accompanied, the burden shall be upon the warehouseman to establish the existence of a lawful excuse for such refusal.

6209. Justifiable delivery. A warehouseman is justified in delivering the goods, subject to the provisions of the three following sections, to one who is:

1. The person lawfully entitled to the possession of the goods, or his agent;
2. A person who is either himself entitled to delivery by the terms of a non-negotiable receipt issued for the goods, or who has written authority from the person so entitled either indorsed upon the receipt or written upon another paper; or
3. A person in possession of a negotiable receipt by the terms of which the goods are deliverable to him or order or to bearer, or which has been indorsed to him or in blank by the person to whom delivery was promised by the terms of the receipt or by his mediate or immediate indorsee.

6210. Liability of warehouseman. Where a warehouseman delivers the goods to one who is not in fact lawfully entitled to the possession of them, the warehouseman shall be liable as for conversion to all having a right of property or possession in the goods if he delivered the goods otherwise than as authorized by subs. 2 and 3 of the preceding section and though he delivered the goods as authorized by said subdivisions he shall be so liable, if prior to such delivery he had either:

1. Been requested, by or on behalf of the person lawfully entitled to a right of property or possession in the goods, not to make such delivery; or
2. Had information that the delivery about to be made was to one not lawfully entitled to the possession of the goods.

6211. Id. Except as provided in § 6236, where a warehouseman delivers goods for which he had issued a negotiable receipt, the negotiation of which would transfer the right to the possession of the goods, and fails to take up and cancel the receipt, he shall be liable to any one who purchases for value in good faith such receipt, for failure to deliver the goods to him, whether such purchaser acquired title to the receipt before or after the delivery of the goods by the warehouseman.

6212. Id. Except as provided in § 6236, where a warehouseman delivers part of the goods for which he had issued a negotiable receipt and fails either to take up and cancel such receipt, or to place plainly upon it a statement of what goods or packages have been delivered, he shall be liable, to any one who purchases for value in good faith such receipt, for failure to deliver all the goods specified in the receipt, whether such purchaser acquired title to the receipt before or after the delivery of any portion of the goods by the warehouseman.

6213. Alteration of a receipt. The alteration of a receipt shall not excuse the warehouseman who issued it from any liability if such alteration was:

1. Immaterial;
2. Authorized; or
3. Made without fraudulent intent.

If the alteration was authorized, the warehouseman shall be liable according to the terms of the receipt as altered. If the alteration was unauthorized, but made without fraudulent intent, the warehouseman shall be liable according to the terms of the receipt, as they were before alteration. Material and fraudulent alteration of a receipt shall not excuse the warehouseman who issued it from liability to deliver, according to the terms of the receipt as originally issued, the goods for which it was issued, but shall excuse him from any other liability to the person who made the alteration and to any person who took with notice of the alteration. Any purchaser of the receipt for value without notice of the alteration shall acquire the same rights against the warehouseman which such purchaser would have acquired if the receipt had not been altered at the time of the purchase.

6214. Lost receipt. Where a negotiable receipt has been lost or de-

stroyed, a court of competent jurisdiction may order the delivery of the goods upon satisfactory proof of such loss or destruction and upon the giving of a bond, with sufficient sureties to be approved by the court, to protect the warehouseman from any liability or expense, which he or any person injured by such delivery may incur by reason of the original receipt remaining outstanding. The court may also in its discretion order the payment of the warehouseman's reasonable costs and counsel fees. The delivery of the goods under an order of the court, as provided in this section, shall not relieve the warehouseman from liability to a person to whom the negotiable receipt has been or shall be negotiated for value without notice of the proceedings or of the delivery of the goods.

6215. Duplicate to be accurate copy of original. A receipt upon the face of which the word "duplicate" is plainly placed is a representation and warranty by the warehouseman that such receipt is an accurate copy of an original receipt properly issued and uncanceled at the date of the issue of the duplicate, but shall impose upon him no other liability.

6216. Right to possession. No title or right to possession of the goods, on the part of the warehouseman, unless such title or right is derived directly or indirectly from a transfer made by the depositor at the time of or subsequent to the deposit for storage, or from the warehouseman's lien, shall excuse the warehouseman from liability for refusing to deliver the goods according to the terms of the receipt.

6217. Where more than one claimant. If more than one person claim the title or possession of the goods, the warehouseman may, either as a defense to an action brought against him for non-delivery of the goods, or as an original suit, whichever is appropriate, require all known claimants to interplead.

6218. Warehouseman excused from liability, when. If some one other than the depositor or person claiming under him has a claim to the title or possession of the goods, and the warehouseman has information of such claim, the warehouseman shall be excused from liability for refusing to deliver the goods, either to the depositor or person claiming under him or to the adverse claimant, until the warehouseman has had a reasonable time to ascertain the validity of the adverse claim or to bring legal proceeding to compel all claimants to interplead.

6219. Right or title of third person. Except as provided in the two preceding sections and in § 6209 and § 6236, no right or title of a third person shall be a defense to an action brought by the depositor or person claiming under him against the warehouseman for failure to deliver the goods according to the terms of the receipt.

6220. Additional liabilities of warehouseman. A warehouseman shall be liable to the holder of a receipt for damages caused by the non-existence of the goods or by the failure of the goods to correspond with the description thereof in the receipt at the time of its issue. If, however, the goods are described in a receipt merely by a statement of marks or labels upon them or upon packages containing them, or by a statement that the goods are said to be goods of a certain kind, or that the packages containing the goods are said to contain goods of a certain kind or by words of like purport, such statements, if true, shall not make liable the warehouseman issuing the receipt, although the goods are not of the kind which the marks or labels upon them indicate, or of the kind they were said to be by the depositor.

6221. Id. A warehouseman shall be liable for any loss or injury to the goods caused by his failure to exercise such care in regard to them as a reasonably careful owner of similar goods would exercise, but he shall not be liable, in the absence of an agreement to the contrary, for any loss or injury to the goods which could not have been avoided by the exercise of such care.

6222. Goods to be kept separate. Except as provided in the following section, a warehouseman shall keep the goods so far separate from the goods

of other depositors, and from other goods of the same depositor for which a separate receipt has been issued, as to permit at all times the identification and re-delivery of the goods deposited.

6223. May mingle goods, when. If authorized by agreement or by custom, a warehouseman may mingle fungible goods with other goods of the same kind and grade. In such case the various depositors of the mingled goods shall own the entire mass in common, and each depositor shall be entitled to such portion thereof as the amount deposited by him bears to the whole.

6224. Severally liable to each depositor. The warehouseman shall be severally liable to each depositor for the care and redelivery of his share of such mass to the same extent and under the same circumstances as if the goods had been kept separate.

6225. Attachment or garnishment. If goods are delivered to a warehouseman by the owner or by a person whose act in conveying the title to them to a purchaser in good faith for value would bind the owner, and a negotiable receipt is issued for them, they cannot thereafter, while in the possession of the warehouseman, be attached by garnishment or otherwise, or be levied upon under an execution, unless the receipt be first surrendered to the warehouseman, or its negotiation enjoined. The warehouseman shall in no case be compelled to deliver up the actual possession of the goods until the receipt is surrendered to him or impounded by the court.

6226. Injunction A creditor whose debtor is the owner of a negotiable receipt shall be entitled to such aid from courts of appropriate jurisdiction, by injunction and otherwise, in attaching such receipt or in satisfying the claim by means thereof as allowed at law or in equity, in regard to property which cannot be readily attached or levied upon by ordinary legal process.

6227. Lien for storage charges. Subject to the provisions of § 6230, a warehouseman shall have a lien on goods deposited or on the proceeds thereof in his hands, for all lawful charges for storage and preservation of the goods; also for all lawful claims for money advanced, interest, insurance, transportation, labor, weighing, coopering, and other charges and expenses in relation to such goods; also for all reasonable charges and expenses for notice and advertisement of sale, and for sale of the goods where default has been made in satisfying the warehouseman's lien.

6228. Enforcement of warehouseman's lien. Subject to the provisions of § 6230, a warehouseman's lien may be enforced:

1. Against all goods, whenever deposited, belonging to the person who is liable as debtor for the claims in regard to which the lien is asserted; and
2. Against all goods belonging to others which have been deposited at any time by the person who is liable as debtor for the claims in regard to which the lien is asserted if such person had been so entrusted with the possession of the goods that a pledge of the same by him at the time of the deposit to one who took the goods in good faith for value would have been valid.

6229. Loses lien, when. A warehouseman loses his lien upon goods:

1. By surrendering possession thereof; or
2. By refusing to deliver the goods when a demand is made with which he is bound to comply under the provisions of this title.

6230. Lien where negotiable receipt is issued. If a negotiable receipt is issued for goods, the warehouseman shall have no lien thereon except for charges for storage of those goods subsequent to the date of the receipt, unless the receipt expressly enumerates other charges for which a lien is claimed. In such case there shall be a lien for the charges enumerated so far as they are within the terms of § 6227, although the amount of the charges so enumerated is not stated in the receipt.

6231. Satisfaction of lien. A warehouseman having a lien valid against

the person demanding the goods may refuse to deliver the goods to him until the lien is satisfied.

6232. Warehouseman has legal remedies against debtor. Whether a warehouseman has or has not a lien upon the goods, he is entitled to all remedies allowed by law to a creditor against his debtor, for the collection from the depositor of all charges and advances which the depositor has expressly or impliedly contracted with the warehouseman to pay.

6233. Liens may be satisfied, how. A warehouseman's lien for a claim which has become due may be satisfied as follows:

The warehouseman shall give a written notice to the person on whose account the goods are held, and to any other person known by the warehouseman to claim an interest in the goods. Such notice shall be given by delivery in person or by registered letter addressed to the last known place of business or abode of the person to be notified. The notice shall contain:

1. An itemized statement of the warehouseman's claim, showing the sum due at the time of the notice and the date or dates when it became due;
2. A brief description of the goods against which the lien exists;
3. A demand that the amount of the claim as stated in the notice, and of such further claim as shall accrue, shall be paid on or before a day mentioned, not less than ten days from the delivery of the notice if it is personally delivered, or from the time when the notice should reach its destination, according to the due course of post, if the notice is sent by mail; and
4. A statement that unless the claim is paid within the time specified the goods will be advertised for sale and sold by auction at a specified time and place.

In accordance with the terms of a notice so given, a sale of the goods by auction may be had to satisfy any valid claim of the warehouseman for which he has a lien on the goods. The sale shall be had in the place where the lien was acquired, or, if such place is manifestly unsuitable for the purpose, at the nearest suitable place. After the time for the payment of the claim specified in the notice to the depositor has elapsed, an advertisement of the sale, describing the goods to be sold, and stating the name of the owner or person on whose account the goods are held, and the time and place of the sale, shall be published once a week for two consecutive weeks in a newspaper published in the place where such sale is to be held. The sale shall not be held less than fifteen days from the time of the first publication. If there is no newspaper published in such place, the advertisement shall be posted at least ten days before such sale in not less than six conspicuous places therein. From the proceeds of such sale the warehouseman shall satisfy his lien, including the reasonable charges of notice, advertisement, and sale. The balance, if any, of such proceeds shall be held by the warehouseman, and delivered on demand to the person to whom he would have been bound to deliver or justified in delivering the goods. At any time before the goods are so sold, any person claiming a right of property or possession therein may pay the warehouseman the amount necessary to satisfy his lien and to pay the reasonable expenses and liabilities incurred in serving notices and advertising and preparing for the sale up to the time of such payment. The warehouseman shall deliver the goods to the person making such payment if he is a person entitled, under the provisions of this title, to the possession of the goods on payment of charges thereon. Otherwise the warehouseman shall retain possession of the goods according to the terms of the original contract of deposit.

6234. Perishable goods. If goods are of a perishable nature, or by keeping will deteriorate greatly in value, or by their odor, leakage, inflammability, or explosive nature will be liable to injure other property, the warehouseman may give such notice to the owner, or to the person in whose name the goods are stored, as is reasonable and possible under the circumstances, to satisfy the lien upon such goods and to remove them from the warehouse, and in the event of the failure of such person to satisfy the lien and to re-

move the goods within the time so specified, the warehouseman may sell the goods at public or private sale without advertising. If the warehouseman after a reasonable effort is unable to sell such goods, he may dispose of them in any lawful manner, and shall incur no liability by reason thereof. The proceeds of any sale made under the terms of this section shall be disposed of in the same way as the proceeds of sales made under the terms of the preceding section.

6235. Enforcing of lien not to preclude other remedies. The remedy for enforcing a lien herein provided does not preclude any other remedies allowed by law for the enforcement of a lien against personal property nor bar the right to recover so much of the warehouseman's claim as shall not be paid by the proceeds of the sale of the property.

6236. Goods lawfully sold. After the goods have been lawfully sold to satisfy a warehouseman's lien, or have been lawfully sold or disposed of because of their perishable or hazardous nature, the warehouseman shall not thereafter be liable for failure to deliver the goods to the depositor, or owner of the goods, or to a holder of the receipt given for the goods when they were deposited, even if such receipt is negotiable.

6237. Receipt may be negotiated by delivery, when. A negotiable receipt may be negotiated by delivery:

1. Where, by the terms of the receipt, the warehouseman undertakes to deliver the goods to the bearer; or

2. Where, by the terms of the receipt, the warehouseman undertakes to deliver the goods to the order of a specified person, and such person or a subsequent indorsee of the receipt has indorsed it in blank or to bearer.

Where, by the terms of a negotiable receipt, the goods are deliverable to bearer or where a negotiable receipt has been indorsed in blank or to bearer, any holder may indorse the same to himself or to any other specified person, and in such case the receipt shall thereafter be negotiated only by the indorsement of such indorsee.

6238. Negotiation by indorsement. A negotiable receipt may be negotiated by the indorsement of the person to whose order the goods are, by the terms of the receipt, deliverable. Such an indorsement may be in blank, to bearer or to a specified person. If indorsed to a specified person, it may be again negotiated by the indorsement of such person in blank, to bearer or to another specified person. Subsequent negotiation may be made in like manner.

6239. May be transferred. A receipt which is not in such form that it can be negotiated by delivery may be transferred by the holder by delivery to a purchaser or donee. A non-negotiable receipt cannot be negotiated, and the indorsement of such a receipt gives the transferee no additional right.

6240. Id. A negotiable receipt may be negotiated:

1. By the owner thereof; or

2. By any person to whom the possession or custody of the receipt has been entrusted by the owner, if, by the terms of the receipt, the warehouseman undertakes to deliver the goods to the order of the person to whom the possession or custody of the receipt has been entrusted, or if at the time of such entrusting the receipt is in such form that it may be negotiated by delivery.

6241. Rights of purchaser of receipt. A person to whom a negotiable receipt has been duly negotiated acquires thereby:

1. Such title to the goods as the person negotiating the receipt to him had or had ability to convey to a purchaser in good faith for value, and also such title to the goods as the depositor or person to whose order the goods were to be delivered by the terms of the receipt had or had ability to convey to a purchaser in good faith for value; and

2. The direct obligation of the warehouseman to hold possession of the

goods for him according to the terms of the receipt as fully as if the warehouseman had contracted directly with him.

6242. Rights of person to whom receipt has been transferred. A person to whom a receipt has been transferred, but not negotiated, acquires thereby, as against the transferor, the title of the goods, subject to the terms of any agreement with the transferor. If the receipt is non-negotiable, such person also acquires the right to notify the warehouseman of the transfer to him of such receipt, and thereby to acquire the direct obligation of the warehouseman to hold possession of the goods for him according to the terms of the receipt. Prior to the notification of the warehouseman by the transferor or transferee of a non-negotiable receipt, the title of the transferee to the goods and the right to acquire the obligation to the warehouseman may be defeated by the levy of an attachment or execution upon the goods by a creditor of the transferor, or by a notification to the warehouseman by the transferor or a subsequent purchaser from the transferor of a subsequent sale of the goods by the tansferor.

6243. Indorsement. Where a negotiable receipt is transferred for value by delivery, and the indorsement of the transferor is essential for negotiation, the transferee acquires a right against the transferor to compel him to indorse the receipt, unless a contrary intention appears. The negotiation shall take effect as of the time when the indorsement is actually made.

6244. Id. A person who for value negotiates or transfers a receipt by indorsement or delivery, including one who assigns for value a claim secured by a receipt, unless a contrary intention appears, warrants:

1. That the receipt is genuine;
2. That he has a legal right to negotiate or transfer it;
3. That he has knowledge of no fact that would impair the validity or worth of the receipt; and
4. That he has a right to transfer the title to the goods, and that the goods are merchantable or fit for a particular purpose whenever such warranties would have been implied, if the contract of the parties had been to transfer without a receipt the goods represented thereby.

6245. Indorser not liable, when. The indorsement of a receipt shall not make the indorser liable for any failure on the part of the warehouseman or previous indorsers of the receipt to fulfill their respective obligations.

6246. Mortgagee, pledgee, etc. A mortgagee, pledgee, or holder for security of a receipt who in good faith demands or receives payment of the debt for which such receipt is security, whether from a party to a draft drawn for such debt or from any other person, shall not by so doing be deemed to represent or to warrant the genuineness of such receipt or the quantity or quality of the goods therein described.

6247. Validity of negotiation. The validity of the negotiation of a receipt is not impaired by the fact that such negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the receipt was induced by fraud, mistake, or duress to entrust the possession or custody of the receipt to such person, if the person to whom the receipt was negotiated or a person to whom the receipt was subsequently negotiated paid value therefor, without notice of the breach of duty, or fraud, mistake, or duress.

6248. Id. Where a person having sold, mortgaged, or pledged goods which are in a warehouse, and for which a negotiable receipt has been issued, or having sold, mortgaged, or pledged the negotiable receipt representing such goods, continues in possession of the negotiable receipt, the subsequent negotiation thereof by that person under any sale, or other disposition thereof to any person receiving the same in good faith, for value and without notice of the previous sale, mortgage, or pledge, shall have the same effect as if the first purchaser of the goods or receipt had expressly authorized the subsequent negotiations.

6249. Seller's lien. Where a negotiable receipt has been issued for goods, no seller's lien or right of stoppage in transitu shall defeat the rights of any purchaser for value in good faith to whom such receipt has been negotiated, whether such negotiation be prior or subsequent to the notification to the warehouseman who issued such receipt of the seller's claim to a lien or right of stoppage in transitu. Nor shall the warehouseman be obliged to deliver or justified in delivering the goods to an unpaid seller unless the receipt is first surrendered for cancellation.

6250. Receipt when goods have not been received. A warehouseman, or any officer, agent, or servant of a warehouseman, who issues or aids in issuing a receipt knowing that the goods for which such receipt is issued have not been actually received by such warehouseman, or not under his actual control at the time of issuing such receipt, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment in the state prison not exceeding five years, or by a fine not exceeding $5000, or by both.

6251. Issuing fraudulent receipt. A warehouseman, or any officer, agent, or servant of a warehouseman, who fraudulently issues or aids in fraudulently issuing a receipt for goods knowing that it contains any false statement, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment in the county jail not exceeding one year or by a fine not exceeding $1000, or by both.

6252. Falsely issuing duplicate. A warehouseman, or any officer, agent, or servant of a warehouseman, who issues or aids in issuing a duplicate or additional negotiable receipt for goods knowing that a former negotiable receipt for the same goods or any part of them is outstanding and uncanceled, without plainly placing upon the face thereof the word "duplicate," except in the case of a lost or destroyed receipt after proceedings as provided for in § 6214, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment in the state prison not exceeding five years, or by a fine not exceeding $5000, or by both.

6253. Ownership must be stated. Where there are deposited with or held by a warehouseman goods of which he is owner, either solely or jointly or in common with others, such warehouseman, or any of his officers, agents, or servants who, knowing this ownership, issues or aids in issuing a negotiable receipt for such goods which does not state such ownership, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment in the county jail not exceeding one year, or by a fine not exceeding $1000, or by both.

6254. Delivery of goods without obtaining receipt. Penalty. A warehouseman, or any officer, agent, or servant of a warehouseman, who delivers goods out of the possession of such warehouseman, knowing that a negotiable receipt the negotiation of which would transfer the right to the possession of such goods is outstanding and uncanceled, without obtaining the possession of such receipt at or before the time of such delivery, shall, except in the cases provided for in § 6214 and § 6236, be found guilty of a crime, and upon conviction shall be punished for each offense by imprisonment in the county jail not exceeding one year, or by a fine not exceeding $1000, or by both.

6255. Depositing goods not owned by depositor. Any person who deposits goods to which he has not title, or upon which there is a lien or mortgage, and who takes for such goods a negotiable receipt which he afterwards negotiates for value with intent to deceive and without disclosing his want of title or the existence of the lien or mortgage, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment in the county jail not exceeding one year, or by a fine not exceeding $1000, or by both.

6256. What rules shall govern. In any case not provided for in this

title, the rules of law and equity, including the law merchant, and in particular the rules relating to the law of principal and agent and to the effect of fraud, misrepresentation, duress, or coercion, mistake, bankruptcy, or other invalidating cause, shall govern.

6257. Construction. This title shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

6258. Definitions. In this title, unless the context or subject matter otherwise requires:

"Action" includes counterclaim, set-off, and suit in equity.

"Delivery" means voluntary transfer of possession from one person to another.

"Fungible goods" means goods of which any unit is, from its nature or by mercantile custom, treated as the equivalent of any other unit.

"Goods" means chattels or merchandise in storage, or which has been or is about to be stored.

"Holder" of a receipt means a person who has both actual possession of such receipt and a right of property therein.

"Order" means an order by indorsement on the receipt.

"Owner" does not include mortgagee or pledgee.

"Person" includes a corporation or partnership of two or more persons having a joint and common interest.

To "purchase" includes to take as mortgagee or a pledgee.

"Purchaser" includes mortgagee or pledgee.

"Receipt" means warehouse receipt.

"Value" is any consideration sufficient to support a simple contract. An antecedent or pre-existing obligation, whether for money or not, constitutes value where a receipt is taken either in satisfaction thereof or as security therefor.

"Warehouseman" means a person lawfully engaged in the business of storing goods for profit.

A thing is done "in good faith," within the meaning of this title, when it is in fact done honestly, whether it be done negligently or not.

6259. Provisions of this title not to apply, when. The provisions of this title do not apply to receipts made and delivered prior to the taking effect of this title.

6260. Shall be known as "warehouse receipt act." This title may be cited as the warehouse receipt act.

TITLE 114.

WEEDS, DESTRUCTION OF NOXIOUS.

('11, p. 287.)

6265. Noxious weeds to be destroyed by property owners. Every person, company, or corporation owning, controlling, or occupying lands in this state, once in each year, and oftener if required as hereinafter provided, shall cut or destroy all weeds known as thistles, burdocks, cockleburs, Canada and Russian thistle, and all other weeds that may be designated as hereinafter provided, and at such times and in such manner as shall effectually prevent them from bearing seed; *provided*, that this section shall not apply to uncultivated desert or mountain lands.

6266. Id. On rights-of-way. Every person, company, or corporation owning the right-of-way for a reservoir, dam, canal, ditch, or any kind of an open artificial water course located or running through either private or public property for the conveyance or conservation of water for general irri-

gation purposes, or for public use of any kind, in this state, once in each year, and oftener if required as hereinafter provided, shall cut down or destroy before they mature their seed, all thistles, burdocks, cockleburs, sandburs, prickly lettuce, and other noxious weeds that may be capable of dissemination through the agency of said water courses, or that may be found growing along the right-of-way of such reservoir, canals, dams, ditches, or other water courses.

6267. Id. On railroads. Every railroad company operating in this state shall, once in each year and oftener if required as hereinafter provided, clear its right-of-way of thistles, burdocks, cockleburs, Canada and Russian thistle, and other noxious weeds before they mature their seeds; *provided*, that this section shall apply only to rights-of-way that abut, lie contiguous or adjacent to cultivated lands or pasture lands inclosed by a fence.

A similar provision in an Indiana statute was held to be constitutional. Chicago, etc. v. Anderson, 242 U. S. 283.

6268. Penalty for non-compliance. Any person or persons, company or corporation, or railroad company in this state failing to comply with any of the provisions of §§ 6265-6267 shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than $10 nor more than $300, said fines to be recovered with costs in any action to be brought in the name of the state by the county in which said lands, rights-of-way, reservoirs, dams, canals, ditches, or other water courses are situated.

6269. Duty of county commissioners. The county commissioners of the counties of this state shall, at least once in each year and oftener if deemed necessary, require the county road commissioners of their respective counties to clear the public roads in the county of noxious weeds and the costs of the same shall be paid out of the county fund. And said county commissioners shall, whenever petitioned by twenty-five land owners of the county, appoint the county road commissioner ex-officio weed inspector, and authorize him to inspect the lands and rights-of-way of the county, and they shall prescribe all other duties of said weed inspector that may be deemed necessary for the enforcement of the provisions of this title. The actual and necessary expenses of said weed inspector shall also be paid out of the county fund.

6270. Id. Fixing time by ordinance. The county commissioners may, by ordinance, fix the time for the destroying or cutting of noxious weeds as in this title provided, and provide for the posting or publishing of notices announcing the time allowed for such purpose, and may require that said noxious weeds be destroyed oftener than once in each year, and may designate and order the destruction of other weeds not enumerated in this title.

TITLE 115.

WEIGHTS AND MEASURES.

('15, p. 173.)

6276. (2724.) U. S. Standard adopted. The weights and measures received from the United States under a resolution of congress approved June 14, 1836, and such new weights and measures as shall be received from the United States as standard weights and measures in addition thereto or in renewal thereof, and such as shall be supplied by the state in conformity therewith, and certified by the national bureau of standards, shall be the state standards of weights and measures.

6277. Office and working standards. Verification. Use. In addition to the state standards of weights and measures, provided for above, there shall be supplied by the state at least one complete set of copies of these, to be kept at all times in the office of the state superintendent, and to be known as office standards; and such other weights, measures, and apparatus as may be found necessary to carry out the provisions of this title, to be known as

working standards. Such weights, measures, and apparatus shall be verified by the state superintendent, or his deputy or inspector, at his discretion, upon their initial receipt, and at least once in each year thereafter, the office standards by direct comparison with the state standards, the working standards by comparison with the office standards. When found accurate upon these tests the office and working standards shall be certified to by the superintendent. The office standards shall be used in making all comparisons of weights, measures, and weighing and measuring devices submitted for test in the office of the superintendent, and the state standards shall be used only in verifying the office standards and for scientific purposes.

Railroad weights and scales tested and regulated, § 4813, sub. 3.

6278. Superintendent. Deputy and inspectors. Salaries and expenses. The dairy and food commissioner shall be ex officio superintendent of weights and measures. There shall be a deputy superintendent of weights and measures and inspectors of weights and measures, the deputy and inspectors to be appointed by the superintendent. The superintendent of weights and measures shall be allowed, for salaries for the deputy superintendent of weights and measures, inspectors of weights and measures, clerical services, traveling and contingent expenses for himself, his deputy, and inspectors, such sums as shall be appropriated by the legislature.

Dairy and food commissioner, § 1920.

6279. Superintendent and deputy to give bonds. Terms. The state superintendent of weights and measures shall forthwith, on his appointment, give a bond in the penal sum of $2000, with sureties to be approved by the secretary of state, for the faithful performance of the duties of his office and for the safekeeping of the standards entrusted to his care, and for the surrender thereof immediately to his successor in office or to the person appointed by the governor to receive them. The deputy superintendent of weights and measures, and each inspector of weights and measures shall forthwith, upon his appointment, give a bond in the penal sum of $1000, with sureties to be approved by the secretary of state, for the faithful performance of the duties of his office and for the safe-keeping of any apparatus entrusted to his care.

6280. (2725.) Custody and care of standards. Duty of superintendent. Report. The superintendent of weights and measures shall take charge of the standards adopted by this title as the standards of the state, and cause them to be kept in a fireproof building belonging to the state (or in a safe and suitable place in the office of the superintendent), from which they shall not be removed except for repairs or for certification, and he shall take all other necessary precautions for their safe-keeping. He shall maintain the state standards in good order, and shall submit them at least once in ten years to the national bureau of standards for certification. He shall keep a complete record of the standards, balances, and other apparatus belonging to the state, and take a receipt for same from his successor in office. He shall biennially, on the 15th day of December, make to the governor a report of all work done by his office. Am'd '11, p. 176.

6281. Tests of city standards. Biennial inspections. The superintendent of weights and measures, or his deputy or inspectors at his discretion, shall, at least once in five years, try and prove by the office standards all standard weights, measures, and other apparatus which may belong to any city required to appoint a sealer and purchase and keep standards of weights and measures by the provisions of this title, and shall certify to such when found to be accurate. The state superintendent, or his deputy or inspectors at his direction, shall, at least once in two years, visit these cities for the purpose of inspecting the work of the local sealers, and in the performance of such duties they may inspect the weights, measures, balances, or any other weighing or measuring device of any citizen, firm, or corporation, and shall have the same powers as the local sealer of weights and measures. The superintendent shall issue from time to time regulations for the guidance

of city sealers, and the said regulations shall govern the procedure to be followed by the aforesaid officers in the discharge of their duties.

6282. General supervision. Inspection at state institutions. The state superintendent of weights and measures shall have and keep a general supervision of the weights and measures, and weighing or measuring devices offered for sale, sold, or in use in the state. He, or his deputy or inspectors at his direction, shall, at least once annually, test all scales, weights, and measures used in checking the receipts or disbursements of supplies in every institution for the maintenance of which moneys are appropriated by the legislature, and he shall report in writing his findings to the supervisory board and to the executive officer of the institution concerned, and, at the request of such board or executive officer, the superintendent of weights and measures shall appoint in writing one or more employes then in actual service of the institution, who shall act as special deputies without extra compensation, for the purpose of checking the receipts or disbursements.

6283. General powers and duties of superintendent. Annual inspections. When not otherwise provided by law, the state superintendent shall have the power, and it shall be his duty in those parts of the state in which a city sealer is not required to be appointed by the provisions of this title, to inspect, test, try, and ascertain if they are correct, all weights, measures, and weighing or measuring devices kept, offered, or exposed for sale, sold, or used or employed by any proprietor, agent, lessee, or employe, in proving the size, quantity, extent, area, or measurement of quantities, things, produce, or articles for distribution or consumption, purchased or offered or submitted by such person or persons for sale, hire, or award; and he shall have the power to, and shall from time to time weigh or measure and inspect packages or amounts of commodities of whatsoever kind kept for the purpose of sale, offered for sale, or sold in a manner in accordance with law. He shall, at least once each year and as much oftener as he may deem necessary, see that all weights, measures, and weighing or measuring devices used are correct. He may, for the purpose above mentioned, and in the general performance of his official duties, enter and go into or upon, and without formal warrant, any stand, place, building, or premises, or stop any dealer whatsoever, and require him, if necessary, to proceed to some place which the state superintendent may specify, for the purpose of making the proper tests. Whenever the state superintendent finds a violation of the statutes relating to weights and measures, he shall cause the violator to be prosecuted.

6284. Correct standards to be sealed. Whenever the state superintendent compares weights, measures, or weighing or measuring instruments and finds that they correspond, or causes them to correspond with the standards in his possession, he shall seal or mark such weights, measures, or weighing or measuring instruments with appropriate devices.

6285. Incorrect standards to be condemned. May be confiscated, when. The state superintendent shall condemn and seize and may destroy incorrect weights, measures, or weighing or measuring devices which in his best judgment are not susceptible of satisfactory repair; but such as are incorrect and yet may be repaired, he shall mark or tag as "condemned for repairs." The owner or user of any weights, measures, or weighing or measuring devices of which such disposition is made shall have the same repaired or corrected within ten days except upon satisfactory showing the superintendent may extend such time, and they may neither use nor dispose of the same in any way, but shall hold the same at the disposal of the superintendent. Any weights, measures, or weighing or measuring devices which have been "condemned for repairs," and have not been repaired as required above, shall be confiscated by the superintendent.

6286. Powers and duties of deputy and inspectors. The powers and duties given to and imposed upon the state superintendent of weights and measures by §§ 6283-6285 are hereby given to and imposed upon his deputy and inspectors also, when acting under his instructions and at his direction.

6287. City sealer. Appointment. Salary. Deputies. There shall be a city sealer of weights and measures in cities of not less than twenty-five thousand population, according to the latest official state or United States census, to be appointed by the mayor and city commission. He shall be paid a salary, to be determined by the mayor and city commission, and no fee shall be charged by him or by the city for the inspecting, testing, or sealing, or the repairing or adjusting of weights, measures, or weighing or measuring devices. Whenever the mayor and city commission shall deem it necessary, one or more deputy sealers of weights and measures may be appointed, and their salary fixed as above. All deputies appointed shall have the same powers, and may perform the same duties as the city sealer, when acting under his instructions and direction.

6288. Bond of city sealer. The city sealer of weights and measures shall forthwith, on his appointment, give a bond in the penal sum of $1000, with sureties to be approved by the appointing power, for the faithful performance of the duties of his office.

6289. City standards. Custody. The mayor and city commission of each city required to appoint a sealer under the provisions of this title shall procure at the expense of the city, and shall keep at all times, a set of weights and measures and other apparatus as complete and of such materials and construction as the said superintendent of weights and measures may direct. All such weights, measures, and other apparatus, having been tried and accurately proven by the state superintendent, shall be sealed and certified to by him as hereinbefore provided, and shall be then deposited with and preserved by the city sealer as public standards for each city.

6290. Powers and duties of city sealer. Where not otherwise provided by law, the city sealer shall have the same powers and shall perform the same duties within his city as are granted to and imposed upon the state superintendent of weights and measures by §§ 6283-6285.

6291. Id. Records. Report. The city sealer shall keep a complete record of all of his official acts, and shall make an annual report, duly sworn to, on the 30th day of November, to the state superintendent of weights and measures, on blanks furnished by the latter; and also, any special reports that the latter may request.

6292. Police powers of inspectors and sealers. The superintendent of weights and measures, his deputy and inspectors, and the city sealers and deputy sealers of weights and measures, are hereby made special policemen, and are authorized and empowered to arrest, without formal warrant, any violator of the statutes in relation to weights and measures, and to seize for use as evidence, without formal warrant, any false or unsealed weight, measure, or weighing or measuring device or package or amount of commodity found to be used, retained, or offered or exposed for sale or sold in violation of law.

6293. Unlawful interference. Penalty. Any person who shall hinder or obstruct in any way the superintendent of weights and measures, his deputy or inspectors, or any city sealer or deputy sealer of weights and measures, in the performance of his official duties, shall be guilty of a misdemeanor, and upon conviction thereof in any court of competent jurisdiction, shall be punished by a fine of not less than $20 or more than $200, or by imprisonment in the county jail for not more than three months, or by both such fine and imprisonment.

6294. Misrepresentation. Use of counterfeit seal. Penalty. Any person who shall impersonate in any way the superintendent of weights and measures, his deputy or inspectors, or any city sealer or deputy sealer of weights and measures, by the use of his seal or counterfeit of his seal, or otherwise, shall be guilty of a misdemeanor, and, upon conviction thereof in any court of competent jurisdiction, shall be punished by a fine of not less

than $100, and imprisonment not more than one year, or by both such fine and imprisonment.

6295. Unlawful to sell coal, etc., except by weight measure. Record. It shall be unlawful to sell or offer to sell any coal, coke, or charcoal in any other manner than by weight. It shall be unlawful for any person to deliver any coal, coke, or charcoal without each such delivery being accompanied by a delivery ticket and a duplicate thereof, on each of which shall be in ink or other indelible substance, distinctly expressed in pounds, the gross weight of the load, the tare weight of the delivery vehicle, and the quantity or quantities of coal, coke, or charcoal contained in the vehicle used in such deliveries, with the name of the purchaser thereof, and the name of the dealer from whom purchased. One of these tickets shall be surrendered to the state superintendent, his deputy or inspectors, or a city sealer or deputy sealer of weights and measures, upon his demand for his inspection, and this ticket or weight slip issued by him when he desires to retain the original shall be delivered to the said purchaser of said coal, coke, or charcoal, or his agent or representative, at the time of the delivery of the fuel; and the other tickets shall be retained by the seller of the fuel. When the buyer carries away the purchase, a delivery ticket showing the actual number of pounds delivered to him must be given to him at the time the sale is made.

6296. Measurement of food products in packages. Net contents to be marked. Proviso. Package defined. It shall be unlawful to keep for the purpose of sale, or sell, or offer or expose for sale, any food products in package form, unless the net quantity of the contents be plainly and conspicuously marked on the outside of the package, in terms of weight, measure, or numerical count; *provided, however,* that reasonable variations or tolerances shall be permitted, and that these reasonable variations or tolerations and also exemptions as to small packages shall be established by rules and regulations made by the dairy and food bureau; and *provided, further,* that this section shall not be construed to apply to those commodities in package form, the manner of the sale of which is specifically regulated by the provisions of other sections of this title. The word "package," as used in this section, shall be construed to include the package, carton, case, can, box, barrel, bottle, phial, or other receptacle put up by the manufacturer; or, when put up prior to the order of the commodity, by the vendor, which may be labeled, branded, or stenciled, or otherwise marked, or which may be suitable for labeling, branding, or stenciling, or marking otherwise, making one complete package of the commodity. The word "package" shall be construed to include both the wholesale and the retail package, with the exception of shipping cases when contents are properly marked.

6297. Dry goods. Net amount to be marked. Definition. It shall be unlawful to keep for the purpose of sale, offer or expose for sale, or sell any commodity composed in whole or in part of cotton, wool, linen, or silk, or any other textile material on a spool or similar holder, or in a container or band, or in a bolt or roll, or in a ball, coil, or skein, or in any similar manner, unless the net amount of the commodity in terms of weight or measure shall be definitely, plainly, and conspicuously marked on the principal label, if there be such a label; otherwise, on a wrapping, band, or tag attached thereto. The words "spool or similar holder, container, or band, bolt, or roll, or ball, coil, or skein," shall be construed to include the spool or similar holder, container or band, bolt or roll, or ball, coil or skein put up by the manufacturer; or when put up prior to the order of the commodity, by the vendor. It shall be held to include both the wholesale and the retail package.

6298. Sale of butter and oleomargarine. Sizes of packages. Net weight to show. It shall be unlawful for any person to sell, or offer to sell, any butter or renovated or process butter or oleomargarine in any other manner than by weight. It shall be unlawful for any person to put up, pack, or keep for the purpose of sale, offer or expose for sale, or sell any butter, or reno-

vated or process butter or oleomargarine in the form of prints, bricks, or rolls in any other than the following sizes, to-wit: One-quarter pound, one-half pound, one pound, one and one-half pounds, or multiples of one pound. Each print, brick, or roll shall bear a definite, plain and conspicuous statement of its true net weight, on the principal label, where there be such a label, otherwise on the outside wrapper thereof; such statement shall be in Gothic type, not less than twelve point. The prints, bricks, or rolls referred to in this section shall be construed to include those prints, bricks, or rolls put up by the manufacturer or producer; or when put up prior to the order of the commodity by the vendor.

6299. Bread. Labeled to show weight and name of manufacturer. All bread kept for the purpose of sale, offered or exposed for sale, or sold shall be sold by weight. To each loaf of bread shall be attached a label plainly showing its correct weight and the firm name of the manufacturer thereof, the size of the label and type to be used to be specified by the state superintendent of weights and measures. It shall be unlawful for any person to make or keep for the purpose of sale, offer or expose for sale, or sell any bread other than such as shall be in accordance with the provisions of this section.

6300. Measurement of liquid and other commodities. Vegetables and fruit. It shall be unlawful to sell, except for immediate consumption on the premises, liquid commodities in any other manner than by weight or liquid measure, or commodities not liquid in any other manner than by measure of length, by weight, or by numerical count; *provided, however,* that nothing in this section shall be construed to prevent the sale of vegetables, fruits, and produce in the standard barrel adopted by the United States government, or of berries and small fruit in boxes as provided in § 6301, usually sold by the head or bunch, in this manner. For the purposes of this section, the term "commodities not liquid" shall be construed to include goods, wares, and merchandise which have heretofore been sold by measure of length, by weight, by measure of capacity, or by numerical count, or which are susceptible of sale in any of these ways.

6301. Berries and small fruit. Measurement and sale. It shall be unlawful after the 1st day of August, 1915, to sell or offer to sell any berries or small fruits in any other manner than by weight, or in the containers described in this section. It shall be unlawful to procure or keep for the purpose of sale, offer or expose for sale, sell or give away any baskets or other open containers for berries or small fruits, holding one quart or less, or to procure or keep for the purpose of sale, offer or expose for sale, or sell berries or small fruits in baskets or other open containers, holding one quart or less of any other than the following capacities, when level full; one quart having a capacity of 67.2 cubic inches and containing not less than twenty-one ounces; one pint having a capacity of 33.6 cubic inches and containing not less than ten and five-tenths ounces, standard dry measure. It shall be unlawful to use berry cups, boxes, crates, or sacks a second time as receptacles for fruits or vegetables, or to use unclean or insanitary crates, boxes, or sacks. It shall be unlawful for any dealer or vendor to transfer berries or small fruits from one container to another, or from the containers in which said fruits or berries are packed by the producer.

6302. Sale by weight. Construction. Whenever any commodity is sold on a basis of weight, it shall be unlawful to employ any other weight in such sale than the net weight of the commodity; and all contracts concerning goods sold on a basis of weight shall be understood and construed accordingly. Whenever the weight of a commodity is mentioned in this title, it shall be understood and construed to mean the net weight of the commodity.

6303. Use of false weights and measures. Other violatoins. Penalty. Any person, who by himself, or by his servant or agent, or as the servant or

agent of another person, shall offer or expose for sale, sell, use in the buying or selling of any commodity or thing or for hire or award, or retain in his possession a false weight or measure, or weighing or measuring device, which has not been sealed by the state superintendent or his deputy or inspectors, or by sealer or deputy sealer of weights and measures, within one year, or shall dispose of any condemned weight or measure, or weighing or measuring device contrary to law, or remove any tag placed thereon by the state superintendent, or his deputy or inspectors, or by a sealer or deputy sealer of weights and measures; or who shall sell or offer or expose for sale less than the quantity he represents, or shall take or attempt to take more than the quantity he represents, when as the buyer he furnished the weight, measure, or weighing or measuring device by means of which the amount of commodity is determined; or who shall keep for the purpose of sale, offer or expose for sale, or sell any commodity in a manner contrary to law; or who shall violate any provisions of this title for which a specific penalty has not been provided; or who shall sell or offer for sale, or use or have in his possession for the purpose of selling or using, any device or instrument to be used to, or calculated to, falsify any weight or measure, shall be guilty of a misdemeanor and shall be punished by a fine of not less than $20 or more than $200 or by imprisonment for not more than three months, or by both such fine and imprisonment, upon the first conviction in any court of competent jurisdiction; and upon the second or subsequent conviction in any court of competent jurisdiction he shall be punished by a fine of not less than $50 or more than $500, or by imprisonment in the county jail for not more than one year, or by both such fine and imprisonment.

6304. Definition of terms. The word "person" as used in this title shall be construed to impart both the plural and singular, as the case demands, and shall include corporations, companies, societies, and associations.

The words "weights, measures, or weighing or measuring devices" as used in this title, shall be construed to include all weights, scales, beams, measures of every kind, instruments and mechanical devices for weighing or measuring, and any appliances and accessories connected with any or all such instruments.

The words "sell" or "sale" as used in this title shall be construed to include barter and exchange.

TITLE 116.

WILLS AND SUCCESSION.

CHAPTER 1.

EXECUTION AND REVOCATION OF WILLS.

6311. (2731.) Who may make a will. Married man limited. Every person over the age of eighteen years, of sound mind, may, by last will, dispose of all his estate, real and personal, and such estate not disposed of by will is succeeded to as provided in chap. 4 of this title, being chargeable in both cases with the payment of all the decedent's debts as provided by law; *provided,* that a married man shall not devise away from his wife more than two-thirds in value of his legal or equitable estates in real property without her consent in writing.

Cal. Civ. C., § 1270*.

Succession of wife, §§ 6406-6412.

Property subject to payment of debts, §§ 6383, 6405, 6408.

Property not subject to payment of debts, §§ 6409, 7644.

There shall be neither dower nor courtesy in this state, § 6412.

Decisions on wife's dower and statutory interest in husband's property, note to § 6406.

Eccentricities and idiosyncrasies, however gross, do not constitute insanity, and cannot incapacitate one otherwise sound from making a valid will.

In re Hansen's Will, 50 U. —; 167 P. 256.

Lay witnesses cannot pass their opinion as to testator's insanity on hearsay statements or upon matters occurring ten or twelve years before the testator's death.

Id.

6312. (2732.) Fraud, etc., invalidates. A will, or a part of a will, procured to be made by duress, menace, fraud, or undue influence, may be denied probate; and a revocation, procured by the same means, may be declared void.

Cal. Civ. C., § 1272.

When gifts to witnesses void, § 6322.

Undue influence to avoid a will must be such as to destroy the free agency of the testator at the time the will is made. It must be a present restraint operating on the mind of the testator at that time.

Miller v. Livingston, 31 U. 415; 88 P. 338.

Where the sole beneficiary in a will gave instructions for the will and directed its terms, and it was drawn at her request; held, that the will must be regarded as having been written by the beneficiary within the rule casting suspicion on a will drawn at the request and direction of the sole beneficiary, which may be sufficient to prevent the probate thereof unless the suspicion is removed.

Id.

In a contest to have a will declared invalid on the ground of undue influence and want of testamentary capacity, evidence of the contents of a former will may be material on such issues, and should be admitted.

In re Young's Estate, 33 U. 382; 94 P. 731.

It is proper to refuse a request that influence acquired by kindness and affection is not undue influence and to charge that undue influence is that degree of importunity which deprives the testator of his free agency so that the instrument executed is not his free and unconstrained act.

In re Miller's Estate, 36 U. 228; 102 P. 996.

Miller v. Livingston, 36 U. 228; 102 P. 996.

To constitute undue influence which can vitiate a will, the influence must be such that the testament is, in fact, the will of the person exercising the influence and not of the testator, and such undue influence may be established without showing any physical coercion or restraint.

Anderson v. Anderson, 43 U. 26; 134 P. 553.

The fact that the testator did not inform his wife, with whom he was living happily, that he had made a will, is not evidence of undue influence on the part of his brothers, where it did not appear that they had anything to do with the concealment, or even knew of it.

Id.

While undue influence is seldom subject to direct proof, and as a general rule must be established by inferences and circumstances, yet a finding of undue influence cannot rest on mere suspicion.

In re Hansen's Will, 50 U. —; 167 P. 256.

6313. (2733.) Married woman may make will as if single. A married woman may dispose of all her separate estate by will, without the consent of her husband, and may alter or revoke the will in like manner as if she were single. Her will must be executed and proved in like manner as other wills.

Cal. Civ. C., § 1273.

Married woman may devise her property as if she were unmarried, Con. art. 22, sec. 2, and note.

6314. (2734.) Who may take by will. A testamentary disposition may be made to any person capable by law of taking the property so disposed of, but corporations other than those formed for scientific, literary, religious, charitable, benevolent, or solely educational purposes cannot take under a will, unless expressly authorized by statute.

Cal. Civ. C., § 1275*.

Corporations not for pecuniary profit may take by devise, §§ 350x3, 894, 903.

Rule against perpetuities does not apply to grants, bequests, or devises to charitable uses. No uncertainty in this case as to who are the beneficiaries.

Staines v. Burton, 17 U. 331; 57 P. 1015.

6315. (2735.) Written will, how executed. Every will, other than a nuncupative will, must be in writing, and every will other than an olographic or a nuncupative will, must be executed and attested as follows:

1. It must be subscribed at the end thereof by the testator himself;

2. The subscription must be made in the presence of the attesting witnesses;

3. The testator must at the time of subscribing the same declare to the attesting witnesses that the instrument is his will; and,

4. There must be two attesting witnesses, each of whom must sign his name as a witness at the end of the will, at the testator's request, in his presence, and in the presence of the other.

Cal. Civ. C., § 1276*.

Nuncupative will, §§ 6326, 6328.

When gifts to witnesses void, §§ 6322, 6323.

Witnesses must add place of residence, § 6317.

Will invalid unless properly executed, § 7115.

Proof of will, §§ 7115, 7572.

6316. (2736.) Olographic will. Execution. Proof. An olographic will is one that is entirely written, dated, and signed by the hand of the testator himself. It is subject to no other form, and may be made in or out of this state, and need not be witnessed. Such wills may be proved in the same manner as other private writings.

Cal. Civ. C., § 1277*.

A letter written by decedent to petitioner, stating that he would make petitioner his sole heir, whether they were married or not, and if he died before they were married would make her his legal heir, "but I hope I will enjoy your company and association before that. Now this is only talk. I do not expect to die, but I am just telling you what I meant"; held not admissible to probate as a will.

In re Jensen's Estate, 37 U. 428; 108 P. 927.

6317. (2737.) Witness to add residence. A witness to a written will

must write, with his name, his place of residence. But a violation of this section does not affect the validity of the will.
Cal. Civ. C., § 1278*.

6318. (2738.) Mutual will valid. Revocation. A conjoint or mutual will is valid, but it may be revoked by any of the testators in like manner with any other will.
Cal. Civ. C., § 1279.

6319. (2739.) Subsequent incompetency of witnesses. If the subscribing witnesses to a will are competent at the time of attesting its execution, their subsequent incompetency from whatever cause it may arise does not prevent the probate and the allowance of the will if it is otherwise satisfactorily proved.
Cal. Civ. C., § 1280.

6320. (2740.) Will may be deposited with county clerk. Wills sealed up and indorsed may be deposited with the county clerk, who shall file and safely preserve the same until the death of the testators, unless such testators shall themselves sooner demand the same.

6321. (2741.) Conditional will. When probate denied. A will, the validity of which is made by its own terms conditional, may be denied probate, according to the event, with reference to the condition.
Cal. Civ. C., § 1281. Conditional wills, §§ 6373, 6378.

6322. (2742.) When gift to witnesses void. All beneficial devises, legacies, and gifts whatever, made or given in any will to a subscribing witness thereto, are void, unless there are two other competent subscribing witnesses to the same; but a mere charge on the estate of the testator for the payment of debts does not exempt his creditors from being competent witnesses to his will.
Cal. Civ. C., § 1282. Will dictated by beneficiary, note to § 7499.

6323. (2743.) Id. When witness is legal heir. If a witness to whom any beneficial devise, legacy, or gift, void by the preceding section, is made, would have been entitled to any share of the estate of the testator, in case the will should not be established, he succeeds to so much of the share as would be distributed to him, not exceeding the devise or bequest made to him in the will, and he may recover the same of the other devisees or legatees named in the will, in proportion to and out of the parts devised or bequeathed to them.
Cal. Civ. C., § 1283.

6324. (2744.) Foreign will valid, if valid where executed. A will of real or personal property, or both, or a revocation thereof, made out of this state by a person not having his domicile in this state, is as valid when executed according to the law of the place in which the same was made, or in which the testator was at the time domiciled, as if it were made in this state and according to the provisions of this chapter.
N. Dak. (1895) § 3652. Mont. Civ. C., § 1731. Alien takes by succession as well as citizen, § 6427.
Validity and interpretation governed by what law, § 6402. Proof of foreign will, § 7586.

6325. (2745.) Republication by codicil. The execution of a codicil referring to a previous will has the effect to republish the will as modified by the codicil.
Cal. Civ. C., § 1287. Will includes codicils, § 5848.

6326. (2746.) Nuncupative will. Definition. A nuncupative will is not required to be in writing nor to be declared or attested with any formalities.
Cal. Civ. C., § 1288.

6327. (2747.) Id. Requisites to validity. To make a nuncupative will valid and to entitle it to be admitted to probate, the following requisites must be observed:

1. The estate bequeathed must not exceed in value the sum of $1000;

2. It must be proved by two witnesses who were present at the making thereof, one of whom was asked by the testator at the time to bear witness that such was his will, or to that effect;

3. The decedent must have been at that time in expectation of immedi-

ate death from an injury or casualty happening or occuring within twenty-four hours previous to the making of such nuncupative will.
Cal. Civ. C., § 1289*.

6328. (2748.) Id. Proof. No proof must be received of any nuncupative will unless it is offered within six months after speaking the testamentary words, nor unless the words or the substance thereof were reduced to writing within thirty days after they were spoken.
Cal. Civ. C., § 1290. Admission to probate, § 7570.

6329. (2749.) Will, how revoked. Except in the cases in this chapter mentioned, no written will, nor any part thereof, can be revoked or altered otherwise than:

1. By a written will, or other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which a will should be executed by such testator; or,

2. By being burnt, torn, canceled, obliterated, or destroyed, with the intent and for the purpose of revoking the same by the testator himself or by some person in his presence and by his direction.
Cal. Civ. C., § 1292.

6330. (2750.) Id. Cancellation, how proved. When a will is canceled or destroyed by any other person than the testator, the direction of the testator and the fact of such injury or destruction must be proved by two witnesses.
Cal. Civ. C., § 1293.

6331. (2751.) Id. Revocation of duplicate will. The revocation of a will executed in duplicate may be made by revoking one of the duplicates.
Cal. Civ. C., § 1295.

6332. (2752.) Id. Effect of subsequent will. A prior will is not revoked by a subsequent will unless the latter contains an express revocation or provision wholly inconsistent with the terms of the former will; but, in other cases, the prior will remains effectual so far as consistent with the provisions of the subsequent will.
Cal Civ. C., § 1296.

6333. (2753.) Id. Revocation of second will does not revive first. If, after making a will, the testator duly makes and executes a second will, the destruction, cancellation, or revocation of such second will does not revive the first will unless it appears by the terms of such revocation that it was the intention to revive and give effect to the first will, or unless after such destruction, cancellation, or revocation, the first will is duly republished.
Cal. Civ. C., § 1297.

6334. (2754.) Id. Effect upon will of subsequent marriage. 1. If, after having made a will, the testator marries, and has issue of such marriage, born either in lifetime or after his death, and the wife or issue survive him, the will is revoked, unless provision is made for such issue by some settlement, or unless such issue are provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; and no other evidence to rebut the presumption of such revocation can be received.

2. If, after making a will, the testator marries, and the wife survives the testator, the will is revoked, unless provision has been made for her either by marriage contract, or by some written settlement showing on its face the testator's intention to substitute such contract or settlement for a provision in her favor in his will, or unless she is provided for in the will, or in any such way mentioned therein as to show an intention not to make such provision; and no other evidence to rebut the presumption of revocation must be received. Am'd '05, p. 15.
Cal. Civ. C., § 1299*. Succession when not limited by marriage contract, § 6408.

6335. (2755.) Id. Contract of sale not a revocation. An agreement made by a testator for the sale or transfer of property disposed of by a will previously made does not revoke such disposal; but the property passes by the will, subject to the same remedies on the testator's agreement, for a specific

performance or otherwise, against the devisees or legatees, as might be had against the testator's successors, if the same had passed by succession.
Cal. Civ. C., § 1301.

6336. (2756.) Id. Incumbrance not a revocation. A charge or incumbrance upon any estate for the purpose of securing the payment of money or the performance of any covenant or agreement is not a revocation of any will relating to the same estate which was previously executed; but the devises and the legacies therein contained must pass, subject to such charge or incumbrance.
Cal. Civ. C., § 1302.

6337. (2757.) Id. Partial disposal not a revocation. A conveyance, settlement, or other act of a testator, by which his interest in a thing previously disposed of by his will is altered but not wholly divested, is not a revocation; but the will passes the property which would otherwise devolve by succession.
Cal. Civ. C., § 1303.

6338. (2758.) Id. When conveyance is a revocation. If the instrument by which an alteration is made in the testator's interest in a thing previously disposed of by his will expresses his intent that it shall be a revocation, or if it contains provisions wholly inconsistent with the terms and nature of the testamentary disposition, it operates as a revocation thereof, unless such inconsistent provision depend on a condition or contingency by reason of which they do not take effect.
Cal. Civ. C., § 1304.

6339. (2759.) Id. Revocation revokes codicils. The revocation of a will revokes all its codicils.
Cal. Civ. C., 1305.

6340. (2760.) After-born child not provided for to succeed. Whenever a testator has a child born after the making of his will, either in his lifetime or after his death, and dies leaving such child unprovided for by any settlement, and neither provided for nor in any way mentioned in his will, the child succeeds to the same portion of the testator's real and personal property that he would have succeeded to if the testator had died intestate.
Cal. Civ. C., § 1306.
Posthumous child taking as one of a class, § 6369.
Posthumous child considered living at death of parent, § 6426.

6341. (2701.) Children unprovided for to succeed, when. When any testator omits to provide in his will for any of his children or for the issue of any deceased child, unless it appears that such omission was intentional, such child or the issue of such child must have the same share in the estate of the testator as if he had died intestate, and succeeds thereto as provided in the preceding section.
Cal Civ. C., § 1307.
Where a testator failed to provide in his will for one of his children, and the statute presumed that the omission was not intentional, such presumption may be rebutted by extrinsic evidence, whether of declarations of the testator or collateral facts.
Coulam v. Doull, 4 U. 267; 9 P. 568; affirmed 133 U. S. 216.
Atwood Estate, 14 U. 1; 45 P. 1036.
This section does not apply to an illegitimate child of the testator's daughter, as there is no common law obligation to provide for an illegitimate grandchild.
Mansfield v. Neff et al., 43 U. 258; 134 P. 1160.

6342. (2762.) Share of child unprovided for, how assigned. When any share of the estate of a testator is assigned to a child born after the making of a will, or to a child or the issue of a child omitted in the will as hereinbefore mentioned, the same must first be taken from the estate not disposed of by the will, if any; if that is not sufficient, so much as may be necessary must be taken from all the devisees or legatees, in proportion to the value they may respectively receive under the will, unless the obvious intention of the testator in relation to some specific devise or bequest or other provision in the will would thereby be defeated; in such case such specific devise, legacy, or provision may be exempted from such apportionment, and a different apportionment consistent with the intention of the testator may be adopted.
Cal. Civ. C., § 1308.
That a will made no provision for a granddaughter was not a ground for contest, but a matter which could be presented upon final distribution as provided for in this section.
In re Frandsen's Will, 50 U. —; 167 P. 363.

6343. (2763.) Advancements under three preceding sections. If such children or their descendants so unprovided for had an equal proportion of the testator's estate bestowed on them in the testator's lifetime by way of advancement, they take nothing in virtue of the three preceding sections.

Cal. Civ. C., § 1309.

Effect of advancement, §§ 6381, 6421-6425, 7766.

6344. (2764.) When devisee dies before testator, descendants take. When any estate is devised to any child or other relation of the testator, and the devisee dies before the testator, leaving lineal descendants, such descendants take the estate so given by the will in the same manner as the devisee would have done had he survived the testator.

Cal. Civ. C., § 1310.

When death of devisee causes failure of devise, §§ 6373, 6374.

6345. (2765.) Devise conveys all testator's estate. Exception. Every devise of land in any will conveys all the real estate of the devisor therein which he could lawfully devise, unless it clearly appears by the will that he intended to convey a less estate.

Cal. Civ. C., § 1311.

6346. (2766.) After-acquired property passes by will. Any estate, right, or interest in lands acquired by the testator after the making of his will passes thereby and in like manner as if title thereto was vested in him at the time of making the will, unless the contrary manifestly appears by the will to have been the intention of the testator. Every will made in express terms, devising, or in any other terms denoting the intent of the testator to devise, all the real estate of such testator, passes all the real estate which such testator was entitled to devise at the time of his decease.

Cal. Civ. C., § 1312.

Devise or bequest of all property, § 6361.

CHAPTER 2.

INTERPRETATION OF WILLS.

6347. (2767.) Testator's intention governs. A will is to be construed according to the intention of the testator. Where his intention cannot have effect to its full extent, it must have effect as far as possible.

Cal. Civ. C., § 1317.

Will to be considered in its entirety.

Spencer v. Van Cott, 2 U. 337.

Where the intention of the testator in respect to a matter is clearly expressed, any subsequent expression in order to limit it must be clear and intelligible.

In re Campbell, 27 U. 361; 75 P. 851.

In re Bovier Est., 51 U. —; 172 P. —.

This section controls all other provisions in which rules of construction are given, in that no rule is to be given effect except to ascertain the real intention of the testator as expressed by him.

In re Poppleton's Estate, 34 U. 285; 97 P. 138.

A bequest in trust "of all the rest, residue, and remainder of my property of every kind and nature whatsoever" for my "nephews and nieces" as the trustee may determine, is valid.

In re Dewey's Estate, 45 U. 98; 143 P. 124.

Andrews v. Tuttle, 45 U. 98; 143 P. 124.

A will, providing for equal distribution of the estate between a son and daughter, except so far as sums had been or should be set off against the interest of either, justified parol evidence that testatrix had borrowed and advanced a sum to the son under an agreement that he should repay it, or, if he failed to do so, that it would be regarded as a part of his interest in the estate.

In re Pickard's Estate, 42 U. 105; 129 P. 353.

6348. (2768.) Intention to be ascertained from will. In case of uncertainty arising upon the face of a will as to the application of any of its provisions, the testator's intention is to be ascertained from the words of the will, taking in view the circumstances under which it was made exclusive of his oral declarations.

Cal. Civ. C., § 1318.

Imperfect descriptions, etc., § 6370.

6349. (2769.) Interpretation governed by following rules. In interpreting a will subject to the law of this state, the rules prescribed by the following sections of this chapter are to be observed unless an intention to the contrary clearly appears.

Cal. Civ. C., § 1319.

6350. (2770.) Several wills to be construed together. Several testamentary instruments executed by the same testator are to be taken and construed together as one instrument.

Cal. Civ. C., § 1320.

6351. (2771.) Parts of will to be harmonized. All the parts of a will are to be construed in relation to each other and if possible so as to form one consistent whole; but where several parts are absolutely irreconcilable, the latter must prevail.

Cal. Civ. C., § 1321.

6352. (2772.) Distinct devise not affected by inference. A clear and distinct devise or bequest cannot be affected by any reasons assigned therefor, or by any other words not equally clear and distinct, or by inference or argument from other parts of the will, or by an inaccurate recital of or reference to its contents in another part of the will.

Cal. Civ. C., § 1322.

6353. (2773.) When ambiguous or doubtful. Where the meaning of any part of a will is ambiguous or doubtful, it may be explained by any reference thereto or recital thereof in another part of the will.

Cal. Civ. C., § 1323.

Where will directed executors to make over certain property to the "presiding bishop of the Church of Jesus Christ of Latter-day Saints, for the benefit of the members of said church," the trustee was clearly designated and the beneficiaries were sufficiently described.

Staines v. Burton, 17 U. 331; 53 P. 1015.

6354. (2774.) Words taken in ordinary sense. The words of a will are to be taken in their ordinary and grammatical sense unless a clear intention to use them in another sense can be collected and that other can be ascertained.

Cal. Civ. C., § 1324.

6355. (2775.) All provisions given effect, if possible. The words of a will are to receive an interpretation which will give to every expression some effect rather than one which will render any of the expressions inoperative.

Cal. Civ. C., § 1325.

6356. (2776.) Intestacy to be avoided. Of two modes of interpreting a will, that is to be preferred which will prevent a total intestacy.

Cal. Civ. C., § 1326.

6357. (2777.) Technical words. Construction. Technical words in a will are to be taken in their technical sense unless the context clearly indicates a contrary intention.

Cal. Civ. C., § 1327.

This section is merely declaratory of the rule prevailing at common law, and is a rule of construction only.

In re Poppleton's Estate, 34 U. 285; 97 P. 138.

6358. (2778.) Id. Unnecessary. Technical words are not necessary to give effect to any species of disposition by will.

Cal. Civ. C., § 1328.

6359. (2779.) Certain words not necessary to pass fee. The term "heirs," or other words of inheritance, are not requisite to devise a fee, and a devise of real property passes all the estate of the testator, unless otherwise limited.

Cal. Civ. C., § 1329.

Word "heir" not necessary to transfer a fee, § 4870.

6360. (2780.) Property embraced in power passes by will. Real or personal property embraced in a power to devise passes by a will purporting to devise all the real or personal property of the testator.

Cal. Civ. C., § 1330.

Devise passing after-acquired property, etc., § 6346.

6361. (2781.) When all testator's property passes. A devise or bequest of all the testator's real or personal property in express terms, or in any other terms denoting his intent to dispose of all his real and personal property, passes all the real or personal property which he was entitled to dispose of by will at the time of his death.

Cal. Civ. C., § 1331.

After-acquired property passes by will, § 6346.

6362. (2782.) Residuary clause. Real property. A devise of the residue of the testator's real property passes all the real property which he was entitled to devise at the time of his death not otherwise effectually devised by his will.

Cal. Civ. C., § 1332.

6363. (2783.) Id. Personal property. A bequest of the residue of the testator's personal property passes all the personal property which he was

entitled to bequeath at the time of his death not otherwise effectually bequeathed by his will.
Cal. Civ. C., § 1333.

6364. (2784.) Testamentary disposition to "heirs," "relations," etc., how construed. A testamentary disposition to "heirs," "relations," "nearest relations," "representatives," "legal representatives," or "personal representatives," or "family," "issue," "descendants," "nearest" or "next of kin," of any person, without other words of qualification, and when the terms are used as words of donation, and not of limitation, vests the property in those who would be entitled to succeed to the property of such person, according to the provisions on succession in this title.
Cal. Civ. C., § 1334. Word "heir" not necessary to devise a fee, § 6359.

6365. (2785.) Id. Are words of donation, not limitation. The terms mentioned in the next preceding section are used as words of donation, and not of limitation, when the property is given to the person so designated directly, and not as a qualification of an estate given to the ancestor of such person.
Cal. Civ. C., § 1335.

6366. (2786.) Words referring to death or survivorship. Words in a will referring to death or survivorship simply relate to the time of the testator's death, unless possession is actually postponed, when they must be referred to the time of possession.
Cal. Civ. C., § 1336.

6367. (2787.) Devise to a class, includes whom. A testamentary disposition to a class includes every person answering the description at the testator's death; but when the possession is postponed to a further period, it includes also all persons coming within the description before the time to which possession is postponed.
Cal. Civ. C., § 1337.

6368. (2788.) When realty deemed personalty. When a will directs the conversion of real property into money, such property and all its proceeds must be deemed personal property from the time of the testator's death.
Cal. Civ. C., § 1338.

6369. (2789.) Unborn child. A child conceived before, but not born until after a testator's death, or any other period when a disposition to a class vests in right or in possession, takes, if answering to the description of the class.
Cal. Civ. C., § 1339. Succession of posthumous child, § 6340.

6370. (2790.) Correction of imperfect description. When applying a will, if it is found that there is an imperfect description, or that no person or property exactly answers the description, mistakes and omissions must be corrected, if the error appears from the context of the will or from extrinsic evidence; but evidence of the declarations of the testator as to his intentions cannot be received.
Cal. Civ. C., § 1340. Intention ascertained from words of will, § 6348.

6371. (2791.) When devises and bequests vest. Testamentary dispositions, including devises and bequests to a person on attaining majority, are presumed to vest at the testator's death.
Cal. Civ. C., § 1341. Legacies and annuities due, when, §§ 6394-6396.

6372. (2792.) Id. When divested. A testamentary disposition, when vested, cannot be divested unless upon the occurrence of the precise contingency prescribed by the testator for that purpose.
Cal. Civ. C., § 1342.

6373. (2793.) Death of devisee before testator. If a devisee or legatee dies during the lifetime of the testator, the testamentary disposition to him fails, unless an intention appears to substitute some other in his place, except as provided in § 6344.
Cal. Civ. C., § 1343.

6374. (2794.) Interest in remainder not affected. The death of a devisee or legatee of a limited interest before the testator's death does not defeat the interest of persons in remainder, who survive the testator.
Cal. Civ. C., § 1344.

6375. (2795.) Conditional disposition. A conditional disposition is one which depends upon the occurrence of some uncertain event, by which it is either to take effect or be defeated.
Cal. Civ. C., § 1345. Conditional will denied probate, when, § 6321.

6376. (2796.) Condition precedent. A condition precedent in a will is one which is required to be fulfilled before a particular disposition takes effect.
Cal Civ. C., § 1346.

6377. (2797.) Id. When property vests. Where a testamentary disposition is made upon a condition precedent, nothing vests until the condition is fulfilled, except where such fulfillment is impossible, in which case the disposition vests, unless the condition was the sole motive thereof, and the impossibility was unknown to the testator, or arose from an unavoidable event subsequent to the execution of the will.
Cal. Civ. C., § 1347.

6378. (2798.) Id. When deemed performed. A condition precedent in a will is to be deemed performed when the testator's intention has been substantially though not literally complied with.
Cal. Civ. C., § 1348.

6379. (2799.) Condition subsequent. A condition subsequent is where an estate or interest is so given as to vest immediately, subject only to be divested by some subsequent act or event.
Cal. Civ. C., § 1349.

6380. (2800.) Devise to several. Owners in common. A devise or legacy given to more than one person vests in them as owners in common.
Cal. Civ. C., § 1350. Similar section, § 4873.

6381. (2801.) Advancements, when ademptions. Advancements or gifts are not to be taken as ademptions of general legacies, unless such intention is expressed by the testator in writing.
Cal. Civ. C., § 1351.
Advancements, §§ 6343, 6421-6425, 7766.
Where the testatrix gave the residue of her estate to her son and daughter equally, except so far as sums had been or should be set off against the interest which either should have, it was immaterial whether a sum was advanced to the son as a gift or to be repaid, since in either case an amount equal thereto should be first given to the daughter before an equal division, in view of the fact that the testatrix had the right to give the daughter more than she gave the son.
In re Pickard's Estate, 42 U. 105; 129 P. 353.

CHAPTER 3.

GENERAL PROVISIONS.

6382. (2802.) Legacies classified. Legacies are distinguished and designated according to their nature, as follows:

1. A legacy of a particular thing, specified and distinguished from all others of the same kind belonging to the testator, is specific; if such legacy fails, resort cannot be had to the other property of the testator;

2. A legacy is demonstrative when the particular fund or personal property is pointed out from which it is to be taken or paid; if such fund or property fails, in whole or in part, resort may be had to the general assets, as in case of a general legacy;

3. An annuity is a bequest of certain specified sums periodically; if the fund or property out of which they are payable fails, resort may be had to the general assets, as in case of a general legacy;

4. A residuary legacy embraces only that which remains after all the bequests of the will are discharged;

5. All other legacies are general legacies.

Cal. Civ. C., § 1357.
Legacies payable in one year, §§ 6395, 6396.
Annuities payable at once, § 6395.
A clause in a will stating that "it is my further desire that out of the proceeds of said estate, leaving the same to the best judgment

and discretion of said executors hereinafter named, to pay" certain sums per month, gave to the administrator a reasonable discretion to fix the amount at what he deemed sufficient, to be paid out of any part of said estate.

Allen v. Barnes, 5 U. 100; 12 P. 912.

Bequests of sums of money to wife and sister for their natural lives, to be paid by executors monthly, beginning at date of decease, constituted annuities commencing at time of testator's death.

In re Sears estate, 18 U. 193; 55 P. 83.

A bequest of $250 to nurse, to be paid as soon as executors had sufficient funds, constituted legacy, which was not due until one year after testator's death.

Id.

The word "legacy" means the money or personal property bequeathed by will. A specific legacy is something distinguished from the rest of the testator's estate, and it is sufficient if it can be specified and distinguished from the rest of the testator's estate at the time of his decease.

In re Campbell, 27 U. 361; 75 P. 851.

6383. (2803.) Property chargeable with payment of debts. When a person dies intestate, all his property, real and personal, without any distinction between them, is chargeable with the payment of his debts, except as otherwise provided by law.

Cal. Civ. C., § 1358.

Property not subject to payment of debts, §§ 6409, 7644.

Property subject to payment of debts, §§ 6311, 6405, 6408.

6384. (2804.) Id. Order in which resorted to. The property of a testator, except as otherwise provided by law, must be resorted to for the payment of debts and expenses in the following order:

1. The property which is expressly appropriated by the will for the payment of the same;
2. Property not disposed of by the will;
3. Property which is devised or bequeathed to a residuary legatee;
4. Property which is not specifically devised or bequeathed; and,
5. All other property ratably.

Before any debts are paid, the expenses of the administration and the allowance to the family must be paid or provided for.

Cal. Civ. C., § 1359*.

Not changed by land registration act, § 4980.

6385. (2805.) Contribution among devisees and legatees. When an estate given by will has been sold for the payment of debts or expenses, all the devisees and legatees must contribute according to their respective interests to the devisee or legatee whose devise or legacy has been taken therefor, and the court, when distribution is made, must by decree for that purpose settle the amount of the several liabilities, and decree the amount each person shall contribute, and reserve the same from their distributive shares, respectively, for the purpose of paying each contribution.

Cal. C., Civ. P., § 1564

6386. (2806.) Bequest of debt due from executor. Effect. The discharge or bequest in a will of any debt or demand of the testator against the executor named, or any other person, is not valid against the creditors of the decedent, but is a specific bequest of the debt or demand. It must be included in the inventory, and, if necessary, applied in the payment of the debts. If not necessary for that purpose, it must be paid in the same manner and proportion as other specific legacies.

Cal. C. Civ. P., § 1448.

6387. (2807.) Property available for payment of legacies. Order. The property of a testator, except as otherwise provided by law, must be resorted to for the payment of legacies in the following order:

1. The property which is expressly appropriated by the will for the payment of the legacies;
2. Property not disposed of by the will;
3. Property which is devised or bequeathed to a residuary legatee;
4. Property which is not specifically devised or bequeathed.

Cal. Civ. C., § 1360.

6388. (2808.) Id. Legacies to kindred. Legacies to husband, widow, or kindred of any class are chargeable only after legacies to persons not related to the testator.

Cal. Civ. C., § 1361.

6389. (2809.) Abatement by classes. Abatement takes place in any class only as between legacies of that class, unless a different intention is expressed in the will.

Cal. Civ. C., § 1361.

6390. (2810.) Sale of property bequeathed. In a specific devise or legacy, the title passes by the will, but possession can only be obtained from the personal representative; and he may be authorized by the court to sell the property devised and bequeathed, in the cases herein provided.

Cal. Civ. C., § 1363.

6391. (2811.) Heir's conveyance good notwithstanding devise, when. The rights of a purchaser or incumbrancer of real property, in good faith and for value, derived from any person claiming the same by succession, are not impaired by any devise made by the decedent from whom succession is claimed, unless the instrument containing such devise is duly proved as a will, and recorded in the office of the clerk of the district court having jurisdiction thereof, or unless written notice of such devise is filed with the recorder of the county where the real property is situated, within four years after the devisor's death.

Cal. Civ. C., § 1364*. Purchasers in good faith, §§ 4875, 4901.

6392. (2812.) Duty of legatees for life. Where specific legacies are for life only, the first legatee must sign and deliver to the second legatee, or, if there is none, to the personal representative, an inventory of the property, expressing that the same is in his custody for life only, and that, on his decease, it is to be delivered and to remain to the use and for the benefit of the second legatee, or to the personal representative, as the case may be.

Cal. Civ. C., § 1365. Termination of life estate, § 7312.

6393. (2813.) Accrual of interest or income. In case of a bequest of the interest or income of a certain sum or fund, the income accrues from the testator's death.

Cal. Civ. C., § 1366.

6394. (2814.) Satisfaction of legacy before death. A legacy or gift in contemplation, fear, or peril of death may be satisfied before death.

Cal. Civ. C., § 1367.

6395. (2815.) Legacies and annuities, when due. Legacies are due and deliverable at the expiration of one year after the testator's decease. Annuities commence at the testator's decease.

Cal. Civ. C., § 1368. Legacies and annuities distinguished, note to § 6382.
Testamentary dispositions to persons on attaining majority vest, when, § 6571.

6396. (2816.) Interest on legacies. Legacies bear interest from the time when they are due and payable, except that legacies for maintenance, or to the testator's widow, bear interest from the testator's decease.

Cal. Civ. C., § 1369.

6397. (2817.) Intent governs four preceding sections. The four preceding sections are in all cases to be controlled by a testator's express intention.

Cal. Civ. C., § 1370.

6398. (2818.) Person intended made executor, though not named. Where it appears, by the terms of a will, that it was the intention of the testator to commit the execution thereof and the administration of his estate to any person as executor, such person, although not named executor, is entitled to letters testamentary in like manner as if he had been named executor.

Cal. Civ. C., 1371. Person named as executor appointed, § 7578.

6399. (2819.) Executor cannot appoint executor. An authority to an executor to appoint an executor is void.

Cal. Civ. C., § 1372. Similar section, § 7582.

6400. (2820.) Executor must qualify. No person has any power as an executor until he qualifies, except that, before letters have been issued, he may pay funeral charges and take necessary measures for the preservation of the estate.

Cal. Civ. C., § 1373. Payment of funeral expenses, § 7666.

6401. (2821.) Wills made prior to May 31, 1884, not affected. The provisions of this title do not impair the validity of the execution of any will made prior to the 31st day of May, 1884, nor affect the construction of any such will.

Cal. Civ. C., § 1375*.

6402. (2822.) What law governs construction of wills. Except as otherwise provided, the validity and interpretation of wills are governed, when relating to real property within this state, by the law of this state; when relating to personal property, by the law of the testator's domicile.

Mont. Civ. C., § 1838.
Validity of foreign wills, § 6324.
Proof of foreign will, § 7586.
Where ancillary administration is had in Utah, the court may construe the will affecting real property and devisees in Utah.
In re Campbell Estate, 51 U. —; 172 P. —.

6403. (2823.) Person killing another not to inherit from such other. No person who has been finally convicted of feloniously causing the death of another shall take or receive any property or benefit by succession, will, or otherwise, directly, or indirectly, by reason of the death of such person; but all property of the deceased and all rights of the defendant upon his death shall vest and be determined the same as if the person convicted was dead.

N. Dak. § 3682.

CHAPTER 4.

SUCCESSION.

6404. (2824.) Defined. Succession is the coming in of another to take the property of one who dies without disposing of it by will.

Cal. Civ. C., § 1383.

6405. (2825.) Property passes to heirs. The property, both real and personal, of one who dies without disposing of it by will, passes to the heirs of the intestate, subject to the control of the court, and to the possession of any administrator appointed by the court for the purpose of administration.

Cal. Civ. C., § 1384.
Payment of debts, §§ 6383, 6408.
Under provisions of this section, upon death of an intestate, all his real and personal property passes to his heirs, subject to administration, the payment of debts against the estate and rights of widow and minor children therein.
Snyder v. Murdock, 20 U. 407; 59 P. 88.

6406. (2826.) Wife's interest in husband's real porperty. One-third in value of all the legal or equitable estates in real property possessed by the husband at any time during the marriage, and to which the wife had made no relinquishment of her rights, shall be set apart as her property in fee simple if she survive him; *provided,* that the wife shall not be entitled to any interest under the provisions of this section in any such estate of which the husband has made a conveyance when the wife, at the time of the conveyance, is not or never has been a resident of the territory or state of Utah. Property distributed under the provisions of this section shall be free from all debts of the decedent, except those secured by mechanics' or laborers' liens for work or labor done or material furnished exclusively for the improvement of the same, and except those created for the purchase thereof, and for taxes levied thereon. The value of such part of the homestead as may be set aside to the widow shall be deducted from the distributive share provided for her in this section. In cases wherein only the heirs, devisees, and legatees of the decedent are interested, the property secured to the widow by this section may be set off by the court in due process of administration.

Iowa, McClain's An. C. (1888) § 3644*.
Limitation on devise by married man, § 6311.
Neither dower nor courtesy in this state, § 6412.
Widow's statutory interest not additional, § 6408, sub. 1.
Relinquishment of insane wife's interest, § 7819.

DOWER RIGHT AND WHO ENTITLED:

By virtue of the organic act, the common law respecting dower was in force during all the time that Utah remained a territory (from September 9, 1850, to January 4, 1896), except when abolished by territorial statute (from February, 1872, to March 3, 1887); being restored by congress on said last named date. By Virtue of Con. art. 24, sec. 2, it remained in force from the admission of the state (January 4, 1896), to January 1, 1898, when it was modified by §§ 2826, 2832, R. S. 1898.
Hilton v. Thatcher, 31 U. 360; 88 P. 20.
Hilton v. Stewart, 31 U. 255; 87 P. 900.
Norton v. Tufts, 19 U. 470; 57 P. 409.

The dower right of a widow, whose husband died after January 1, 1898, in land which he conveyed without her consent in 1888, is not abrogated by § 6412, providing that there shall be no courtesy nor dower in the state, in view of § 6406, giving the widow one-third of all the real property possessed by the husband during marriage to which she made no relinquishment of her rights.
Hilton v. Thatcher, 31 U. 360; 88 P. 20.
Hilton v. Stewart, 31 U. 355; 87 P. 900.

A plural wife acquires no dower right in her husband's property, and has no rights of inheritance.
Raleigh v. Wells, 29 U. 217; 81 P. 908.

A sealing ceremony in accordance with the usages of the Mormon church constituted the parties husband and wife, so as to entitle the woman to dower; though the ceremony was performed in contemplation of her immediate decease and solely for her celestial advantage. There was no cohabitation, a church divorce was granted on her recovery, and she soon married again, living with her second husband nearly thirty years and bearing him ten children.

Hilton v. Roylance, 25 U. 129; 69 P. 660.
Stewart v. Hilton, 25 U. 160; 69 P. 1134.

In an action for dower, the burden is upon the wife to establish a valid marriage, where validity of the marriage is put in issue.

Hilton v. Snyder, 37 U. 384; 108 P. 698.

In a wife's action to establish her dower right in property which her husband sold, judgments in similar actions against other grantees and in an action against the administrator of the estate for a wife's portion, are inadmissible to establish the marriage, and that she was his wife at the time of his death and of the conveyances.

Id.

There is no dower in unpatented mining claims.

Black v. Elkhorn Mining Co., 163 U. S. 445.

ITS LIABILITY TO CLAIMS, TAX, ETC.:

The wife's dower right in her husband's property is subject to a purchase money claim.

Wherritt v. Dennis, 48 U. 309; 159 P. 534.

A wife's interest in her husband's property other than homestead is subject to mechanic's lien claim.

Langton Lime & C. Co. v. Perry, 48 U. 112; 159 P. 49.
Langton v. Smith, 48 U. 112; 159 P. 49.

The property herein granted to the widow is not received by her under the succession statutes, and is not subject to inheritance tax where she takes by right of this section.

In re Bullen's Estate, 47 U. 961; 151 P. 533.

But where she takes under her husband's will, even though the amount is compromised, it is subject to inheritance tax.

In re Osgood's Estate, 51 U. —; 172 P. —.

Where a wife owned a contingent interest under this section and joined with her husband in giving a warranty deed, her warranty is personal to grantee and he only may sue on it.

H. T. & C. Co. v. White House, 47 U. 323; 154 P. 950.

ITS PROPORTION OR VALUE:

Where the estate is solvent and out of debt, the value of such part of the homestead as may be set aside to the widow should be deducted from her distributive share; she cannot have both unless such design on the part of the testator clearly appears from the will.

In re Little's Estate, 22 U. 204; 61 P. 899.

Under § 2741, C. L. 1888, the widow is not put to her election, but takes one-third of the real property of the intestate in fee and one-third of the personal property, as well as a dower interest of the estate for life in one-third of all the intestate's realty.

Knudsen v. Hannberg, 8 U. 203; 30 P. 749.

Sec. 676 of the Compiled Laws of 1876 gives the widow of an intestate a life interest in the homestead, with remainder over to the children of the deceased.

Dooly v. Stringham, 4 U. 107; 7 P. 405.

A widow cannot complain of a conveyance of land made by her husband without her knowledge upon the eve of marriage, and in contemplation of it, where he held the land as a mere trustee for the grantees, his sons.

Wilson v. Wilson, 31 U. 169; 89 P. 643.

Under this section the widow is not entitled to have the value of her interest set apart; her interest being in the nature of an incumbrance on each parcel.

In re Park's Estate, 31 U. 255; 87 P. 900.

A contract to purchase real estate signed by husband alone is not enforcible after his death so far as wife's one-third is concerned.

Free v. Little, 31 U. 449; 88 P. 407.

A testator having disposed of his personal property by will, and the widow having renounced the will, she cannot claim an interest in the personalty as distributee under § 6408.

In re Little's Estate, 22 U. 204; 61 P. 899.

A married man cannot legally devise away from his wife more than two-thirds of his legal and equitable estate in real property.

In re Little's Estate, 22 U. 204; 61 P. 899.
Free v. Little, 31 U. 449; 88 P. 407.

The right to dispose of homestead property by will is limited to such estates as exceed the homestead limit in value.

Knudsen v. Hannberg, 8 U. 203; 30 P. 749.
In re Little's Estate, 22 U. 204; 61 P. 899.

Where a widow entitled under Comp. Laws 1876, § 703, to a life interest in one-fourth of her husband's estate, agreed to receive property in lieu of that interest, and the agreement was approved by the commissioner appointed to make partition, and his report was confirmed by the decree of distribution, the widow took the property in fee, and her grantee could hold it free from the claims of other heirs.

Shaw v. Hays, 47 U. 14; 151 P. 337.
Rockwell v. Hays, 47 U. 14; 151 P. 337.

ITS LOSS BY ESTOPPEL, ETC.:

A marital separation by mutual agreement, even if followed by adultery, was not sufficient at common law to disendow the wife, until the husband, by offering to take her back, had withdrawn from the contract of separation, and the wife had thereupon refused such offer.

Norton v. Tufts, 19 U. 470; 57 P. 409.

A widow may, by mere silence, estop herself from claiming dower in husband's estate; but where a concealment by silence is relied upon for estoppel, the party against whom estoppel is claimed must have knowledge of the facts.

Id.

An instrument, whereby a wife released her one-third interest for a sum of money on an understanding that the husband should apply for a divorce and that the wife should make no defense thereto, was void as against public policy.

In re Bell's Estate, 29 U. 1; 80 P. 615.
Palmer v. Palmer, 26 U. 31; 72 P. 3.

Complainant was married and afterwards, in 1873, she and her husband obtained a purported church divorce. They lived apart thereafter until 1900, when the latter died. The complainant never asked for or received aid from him, and they both lived as unmarried persons, and complainant went by her maiden name until 1875, when she married another man in the same city, and complainant thereafter was known by the name of her second husband and joined him in conveyances, which were recorded, and complainant raised a large family by her second husband. After the alleged divorce her first husband conveyed the property in controversy as an unmarried man. At least six months before his death, complainant was informed of a decision of the court holding church divorce invalid, but continued to live with her second husband as husband and wife; held, complainant was estopped as against bona fide grantees of her husband, after their alleged divorce, or purchasers therefrom, from claiming dower in the land sold by him.

Hilton v. Sloan, 37 U. 359; 108 P. 689.

The wife's right to dower is not affected by the husband's representations upon selling the land that he is unmarried unless she permits innocent persons to deal with him in good faith with actual or constructive knowledge of his representations.

Id.

One purchasing land from another, who was entitled to invoke an estoppel as against claimants thereto, may himself rely on the estoppel, though he had knowledge of the facts when purchasing which would have prevented his grantor from invoking estoppel, had the latter known them.

Id.

6407. (2827.) When widow to elect between will and distributive share. If the husband shall make any provision by will for the widow, such provision shall be construed to be in lieu of the distributive share secured by the next

preceding section, unless it shall appear from the will that the decedent designed the testamentary provisions to be additional to such distributive share, in which case the widow shall be presumed to have accepted both such testamentary provisions and such distributive share. If, however, it does not appear from the will that its provision for the widow is additional, then the widow shall be conclusively presumed to have renounced such provision, and to have accepted her distributive share, unless within four months after the admission of the will to probate, or within such additional time before distribution as the court may allow, she shall, by written instrument filed with the clerk of the court, accept the testamentary provision, which acceptance shall be construed to be a renunciation of her distributive share. In the event that the wife shall be insane or incompetent, or absent from the state, an election shall be made for her by a general guardian, if she have one, or by a special guardian for the purpose, appointed by the court.

A testator having disposed of his personal estate by will, and the widow having renounced the will, she cannot claim interest in the personalty as distributes under the provisions of § 6408.
In re Little's Estate, 22 U. 204; 61 P. 899.

6408. (2828.) Succession in absence of will and of marriage contract. When any person having title to any estate not otherwise limited by marriage contract dies without disposing of the estate by will, it is succeeded to and must be distributed, unless otherwise expressly provided in this title, or in the probate code, subject to the payment of his debts, in the following manner:

1. **Surviving husband or wife; with children or issue.** If the decedent leave a surviving husband or wife, and only one child, or the issue of one child, in equal shares to the surviving husband or wife, and child or issue of such child; if the decedent leave a surviving husband or wife, and more than one child living, or one child living and the issue of one or more deceased children, one-third to the surviving husband or wife, and the remainder in equal shares to his children, and to the issue of any deceased child, by right of representation; but if there be no child of the decedent living at his death, the remainder goes to all of his lineal descendants; and if all of the descendants are in the same degree of kindred to the decedent, they share equally, otherwise they take according to the right of representation; *provided,* that the share in the legal and equitable estates in real property of which an intestate husband died possessed, secured by this section to his widow, shall not be additional to the interest in such estate provided for her in § 6406.

When husband or wife inherits all, sub. 5, hereunder.

2. **Issue, but no surviving husband or wife.** If the decedent leave no surviving husband or wife, but leave issue, the whole estate goes to such issue, and if such issue consists of more than one child living, or one child living and the issue of one or more deceased children, then the estate goes in equal shares to the children living, or to the child living, and the issue of the deceased child or children by right of representation;

3. **Surviving husband or wife; no issue; when father, etc., inherit.** If the decedent leave no issue, all of the estate, real and personal, of which the decedent died seized or possessed, if not over $5,000 in value, exclusive of debts and expenses, goes to the surviving husband or wife; and if over that value, $5,000 in value thereof goes to the surviving husband or wife, and the excess goes one-half to the surviving husband or wife, and the other half to the decedent's father and mother, in equal shares, and if either be dead, the whole of said half goes to the other; if there be no father nor mother, then one-half of such excess goes in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brother or sister, by right of representation; if the decedent leave no issue, nor husband, nor wife, the estate must go to his father and mother in equal shares, or if either be dead, then to the other;

When father and mother inherit.
Jones v. Jones, 12 U. 72; 41 P. 563.

4. **When brothers and sisters inherit all.** If there be neither issue, husband, wife, father, nor mother, then in equal shares to the brothers and sis-

ters of the decedent, and to the children of any deceased brother or sister, by right of representation;

5. **When husband or wife inherits all.** If the decedent leave a surviving husband or wife, and neither issue, father, mother, brother, nor sister, the whole estate goes to the surviving husband or wife;

6. **When no immediate family, next of kin inherit.** If the decedent leave neither issue, husband, wife, father, mother, brother, nor sister, the estate must go to the next of kin, in equal degree, excepting that when there are two or more collateral kindred in equal degree, but claiming through different ancestors, those who claim through the nearest ancestors must be preferred to those claiming through an ancester more remote.

7. **Death of child under age; other children succeed.** If the decedent leave several children, or one child and the issue of one or more children, and any such surviving child dies under age, and not having been married, all the estate that came to the deceased child by inheritance from such decedent descends in equal shares to the other children of the same parent, and to the issue of any such other children who are dead, by right of representation;

8. **Death of child under age; when issue of other children succeed.** If, at the death of such child who dies under age, not having been married, all the other children of his parents are also dead, and any of them have left issue, the estate that came to such child by inheritance from his parent descends to the issue of all other children of the same parent; and if all the issue are in the same degree of kindred to the child, they share the estate equally, otherwise they take according to the right of representation;

9. **When estate escheats to school fund.** If the decedent leave no husband, wife, nor kindred, and there be no heirs to take the estate or any portion thereof, the same shall escheat to the state for the benefit of the school fund.

Cal. Civ. C., § 1386*.
Person feloniously causing death of another not to inherit from deceased, § 6403.
Effect upon will of subsequent marriage; marriage contract, § 6334.
The portion which a widow receives under this section over the portion allowed to her by § 6406 is received as an heir, and is subject to inheritance tax.
In re Bullen's Estate, 47 U. 96; 151 P. 533.

6409. (2829.) Homestead exemption. Debts. A homestead consisting of lands and appurtenances not exceeding in value the sum of $2,000, and $250 additional for each minor child, together with all the personal property exempt from execution, shall be wholly exempt from the payment of the debts of the decedent, and shall be the absolute property of the surviving husband or wife and minor children, or of the minor children in case there be no surviving husband or wife, to be set apart on petition and notice, at any time after the return of the inventory; *provided,* that the homestead selected shall be subject to any incumbrances given for the purchase price or by the consent of both husband and wife, and to mechanics' liens. This section shall not be construed to prevent the disposition by will of the homestead and exempt personal property.

Cal. C. Civ. P., §§ 1465*, 1468*.
Homestead exemption to be provided for, Con. art. 22, sec. 1.
Property exempt from taxation, § 6925.
Payment of incumbrance on homestead, § 7668.
Homestead provisions, §§ 2862-2882.
Homestead of decedent, use, distribution, §§ 7643, 7644.
The right to dispose of homestead property by will is limited to such estates as exceed the homestead limit in value.
Knudsen v. Hannberg, 8 U. 203; 30 P. 749.
In re Little's Estate, 22 U. 204; 61 P. 899.
The provisions of this section and §§ 7643, 7644, should be construed together, and where the estate is less than $1500 in value, the expenses of the last sickness, funeral charges, etc., should be paid before any distribution.
In re Thorn's Estate, 24 U. 209; 67 P. 22.
Where decedent left real estate valued at $4,000 and exempt personal property, his widow and his only minor child were entitled under the provisions of this section to have a homestead of the value of $2,250, and the exempt personal property set apart to them.
In re Syndergaard's Estate, 31 U. 490; 88 P. 616.
Homestead not subject to mechanics' liens.
Volker L. Co. v. Vance, 32 U. 74; 88 P. 896.
Where a homestead is set apart to the wife and the minor child, it becomes theirs absolutely, and was not subject to be reopened and and further administered because at a subsequent time the value of the property set aside exceeded the limit of the exemption.
In re Bedford's Estate, 34 U. 24; 95 P. 518.
The homestead belongs to the heirs to whom it is set apart, and the heirs who were of age at the time of the death of intestate or at the time the homestead was set apart had no interest therein.
Christensen v. Robinson, 35 U 67; 99 P. 458.

6410. (2830.) Id. Ownership. Partition. The homestead and exempt personal property shall belong to the surviving husband or wife and

minor children; or, if there be no minor children, to the surviving husband or wife; or, if there be no surviving husband or wife, to the minor children. If the surviving husband or wife again marries, or when all of said minor children arrive at the age of majority, the homestead may be partitioned, one-half to the surviving husband or wife and the other half to the said children. The interest of the surviving husband or wife or of any child in the homestead may be disposed of by will, or shall pass by succession in the proportions aforesaid as other real property, but partition shall not be made except at such times as in this section provided.

Cal. C. Civ. P., § 1468*.

6411. (2831.) Id. Value deducted from share of survivor. The value of such part of the homestead and exempt personal property as may be set aside to the surviving wife or husband or minor children shall be deducted from the distributive share provided for such survivors.

In re Little's Estate, 22 U. 204; 61 P. 899.

6412. (2832.) Dower and curtesy. There shall be neither dower nor curtesy in this state.

Cal. Civ. C., § 1387*.

Decisions on dower and wife's statutory rights, note to § 6406.

6413. (2833.) Illegitimate children to inherit, when. Every illegitimate child is an heir of the person who acknowledges himself to be the father of such child; and in all cases is an heir of his mother; and inherits his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock. The issue of all marriages null in law, or dissolved by divorce, are legitimate.

Legitimation by acknowledgment, § 19.

Effect of failure to provide for child, §§ 6340-6343.

Inheritance of polygamous children, §§ 6428-6430.

Act Utah, 1852, § 25, permiting illegitimate children to inherit from the father, was valid under the organic act, and was not abrogated by act of congress, July 1, 1862, annulling all acts passed by the legislature of Utah "which establish, support, maintain, shield, or countenance polygamy."

Cope v. Cope, 137 U. S. 682; reversing same case, 7 U. 63; 24 P. 677.

See Chapman v. Handley, 7 U. 49; 24 P. 673.

In re Pratt Estate, 7 U. 278; 26 P. 567.

A bachelor who takes an illegitimate child into his family, and acknowledges it to be his own, gives such child right of inheritance.

In re Garr's Estate, 31 U. 57; 86 P. 757.

Under § 6430, the father of a child born of a plural marriage, who has publicly acknowledged the child and cared for him in his own family as his son, may inherit from such child.

Rohwer v. District Court, 41 U. 279; 125 P. 671.

A father who went to the hospital before the child was born and made arrangements for the care of the mother during her confinement and paid the expense therefor, and who in a few weeks after the birth of the child acknowledged it as his own and who demanded the custody of the child, who, under oath in a petition for habeas corpus for the custody of the child and in open court, acknowledged the child as his own, openly and publicly acknowledged the child.

Harrison v. Harker, 44 U. 541; 142 P. 716.

Where the parents of an illegitimate child marry the child becomes legitimate.

Id.

6414. (2834.) Inheritance from illegitimate child. If an illegitimate child dies intestate, without lawful issue, his estate goes to his mother, or, in case of her decease, to her heirs at law.

Cal. C. Civ. P., § 1388*.

6415. (2835.) Degrees of kindred, how computed. The degree of kindred is established by the number of generations, and each generation is called a degree.

Cal. Civ. C., § 1389.

6416. (2836.) Id. Lineal and collateral. The series of degrees forms the line; the series of degrees between persons who descend from one another is called direct or lineal consanguinity, and the series of degrees between persons who do not descend from one another, but spring from a common ancestor, is called the collateral line or collateral consanguinity.

Cal. Civ. C., § 1390.

6417. (2837.) Id. Ascending and descending. The direct line is divided into a direct line descending and a direct line ascending. The first is that which connects the ancestor with those who descend from him. The second is that which connects a person with those from whom he descends.

Cal. Civ. C., § 1391.

6418. (2838.) Id. In direct line. In the direct line there are as many degrees as there are generations. Thus the son is, with regard to the father,

in the first degree; the grandson, in the second; and vice versa with regard to the father and grandfather toward the sons and grandsons.

Cal. Civ. C., § 1392.

6419. (2839.) Id. In collateral line. In the collateral line the degrees are counted by generations, from one of the relations up to the common ancestor and from the common ancestor to the other relations. In such computation the decedent is excluded, and the relative included, and the ancestor counted but once. Thus, brothers are related in the second degree; uncle and nephew in the third degree; cousins-german in the fourth, and so on.

Cal. Civ. C., § 1393.

6420. (2840.) Kindred of the half-blood inherit equally. Kindred of the half-blood inherit equally with those of the whole-blood in the same degree, unless the inheritance comes to the intestate by descent, devise, or gift of some one of his ancestors, in which case all those who are not of the blood of such ancestor must be excluded from such inheritance.

Cal. Civ. C., § 1394.

Children of decedent's father by another mother cannot inherit from decedent's property which descended to him from his mother and a half-sister on his mother's side.

Amy v. Amy, 12 U. 278; 42 P. 1121.

The phrase "of the blood" includes half-blood as well as whole blood.

Gardner's Estate v. Gardner et al., 42 U. 40; 129 P. 360.

6421. (2841.) Advancements deducted from share. Any estate, real or personal, given by the decedent in his lifetime as an advancement to any child, or other lineal descendant, is a part of the estate of the decedent for the purposes of division and distribution thereof among his issue, and must be taken by such child or other lineal descendant toward his share of the estate of the decedent.

Cal. Civ. C., § 1395. Advancements, §§ 6343, 6381, 7666.

6422. (2842.) Excess not refunded. If the amount of such advancement exceeds the share of the heir receiving the same, he must be excluded from any further portion in the division and distribution of the estate, but he must not be required to refund any part of such advancement; and, if the amount so received is less than his share, he is entitled to so much more as will give him his full share of the estate of the decedent.

Cal. Civ. C., § 1396.

Cited in: In re Pickard's estate, 42 U. 105; 129 P. 353.

6423. (2843.) Advancements defined. All gifts and grants are made as advancements, if expressed in the gift or grant to be so made, or if charged in writing by the decedent as an advancement, or acknowledged in writing as such by the child or other successor or heir.

Cal. Civ. C., § 1397.

6424. (2844.) Value of advancements, how determined. If the value of the estate so advanced is expressed in the conveyance, or in the charge thereof made by the decedent, or in the acknowledgment of the party receiving it, it must be held as of that value in the division and distribution of the estate; otherwise, it must be estimated according to its value when given, as nearly as the same can be ascertained.

Cal. Civ. C., § 1398.

6425. (2845.) Advancements charged to issue of heirs. If any child, or other lineal descendant receiving an advancement, dies before the decedent, leaving issue, the advancement must be taken into consideration in the division and distribution of the estate, and the amount thereof must be allowed accordingly by the representatives of the heirs receiving the advancement, in like manner as if the advancement had been made directly to them.

Cal. Civ. C., § 1399.

6426. (2846.) Inheritance by representation. Posthumous children. Inheritance or succession by "right of representation" takes place when the descendants of any deceased heir take the same share or right in the estate of another person that their parents would have taken if living. Posthumous children are considered as living at the death of their parents.

Cal. Civ. C., § 1403. Succession of posthumous child, §§ 6340, 6369.

6427. (2847.) Aliens may take. Aliens may take in all cases by succession as well as citizens; and no person capable of succeeding under the

provisions of this title is precluded from such succession by reason of the alienage of any relative.

Cal. Civ. C., § 1404*. Foreign will, §§ 6324, 6402, 7586.

6428. (2848.) Inheritance by issue of polygamous marriages. Sec. 6413 included when first enacted and effectually operated at all times thereafter and now operates to include the issue of bigamous and polygamous marriages, and entitles all such issue to inherit, as in said section provided, except such as are not included in the proviso of § 11 of the act of congress called the "Edmunds-Tucker act," entitled "An act to amend an act entitled, 'An act to amend § 5352' of the Revised States of the United States, in reference to bigamy and for other purposes."

Inheritance of illegitimate children, § 6413, and note.

6429. (2849.) Id. Cases heretofore determined. New trial. In all cases involving the rights of such issue to so inherit, heretofore determined adversely to such issue in any of the courts of the territory of Utah, a motion for a new trial or rehearing shall be entertained, on application of such issue who was or were parties, at any time before the 10th day of March, 1897; and the case or cases in which said motion is so directed to be heard shall be deemed transferred to the court of the state of Utah corresponding to that of the territory of Utah in which such adverse decision was made, and the courts shall thereupon proceed to hear and determine said motion, and if granted, to proceed to hear and determine the case or cases without prejudice from the lapse of time since the former hearing or any prior determination of a like motion; *provided,* that this section shall not be construed to affect the rights of bona fide purchasers from any such parties before the approval of this title.

In enacting this section the legislature assumed a control over the judiciary not warranted by the constitution, and such a statute, destroying vested rights and the finality of judicial determination, is unconstitutional and void.

In re Handley, 15 U. 212; 49 P. 829.

6430. (2850.) Polygamous issue born on or prior to January 4, 1896, legitimated. The issue of bigamous and polygamous marriages, heretofore contracted between members of the Church of Jesus Christ of Latter-day Saints, born on or prior to the 4th day of January, A. D. 1896, are hereby legitimated; and such issue are entitled to inherit from both parents, and to have and enjoy all rights and privileges to the same extent and in the same manner as though born in lawful wedlock.

Legitimation by acknowledgment, §§ 19, 6413.
Succession of illegitimate child, §§ 19, 6413.
This section applies only to the issue of Mormon church plural marriages and not to children illegitimate at common law, and the father of the child born of a plural marriage who has publicly acknowledged the child and has cared for him in his own family as his son, may inherit from such child.

Rohwer v. District Court, 41 U. 279; 125 P. 671.
It was not until the enactment of this section in 1896 that the children of such marriages were legitimate for all purposes, hence such a child would not inherit from its grandfather, who died December 25, 1882.
Mansfield v. Neff et al., 43 U. 258; 134 P. 1160.

TITLE 117.

CODE OF CIVIL PROCEDURE.

CHAPTER 1.

PRELIMINARY PROVISIONS.

6441. (2851.) Name of title. This title shall be known as the Code of Civil Procedure.

6442. (2852.) But one form of civil action. There is in this state but one form of civil action for the enforcement or protection of private rights and the redress or prevention of private wrongs.

Cal. C. Civ. P., § 307.
Joinder of actions, § 6567.
Recovery on one of two counts, note to § 6567.
Law and equity may be administered in the same action, Con. art. 8, sec. 19.
When there is a variance between rules of

common law and of equity, the rules of equity shall prevail, § 5839.

The code applies to and governs all pleadings, modes, and forms at law and in equity.

Houtz v. Gisborn, 1 U. 173.

While all the forms of action have been abolished by the code, the inherent distinction between legal and equitable causes of action, and the remedies appropriate to each, are not changed.

Zeile v. Moritz, 1 U. 283.

Kahn v. Old Telegraph M. Co., 2 U. 174.

Hamner v. Ballantyne, 13 U. 325; 44 P. 704.

While distinctions as to forms of actions are abolished, the distinction as to causes of actions remains. Plaintiff cannot in one count rely upon false imprisonment and malicious prosecution.

Johnston v. Meaghr, 14 U. 426; 47 P. 861.

Only one cause of action can arise out of a promise or imposed duty, though the pleader may state the facts in different ways.

Williams v. Nelson, 45 U. 255; 145 P. 39.

6443. (2853.) Parties, how designated. In such action the party complaining is known as the plaintiff, and the adverse party as the defendant.

Cal. C. Civ. P., § 308.

Parties to actions, §§ 6495-6520.

Title not changed in consequence of an appeal, § 6993.

6444. (2854.) Special issues may be tried by jury. In a case where neither party can, as of right, require a trial by jury of an issue of fact arising upon the pleadings, or where a question of fact, not in issue upon the pleadings, is to be tried, an order for the trial thereof by a jury may be made, stating distinctly and plainly the question of fact to be tried. Such an order is the only authority necessary for the trial.

Cal. C. Civ. P., § 309*.

What issues to be tried by jury, what by the court, § 6781.

Submission of special findings to jury, § 6821.

Verdict general or special, § 6820.

Where jury is advisory merely, verdict is not binding on the court.

Smith v. Richardson, 2 U. 424.

Toltec Ranch Co. v. Cook, 24 U. 453; 67 P. 1123.

Grand Central M. Co. v. Mammoth M. Co., 29 U. 490; 83 P. 648.

Where a case, before the rendition of verdict, is treated by the parties and the court as one triable by a jury, the judge should render judgment on the verdict, and should not make findings and judgment at variance therewith.

Houston v. Hechler, 47 U. 215; 152 P. 726.

Naylor v. Jensen, 38 U. 310; 113 P. 73.

CHAPTER 2.

LIMITATIONS—IN GENERAL.

6445. (2855.) Actions to be commenced within periods prescribed. Civil actions can be commenced only within the periods prescribed in the three succeeding chapters, after the cause of action shall have accrued, except where in special cases a different limitation is prescribed by statute.

Cal. C. Civ. P., § 312.

Easement acquired in twenty years, note to § 6456; boundary, twenty years, note to § 6456.

Adverse possession of water for seven years, note to § 3450.

Possession open, continuous, etc., and taxes paid, § 6456, and note.

Limitations not affected by the general repeal of 1878, § 5834.

Defense of statute of limitations must be pleaded; by whom, and how, § 6602, and note.

No right of action unless seized or possessed within seven years, §§ 6449, 6450.

The word "action" construed, § 6492.

WHEN STATUTE BEGINS TO RUN:

The statute of limitations should be enforced not only on the presumption that the debt has been paid but because it is essentially a statute of repose; it should be viewed as a wise and beneficial law rather than as a discreditable defense.

Kuhn v. Mount, 13 U. 108; 44 P. 1036.

When the breach of a contract consists in a failure to pay over money balances due thereunder, the liability falls upon the defaulting party, when such failure occurs.

Victor Sewing Machine Co. v. Crockwell, 2 U. 557; 112 U. S. 676, 688.

Statute begins to run from time owner was deprived of his property, notwithstanding his ignorance of defendant's wrongful act, defendant having practiced no deceit or concealment.

Dee v. Hyland, 3 U. 308; 3 P. 388.

Statute of limitations does not begin to run against patentee of land from United States before issuance of patent; date of final payment does not govern.

Steele v. Boley, 7 U. 64; 24 P. 755; overruling same case, 6 U. 308; 22 P. 311.

But see Toltec Ranch Co. v. Babcock, 24 U. 183; 66 P. 876; affirmed 191 U. S. 532.

Where an insurance policy provided that no suit should be sustainable until after an award should have been made, nor unless such action was commenced within twelve months from the date of the fire, and no time was limited within which the award should be made, and suit was begun more than a year after the fire; held, that it was not barred by the statute of limitations.

Hong Sling v. Royal Insurance Co., 8 U. 135; 30 P. 307.

Shipper on railroad is not bound by limitation in contract to present claim for damage to stock within ten days.

Houtz v. U. P. Ry. Co., decided January, 1908.

Where a person is entitled to indemnity on a judgment paid by him, the statute commences to run from the time of such payment.

Culmer v. Wilson, 13 U. 129; 44 P. 833.

See Fullerton v. Bailey, 17 U. 85; 53 P. 1020.

Action to recover payments made on real estate deal where grantor fails to convey accrues at time of such failure.

Duncan v. Geyser M. Co., 17 U. 209; 53 P. 1044.

In an action to foreclose a mortgage upon real property, the statute begins to run when the debt becomes due.

Thompson v. Cheesman, 15 U. 43; 48 U. 477.

The statute of limitations does not commence to run until a cause of action arises.

Crescent M. Co. v. Silver King M. Co., 17 U. 444; 54 P. 244.

Stevens v. Rogers, 16 U. 105; 51 P. 216.

Culmer v. Wilson, 13 U. 129; 44 P. 833.

Where complaint was filed within period prescribed by § 3143, C. L. U. 1888, and defendant

appeared generally, though summons was not served until more than four years after maturity of the obligation, the action was not barred.

Keyser v. Pollock, 20 U. 371; 59 P. 87.

The subsequent passage of an act by the legislature increasing the period of limitation could not operate to affect or renew a cause of action already barred.

Ireland v. Mackintosh, 22 U. 296; 61 P. 901.

Amendment extending time from four to six years applied to contracts not already barred.

Guthiel v. Gilmer, 27 U. 496; 76 P. 628.

Where there is an agreement between parties for a mutual exchange of lands, and each puts the other in possession of the lands so exchanged, and the agreement is subsequently violated by one of the parties, by mortgaging the land to be conveyed by him, the cause of action in the other arises when he discovers the violation.

Snow v. Rich, 22 U. 123; 61 P. 336.

Under § 6094, a cause of action accrues at once in favor of a party who pays an unlawful tax under protest.

Centennial-Eureka M. Co. v. Juab Co., 22 U. 395; 62 P. 1024.

When defendant contracted to repay plaintiff certain sums out of profits, the obligation became absolute after the lapse of a reasonable time.

White v. Century M. Co., 28 U. 331; 78 P. 868.

McIntyre v. Ajax M. Co., 20 U. 323; 60 P. 552.

Busby v. Century M. Co., 27 U. 231; 75 P. 725.

Adverse possession of railroad lands is not dependent upon the time when patent passed to the railroad.

Toltec Ranch Co. v. Babcock, 24 U. 183; 66 P. 876; affirmed 191 U. S. 532.

Toltec Ranch Co. v. Cook, 24 U. 453; 67 P. 1123.

But see Steele v. Boley, 7 U. 64; 24 P. 755.

A right of action on a deficiency judgment, entered after foreclosure sale, accrued at the date the amount of the deficiency was ascertained and not at the time the decree of foreclosure was made.

Howe v. Sears, 30 U. 344; 84 P. 1107.

Since the appointment of a receiver to wind up the offairs of an insolvent building and loan association works a practical dissolution of the association, and the mortgage indebtedness of its borrowing members becomes immediately due, when an association went into a receiver's hands, the statute of limitations began to run against an unmatured mortgage held by it.

Graves v. Seifried, 31 U. 203; 87 P. 674.

Causes of action which accrue to the administrator after the death of an intestate are not complete, and do not exist, and limitations do not begin to run until the administrator is appointed.

Hatch v. Hatch, 46 U. 116; 148 P. 433.

Query: As to the right of the holders of tax liens to invoke the statute of limitations against each other.

Lawrence v. Murphy, 45 U. 572; 147 P. 905.

Statute of limitations not applicable to action for divorce.

Tufts v. Tufts, 8 U. 142; 30 P. 309.

A junior lien holder may interpose the statute against a senior mortgagee, to the extent of his interest, and if he acquires title he may bar the senior mortgagee. The mortgagor's absence from the state does not toll the statute in such action, and the statute starts to run against the senior mortgagee at the time the right of action on the mortgage accrues.

Boucofski v. Jacobsen, 36 U. 165; 104 P. 117.

Graves v. Seifried, 31 U. 203; 87 P. 674.

The statute is applicable as a bar to a suit to reform a contract.

Weight v. Bailey, 45 U. 584; 147 P. 899.

Where an excessive payment is barred by limitations, a counterclaim for the the overpayment is barred.

Utah Commr. & Savings Bank v. Fox, 44 U. 323; 140 P. 660.

But where cross demands exist, they may be offset against each other, and claims which are barred so as to prevent judgment may be allowed as an offset.

Utah Commr. & Savings Bank v. Fox, 40 U. 205; 120 P. 840.

Limitation against cause of action arising after intestate's death begins to run when administrator is appointed.

Hatch v. Hatch, 46 U. 116; 148 P. 1096.

A cause of action arises the moment an action may be maintained to enforce a legal right, and the statute of limitations then begins to run.

Sweetser v. Fox, 43 U. 40; 134 P. 599.

WHEN STATUTE BEGINS TO RUN AGAINST A TRUSTEE OR CO-TENANT:

Trusts arising by operation of law, note to § 5812.

Trustee of express trust defined, § 6495.

Where a declaration of trust provided for the payment of the money advanced out of the rents, issues, and profits of a mine, the statute did not begin to run until the trust was closed.

Charter Oak Ins. Co. v. Gisborn, 5 U. 319; affirmed 142 U. S. 326.

An express trust never having been fully performed is still a subsisting and continuing trust, against which limitations do not run.

Felkner v. Dooly, 27 U. 350; 75 P. 854.

Mere lapse of time, when the parties remain in the same relative positions, and the delay has worked no serious wrong to the adverse party, so that justice can still be done, although an important ingredient in the law of laches, will not operate as a bar in equity.

Hamilton v. Dooly, 15 U. 280; 49 P. 769.

Statute begins to run from time of repudiation becoming known to cestui que trust.

Wood v. Fox, 8 U. 380; 32 P. 48; affirmed 166 U. S. 648.

Crofoot v. Thatcher, 19 U. 212; 57 P. 171.

Felkner v. Dooly, 28 U. 236; 78 P. 365.

Chambers v. Emery, 13 U. 374; 45 P. 192.

Thomas v. Glendinning, 13 U. 47; 44 P. 652.

Where a trustee denies the trust or denies the liability under the trust relation, and the beneficiary has notice of such repudiation, then the statute of limitations attaches, and, under this section and § 6474, an action to recover the interest of the beneficiary in the proceeds of a sale made by such trustee, after four years have elapsed, is barred.

Felkner v. Dooly, 28 U. 236; 78 P. 365.

Statute of limitations does not begin to run against a trustee until he denies the trust, or asserts an adverse title.

Schenck v. Wicks, 23 U. 576; 65 P. 732.

Crofoot v. Thatcher, 19 U. 212; 57 P. 171.

The rule that limitations do not run against a trust holds only between cestui que trust and trustee, and does not apply to a cestui que trust and trustee, as against third persons.

Jenkins v. Jensen, 24 U. 108; 66 P. 773.

Where plaintiff is in continuous, open and adverse possession for over twenty years, during which time she pays the taxes and assessments and makes valuable improvements, and the defendant co-tenants had knowledge that she claimed ownership, title by adverse possession, is established in plaintiff, and it is not necessary that she should have given actual notice of her claim to her co-tenants.

Mathews v. Baker, 47 U. 532; 155 P. 427.

Where a tenant in common of corporation stock has the stock issued in his own name, his possession is regarded as for the benefit of all until he unequivocally repudiates the interest of his co-tenants; and voting the stock, transferring it to his name, and exclusively using the water to which it was entitled do not operate as repudiation so as to start the statute in his favor.

Rasmussen v. Sevier Valley Canal Co., 48 U 490; 160 P. 144.

Leaving money with the defendant, with instructions to use a part in paying depositor's debts and to turn the balance over to depositor on demand, does not constitute a trust fund.

Francis v. Gisborn, 30 U. 67; 83 P. 571.

In a suit by a wife's administrator against the husband's executors to recover wife's separate estate, where there has been no demand and refusal, or hostile assertion or holding on the part of the husband against the wife, the statute does not run.

Hatch v. Hatch, 46 U. 116; 148 P. 1096.

CHAPTER 3.

LIMITATIONS—REAL PROPERTY.

6446. (2856.) Action by the state. Seven years. The state will not sue any person for or in respect to any real property, or the issues or profits thereof, by reason of the right or title of the state to the same, unless:

1. Such right or title shall have accrued within seven years before any action or other proceeding for the same shall be commenced; or,

2. The state or those from whom it claims shall have received the rents and profits of such real property, or some part thereof, within seven years.

Cal. C. Civ. P., § 315*.

Limitations apply to the state as well as to persons, § 6475.

Limitations do not apply to the streets, parks, etc., § 6457.

6447. (2857.) Action by grantee of the state barred if state barred. No action can be brought for or in respect to real property by any person claiming under letters patent or grants from this state, unless the same might have been commenced by the state as herein specified, in case such patent had not been issued or grant made.

Cal. C. Civ. P., § 316. Mont. C. Civ. P., § 481.

6448. (2858.) Action against grantee of the state under void grant. Seven years. When letters patent or grants of real property issued or made by the state are declared void by the determination of a competent court, an action for the recovery of the property so conveyed may be brought either by the state or by any subsequent patentee or grantee of the property, his heirs or assigns, within seven years after such determination, but not after that period.

Cal. C. Civ. P., § 317*. Mont. C. Civ. P., § 482.

6449. (2859.) No action unless seized or possessed within seven years. No action for the recovery of real property, or for the possession thereof, shall be maintained, unless it appear that the plaintiff, his ancestor, grantor, or predecessor was seized or possessed of the property in question within seven years before the commencement of the action.

Cal. C. Civ. P., § 318*.

See note to § 6450, 6451.

6450. (2860.) Id. Action or defense founded on realty. Seven years. No cause of action, or defense or counterclaim to an action, founded upon the title to real property or to rents or profits out of the same, shall be effectual unless it appears that the person prosecuting the action, or interposing the defense or counterclaim, or under whose title the action is prosecuted or defense or counterclaim is made, or the ancestor, predecessor, or grantor of such person was seized or possessed of the property in question within seven years before the committing of the act in respect to which such action is prosecuted or defense or counterclaim made.

Cal. C. Civ. P., § 319*. N. Y. Civ. P., § 366*. N. Dak. (1895) § 5189*.

Limitation of action for mesne profits, § 6466.

When statute begins to run, note to § 6445.

Presumption in favor of legal owner, § 6451.

Possession must have been hostile and continuous, and taxes paid, § 6456, and note.

Easement acquired in twenty years, note to § 6456.

Boundary established by acquiescence for a long period, note to § 6456.

Statute of limitations, how and by whom pleaded, § 6602, and note.

This section applies to suit for accounting against trustee of real property, note to § 6445.

Action against mortgagee in possession barred in seven years, § 6476.

BAR IN SEVEN YEARS:

Where a party enters upon land of another, knowing that the entry is without right or title, and maintains his possession of such property without the owner's permission or consent, such party obtains no right to said land which can ripen into a right of possession, except by adverse possession for the statutory period, even though the owner makes no objection and the trespasser makes valuable improvements.

Coombs v. S. L. & Ft. Douglas Co., 9 U. 322; 34 P. 248.

An action or defense founded on real property is barred by this section where there has been an adverse possession for a period of seven years.

Funk v. Anderson, 22 U. 238; 61 P. 1006.

Adverse possession of settler on railroad land for seven years bars recovery by railroad, though such adverse possession began before patent passed to the railroad and did not continue for seven years thereafter.

Toltec Ranch Co. v. Babcock, 24 U. 183; 66 P. 876; affirmed 191 U. S. 532.

Toltec Ranch Co. v. Cook, 24 U. 453; 67 P. 1123.

But see Steele v. Boley, 7 U. 64; 24 P. 755.

A party who has failed to institute an action to recover possession of a mining claim within seven years after possession by another is barred.

Lavagnino v. Uhlig, 26 U. 1; 71 P. 1046; affirmed 198 U. S. 443.

Where an administrator neglected to bring an action to recover real property within the time prescribed by statute, an heir, although a minor at the time of the accrual of the action, was also barred. In such case the heir

has right of action against the administrator and his bondsmen.

Jenkins v. Jensen, 24 U. 108; 66 P. 773.

Where a suit was started, and after pending twelve years was dismissed for want of prosecution, the defendant could not claim acquiescence in a boundary line or set up title by adverse possession to another suit, nor was the plaintiff estopped.

Moyle v. Thomas, 46 U. 542; 151 P. 361.

Where the occupant is in possession of the surface of a mining claim which has a surface value independent of mining, and he pays the taxes on the surface and improvements thereon, he may acquire title to the surface even though the owner has paid taxes on the mining claim.

Utah Copper Co. v. Eckman, 47 U. 165; 152 P. 178.

There can be no adverse possession of land prior to the passing of the title thereto from the United States government.

Id.

The limitation of an action to recover compensation for use of real estate for public use without condemnation is seven years.

Salt Lake Inv. Co. v. O. S. L. R. Co., 46 U. 203; 148 P. 439.

Where a father deeds property to his grandson, reserving from the grant the use and possession of said premises during the natural life of his son, and the son enters into possession, claiming a life estate therein, and improves the same, held seven years possession establishes his life estate.

Wells v. Wells, 7 U. 68; 24 P. 752.

6451. (2861.) Possession presumed in legal owner, unless adversely held. Seven years. In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the property shall be presumed to have been possessed thereof within the time required by law, and the occupation of the property by any other person shall be deemed to have been under and in subordination to the legal title, unless it appears that the property has been held and possessed adversely to such legal title for seven years before the commencement of the action.

Cal. C. Civ. P., § 321*.

When statute begins to run, § 6450, and note.

Actual possession is prima facie evidence of title in fee simple.

Johnston v. Meaghr, 14 U. 426; 47 P. 861.

The presumption is, that one holding the legal title has been possessed of the land within the time required by law, unless it appears that the property was held and possessed adversely to him for seven years.

Funk v. Anderson, 22 U. 238; 61 P. 1006.

Open, notorious, uninterrupted, and peaceable possession of land, under claim of right, will be presumed to have been adverse from its inception as to the holder of the legal title, though not in its character hostile.

Toltec Ranch Co. v. Babcock, 24 U. 183; 66 P. 876; affirmed 191 U. S. 532.

The burden is on one claiming title by adverse possession to prove the same, and not on the defendant to establish that he was in possession under his legal title for the statutory period.

Needham v. S. L. City, 7 U. 319; 26 P. 920.

Smith v. North C. W. Co., 16 U. 194; 52 P. 283.

Funk v. Anderson, 22 U. 238; 61 P. 1006.

Center Cr. Irr. Co. v. Lindsay, 21 U. 192; 60 P. 559.

Dignan v. Nelson, 26 U. 186; 72 936.

English v. Openshaw, 28 U. 241; 78 P. 476.

Tate v. Rose, 35 U. 229; 99 P. 1003.

Tate v. Shaw, 35 U. 240; 99 P. 1007.

Possession under a tax sale certificate is, during the period of redemption, an admission that the possession is subject to the owner's right of redemption, and is not adverse to the true owner.

S. L. Investment Co. v. Fox, 32 U. 301; 90 P. 464.

The owner of vacant unimproved property is presumed to be in constructive possession and entitled to actual possession, and an adverse possession of two years with payment of taxes for more than seven years does not bar owner.

Ives v. Grange, 42 U. 608; 134 P. 619.

In an action to quiet title, the statute of limitation is an affirmative defense to be proven by defendant.

Tate v. Rose, 35 U. 229; 99 P. 1003.

Tate v. Shaw, 35 U. 240; 99 P. 1007.

Possession under a deed is evidence of title to all of tract described in deed, and the presumption of possession is not affected by the fact that a recent division fence had been erected so as to cut off a few feet.

Cotterel v. Pickering, 32 U. 62; 88 P. 696.

Where a son purchases a home in his name for his father and mother, intending to vest a life estate in them, their possession is in subordination of the legal title, and is not adverse.

Sheppick v. Sheppick, 44 U. 131; 138 P. 1169.

Where an owner in possession conveys an undivided portion and continues in possession of the whole, such possession is not adverse.

English v. Openshaw, 28 U. 241; 78 P. 476.

A tax deed initiates a new title, and possession thereunder is prima facie adverse to the original title.

Welner v. Stearns, 40 U. 185; 120 P. 490.

Whenever possession is of such character that ownership may be inferred therefrom, then the possession may be presumed to be hostile.

Pioneer Inv. Co. v. Bd. of Ed. of S. L. C., 35 U. 1; 99 P. 150.

6452. (2862.) Adverse possession under written instrument, decree, etc. What deemed held. Whenever it shall appear that the occupant, or those under whom he claims, entered into possession of the property under claim of title exclusive of other right, founding such claim upon a written instrument, as being a conveyance of the property in question, or upon the decree or judgment of a competent court, and that there has been a continued occupation and possession of the property included in such instrument, decree, or judgment, or of some part of the property under such claim, for seven years, the property so included shall be deemed to have been held adversely, except that when the property so included consists of a tract divided into lots, the possession of one lot shall not be deemed a possession of any other lot of the same tract.

Cal. C. Civ. P., § 322*.

Possession must be continuous, taxes paid, etc., § 6456, and note.

Where a divorced wife under a void decree came into possession of real estate, and remained in possession as a femme sole for the full time of the statute of limitations; held, that she acquired title by adverse possession.

Warr v. Honeck, 8 U. 61; 29 P. 1117.

Where the surviving wife has a life estate in her husband's homestead, the character of her

possession may be changed by a parol partition so as to make her possession adverse.
Whittemore v. Cope, 11 U. 344; 40 P. 256.
Where a grantee's use of a property is as a yard in connection with a blacksmith shop, the adverse possession is not interrupted by record owner occasionally driving over premises.
Bingham v. McDonald, 37 U. 457; 110 P. 56.
The purchaser's right to claim adversely to the vendor and the railroad company began only when he had performed all the conditions of such contract and became entitled to a conveyance of the property.
Central Pac. Ry. Co. v. Tarpey, 50 U. —; 168 P. 554.

6453. (2863.) Id. What constitutes possession and occupancy. For the purpose of constituting an adverse possession by any person claiming a title founded upon a written instrument or a judgment or decree, land shall be deemed to have been possessed and occupied in the following cases:

1. Where it has been usually cultivated or improved;
2. Where it has been protected by a substantial inclosure;
3. Where, although not inclosed, it has been used for the supply of fuel or of fencing under timber for the purposes of husbandry, or for pasturage, or for the ordinary use of the occupant;
4. Where a known farm or single lot has been partly improved, the portion of such farm or lot that may have been left not cleared or not inclosed, according to the usual course and custom of the adjoining country, shall be deemed to have been occupied for the same length of time as the part improved and cultivated.

Cal. C. Civ. P., § 323.
Whether a tax deed to the south half of a section, a few acres of which defendant had inclosed, occupied, and cultivated, was color of title or not, defendant acquired no title by adverse possession to the land outside of his inclosure, where no part of it was inclosed by a substantial fence, or otherwise, or occupied or used.
Pacific L. & W. Co. v. Hartsough, 50 U. —; 168 P. 552.
Where defendant's claim of title was not founded upon a written instrument, but was based upon actual possession, an open, notorious, peaceable occupation under claim of right was not sufficient without actual cultivation or improvement, or money expended for irrigation or an inclosure.
Central Pac. Ry Co. v. Tarpey, 50 U. —; 168 P. 554.

6454. (2864.) Adverse possession under claim of title only. Land deemed held. Where it appears that there has been an actual continued occupation of land under claim of title, exclusive of any other right, but not founded upon a written instrument, judgment, or decree, the land so actually occupied, and no other, shall be deemed to have been held adversely.

Cal. C. Civ. P., § 324.
Possessory rights, § 4867.
Occupying claimants, §§ 5031-5038.
Title to streets, etc., cannot be obtained by adverse possession, § 6457.
Legal owner presumed to have in possession, § 6451.
When statute begins to run, note to § 6445.
A plural wife may accept a gift of her husband's property, or may acquire title to real estate of her husband by adverse possession founded on a gift.
Raleigh v. Wells, 29 U. 217; 81 P. 908.

6455. (2865.) Id. What constitutes possession and occupancy. For the purpose of constituting an adverse possession by a person claiming title not founded upon a written instrument, judgment, or decree, land is deemed to have been possessed and occupied in the following cases only:

1. Where it has been protected by a substantial inclosure;
2. Where it has been usually cultivated or improved;
3. Where labor or money has been expended upon dams, canals, embankments, aqueducts, or otherwise, for the purpose of irrigating said lands, amounting to the sum of $5 per acre.

Cal. C. Civ. P., § 325*.
Adverse possession must have been hostile, continuous, etc., § 6456, and note.

6456. (2866.) In all cases adverse possession must be continuous, and taxes paid. In no case shall adverse possession be considered established under the provisions of any section of this code, unless it shall be shown that the land has been occupied and claimed for the period of seven years continuously, and that the party or persons, their predecessors, and grantors have paid all taxes which have been levied and assessed upon such land according to law.

Cal. C. Civ. P., § 325*.
When statute begins to run, note to § 6445.
Possession presumed in legal owner, § 6451, and note.
Action or defense founded upon title to realty barred in seven years, § 6450, and note.
Water right by adverse use, etc., note of § 3450.
Allowance for improvements made under color of title, § 5031.
Adverse possession must be for seven full years; the making of valuable improvements without objection from owner does not affect owner's rights.
Coombs v. S. L. & Ft. Douglas Co., 9 U. 322; 34 P. 248.
As among joint tenants a holding does not become adverse until tenant out of possession has notice.
Smith v. North C. Water Co., 16 U. 194; 52 P. 283.

In order to establish adverse possession, the party claiming it must have paid all taxes during the period.
Funk v. Anderson, 22 U. 238; 61 P. 1006.
Dignan v. Nelson, 26 U. 186; 72 P. 936.
Raleigh v. Wells, 29 U. 217; 81 P. 908.
Crane v. Judge, 30 U. 50; 83 P. 566.

Must be founded on actual, open, notorious possession with an intention to claim as owner against the rights of the true owner, continuing for the time prescribed.
Dignan v. Nelson, 26 U. 186; 72 P. 936.
Needham v. S. L. City, 7 U. 319; 26 P. 920.
English v. Openshaw, 28 U. 241; 78 P. 476.
Snow v. Rich, 22 U. 123; 61 P. 336.
Schenck v. Wicks, 23 U. 576; 65 P. 732.
S. L. Inv. Co. v. Fox, 32 U. 301; 90 P. 564.

Where property had been sold to the county for taxes, and the claimant took possession under a claim of title and inclosed the premises in July, 1899, and received a deed from the county therefor in May, 1900, adverse possession against everyone except the county started at the time possession was taken.
Welner v. Stearns, 40 U. 185; 120 P. 490.

Title by adverse possession can be acquired only in accordance with this section, and cannot be acquired by prescription.
R. G. W. Ry. Co. v. S. L. Inv. Co., 35 U. 528; 101 P. 586.

Plaintiff suing to quiet title to a parcel of land 50x75 feet in a city, and relying on title by adverse possession, does not prove payment of taxes thereon by introducing tax receipts describing a tract "50x75 feet, Heber Avenue," where either plaintiffs or his wife claim to own property adjoining said parcel.
Fares v. Urban, 46 U. 609; 151 P. 57.

Where plaintiff is in continuous, open, and adverse possession for over twenty years, during which time she pays the taxes and assessments and makes valuable improvements, and the defendant co-tenants had knowledge that she claimed ownership, title by adverse possession is established in plaintiff, and it is not necessary that she should have given actual notice of her claim to her co-tenants.
Mathews v. Baker, 47 U. 532; 155 P. 427.

Where a railroad company claims ownership of part of a lot, in addition to its right-of-way through such lot, and returns it to the state board of equalization, by whom it is taxed, and the owner of the lot pays the taxes assessed thereon by the county assessor, exclusive of the right-of-way; the state board was without jurisdiction, and the taxes paid by the railroad did not operate as payment of taxes.
R. G. W. Ry. Co. v. S. L. Inv. Co., 35 U. 528; 101 P. 586.

The burden of proof rested on one claiming by adverse possession to show that taxes were not levied and assessed if such was the fact or that they were paid if they were levied and assessed, and the failure to pay for one year defeats the claim of adverse possession.
Central Pac. Ry. Co. v. Tarpey, 50 U. —; 168 P. 554.

Where, before the purchaser under a contract had adverse possession for seven consecutive years, he brought suit against the railroad company for the specific performance of its agreement, on the theory that the party who made the contract with him was the agent, thereby recognizing and admitting its legal title, this broke the continuance of his adverse possession.
Id.

Where plaintiff has paid all taxes levied on a mining claim under § 5864, and defendants have occupied and improved parcels of the surface thereof which have a value independent of mining purposes, and have paid taxes thereon under a very uncertain description, the occupant's possession may ripen into title whether the tax description was sufficient or not, for if there was no legal assessment, payment of taxes was not necessary for the acquisition of title.
Utah Copper Co. v. Chandler, 45 U. 85; 142 P. 1119.

Of course, where the occupant pays taxes his possession ripens into title.
Utah Copper Co. v. Eckman, 47 U. 165; 152 P. 178.

A finding that all the rights of the plaintiff are barred by §§ 6449-6456, inclusive, and that the right of the defendant is perfected by said statutes, is a mere conclusion.
Ives v. Grange, 42 U. 608; 134 P. 619.

EASEMENTS:

See Stephens v. U. P. R. Co., 48 U. 528, 161 P. 459.

A prescriptive easement arises only by an adverse use and enjoyment thereof, continuous and uninterrupted for twenty years under a claim of right.
Harkness v. Woodmansee, 7 U. 227; 26 P. 291.
Yeager v. Woodruff, 17 U. 361; 53 P. 1045.
Coleman v. Hines, 24 U. 360; 67 P. 1122.
Morris v. Blunt, 49 U. 243; 161 P. 1127.

Where a deed granted the use of a passageway "so long as it is used as a passageway," and the grantee used the way under the deed and did not repudiate the license nor apprise the grantor he was using it under a claim of right, such user did not ripen into a prescriptive right.
Reese Howell Co. v. Brown, 48 U. 142; 158 P. 684.

Where defendant had an easement in a street for maintaining a flume for milling purposes, he could not acquire more than a perpetual right to maintain the flume for such purposes, and could not claim by adverse possession legal title to that part of the street so as to enable him to maintain the flume banks at any desired height.
Hague v. Juab County M. & E. Co., 39 U. 290; 107 P. 249.

To acquire a private easement in the nature of a right-of-way over the lands of another, the claimant must have used the same openly, continuously, and adversely for twenty years, and during all of that time title to the lands must have been out of the United States.
Bolton v. Murphy, 41 U. 591; 127 P. 335.

Easement by prescription must be acquired by twenty years' user after patent issues, as no prescriptive rights can be acquired against the United States.
Lund v. Wilcox, 34 U. 205; 97 P. 33.

The complaint in an action to enjoin interference with use of land as a highway did not show a right based on adverse user, where it did not allege that the use of the land was adverse and under a claim of right.
Farr v. Wheelwright C. Co., 49 U. 274; 163 P. 256.

BOUNDARIES:

Where the complaint definitely describes the ground in controversy, plaintiff cannot show acquiescence in a fence line beyond the area described in the complaint.
Tuckfield v. Crager, 29 U. 472; 82 P. 860.

A temporary shed erected without regard to a boundary does not become a boundary line, nor is title by possession acquired by leaving vehicles and occasionally depositing refuse on land.
Peery Estate v. Ford, 46 U. 436; 151 P. 59.

Where there is a surplus of land in a block, such fact will be considered.
Houghton v. Barton, 49 U. 611; 165 P. 471.

In a boundary dispute between the owners of the north half and the south half of a lot, where the owner of the north half took possession of a strip which he believed was a part of the north half, and improved it, and then moved away, and the purchaser of the south half took actual possession of the strip, collected rent from the tenants, made additional improvements and paid taxes including improvements, the owners of the north half being assessed with no improvements, the owner of the south half acquired title by adverse possession.
Id.

A boundary line is established by acquiescence for a long term of years.
McMaster v. Morse, 18 U. 21; 55 P. 70.
Larson v. Onesite, 21 U. 38; 59 P. 234.
Crane v. Judge, 30 U. 50; 83 P. 566.
Holmes v. Judge, 31 U. 269; 87 P. 1009.
Nover v. Langton, 37 U. 9; 106 P. 508.
Rydalch v. Anderson, 37 U. 99; 107 P. 25.
Young v. Hyland, 37 U. 29; 108 P. 1124.
Farr v. Thomas, 41 U. 1; 122 P. 906.
Binford v. Eccles, 41 U. 453; 126 P. 333.
Christensen v. Buetler, 42 U. 392; 131 P. 666.
Warren v. Mazzuchi, 45 U. 612; 148 P. 360.
Tanner v. Stratton, 44 U 253; 139 P. 940.

Bartholomew v. Pickett, 50 U. —; 170 P. 65.
Blackham v. Olsen, 50 U. —; 169 P. 156.
Van Cott v. Cashier, 51 U. —; 171 P. —.
Less than twenty years' acquiescence seems to be insufficient to establish a boundary, unless the element of estoppel enters.
Switzgable v. Worseldine, 5 U. 315; 15 P. 144.
Swenson v. Snell, 22 U. 191; 61 P. 555.
Strickley v. Hill, 22 U. 257; 62 P. 893.
Cottrell v. Pickering, 32 U. 62; 88 P. 696.

6457. (2866x.) Title to streets, etc. No person shall be allowed to acquire any right or title in or to any lands held by any town or city or county or the corporate authority thereof, designated for public use as streets, lanes, avenues, alleys, parks, and public squares, or for other purpose, by adverse possession thereof for any length of time whatsoever, unless it shall affirmatively appear that such town or city or county or the corporate authorities thereof have sold or otherwise disposed of and conveyed such real estate to a purchaser for a valuable consideration, and that for more than seven years subsequent to such conveyance, the purchaser, his grantees or successors in interest, have been in the exclusive, continuous, and adverse possession of such real estate, in which case an adverse title may be acquired.

'99, p. 55; am'd '11, p. 321.

Streets continue until abandoned, § 2802.
The phrase, "or for other purposes," must be limited to things ejusdem generis with the property especially named, and the city board of education may lose title to property by adverse possession that is not used for school purposes, but held for sale as business property.
Pioneer Inv. & T. Co. v. Bd. Education, 35 U. 1; 99 P. 150.
There is no bar by statute of limitations against a municipality in respect to a public street within its boundaries, but it may be estopped from claiming a portion of a street.
Wall v. Salt Lake City, 50 U. —; 168 P. 766.

6458. (2867.) Possession of tenant, possession of landlord for seven years. When the relation of landlord and tenant has existed between any persons, the possession of the tenant is deemed the possession of the landlord until the expiration of seven years from the termination of the tenancy, where there has been no written lease, until the expiration of seven years from the time of the last payment of rent, notwithstanding that such tenant may have acquired another title, or may have claimed to hold adversely to his landlord; but such presumption cannot be made after the periods herein limited.

Cal. C. Civ. P., § 326*.
When statute begins to run, note to § 6445.
Lessee of mine cannot acquire adverse title, note to § 3890.

6459. (2868.) Right of possession not affected by descent cast. The right of a person to the possession of real property is not impaired or affected by a descent cast in consequence of the death of a person in possession of such property.

Cal. C. Civ. P., § 327.

6460. (2869.) Action to recover estate sold by guardian. Three years. No action for the recovery of any estate sold by a guardian can be maintained by the ward, or by any person claiming under him, unless it is commenced within three years next after the termination of the guardianship.

Cal. C. Civ. P., § 1806*.
Sale of land by guardian, § 7838.

6461. (2870.) Action to recover estate sold by executor, etc. Three years. No action for the recovery of any estate sold by an executor or administrator in the course of any probate proceeding can be maintained by any heir or other person claiming under the decedent, unless it be commenced within three years next after such sale. An action to set aside the sale may be instituted and maintained at any time within three years from the discovery of the fraud or other lawful grounds upon which the action is based.

Cal. C. Civ. P., § 15736.
Sale of land by executor or administrator, § 7677.

6462. (2871.) Legal disability prevents running of statute. Removal. The two preceding sections shall not apply to minors or others under any legal disability to sue at the time when the right of action first accrues, but all such persons may commence an action at any time within one year after the removal of the disability.

Cal. C. Civ. P., §§ 1574*, 1806*.
Legal disability, actions other than for recovery of real property, § 6480.
Adverse possession for more than seven years against an administrator entitled to sue for recovery of the property will bar an action to quiet title therein brought by an heir who was under disability at the time the cause of action accrued.
Jenkins v. Jensen, 24 U. 108; 66 P. 773.

6463. (2872.) Id. Time of disability not reckoned. If a person entitled to commence an action for the recovery of real property, or for the recovery

of the possession thereof, or to make any entry or defense, founded on the title to real property, or to rents or services out of the same, be at the time such title shall first descend or accrue, either:

1. Within the age of majority; or,
2. Insane; or,
3. Imprisoned on a criminal charge, or in execution upon conviction of a criminal offense, for a term less than for life—the time during which such disability continues is not deemed any portion of the time in this chapter limited for the commencement of such actions, or the making of such entry or defense, but such action may be commenced, or entry or defense made, within the period of two years after such disability shall cease, or after the death of the person entitled, who shall die under such disability, but such action shall not be commenced, or entry or defense made, after that period.

Cal. C. Civ. P., § 328*.
Disaffirmance of contract by minor, § 3956.
One year after disability removed, in actions personal, § 6480.

UTAH STATE PROPERTY

CHAPTER 4.

LIMITATIONS—OTHER THAN REAL PROPERTY.

6464. (2873.) Periods prescribed. The periods prescribed for the commencement of actions other than for the recovery of real property are as hereinafter provided.

Cal. C. Civ. P., § 335.
Statute how pleaded, § 6602, and note.
Statute begins to run when, note to § 6445.

6465. (2874.) Action on judgment. Eight years. Within eight years:

An action upon a judgment or decree of any court of the United States, or of any state or territory within the United States.

Cal. C. Civ. P., § 331*.
Judgment a lien for eight years, § 6868.
Execution must issue within eight years, § 6912.
The statute, on a judgment where there is no appeal, starts on the entry of the judgment, not at the expiration of six months allowed for appeal.
Sweetser v. Fox, 43 U. 40; 134 P. 599.

6466. (2875.) Action on written instrument. Mesne profits. Six years. Within six years:

1. An action for the mesne profits of real property;
2. An action upon any contract, obligation, or liability founded upon an instrument of writing, except those mentioned in the preceding section.

Cal. C. Civ. P., §§ 336*, 337*.
Limitation on action to recover rents or profits of real property, § 6450.
Payment or new promise extends time, § 6489, and note.
Statute begins to run when, note to § 6445.
Statute does not begin to run till cause of action arises, note to § 6445.
Effect of limitations in insurance contract and stock-shipper's contract, note to § 6445.
Statute how pleaded, § 6602, and note.

This section applies to a new promise in writing to pay an old account not founded on instrument of writing.
Boukofsky v. Powers, 1 U. 333.
Gruenberg v. Buhring, 5 U. 414; 16 P. 486.
See Anthony v. Savage, 2 U. 466.

An action upon a bond for the payment of indebtedness arising by sales of merchandise upon account is an action founded upon an instrument of writing.
Victor S. M. Co. v. Crockwell, 3 U. 152; 1 P. 470.
See Streeper v. Victor S. M. Co., 112 U. S. 676, 688.

Claim already barred not affected by increase in limitation from four to six years.
Ireland v. McIntosh, 22 U. 296; 61 P. 901.

An action on a written instrument accruing within four years prior to March 20, 1897 (when the statute was extended by amendment from four to six years), might, under provisions of this section, be commenced any time within six years after such accrual.
Guthiel v. Gilmer, 27 U. 496; 76 P. 628.

Note secured by mortgage may be extended by consent of parties, and all parties, including subsequent purchaser with notice, will be bound thereby.
McKay v. Ward, 20 U. 149; 57 P. 1024.

In an action founded upon a receipt given for notes taken for collection, plaintiff had four years, under law of 1888, from the time the statute began to run within which to begin suit.
Stevens v. Rogers, 16 U. 105; 51 P. 216.

An action on the written obligation of one of several uniting in the purchase and sale of corporate stock, all to be interested in proportion to the amount subscribed, is controlled by sub. 2, of this section.
McMillan v. Whitley, 38 U. 452; 113 P. 1026.

6467. (2876.) Action on contract not in writing. Four years. Within four years:

An action upon a contract, obligation, or liability not founded upon an instrument of writing; also on an open account for goods, wares, and merchandise, and for any article charged in a store account; *provided*, that action in said cases may be commenced at any time within four years after the last charge is made, or the last payment is received.

Cal. C. Civ. P., § 339*.
Action upon mutual, open, and current account, § 6473.
Statute begins to run, when, note to § 6445.
Decisions as to trusts and trustees, note to § 6445.
Word "liability" does not embrace torts.
Thomas v. U. P. Ry. Co., 1 U. 235.
Action on a verbal assumption of the payment of a mortgage must be brought within two years, under the statute of 1888.
Thompson v. Cheesman, 15 U. 43; 48 P. 477.
Action against city for money illegally collected for taxes barred in two years, under law of 1888.
Raleigh v. S. L. City, 17 U. 130; 53 P. 974.
See Cent. Eureka M. Co. v. Juab Co., 22 U. 395; 62 P. 1024.
Upon a failure to convey land, a right of action accrues to recover payments made, and the contract, being implied, the action is barred, under § 3145, laws of 1888, if not brought within two years thereafter.
Duncan v. Geyser M. Co., 17 U. 209; 53 P. 1044.
Where a grantee verbally agrees to pay the grantor, for life, a half of the crop grown on the land conveyed, an action therefor for the years 1903 and 1904, brought within four years from January 1, 1903, was not barred.
Johnson v. Johnson, 31 U. 408; 88 P. 230.
Leaving money with the defendant, with instructions to use a part in paying depositors' debts and to turn the balance over to depositor on demand, does not constitute a trust fund, and the limitation is controlled by this section.
Francis v. Gisborn, 30 U. 67; 83 P. 571.

6468. (2877.) Action for liability created by statute. One year. Trespass, waste, fraud, etc. Three years.

1. An action for liability created by the statute of a foreign state or by the statute of this state other than a penalty or forfeiture under the laws of this state shall be begun within one year;

2. An action for waste or trespass of real property, within three years; *provided,* that when the waste or trespass is committed by means of underground works upon any mining claim, the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting such waste or trespass;

3. An action for taking, detaining, or injuring personal property, including actions for specific recovery thereof, within three years; *provided,* that in all cases where the subject of the action is a domestic animal usually included in the term "live stock," having upon it at the time of its loss a recorded mark or brand, and when such animal was strayed or stolen from the true owner without his fault, the statute shall not begin to run against an action for the recovery of such animal until the owner has actual knowledge of such facts as would put a reasonable man upon inquiry as to the possession thereof by the defendant;

4. An action for relief on the ground of fraud or mistake, three years; the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake. Am'd '05, p. 114.

Cal. C. Civ. P., § 338*. Mont. Civ. P., §524*.
Statute of limitations begins to run, when, note to § 6445.
The right of an abutting property owner to recover damages for change of street grade is governed by Con. art. 1, sec. 22, and not by C. L., § 700, and such action is not based on a statutory liability within sub. 1 hereof, but is governed by § 6474.
Webber v. Salt Lake City, 40 U. 221; 120 P. 503.
An action against a railroad for cattle killed on its right-of-way, predicated on negligence in operating the train, as well as on defective cattle guards and right-of-way fences, is not governed by sub. 1.
Preece v. O. S. L. R. Co., 48 U. 551; 161 P. 40.
Action against a judgment creditor for directing a levy and sale of exempt property is governed by this section, and not by § 6469.
Snow v. West, 35 U. 206; 99 P. 674.
An action against a railroad company for compensation for use of land without condemnation thereof is governed by § 6450, and not by sub. 2 of this section.
Salt Lake Inv. Co. v. O. S. L. R. Co., 46 U. 203; 148 P. 439.
Sub. 2 applies to the action of trespass at common law, and not to an action against a railroad company for injury to a house caused by the jar of trains and the emission of smoke and cinders, to which latter action § 6474 applies.
O'Neill v. San Pedro, L. A. & S. L. R. Co., 38 U. 475; 114 P. 127.
Where the plaintiff does not own the land on which fish ponds are situate, an action for damages for the pollution of such ponds is only for damage to personal property, and is governed by sub. 3.
Reese v. Qualtrough, 40 U. 23; 156 P. 955.
The provisions of this section apply to the fraud of a bank in loaning the money of a depositor in a different manner than he directs for the benefit of the bank, though the fraud is not intentional.
Larsen v. Utah L. & T. Co., 23 U. 449; 65 P. 208.
An action to recover stock on the ground of fraud and non-compliance with the statute is barred by § 3144, laws of 1888, and this section, where complainant participated in proceedings under which levy was made, had notice of sale, acquiesced therein, and slept on his rights for more than three years.
Raht v. Sevier M. & M. Co., 18 U. 290; 54 P. 889.
An action by a city, to set aside a judgment entered upon the disclaimer of its attorney, quieting title to land owned by it and wrongfully sold for taxes from which it was exempt, is barred three years after the entry of such judgment, even though judgment were fraudulently secured, as the city must have known when judgment was rendered that its property was exempt from taxation.
Salt Lake City v. S. L. Inv. Co., 43 U. 181; 134 P. 603.
The statute starts to run from the time plaintiff is informed of such facts tending to show fraud as would put an ordinary person on inquiry; and if the action is barred against the agent of an undisclosed principal, it is barred against the principal, as mere concealment of agency is not such fraud as tolls the statute.
Gibson v. Jensen, 48 U. 244; 158 P. 426.

Where there is no allegation of concealment or estoppel, a mistake in a deed describing the grantee's rights is barred under sub. 4, since the grantee is presumed to have known of the alleged mistake.
Reese Howell Co. v. Brown, 48 U. 142; 158 P. 684.

A mere suspicion of fraud does not start the statute, it requires some tangible information.
Cunningham v. Pettigrew, 169 Fed. Rep. 335.

Where a contract for the sale of an interest in an estate, in which there was a life estate, provided for an adjustment of the price based on the appraised valuation of the estate at the time of final distribution, and in 1895 final distribution thereof was ordered over the objection of the plaintiff that it should not be made until the death of the life tenant, and upon the death of the life tenant in 1909 an action was brought to reform the contract for fraud and mistake in that the contract should have provided that an appraisal of the interest should be made upon partition after the death of the life tenant; such action is barred by sub. 4, as the time began to run from the date of distribution, even though plaintiff interpreted the contract otherwise.
Weight v. Bailey, 45 U. 584; 147 P. 899.

6469. (2878.) Action against officer or for death by negligence. Two years. Within two years:

1. An action against a marshal, sheriff, constable, or other officer upon a liability incurred by the doing of an act in his official capacity, and in virtue of his office, or by the omission of an official duty, including the non-payment of money collected upon an execution; but this section shall not apply to an action for an escape;

2. An action to recover damages for the death of one caused by the wrongful act or neglect of another.

Cal. C. Civ. P., § 339*.
Action for damages for negligence of common carrier, four years.
Thomas v. U. P. Ry. Co., 1 U. 235.

Action against judgment creditor for directing levy and sale of exempt property is governed by § 6468, and not by this section.
Snow v. West, 35 U. 206; 99 P. 674.

6470. (2879.) Action for forfeiture, libel, assault, etc. One year. Within one year:

1. An action upon a statute for a penalty or forfeiture where the action is given to an individual, or to an individual and the state, except when the statute imposing it prescribes a different limitation;

2. An action upon a statute, or upon an undertaking in a criminal action, for a forfeiture or penalty to the state;

3. An action for libel, slander, assault, battery, false imprisonment, or seduction;

4. An action against a sheriff or other officer, for the escape of a prisoner arrested or imprisoned upon either civil or criminal process;

5. An action against a municipal corporation for damages or injuries to property caused by a mob or riot.

Cal. C. Civ. P., § 340*.

Limitation on notary's bonds, § 4252.

6471. (2880.) Action against officer for seizure or for taxes. Six months. Within six months, an action against an officer, or officers de facto:

1. To recover any goods, wares, merchandise, or other property seized by any such officer in his official capacity, as tax collector, or to recover the price or value of any goods, wares, merchandise, or other personal property so seized, or for damages for the seizure, detention, sale of, or injury to, any goods, wares, merchandise, or other personal property seized, or for damages done to any person or property in making any such seizure;

2. For money paid to any such officer under protest, or seized by such officer in his official capacity, as a collector of taxes, and which, it is claimed, ought to be refunded.

Cal. C. Civ. P., 341*.
Action for money illegally collected for taxes must be brought within six months, if brought against the officer.
Raleigh v. S. L. City, 17 U. 130; 53 P. 974.

6472. (2881.) Action against county or city on rejected claim. One year. Actions on claims against a county, incorporated city, or town, which have been rejected by the board of county commissioners, city council, or board of trustees, as the case may be, must be commenced within one year after the first rejection thereof by such board, city council, or board of trustees. Am'd '03, p. 11.

Presentation of claim against county, §§ 1427-1435; city, §§ 619, 816, 570x2; town, § 788.

6473. (2882.) Action accrues from last item of mutual account. In an action brought to recover a balance due upon a mutual, open, and current account, where there have been reciprocal demands between the parties, the cause of action shall be deemed to have accrued from the time of the last item proved in the account on either side.

Cal. C. Civ. P., § 344.
Action upon open account, § 6467, and note.
A statute of limitations commences to run from the date of each transaction in an open account, and not from the date of the last entry. In mutual accounts, the statute runs from the date of the last entry.
Anthony v. Savage, 2 U. 466.
Mutual, open, and current account. Statute runs from last entry.
Toponce v. Corinne M. & S. Co., 6 U. 439; 24 P. 534; affirmed 152 U. S. 405.
That one partner confessed judgment on an account before the statute had run had no effect as against the other after four years, except to make the claim an account stated, so that in an action begun after such time it is immaterial whether one partner could bind the other.
Woolf v. Gray, 48 U. 239; 158 P. 788.

6474. (2883.) Actions for relief not provided for. Four years. An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued.

Cal. C. Civ. P., § 343.
Statute begins to run, when, note to § 6445.
When statute begins to run against a trustee, note to § 6445.
Debts held to be due in a reasonable time, note to § 6445.
Action for damages for death by negligence, two years, § 6469.
This section embraces actions for negligence against common carrier.
Thomas v. U. P. Ry. Co., 1 U. 235.
The general statute of limitations, which nowhere refers to actions for divorce, does not apply to such actions.
Tufts v. Tufts, 8 U. 142; 30 P. 309.
This section applies to an action for the recovery of unlawful taxes paid under protest.
Centennial-Eureka M. Co. v. Juab Co., 22 U. 395; 62 P. 1024.
An action for compensation for taking land is governed by § 6450.
S. L. Inv. Co. v. O. S. L. R. Co., 46 U. 203; 148 P. 439.
Where a trustee has repudiated the trust, action is barred after a lapse of four years from the time the beneficiary received notice of such repudiation.
Felkner v. Dooly, 28 U. 236; 78 P. 365.
The following actions are governed by this section:
By abutting property owner for damages by a change of street grade.
Webber v. Salt Lake City, 40 U. 221; 120 P. 503.
Against a railroad for injury to adjacent property by jar and emission of smoke and cinders.
O'Neill v. San Pedro, L. A. & S. L. R. Co., 38 U. 475; 114 P. 127.
For a refund of taxes collected on property not subject to taxation.
Neilsen v. Sanpete County, 40 U. 560; 123 P. 334.
To enjoin a special assessment for municipal improvements.
Branting v. Salt Lake City, 47 U. 296; 153 P. 995.

6475. (2884.) Limitations herein apply to state. The limitations prescribed in this chapter shall apply to actions brought in the name of or for the benefit of the state in the same manner as to actions by private parties.

Cal. C. Civ. P., § 345.
Limitation, recovery of real property by the state, § 6446.
These statutes are applicable to the agencies of the state.
Pioneer Inv. Co. v. Bd. Ed., 35 U. 1; 99 P. 150.

6476. (2885.) Action against mortgagee in possession. Seven years. An action to redeem a mortgage of real property, with or without an account of rents and profits, may be brought by the mortgagor, or those claiming under him, against the mortgagee in possession, or those claiming under him, unless he or they have continuously maintained an adverse possession of the mortgaged premises for seven years after breach of some condition of the mortgage.

Cal. C. Civ. P., § 346*.
Redemption of land sold under foreclosure, § 7235.

6477. (2886.) Id. When more than one mortgagor. If there is more than one such mortgagor, or more than one person claiming under a mortgagor, some of whom are not entitled to maintain such an action, under the provisions of this chapter, any one of them who is entitled to maintain such an action may redeem therein a divided or undivided part of the mortgaged premises, according as his interest may appear, and have an accounting for a part of the rents and profits, proportionate to his interest in the mortgaged premises, on payment of a part of the mortgage money, bearing the same proportion to the whole of such money as the value of his divided or undivided interest in the premises bears to the whole of such premises.

Cal. C. Civ. P., § 347.

6478. (2887.) No limitation against recovery of deposits. To actions brought to recover money or other property deposited with any bank, banker, trust company, or savings or loan corporation, association, or society, there is no limitation.

Cal. C. Civ. P., § 348*.
Suit to recover a fund deposited in the bank for special purpose governed by this section.
Larsen v. U. L. & T. Co., 23 U. 449; 65 P. 208.

CHAPTER 5.

LIMITATIONS—MISCELLANEOUS.

6479. (2888.) Absence suspends running of statute. If when the cause of action accrues against a person he is out of the state, the action may be commenced within the term herein limited after his return to the state; and if after the cause of the action accrues he depart from the state, the time of his absence is not part of the time limited for the commencement of the action.

Cal. C. Civ. P., § 351.

Where contracts made between non-residents, statute does not begin to run until defendant comes into the territory.

Burnes v. Crane, 1 U. 179.

Lawson v. Tripp, 34 U. 28; 95 P. 520.

Words "depart" and "return" herein apply as well to non-residents coming into Utah as to residents going abroad and returning, and the words "return to the state" are equivalent to "come within the state."

Id.

The junior lien holder may invoke the statute against the senior mortgagee, and in such action absence from the state of the mortgagor does not toll the statute, though it would be tolled in an action by the mortgagee against the mortgagor.

Graves v. Seifried, 31 U. 203; 87 P. 674.

Boucofski v. Jacobsen, 36 U. 165; 104 P. 117.

A finding that defendant had a home, family, and residence in the state continuously from the time the debt was contracted until two years after the statute of limitation had run, is sufficient evidence of continuous residence in the state to invoke the statute of limitation.

Woolf v. Gray, 48 U. 239; 158 P. 788.

Where, after the cause of action accrued, the defendant departed from the state and was absent for the ensuing six years, with the exception of a period of about four months at one time, the statute is tolled, even though the defendant's wife and family continued to reside in the state during the entire time.

Keith-O'Brien Company v. Snyder, 50 U. —; 169 P. 954.

6480. (2889.) Legal disability prevents running of statute. Removal. If a person entitled to bring an action, other than for the recovery of real property, be at the time the cause of action accrued, either:

1. Within the age of majority; or,
2. Insane; or,
3. Imprisoned on a criminal charge, or in execution under the sentence of a criminal court, for a term less than for life—the time of such disability is not a part of the time limited for the commencement of the action, but such action may be commenced within one year after such disability shall cease.

Cal. C. Civ. P., §§ 352*, 1574*, 1805*, 1806*.

Two years after disability removed, in actions real, § 6463.

Disaffirmance of contract by minor, § 3956.

Disability must exist when right accrues, §§ 6486, 6487.

Actions for recovery of real property, §§ 6462, 6463.

6481. (2890.) Death before expiration of limitation. Effect. If a person entitled to bring an action die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced by his representatives after the expiration of that time, and within one year from his death. If a person against whom an action may be brought die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced against his representatives after the expiration of that time, and within one year after issuing of letters testamentary or of administration.

Cal. C. Civ. P., § 353*.

During vacancy in administration, time does not run, § 7690.

Presentment of claim against estate, rejection, limitation of action, §§ 7653-7656

Where a person dies before the statute has run and letters of administration are issued, and suit is started within a year from such date, the action is commenced in time.

Robison v. Gull, 51 U. —; 173 P. —.

6482. (2891.) Death of debtor out of state, statute suspended. If a person against whom a cause of action exists dies without the state, the time which elapses between his death and the expiration of one year after the issuing, within this state, of letters testamentary or letters of administration, is not a part of the time limited for the commencement of an action therefor, against his executor or administrator.

Mont. Civ. P., § 544.

6483. (2892.) War suspends statute as to aliens. When a person is an alien subject, or citizen of a country at war with the United States, the time of the continuance of the war is not part of the period limited for the commencement of the action.

Cal. C. Civ. P., § 354.

6484. (2893.) New action after reversal or failure not upon the merits. If any action be commenced within due time, and a judgment thereon for the plaintiff be reversed, or if the plaintiff fail in such action or upon a cause of

action otherwise than upon the merits, and the time limited for the same shall have expired, the plaintiff, or, if he die, and the cause of action survive, his representatives, may commence a new action within one year after the reversal or failure.

Kansas (1889) § 4100.

Where the adverse claimant brings an action to quiet title, the running of the statute is not suspended, and upon its dismissal this section is not applicable.

Welner v. Stearns, 40 U. 185; 120 P. 490.

That another action had been commenced, prior to the instant one, to which the bar of the statute of limitations is urged, does not remove the bar if such action was on a different cause or was commenced after the statute had run.

Woolf v. Gray,, 48 U. 239; 158 P. 788.

Where an attorney had prepared two complaints, and by an oversight had filled the wrong complaint, which was not discovered until the case came on for trial, and the action was then dismissed, and the complaint originally intended to be filed, was filed, this section is applicable.

Salisbury v. Poulson, 51 U. —; 172 P. 315.

In the following cases actions were held to have failed "otherwise than on its merits":

Where an action is voluntarily dismissed.

Luke v. Bennion, 36 U. 61; 106 P. 712.

Where a non-suit is granted.

Williams v. Nelson, 45 U. 255; 145 P. 39.

Where a judgment of non-suit is affirmed on appeal, plaintiff has one year from affirmance.

Guthiel v. Gilmer, 27 U. 496; 76 P. 628.

Where, in the justice's court, a motion for judgment on the pleadings was argued and submitted, but not decided, and the action dismissed on the plaintiff's motion.

Quealy v. Sullivan, 42 U. 565; 132 P. 4.

6485. (2894.) Where action stayed by injunction, etc., statute suspended. When the commencement of an action is stayed by injunction, or a statutory prohibition, the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action.

Cal. C. Civ. P., § 356.

6486. (2895.) Disability must exist when right of action accrues. No person can avail himself of a disability, unless it existed when his right of action accrued.

Cal. C. Civ. P., § 357.

6487. (2896.) Co-existing disability must be removed. When two or more disabilities co-exist at the time the right of action accrues, the limitation does not attach until all are removed.

Cal. C. Civ. P., § 358.

6488. (2897.) Action against directors or stockholders. Three years after discovery. This chapter does not affect actions against directors or stockholders of a corporation, to recover a penalty or forfeiture imposed, or to enforce a liability created by law; but such actions must be brought within three years after the discovery, by the aggrieved party, of the facts upon which the penalty or forfeiture attached, or the liability was created.

Cal. C. Civ. P., § 359.

Powers and liabilities of directors, § 871, and note.

6489. (2898.) Payment, acknowledgment, or promise extends time. In any case founded on contract, when any part of the principal or interest shall have been paid, or an acknowledgment of an existing liability, debt, or claim, or any promise to pay the same shall have been made, an action may be brought in such case within the period prescribed for the same, after such payment, acknowledgment, or promise; but such acknowledgment or promise must be in writing, signed by the party to be charged thereby. When a right of action is barred by the provisions of any statute, it shall be unavailable either as a cause of action or ground of defense.

Kansas (1889) §§ 4101, 4102.

The acknowledgment and new promise is a new contract, notwithstanding it was made before statute had run against original account.

Boukofsky v. Powers, 1 U. 333.

The mere stating of an account between the parties does not take the case out of the statute of limitations, unless such stated account be in writing and signed by the party sought to be charged.

Anthony v. Savage, 2 U. 466.

Where an account is barred, it is still a sufficient consideration for a new promise; and if such new promise be made, the action must be upon such promise, and not upon the original cause of action.

Id.

A new promise in writing made after a cause of action is barred does not revive the former obligation, but creates a new one, which in its turn is subject to a bar by lapse of time as an original promise.

Ireland v. McIntosh, 22 U. 296; 61 P. 901.

Gruenberg v. Buhring, 5 U. 414; 16 P. 486.

A new promise based on a prior agreement, barred by the statute of limitations, is within provisions of § 6823, and must be in writing.

Whitehill v. Lowe, 10 U. 419; 37 P. 589.

For example of sufficient acknowledgment hereunder, see

Thomas v. Glendinning, 13 U. 47; 44 P. 652.

Acknowledgment with promise to pay upon contingency is sufficient. But in action thereon, plaintiff must show that contingency has happened.

Kuhn v. Mount, 13 U. 108; 44 P. 1036.

A payment will not revive an action which was barred when the provision as to payments was enacted.

Francis v. Gisborn, 30 U. 67; 83 P. 571.

Scheduling a claim in bankruptcy does not revive the debt.

O'Donnel v. Parker, 48 U. 578; 160 P. 1192.

Where cross demands exist, they may be offset against each other, and claims which are barred so as to prevent judgment may be allowed as an offset.

Utah C. S. B. v. Fox, 40 U. 205; 120 P. 840.

Where property was pledged under a usurious contract, payments made acceptance thereof and extending time for future payments and promising to keep the property for plaintiff, operates as an extension of time for bringing the action.

Conner v. Smith, 50 U. —; 169 P. 158.

6490. (2899.) Action barred in another state, barred here. Exception. When a cause of action has arisen in another state or territory, or in a foreign country, and by the laws thereof an action thereon cannot there be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this state, except in favor of one who has been a citizen of this state and who has held the cause of action from the time it accrued.

Cal. C. Civ. P., § 361.

Action must be brought within the period prescribed by the local laws of the country where the suit is brought.

Burnes v. Crane, 1 U. 173.

Where a resident plaintiff acquired a cause of action by assignment after it accrued, he does not come within the exception of this section.

Lawson v. Tripp, 34 U. 28; 95 P. 520.

6491. (2900.) Existing rights not affected hereby. This chapter does not extend to actions already commenced, nor to cases where the time prescribed in any existing statute for acquiring a right or barring a remedy has fully run.

Cal. C. Civ. P., § 362*.

Through inadvertence, in R. S. 1898, the word "chapter" was inserted in this section instead of a reference to this and the two chapters next preceding.

General repeal not to affect limitations, § 5834.

Effect of increase of limitation on claims, note to § 6466.

6492. (2901.) "Action," how construed. The word "action," as used in this chapter, is to be construed, whenever it is necessary to do so, as including a special proceeding of a civil nature.

Cal. C. Civ. P., § 363.

Special proceedings in general, §§ 7374, 7375.

CHAPTER 6.

PARTIES.

6495. (2902.) Action to be in name of real party in interest. Trustee of express trust defined. Every action must be prosecuted in the name of the real party in interest, except that an executor or administrator, a trustee of an express trust, or a person expressly authorized by statute may sue without joining with him the person for whose benefit the action is prosecuted. A person with whom or in whose name a contract is made for the benefit of another is a trustee of an express trust, within the meaning of this section.

Mont. C. Civ. P., § 570.

Corporate and representative capacity may be pleaded generally, § 6610; denial must be under oath, § 6611.

Parties having an interest, etc., may be joined as plaintiffs, § 6506.

Actions by executors, etc., §§ 7718-7720.

Who may sue for wrongful death, §§ 6504, 6505.

Executor who has not qualified not made a party, § 7726.

Substitution of parties, § 6513, and note.

In water suits all parties on the stream may be brought in, § 3485.

Complaint by officer in his official capacity should show same.

Hamilton v. Spiers, 2 U. 225.

An executor has no authority to maintain an action in his own name to have a trust declared in favor of a devisee to real estate, claimed as belonging to such devisee.

Raleigh v. Hulett, 2 U. 122.

In an action against executors de son tort, the complaint must charge them as executors generally.

First N. Bank v. Lewis, 12 U. 84; 41 P. 712.

In an action on a tax collector's bond, for his neglect or refusal to pay over to the treasurer taxes collected, the county court, and not the county, is the proper party plaintiff.

S. L. Co. v. Golding, 2 U. 319.

Suit may be brought in the name of the lessee under a deed giving right to possession, since he is the real party in interest.

Tarpey v. Des. Salt Co., 5 U. 205; 14 P. 338.

Trustees of school district are proper plaintiffs in action on bond of county collector running to "whomsoever it may concern," to recover funds of district in collector's hands.

Walton v. Jones, 7 U. 462; 27 P. 580.

Where a libelous article refers to a family or class of individuals, any one of the family or class may maintain an action therefor.

Fenstermaker v. Tribune Publishing Co., 12 U. 439; 43 P. 112.

Where legal title to homestead is in wife, husband may join as plaintiff, in an action to enjoin sale, where he has an equitable interest.

Anderson v. Davis, 18 U. 200; 55 P. 363.

Wife the proper person to bring action for support of children under decree of divorce, though decree provided that the money was to be paid to a third person for the use of the children.

Hunt v. Monroe, 32 U. 440; 91 P. 269.

Plaintiff, a mortgagee, whose debt exceeded the loss, sued on an insurance policy between defendant (the insurer) and the mortgagor, which provided, "loss, if any, payable to Peck, as his interest may appear." The suit was properly brought by plaintiff alone.

Peck v. Girard F. & M. Ins. Co., 16 U. 121; 51 P. 255.

Actions to enforce the statutory liabilities of the stockholders of an insolvent banking corporation should be brought by the creditors.
McLaughlin v. Kimball, 20 U. 254; 58 P. 685.
Steinke v. Loofbourow, 17 U. 252; 54 P. 120.

Agent is not the real party in interest though he has an interest in the profits.
Tripler v. Mt. Pleasant Bank, 21 U. 313; 61 P. 25.

The beneficiary of a contract may sue on it, although the contract was made without his knowledge and without consideration from him.
Brown v. Markland, 16 U. 360; 52 P. 597.
Thompson v. Cheesman, 15 U. 43; 48 P. 477.
Montgomery v. Rief, 15 U. 495; 50 P. 623.
McKay v. Ward, 20 U. 149; 57 P. 1024.

The trustee of an express trust is the real party in interest, and judgment in suit prosecuted by him is a bar to a suit by those whom he represented.
Com. Nat. Bank v. Paige-Brinton, 45 U. 14; 142 P. 709.

A complaint in an action not brought by the real party in interest cannot be amended by the substitution of the proper party where a wholly new issue is presented by the substitution, or the defendant is prejudiced thereby.
Wilson v. Kiesel, 9 U. 397; 35 P. 488.
Skews v. Dunn, 3 U. 186; 2 P. 64.

That the person making a contract for another makes it in his own name, does not preclude the other from suing thereon, as the real party in interest.
Cole v. Utah Sugar Co., 35 U. 148; 99 P. 681.

Where the plaintiff, in an action to recover on a benefit certificate, alleged that after issuance she became the wife of insured, a denial of the marriage does not raise the question of whether the plaintiff was the real party in interest.
Moran v. Knights of Columbus, 46 U. 397; 151 P. 353.

Where claims against a railroad which were assigned to plaintiff to sue on were assigned to another, who sued the railroad, which settled with the subsequent assignee, taking an indemnity bond holding it harmless against plaintiff's demand, and, thereafter, plaintiff sued the railroad and recovered on the claims not more than the settlement, plaintiff was not entitled to have defendant's appeal dismissed on the ground that any further litigation of the claims by defendant involved merely a question of whether plaintiff or the subsequent assignee was the rightful owner, and hence defendant was no longer the real party in interest.
Broadbent v. D. & R. G. R. Co., 48 U. 598; 160 P. 1185.

ACTION BY ASSIGNEE:

The test of assignability, note to § 6496.
Substitution of parties after assignment pendente lite, § 6513, and note.

Assignment solely for the purpose of suit constitutes the assignee the real party in interest.
Wines v. R. G. W. Ry. Co., 9 U. 228; 33 P. 1042.

Whenever a cause of action is assigned without consideration, the assignor continues to be the real party in interest, the assignee being merely a trustee or collection agent, and the assignment does not deprive a defendant of the privilege to change the place of trial.
Dee v. S. P., L. A. & S. L. , — U. —; 167 P. 246.

Where the owner of a note assigns it, authorizing the assignee to sue thereon and collect it, though the owner retained it in his possession, he cannot maintain an action thereon without a reassignment to him.
Anderson v. Yosemite Mining Company, 9 U. 420; 35 P. 502.

Where plaintiff sues as the assignee of the executors of a certain estate administered in New York, and it appears that under the law of New York the executors had authority to transfer the contract sued on, plaintiff had the right to sue and maintain the suit as such assignee, without regard to any administration of the estate in this state.
Camp v. Simon, 23 U. 56; 63 P. 332.

The objection that the plaintiff is not the real party in interest, when available by way of defense, must be raised by demurrer or answer, or it will be considered to have been waived.
Fritz v. Western U. Tel. Co., 25 U. 263; 71 P. 209.

Assignee of an interest in the cause of action may be made a party plaintiff; defendant will not be heard to object that assignment was without consideration.
Rutan v. Huck, 30 U. 217; 83 P. 833.

The fact that plaintiffs signed acceptances sued upon after the complaint was filed does not render necessary a supplemental complaint showing assignment.
Lowell v. Parkinson, 4 U. 64; 6 P. 58.

The assignee of a part of a claim is the real party in interest; objection to splitting the action is waived if not taken by demurrer or answer.
Nat'l Ins. Co. v. D. & R. G. R. Co., 44 U. 26; 137 P. 653.

6496. (2903.) Assignment of thing in action. Effect. In the case of an assignment of a thing in action, the action by the assignee is without prejudice to any set-off or other defense existing at the time of or before notice of the assignment; but this section does not apply to a negotiable instrument transferred in good faith and upon good consideration, before maturity.

Cal. C. Civ. P., § 368.
Action not to abate by death or transfer, § 6513.
Substitution of parties, § 6513, and note.
Party not to be deprived of benefit of cross-demand by death or assignment, § 6578.
Title of indorsee of negotiable instrument transferred before maturity, § 4086.
Assignee a proper party plaintiff, note to § 6495.

The test of the assignability of a chose in action depends upon whether or not it would survive and pass to the personal representative of a decedent; and, under this section and § 6513, the assignee of a claim for money paid by mistake and having an interest therein independent of the assignment may bring an action in his own name.
Lawler v. Jennings, 18 U. 35; 55 P. 60.

6497. (2904.) Married woman as a party. A married woman may sue and be sued in the same manner as if she were unmarried.

Mont. Civ. P., § 572. Ohio, § 4996.
Married woman as a party, §§ 2984-2986.
Judgment against married woman, § 6858.
Property rights, etc., of married woman, Con. art. 22, sec. 2; §§ 2983-2991, and notes.
Wife may be "head of a family" under homestead law, § 2896.

6498. (2905.) Husband and wife sued together. Either may defend. If husband and wife are sued together, the wife may defend for her own right, and if either neglect to defend, the other may defend for both.

Iowa, McClain's An. C. (1888) § 3768*.

6499. (2906.) Deserted husband or wife as a party. When a husband has deserted his family, the wife may prosecute or defend in his name any

action which he might have prosecuted or defended, and shall have the same powers and rights therein as he might have, and, under like circumstances, the husband shall have the same right.

Iowa, McClain's An. C. (1888) § 3769*.

6500. (2907.) Infant or incompetent must appear by guardian. When an infant, or an insane or incompetent person is a party, he must appear either by his general guardian, or by a guardian ad litem appointed by the court, or judge thereof, in which the action is pending in each case. A guardian ad litem may be appointed in any case, when it is deemed by the court in which the action or proceeding is prosecuted, or by the judge thereof, expedient to represent the infant, insane, or incompetent person in the action or proceeding, notwithstanding he may have a general guardian and may have appeared by him.

Cal. C. Civ. P., § 372.
Guardian to appear for ward, §§ 7432, 7877.
Special guardian for insane wife, § 2995.
It is proper to substitute a guardian ad litem for a non-resident general guardian, though action may be maintained by either.
Hyndman v. Stowe, 9 U. 23; 33 P. 227.
This authorizes the appointment of a guardian ad litem before the action is started, and also for a resident and non-resident minor plaintiff, as well as for a resident and non-resident minor defendant.
Schuyler vs. Southern Pacific, 37 U. 581; 109 P. 458.

6501. (2908.) Guardian ad litem, how appointed. When a guardian ad litem is appointed by a court, or the judge thereof, he must be appointed as follows:

1. When the infant is plaintiff, upon the application of the infant, if he be of the age of fourteen years, or if under that age, upon the application of a relative or friend of the infant;

2. When the infant is defendant, upon the application of the infant, if he be of the age of fourteen years and apply within twenty days after the service of the summons, or if under that age or if he neglects so to apply, then upon the application of a relative or friend of the infant, or of any other party to the action;

3. When an infant defendant resides out of this state, the plaintiff, upon motion therefor, shall be entitled to an order designating some suitable person to be guardian ad litem for such infant defendant, unless the defendant, or some one in his behalf, within twenty days after service of notice of such motion shall procure to be appointed a guardian for such infant. Service of such notice may be made upon the general or testamentary guardian of such defendant, if he have one in this state; if not, such notice, together with the summons in the action, shall be served in the manner provided by law for publication of summons upon such infant if over fourteen years of age, or, if under fourteen years of age, by such service on the person with whom such infant resides. The guardian ad litem for such non-resident infant defendant shall have twenty days after his appointment in which to plead to the action;

4. When an insane or incompetent person is a party to an action or proceeding, upon the application of a relative or friend of such insane or incompetent person, or of any other party to the action or proceeding.

Cal. C. Civ. P., § 373*. Wisconsin § 2614*.

6502. (2909.) Unmarried female may sue for seduction. An unmarried female, under twenty years of age at the time of her seduction, may prosecute, as plaintiff, an action therefor, and may recover therein such damages, pecuniary or exemplary, as are assessed in her favor.

Cal. C. Civ. P., 374*. Limitation of action, one year, § 6470.

6503. (2910.) Id. When parent or guardian may sue. A father, or, in case of his death or desertion of his family, the mother, may prosecute as plaintiff for the seduction of the daughter, who, at the time of her seduction, is under the age of majority; and the guardian, for the seduction of the ward, who, at the time of her seduction, is under the age of majority, though the daughter or the ward be not living with or in the service of the plaintiff at the time of the seduction, or afterwards, and there be no loss of service.

Cal. C. Civ. P., § 375*.

6504. (2911.) Parent or guardian may sue for death of minor child or of ward. A father, or, in case of his death or desertion of his family, the

mother, may maintain an action for the death or injury of a minor child, when such injury or death is caused by the wrongful act or neglect of another; and a guardian may maintain an action for the injury or death of his ward, if the ward be of lawful age, when such injury or death is caused by the wrongful act or neglect of another, the action by the guardian to be prosecuted for the benefit of the heirs of the ward. Any such action may be maintained against the person causing the injury or death, or, if such person be employed by another person who is responsible for his conduct, also against such other person. Am'd '01, p. 40.

Cal. C. Civ. P., 376*.

Elements of damage for loss of child, § 6505, and note.

6505. (2912.) Heirs, etc., may sue for death of adult. When the death of a person not a minor is caused by the wrongful act or neglect of another, his heirs, or his personal representatives for the benefit of his heirs, may maintain an action for damages against the person causing the death, or, if such person be employed by another person who is responsible for his conduct, then also against such other person. If such person have a guardian at the time of his death, only one action can be maintained for the injury to or death of such person, and such action may be brought by either the personal representatives of such adult person deceased for the benefit of his heirs, or by such guardian for the benefit of his heirs as provided in § 6504. In every action under this and the preceding section such damages may be given as under all the circumstances of the case may be just. Am'd '01, p. 40.

Cal. C. Civ. P., 377*.

Amount of recovery not to be limited by law, Con. art. 16, sec. 5.

The fixing of the amount of the damages is a question for the jury alone, note to Con. art. 8, sec. 9.

Negligence cases not bearing upon any particular statute are not included in this volume.

General damages pleaded generally; special damages, specially, note to § 6566.

Actions which survive do not abate by death or transfer, § 6513.

Limitation of action, two years, § 6469.

Amount allowed under industrial commission chapter, §§ 3137-3140.

At common law, a father cannot maintain an action for the death of his son occasioned by negligence.

Thomas v. U. P. Ry. Co., 1 U. 232.

Administrator is party plaintiff.

Fritz v. West. Union Tel. Co., 25 U. 263; 71 P. 209.

Pugmire v. Diamond C. & C. Co., 26 U. 115; 72 P. 385.

An action in Utah for the negligent death of a person in Wyoming must be brought in the name of the personal representative of the deceased, as required by statutes of Wyoming, and not by the heirs of such person in their own names, as permitted by this section.

Thorpe v. U. P. Ry. Co., 24 U. 475; 68 P. 145.

Utah S. & T. Co. v. Diamond C. & C. Co., 26 U. 299; 73 P. 524.

In re Lowham's Estate, 30 U. 436; 85 P. 445.

An action may be maintained for the death of one occurring in Utah, though the beneficiaries are non-resident aliens, subject to a foreign power.

Bingham Mines Co. v. Bianco, 246 Fed. 936.

ELEMENTS OF DAMAGE:

In determining the amount of damages for death by wrongful act, it is proper for the jury to consider the number and ages of the members of the decedent's family, the loss of his society and companionship, his habits in regard to supporting his family and what he might be expected to do in the future, expressly excluding mere mental suffering.

Pool v. S. P. Co., 7 U. 303; 26 P. 654.

Webb v. D. & R. G. Ry., 7 U. 17; 24 P. 616.

Wells v. D. & R. G. Ry. Co., 7 U. 482; 27 P. 688.

Chilton v. U. P. R. R. Co., 8 U. 47; 29 P. 963.

Evans v. O. S. L. R. R. Co., 37 U. 431; 108 P. 638.

In an action by a parent for the negligent death of his minor child, it was proper to authorize a recovery for the loss of services of the child, and its society and comfort; the court expressly excluding any recovery for sorrow, grief, or anguish, to the parents, or pain and suffering to the child.

Corbett v. O. S. L. Ry., 25 U. 449; 71 P. 1065.

Hyde v. U. P. R. R. Co., 7 U. 356; 26 P. 973.

Beaman v. Martha W. Co., 23 U. 139; 63 P. 631.

The damages in an action by parents for the negligent death of an adult child are not limited to the probable conditions of money which the parents would have received during the child's lifetime, but may also consist of the elements entering into the domestic relations of parent and child, living in one family, or otherwise.

Rogers v. R. G. W. Ry. Co., 32 U. 367; 90 P. 1075.

Evidence as to the physical condition of the widow—her inability to do housework and the necessity for caring for her—was admissible on the question of damages.

Evans v. O. S. L. R. R. Co., 37 U. 431; 108 P. 638.

In an action for a death in another state, it will be presumed, on absence of proof to the contrary, that the laws of that state allowed a recovery and damages as in this section provided.

Grow v. O. S. L. R. R. Co., 44 U. 460; 138 P. 398.

A verdict for $5300 for death of a man 61 years old was not excessive where deceased left a family, and was sober, and in good health, earning $3.75 per day.

Brostom v. Lynch-Cannon Engr. Co., 46 U. 103; 148 P. 423.

Where the children of deceased, being all adults from 31 to 48 years old, married and maintaining separate homes apart from deceased, loss of comfort, association, and companionship of deceased by them should not be submitted as an element of damages.

White v. Shipley, 48 U. 496; 160 P. 441.

Damages for mental anguish can be recovered only where injury was wilful or malicious.

Giblin v. McIntyre, 2 U. 384; affirmed 100 U. S. 124; 25 Law Ed. 572.

Vanderberg v. Connoly, 18 U. 112; 54 P. 1097.

Thirkfield v. M. V. Cemetery Assn., 12 U. 76; 41 P. 564.

Farr v. Swigart, 13 U. 150; 44 P. 711.

6506. (2913.) Persons interested may join as plaintiffs. All persons having an interest in the subject of the action, and in obtaining the relief

demanded, may be joined as plaintiffs, except when otherwise provided in this code.

Cal. C. Civ. P., § 378.
Action prosecuted in name of real party in interest, § 6495.
Joinder of parties plaintiff, note to § 6495.
When one or more may sue or defend for all, §§ 6510, 6511.
Persons owning no interest in the property and having no interest in the event of a suit are not necessary parties.
Houtz v. Gisborn, 1 U. 173.
A sheriff and his deputy are jointly and severally liable for the acts of the deputy, and may jointly maintain an action for the value of the property levied upon by the deputy and taken from his possession.
Burton v. Winsor Mining Co., 2 U. 240.
Several judgment creditors may join as plaintiffs in same action to enforce their rights by creditors' bill.
Enright v. Grant, 5 U. 334; 15 P. 268.
A complaint, in an action by the owner of an undivided half interest in personal property for conversion, was not insufficient because it failed to show who owned the other half.
Boley v. Allred, 25 U. 402; 71 P. 869.

6507. (2914.) Who may be joined as defendants. Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein. And in an action to determine the title or right of possession to real property which at the time of the commencement of the action is in the possession of a tenant, the landlord may be joined as a party defendant.

Cal. C. Civ. P., § 379.
Parties to foreclosure, §§ 7230, 7232.
Necessary parties may be brought in, § 6519.
Possesssion of tenant is possession of landlord, § 6458.
Intervention, new parties, §§ 6518, 6519.
Associates sued under common name, § 6520.
Joinder parties, §§ 6506-6512.
Parties in action for possession of real property, § 7319.
Joinder of creditor with sheriff, §§ 6155, 6516.
In water suits all persons on the stream may be made parties, § 3485.
In action for a tract of land, plaintiff cannot join several defendants who are in possession and claim distinct and separate parcels thereof.
Moore v. Wilson, 1 U. 187.
In a petition brought by a receiver to require a party to turn over certain property to the receiver, where it appears that a fraudulent assignment was made to another corporation and by that corporation the property was assigned to a trustee, who holds the legal title and is in possession, the said corporation is not a necessary party.
United States v. The Church, 5 U. 538; 18 P. 35.
When an action is based upon fraud, the persons perpetrating the fraud and all others whose gains or losses are traceable thereto are proper parties.
Stevens v. S. Ogden L. B. & I. Co., 14 U. 232; 47 P. 81.
Where two officers as individuals were joined with the defendant corporation in an action for specific performance; held, that there was a misjoinder.
Whitehill v. Lowe, 10 U. 419; 37 P. 589.
Ruffatti v. Societe des Mines, 10 U. 386; 37 P. 591.
Persons claiming water rights adverse to those of plaintiff, or who have diverted water from the same stream, may be made parties to a suit to determine their several rights and priorities, even though they reside without the county wherein the suit is commenced.
Deseret Irr. Co. v. McIntyre, 16 U. 298; 52 P. 628.
Joinder where several railroads use a depot and rolling stock, and negligence of all contributes to injury.
Brown v. S. P. Co., 31 U. 318; 88 P. 7.
An objection on account of misjoinder of a party defendant is, under provisions of § 6573, waived unless raised by demurrer or answer.
Stevens Imp. Co. v. South O. L. B. & I. Co., 20 U. 267; 58 P. 843.
Fields v. Cobbey, 22 U. 415; 62 P. 1020.
Henderson v. Turngren, 9 U. 432; 35 P. 495.
Spencer v. Van Cott, 2 U. 337.
Defendant agreed to construct a canal for a company under the supervision of the company's engineer, whose measurements and determinations were to be final; defendant contracted with the plaintiff, who performed the work and received pay according to company engineer's measurements; held in suit by plaintiff for pay, it was error to make the company a party.
Annett v. Garland; 8 U. 150; 30 P. 365.
In an action against several as partners an answering defendant testifies that "S," is not a partner; held he is not prejudiced by an amendment dropping "S."
Brown v. Pickard, 4 U. 292; 9 P. 573.
One who, under contract for sale of land on instalments, claims a lien prior to the lien of mechanics, although not an indispensable party, was properly made a party defendant in action to foreclose mechanic's lien, in order to determine the amount and character of his claim; held the judgment entered in favor of the contract-holder is conclusive, and he cannot thereafter bring another action to foreclose his lien.
Cain v. Parfitt, 48 U. 81; 158 P. 448.

6508. (2915.) Parties to action to determine adverse claim. Writ. In an action brought by a person out of possession of real property, to determine an adverse claim of an interest or estate therein, the person making such adverse claim and persons in possession may be joined as defendants, and, if the judgment be for the plaintiff, he may have a writ for the possession of the premises as against the defendants in the action, against whom judgment has passed.

Cal. C. Civ. P., § 380.
Adverse possession, §§ 6452-6456.
Action to determine adverse claim, §§ 7221-7247.
Writ of possession, § 6913.

6509. (2916.) Id. Persons claiming under common title. Any two or more persons claiming any estate or interest in lands under a common source of title, whether holding as tenants in common, joint tenants, coparceners, or in severalty, may unite in an action against any person claiming an adverse estate or interest therein for the purpose of determining such adverse claim,

or of establishing such common source of title, or of declaring the same to be held in trust, or of removing a cloud upon the same.

Cal. C. Civ. P., § 381.
Tenants in common, etc., as parties, § 6512.
Action to remove cloud upon title, §§ 7247-7257.

6510. (2917.) Joinder of parties united in interest. Part may appear for all. Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint; and when the question is one of a common or general interest of many persons, or when the parties are numerous and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.

Cal. C. Civ. P., § 382.
Persons interested may be joined as plaintiffs, § 6506.
Who may be joined as defendants, § 6507.
In an action against a co-partnership to enforce a mechanic's lien, it will be assumed that a surviving partner who joined in a general demurrer did so as surviving partner, that being the only capacity in which he was properly a party.
Bingham Coal & Lbr. Co. v. Blom, 43 U. 584; 137 P. 630.

6511. (2918.) Joinder of parties severally liable. Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, and sureties on the same or separate instruments, may all, or any of them, be included in the same action, at the option of the plaintiff.

Cal. C. Civ. P., § 383.
Costs when several actions are brought on same instrument, § 7037.
When one or more served, proceedings, § 6558.
Judgment, §§ 6855, 6856, 6874.
Execution, § 6914.
Liability of parties to negotiable instruments, §§ 4094-4103.
Action against partnership, § 6520.
See Dobs v. Rees, 49 U. 270; 163 P. 255.
The maker and the grantor of a promissory note may be sued thereon in the same action.
Gagen v. Stevens, 4 U. 348; 9 P. 706.
Anderson v. Stevens, 2 U. 538.
That two firms have a common member will not prevent a suit by two members of one firm upon a note against two members of the other firm acting as individuals.
Jungk v. Reed, 9 U. 49; 33 P. 236.
Maker and indorser of note may be joined without stating separate cause of action against each.
Smith v. McEvoy, 8 U. 58; 29 P. 1030.

6512. (2919.) Tenants in common, etc., as parties. All persons holding as tenants in common or as joint tenants, or any number less than all, may jointly or severally commence or defend any civil action or proceeding for the enforcement or protection of the rights of such party. In all cases one tenant in common or joint tenant can sue his co-tenant.

Mont. Civ C., § 586.
Action for waste against tenant in common, etc., § 7241.
Tenants in common, etc., as parties, §§ 6509-6510.
In water suits joint and several interests will be determined, § 3485.
Applies to tenant in common of water.
Spanish Fork v. Hopper, 7 U. 235; 26 P. 293.
A tenant in common is not a necessary party in suit to quiet title.
Karren v. Rainey, 30 U. 7; 83 P. 333.
The owner of a one-half interest in personal property may sue for conversion without joining his co-owners as plaintiff or defendant.
Boley v. Allred, 25 U. 402; 71 P. 869.
Where inseverable personal property is held by several persons as joint tenants, the tenant in actual possession may retain it as against the co-tenants.
Rocky Mt. Farm Co. v. Lunt, 46 U. 299; 151 P. 521.
Where leased sheep are intermingled with the sheep of lessee and are incapable of identification, the lessor and lessee become tenants in common and either may maintain replevin against his co-tenant for his individual interest.
Manti City Savings Bank v. Peterson, 33 U. 209; 93 P. 566.

6513. (2920.) Action not to abate by death or transfer. Substitution. An action or proceeding does not abate by the death or any disability of a party, or by the transfer of any interest therein, if the cause of action or proceeding survive or continue. In case of the death or any disability of a party, the court, on motion, may allow the action or proceeding to be continued by or against his representative or successor in interest. In the case of any other transfer of interest, the action or proceeding may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding.

Cal. C. Civ. P., § 385.
If party die after verdict or decision and before judgment, judgment may be rendered, § 6866.
Assignment of thing in action not to prejudice defense, when, § 6496.
Action in name of assignee, note to § 6495.
Termination of plaintiff's title pending action to recover real property, § 7249.
Alienation by defendant pending action to recover real property, § 7256.
In case of death of defendant, claim must be presented for allowance, § 7657.
Substitution of executors, etc., § 7875.
Substitution on request of defendant, § 6514.

SUBSTITUTION OF PARTIES, ETC.

If the plaintiff transfers his interest in the action during the pendency of the suit, it may be continued in the name of the original party.
Firman v. Bateman, 2 U. 268.
Substitution of assignee pending appeal from justice's to district court is error where it

rendered a formerly incompetent witness competent.

Skews v. Dunn, 3 U. 186; 2 P. 64.

Judgment in favor of assignee without order of substitution, where action was brought by assignor is erroneous.

Lowell v. Parkinson, 4 U. 64; 6 P. 58.

Secs. 2961, 2962, 3187, 4198, C. L. 1888, do not change the rule that a personal action does not survive; and an action for a personal injury brought by the deceased in his lifetime does not survive though after his death leave was asked to amend to show that the wrongful act caused the death.

Mason v. U. P. Ry. Co., 7 U. 77; 24 P. 796.

An action to foreclose a mortgage may be continued in the name of the original plaintiff for the benefit of the indorsee of the mortgage note, who paid it to the plaintiff during the pendency of the action.

National Bank of the Republic v. Hapgood, 9 U. 85; 33 P. 241.

Where claim has been assigned after suit brought and suit continued and judgment recovered in name of assignor, creditor's bill to collect payment must be brought in name of assignee.

Wilson v. Kiesel, 9 U. 397; 35 P. 488; same case, 164 U. S. 124.

See Thomas v. Morris, 8 U. 284; 31 P. 446.

Judgment against a party after his death, the fact not appearing, is erroneous but not void.

Elliott v. Bastian, 11 U. 452; 40 P. 713.

An assignment of judgment, under provisions of this section, does not abate the action, but the same may be carried on in the name of the original party, or the court may allow substitution of the transferee.

Schroeder v. Pratt, 21 U. 176; 60 P. 512.

Under this section, a grantee pendente lite of premises which constitute the subject matter of a suit instituted to recover possession of the land has a right to be substituted as plaintiff, and, if so substituted, acquires all the rights of the plaintiff under the judgment.

Hanks v. Matthews, 16 U. 325; 52 P. 7.

The action having been continued as it properly might be, in the name of the original plaintiff, after he deeded the land in controversy, costs may be awarded against defendant, though, after the issue is found against him, he purchases the land from plaintiff's grantee.

Christofferson v. Craghead, 26 U. 483. 73 P. 639.

Purchaser after condemnation proceedings begun not required to be made a party.

Brigham City v. Chase, 30 U. 410; 85 P. 436.

It will be presumed, where the record shows a substitution has been made because of the death of parties plaintiff, that the representatives were appointed by a court of competent jurisdiction and that the order of substitution was regularly made. Such a party substituted was not required to file new pleadings.

Warren v. Robinson, 25 U. 205; 70 P. 989.

Under provisions of this section, authorizing an action to be carried on either by the original party to the contract or his assignee, the refusal of the court to substitute plaintiff's assignee as plaintiff in an action on a contract was not error.

Oberndorfer v. Moyer, 30 U. 325; 84 P. 1102.

An action for malicious personal injury inflicted by shooting abates on the death of the wrongdoer.

Brown v. Witeman, 47 U. 31; 151 P. 366.

In an action for wrongful death, the substitution of decedent's personal representative for decedent's widow as plaintiff is not error.

Pugmire v. Diamond, etc., 26 U. 115; 72 P. 385.

Sargent v. U. P. Fuel Co., 37 U. 392; 108 P. 928.

A cause of action for personal injury due to negligence will not survive the death, and if a judgment is had before death and it is reversed, the cause of action is gone.

Candland v. Mellen, 46 U. 519; 151 P. 341.

Where defendants, who were land owners under the canals of a quasi public irrigation district and members thereof, were restrained from interfering in any manner with the ditches of the district, they are restored to their individual rights upon the dissolution of the district.

Thompson v. McFarland, 29 U. 455; 82 P. 478.

6514. (2921.) Substitution of claimant for defendant. A defendant against whom an action to recover upon a contract or for specific real or personal property is pending may, at any time before answer, upon affidavit that a person not a party to the action makes against him, and without any collusion with him, a demand upon such contract or for such property, upon notice to such person and the adverse party, apply to the court for an order to substitute such person in his place, and discharge him from liability to either party, on his depositing in court the amount claimed on the contract, or delivering the property, or its value, to such person as the court may direct, and the court may in its discretion make the order.

Cal. C. Civ. P., § 386*.

6515. (2922.) Id. Joinder of creditor with sheriff. The provisions of the next preceding section shall be so far applicable to an action brought against a sheriff or other officer for the recovery of personal property taken by him under an attachment or execution, or for the value of such property so taken and sold by him, that upon exhibiting to the court the process under which he acted, with his affidavit that the property, for the recovery of which, or its proceeds, the action was brought, was taken under such process, he may have the attaching or execution creditor made a joint defendant with him, and if jugment go against them, it shall provide that the property of such creditor shall be first exhausted in satisfaction thereof.

Iowa, McClain's An. C., § 3778*.

True value of such property may be shown, § 6620.

Entry of judgment against sureties on sheriff's indemnity bond, on motion, § 7222.

6516. (2923.) Id. On application of sheriff and creditor. In an action against a sheriff or other officer for the recovery of property taken under an attachment or execution, the court may, upon application of the defendant and of the party in whose favor the process issued, permit the latter to be joined with such officer as defendant.

Iowa, McClain's An. C., § 3779.

6517. (2924.) Interpleader of conflicting claimants. Whenever conflicting claims are or may be made upon a person for or relating to personal property, or the performance of an obligation, or any portion thereof, such person may bring an action against the conflicting claimants to compel them to interplead and litigate their several claims among themselves. The order of substitution may be made, and the action of interpleader may be maintained, and the applicant or plaintiff be discharged from liability to all or any of the conflicting claimants, although their titles or claims have not a common origin, or are not identical, but are adverse to and independent of one another.

Cal. C. Civ. P., § 386*.

Interpleader in garnishment proceedings, § 6741.

Persons holding stock in escrow may require the parties interested to interplead and litigate conflicting claims.

Walker v. Bamberger, 17 U. 239; 54 P. 108.

Where the state board of equalization had authority to reapportion railroad property for taxation to a certain county, a demurrer to the complaint, alleging that both counties are attempting to collect taxes, and that plaintiff has refused to pay either county, and that the action was brought to interplead both counties to determine which is entitled to the tax, is properly sustained.

Union Pac. R. R. Co. v. Summit County, 48 U. 540; 161 P. 463.

Where a litigant tenders the money claimed by two other parties into court, no judgment in his favor for the money can be legally entered.

McGuire v. State Bank of Tremonton, 49 U. 381; 164 P. 494.

6518. (2925.) Intervention. Who may intervene, and how effected. Any person may, before the trial, intervene in an action or proceeding, who has an interest in the matter in litigation, in the success of either of the parties, or an interest against both. An intervention takes place when a third party is permitted to become a party to an action or proceeding between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both the plaintiff and the defendant; and is made by complaint, setting forth the grounds upon which the intervention rests, filed by leave of the court and served upon the parties to the action or proceeding who have not appeared, and upon the attorneys of the parties who have appeared who may answer or demur to it as if it were an original complaint.

Cal. C. Civ. P., § 387.

In proceedings to forfeit to the U. S. certain real estate whose proceeds are directed to be applied to the use of the common schools of Utah territory; held, that such common schools have not such an interest in the property as to enable them to intervene.

U. S. v. The Church, 6 U. 9; 21 P. 503, 524.

Where it appears from a complaint in intervention that the intervenor and those whom he represents have a common or general interest in the questions involved and either gain or lose by the direct operation and effect of the judgment, and the number of persons who would be joined as intervenors is so large that it would be impracticable to bring them before the court; held, that the intervenor had a standing in court under §§ 6510, 6518.

West Point Irr. Co. v. Moroni & Mt. Pleasant Irr. Co., 14 U. 127; 46 P. 762.

Where a garnishee answers that he is not indebted to the defendant, the defendant may intervene in the action to establish that the garnishee is indebted and to establish his exemption.

Dayton v. Free, 49 U. 221. 162 P. 614.

A receiver of an insolvent corporation, or other persons prejudiced, may intervene in an attachment suit against the corporation and move to set aside an order of sale.

Newell v. Third Dist. Court, 37 U. 418; 108 P. 1121.

A judgment creditor, who had an execution which was served on a bank holding funds of the debtor and returned unsatisfied, could intervene in an action by the debtor against the bank to recover such money.

Wheelwright v. Nat'l. Cop. Bank, 42 U. 579; 133 P. 132.

Where property is attached which claimant claimed, he may intervene in action in which the attachment was issued and contest the title to the attached property.

Houston R. Est. Inv. Co. v. Heckler (Yerrick, Intervenor), 44 U. 64; 138 P. 1159.

6519. (2926.) Court may order in new parties. The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court must then order them to be brought in. And when, in an action for the recovery of real or personal property, a person not a party to the action, but having an interest in the subject thereof, makes application to the court to be made a party, it may order him to be brought in by the proper amendment.

Cal. C. Civ. P., § 389.

When new party necessary on counterclaim, procedure, § 6580.

One who is necessary to complete determination may be made a party, § 6507.

The court may order necessary parties to be brought in.

Houtz v. Gisborn, 1 U. 173.

New parties brought in by cross-complaint.

Chalmers v. Trent, 11 U. 88; 39 P. 488.

In controversy between contractor and subcontractor, involving questions upon which also depend rights of contractor against owner, this fact is not sufficient to justify making owner a party.

Garland v. McMartin, 8 U. 150; 30 P. 365.

Persons claiming adverse water rights, or who have diverted water from the same stream, may be made parties to a suit to determine their several rights and priorities, even though they reside without the county wherein the suit was commenced.
Des. Irr. Co. v. McIntyre, 16 U. 398; 52 P. 628.

Where a complete determination of a controversy requires presence of persons not already parties, this section prescribes the procedure.
Houser v. Smith, 19 U. 150; 56 P. 683.

6520. (2927.) Action against persons associated as partners, etc. Service. Judgment. When two or more persons associated in any business either as a joint stock company, a partnership, or other association, not a corporation, transacting such business under a common name, whether it comprises the name of such associates or not, they may be sued by such common name, the summons in such cases being served as provided by sub. 5 of § 6548; and the judgment in the action shall bind the joint property of all the associates, in the same manner as if all had been named defendants and had been sued upon their joint liabilities. Am'd '11, p. 81.

Cal. C. Civ. P., § 388.
Joinder parties severally liable, § 6511, and note.
Action against joint debtors; service on part, § 6558.
Liability of special partners, §§ 4351, 4357.
When the suit is against two or more defendants by their individual names, not against them by a common name in which they are transacting business, the service of summons on one or more will not give jurisdiction to enter judgment against those not served.
Blyth & Fargo Co. v. Swenson, 15 U. 345; 49 P. 1027.
A judgment against a firm in its firm name is not binding upon the separate property of the individual members.
Hamner v. Ballantyne, 16 U. 436; 52 P. 770.
Where, in the caption of the complaint, the defendants are named individually and described as doing business under the firm name given, though it is alleged in the body of the complaint that they were copartners, the action is against them individually and not against the partnership.
Guthiel v. Gilmer, 27 U. 496; 76 P. 628.
Blyth Co. v. Swenson, 15 U. 345; 49 P. 1027.
A voluntary association cannot be sued in its name as such, but can be brought into court only in the name of its members, or, if they are too numerous, a few of them may be made defendants to represent the interests of all.
Pearson v. Anderburg, 28 U. 495; 80 P. 307.
Where a defendant is sued as a corporation, its corporate existence must be proved, though the answer alleges it to be a joint stock company.
White v. Shipley, 48 U. 496; 160 P. 441.

CHAPTER 7.

PLACE OF TRIAL

6525. (2928.) Action affecting realty tried where subject situated. Actions for the following causes must be tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial, as provided in this code:

1. For the recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest, and for injuries to real property;
2. For the partition of real property;
3. For the foreclosure of all liens and mortgages on real property.

Where the real property is situated partly in one county and partly in another, the plaintiff may select either of the counties, and the county so selected is the proper county for the trial of such action.

Cal. C. Civ. P., § 392. Cal. Sup. (1889) p. 356.
Actions to be tried in county in which they arise, Con. art. 8, sec. 5.
Decisions on place of trial, note to Con. art. 8, sec. 5.

6526. (2929.) Action tried where cause arose. Actions for the following causes shall be tried in the county where the cause or some part thereof, arose, subject to the like power of the court to change the place of trial:

1. For a recovery of a fine, penalty, or forfeiture imposed by statute, except that when it is imposed for an offense committed on a lake, river, or other stream of water, situated in two or more counties, the action may be brought in any county bordering on such lake, river, or stream, opposite to the place where the offense was committed;
2. Against a public officer, or person especially appointed to execute his duties, for an act done by him in virtue of his office, or against a person who, by his command or in his aid, does anything touching the duties of such officer.

Cal. C. Civ. P., § 393*.
Decisions on place of trial, note to Con. art. 8, sec. 5.

6527. (2930.) Action against a county, where tried. An action against

a county may be commenced and tried in such county, unless such action is brought by a county, in which case it may be commenced and tried in any county not a party thereto.

Cal. C. Civ. P., § 394*. Cal. Sup. (1893) p. 949.

6528. (2931.) Action on written contract, where tried. When the defendant has contracted in writing to perform an obligation in a particular county of the state and resides in another county, an action on such contract obligation may be commenced and tried in the county where such obligation is to be performed or in which the defendant resides.

Decisions on place of trial, note to Con. art. 8, sec. 5.

An action to foreclose a chattel mortgage may be started in a county where the note is payable though the property is in, and defendants reside in, another county.

Emerson, Brantingham Imp. Co. v. Giles, 52 —; 173 P. —.

6529. (2931x.) Transitory causes. Residence of corporations. All transitory causes of action arising without this state shall, if suit shall be brought thereon in this state, be brought and tried in the county where any defendant in such action resides; and if any such defendant is a corporation, any county in which such corporation has an office or place of business shall be deemed the county in which such corporation resides within the meaning of this section. '01, p. 16; '03, p. 76; '17, p. 437.

Waiver of objection to venue, note to Con. art. 8, sec. 5, and note to § 2934.

A corporation having its principal office located in Salt Lake City and carrying on its general business there is a resident of Salt Lake City within the meaning of the statute.

Crookston v. Centennial-Eureka Mining Co., 13 U. 117; 44 P. 714.

Transitory action arising without the state to be tried in county of defendant's residence, under this section, unless he waives the right.

Farnsworth v. U. P. Coal Co., 32 U. 112; 89 P. 74.

Stone v. U. P. Ry. Co., 32 U. 185; 89 P. 715, 723.

The right of action for wrongful death provided by R. S. Wyoming is transitory, and may be maintained in the courts of another state having jurisdiction of such matters, and having acquired jurisdiction of the parties.

Utah S. & T. Co. v. Diamond C. & C. Co., 26 U. 299; 73 P. 524.

In re Lowham's Estate, 30 U. 436; 85 P. 445.

This section does not go to jurisdiction of subject matter, but merely confers a privilege on a defendant, which it waives by general demurrer, though one of the grounds thereof is that the court has not jurisdiction of the subject matter.

Farnsworth v. U. P. Coal Co., 32 U. 112; 89 P. 74.

Stone v. U. P. Ry. Co., 32 U. 185; 89 P. 715, 723.

Where cattle enter upon land and eat wheat in stacks, the action therefor is transitory.

Allen v. Allen, 47 U. 145; 151 P. 982.

6530. (2931x1.) Id. In favor of residents. All transitory causes of action arising without this state in favor of residents of this state shall, if suit is brought thereon in this state, be brought and tried in the county where such resident resides, or in the county where the principal defendant resides, or if the principal defendant is a corporation, then in the county where such resident resides or in the county where such corporation has its principal place of business, subject, however, to a change of venue as provided by law; *provided, however,* that this and the next preceding section shall in no way affect any causes in action now pending in any court of this state.

'01, p. 16; '03, p. 76.

This section confers a personal privilege on a defendant corporation, and it is waived unless a seasonable objection or motion is made.

Dee v. S. P., L. A. & S. L. R. Co., 50 U. —; 167 P. 246

Whenever a cause of action is assigned without consideration, the assignor continues to be the real party in interest, the assignee being merely a trustee or collection agent, and the cause of action arises in favor of the assignor, and such assignment does not deprive a defendant in proper proceedings of the privilege to change the place of trial.

Id.

Where defendant corporation moved for change of venue without negativing the fact that plaintiff was a bona fide purchaser of the cause of action, and thereafter it developed on cross-examination of witness that the plaintiff was not a bona fide purchaser, but defendant did not renew its motion, assigning specifically the newly discovered ground, defendant waived its privilege of change of the place of trial.

Id.

6531. (2932.) In all other cases. In all other cases the action must be tried in the county in which the cause of action arises, or in the county in which any defendant resides at the commencement of the action; *provided,* that if any such defendant is a corporation, any county in which such corporation has its principal office or place of business shall be deemed the county in which such corporation resides within the meaning of this section. If none of the defendants reside in this state, such action may be commenced and tried in any county which the plaintiff may designate in his complaint; and if the defendant is about to depart from the state, such action may be tried in any county where either of the parties reside or service is had, sub-

ject, however, to the power of the court to change the place of trial as provided by law. Re-enacted '13, p. 165; am'd '17, p. 437.

Secs. 6531 and 6532 having been held unconstitutional, in Konold v. R. G. W. Ry. Co., 16 U. 151, 51 P. 250, were thereafter repealed by Laws of '01, p. 117; the case being subsequently overruled, the sections were re-enacted, Laws '13, p. 165, § 6531 amended, Laws '17, p. 437.

If an action is commenced in the wrong county the remedy is by following this section, not by a demurrer, on the ground that the court is without jurisdiction.

Emerson, Brantingham Imp. Co. v. Giles, 52 U. —; 174 P. 181.

6532. (2933.) Right to change of venue waived if not demanded. If the county in which the action is commenced is not the proper county for the trial thereof, the action may, notwithstanding, be tried therein unless the defendant, at the time he appears and answers or demurs, files an affidavit of merits, and demands, in writing, that the trial be had in the proper county. Re-enacted '13, p. 165.

6533. (2934.) Change of venue. Grounds. The court may, on motion, change the place of trial in the following cases:

1. When the county designated in the complaint is not the proper county;

2. When there is a reason to believe that an impartial trial cannot be had therein;

3. When the convenience of witnesses and the ends of justice would be promoted by the change;

4. When from any cause the judge is disqualified from acting; *provided, however,* that the court in its discretion may either grant the motion to change the place of trial for the cause stated in this subdivision, or may call in another district judge, not disqualified, to try the case;

5. When all the parties to an action, by stipulation, or by consent in open court, entered in the minutes, may agree that the place of trial may be changed to any county in the state. Thereupon the court must order the change as agreed upon. Am'd '01, p. 17; '13, p. 90.

Mont. Civ. C., §§ 615, 619*. Cal. C. Civ. P., § 397*.

Stipulation to try case in another county, § 1680.

Disqualification of judges, § 1795; Con. art. 8, sec. 13.

Actions to be tried in county where they arise, Con. art. 8, sec. 5.

Change of venue in cases provided by law, Con. art. 8, sec. 5, and note.

Affidavit of party resisting motion for change of venue on ground of inconvenience of witnesses should show names and residence of witnesses, etc.

Crookston v. Centennial-Eureka Mining Co., 13 U. 117; 44 P. 714.

Motion for change of venue must be made before trial.

Anderson v. Mam. M. Co., 26 U. 357; 73 P. 412.

Right to change of venue waived by failure to demand it.

Snyder v. Pike, 30 U. 102; 83 P. 692.

Obligors on a bond who were sued in a county other than that of their residence waived the right to remove by entering demurrer to jurisdiction.

Continental Life Ins. Co. v. Jones, 31 U. 403; 88 P. 229.

An objection to venue under § 6529 is waived by a general demurrer, though one of the grounds thereof is that the court has not jurisdiction of the subject matter.

Farnsworth v. U. P. Coal Co., 32 U. 112; 89 P. 74.

Stone v. U. P. Ry. Co., 32 U. 185; 89 P. 715, 723.

6534. (2935.) Id. Court to which transferred. If any action or proceeding is commenced or pending in a court, and the court orders the place of trial to be changed, it must be transferred for trial to a court the parties may agree upon, by stipulation in writing, or made in open court and entered in the minutes, or if they do not so agree, then to the nearest court where the like objection or cause for making the order does not exist.

Cal. C. Civ. P., § 398*.

Stipulation to try case at another place, § 1680.

Order changing venue by court of its own motion is presumed to have been for good cause, and confers jurisdiction on court to which transferred.

Ex parte Whitmore, 9 U. 441; 35 P. 521.

Elliot v. Whitmore, 10 U. 246; 37 P. 461.

Order changing venue is intermediate, not final.

Nounnan v. Aspinwall, 1 U. 140.

6535. (2936.) Id. Transfer of papers. Costs. Effect. When an order is made transferring an action or proceeding for trial, the clerk of the court must transmit the pleadings and papers therein to the clerk of the court to which it is transferred. The costs and fees thereof and of filing the papers anew must be paid by the party at whose instance the order was made; *provided,* that when said order is made for the reason that the cause was commenced in the wrong county, and this appears affirmatively upon the face of the complaint, said costs of transfer and filing the papers anew shall be paid by

the plaintiff in the action within ten days after the making of such order or said cause dismissed for want of jurisdiction. The court to which an action or proceeding is transferred shall have and exercise the like jurisdiction as though it had been originally commenced therein.

Cal. C. Civ. P., § 399*.

6536. (2937.) Id. Certification of judgment affecting real estate. When an action or proceeding affecting the title to or possession of real estate has been brought in or transferred to a court for a county other than the county in which the real estate, or some portion of it, is situated, the clerk of such court must, after final judgment therein, certify, under his seal of office, and transmit to the corresponding court of the county in which the real estate affected by the action is situated a copy of the judgment. The clerk receiving such copy must file, docket, and record the judgment in the records of the court, briefly designating it as a judgment transferred from ..... court (naming the proper court).

Cal. C. Civ. P., § 400.

Execution on such judgment, § 6912.

Judgment docketed becomes a lien, § 6868.

CHAPTER 8.

MANNER OF COMMENCING ACTION.

6538. (2938.) Action, how commenced. A civil action shall be commenced by the filing of a complaint with the clerk of the court in which the action is brought or by the service of a summons.

Cal. C. Civ. P., § 405*.

Col. Mills' An. C. (1896) § 32*; N. Dak. (1895) § 5246*; Iowa, McClain's An. C. (1888) § 3804*; N. Y. Civ. P., § 416*; Wash. (1896) § 4127*; Wis. § 2629*.

Action deemed pending for what time, § 7220.

Summons must issue within three months, § 6542.

Jurisdiction attaches from time of service of summons or the filing of the complaint, § 6559.

The commencement of a suit must be taken to be the filing of the complaint where summons was not issued within one year, but defendants voluntarily answered without objection.

Needham v. Salt Lake City, 7 U. 319; 26 P. 920.

The complaint in replevin, alleging in the present tense ownership and right of possession, is sufficient, and allows proof thereof as of the time the action was started though the filing of the complaint is a few days after the verification.

James v. Jensen, 50 U. —; 167 P. 827.

Jones v. West Pub. Co., 51 U. —; 174 P. —.

6539. (2939.) Form of summons. When service by publication. The summons in a civil action shall be substantially in the following form:

In the District Court of ..... County, State of Utah.

....., plaintiff, vs. ....., defendant. Summons.

The state of Utah to the said defendant:

You are hereby summoned to appear within twenty days after service of this summons upon you, if served within the county in which this action is brought; otherwise within thirty days after service, and defend the above entitled action; and in case of your failure so to do, judgment will be rendered against you according to the demand of the complaint.

(Signed by).....

Plaintiff (or plaintiff's attorney).

P. O. Address:.....

If the complaint be on file at the time of service of the summons, the words "which has been filed with the clerk of said court," shall be added, following the word "complaint;" otherwise the words, "which, within ten days after service of this summons upon you, will be filed with the clerk of said court," shall be added, following the word "complaint." When service of the summons is made by publication, the summons shall also contain a brief statement of the object of the action, as, for example: "This action is brought to recover a judgment—dissolving the marriage contract (or bonds of matrimony) heretofore existing between you and the plaintiff;" or, "quieting plaintiff's title to the land described in said complaint;" or, "foreclosing plaintiff's mortgage upon the land (or other property) described in said complaint," as the case may be. Am'd '07, p. 16.

Cal. C. Civ. P., § 407*.
Col., Mills' An. C. (1896) § 35*.
A party may prosecute or defend before any tribunal any civil cause to which he is a party, Con. art. 1, sec. 11.
Time to answer or demur may be extended, §§ 6619, 7023.
Form of summons in city court, § 1714.
Form of summons in juctice's court, § 7436.
Must issue within three months, § 6542.
Public utility commission may issue summons, § 4821.

The summons, in an action by an officer should show his official character.
In re Hamilton v. Spiers, 2 U. 225.
Summons failing to state time and place at which defendant shall appear and answer is fatally defective.
Winters v. Hughes, 3 U. 443; 24 P. 759.
But summons in action on promissory note erroneously drawn under § 3204, sup. 5 C. L. 1888, is sufficient to support judgment by default.
Miller v. Zeigler, 3 U. 17; 5 P. 518.

6540. (2940.) Who may serve summons. Return. Time valid. The summons, together with a copy of the complaint, if any, may be served by the sheriff of the county where the defendant may be found, or by any other person over twenty-one years of age and not a party to the action. The officer or other person serving a summons shall make due return thereof, within five days after service, to the person whose name is subscribed thereto. The person subscribing the summons may, at his option, by indorsement thereon, fix a time for the service thereof, which shall not exceed three months, and the service shall then be made accordingly.

Wis., § 2635; Cal. C. Civ. P., § 410*; Sup. (1893) p. 950.
When sheriff disqualified, constable to serve, § 1523.
Private party serving summons not entitled to fee, § 6546.
Service of summons by telegraph or telephone, § 7032.

6541. (2941.) Separate summons for defendants in different counties. Where there are several defendants residing in different counties, a separate summons may be issued to each county for the service of the defendants residing therein.

Cal. C. Civ. P., § 406*.
One copy of complaint deposited for defendants in each county, § 6546.

6542. (2942.) Summons must issue within three months. If an action be commenced by the filing of a complaint with the clerk, summons must issue thereon within three months from the date of filing. If the summons be returned without being served upon any or all of the defendants, an alias summons may be issued and served at any time within one year after the filing of the complaint. Am'd '07, p. 28.

Cal. C. Civ. P., § 408*. See Sup. (1889) p. 358.
Sec. 3203, C. L. 1888, did not require the service of summons within the year, but the summons was required to be issued within a year from the filing of the complaint.
Culmer v. Caine, 22 U. 216; 61 P. 1008.
The time for serving a cross-complaint not being fixed by statute, it should be served within a reasonable time.
Id.

6543. (2943.) Appearance of one defendant; service upon others. If the action be brought upon a joint contract of two or more defendants, and one of them has appeared within the year, the other or others may be served or appear at any time before trial.

Cal. C. Civ. P., § 406*.

6544. (2944.) Time of service to be indorsed on copy. Any officer or other person authorized to serve a summons, and who shall serve the same, shall, at the time of the service thereof, indorse upon the copy or copies of such summons which he shall deliver to the defendant or defendants in such action the date upon which the same was so served, and sign his name thereto, and add, if an officer, his official title.

Wis., S. & B. An. S. (1889) § 2635a*.

6545. (2945.) Appearance or written acknowledgment deemed service. Refusal of copy. The voluntary appearance of a defendant, or an acknowledgment on the back of a summons or other written acknowledgment of service of summons upon him, shall be deemed valid and sufficient service. When the defendant shall refuse to receive a copy of the summons, the offer of the officer or other person to deliver a copy thereof shall be deemed sufficient service of such summons, provided the person serving the same shall state that it is a summons.

Col., Mills' An. C. (1896) § 40*.
Guardian may appear for ward and waive service, § 7877.
"Appearance" defined, effect, § 7029.
General appearance of defendant waives all objections to service of summons.
Keyser v. Pollock, 20 U. 371; 59 P. 87.
Houtz, v. Gisborn, 1 U. 173.

6546. (2946.) Complaint to be filed within ten days. Copy. Return. Fees. Within ten days after service of the summons, the complaint, if not

previously filed, together with the summons and proof of service thereof, must be filed in the office of the clerk of the court in which the action is brought. At the same time, one copy of the complaint shall be deposited with the clerk for the defendants in each county in which the summons shall have been served, unless a copy thereof was served with the summons in each of such counties. Otherwise the action shall be dismissed on motion of any defendant. Whenever any person other than a sheriff shall serve a summons, no fee shall be allowed therefor, either for traveling in making such service or for serving such summons.

Col. Mills' An. C. (1896) § 32*.

Where a complaint, a copy not having been served, is filed within ten days after the summons was served, and a return on the summons by error showed it was served in September instead of October, and by a mistake of the attorney's stenographer a copy of the complaint was not filed, when defendant makes a motion to dismiss because "the face of the record" shows the complaint was not filed within ten days after service of the summons and a copy of the complaint not filed; held the court should have sustained plaintiff's application to amend the return and file a copy of the complaint, and the court erred in dismissing the action.

West Mt. Lime & Stone Co., v. Danley, 38 U. 218; 111 P. 647.

Plaintiff's failure to deposit a copy of complaint for the defendants is an irregularity, and not jurisdictional.

Id.

The filing of the summons and proof of service within ten days is jurisdictional. It cannot be filed afterwards.

Reese v. District Court, 51 U. —; 174 P. —.

6547. (2947.) Objection to summons or service, how taken. Objections to the summons, or the service thereof, or proof of service thereof, may be taken by motion on behalf of the defendant, particularly specifying the objections, accompanied by the certificate of counsel that in his opinion the objection is well taken; after the filing and serving of such motion and certificate, the time for pleading shall be suspended until such objection is passed upon by the court.

Failure to make personal service, leave to answer, § 6619.

6548. (2948.) Summons, how served. The summons must be served by delivering a copy thereof as follows:

1. If the defendant is an incorporated city, to the mayor or recorder; if an incorporated town, to the president or clerk of the board of trustees;

2. If the defendant is a county, to a county commissioner or to the county clerk of such county;

3. If the defendant is a school district, to a trustee thereof; if the board of education of a city, to the president or clerk of such board;

4. If the defendant is an irrigation district, to the president, superintendent, or water master;

5. If the defendant is a domestic corporation, to the president or head of the corporation, secretary, treasurer, cashier, or managing agent thereof. If no such person can be found within the state, then upon a director of the corporation found within the state. If the defendant is a foreign corporation, or non-resident joint stock company or association, to the president, secretary, treasurer, or other officer thereof, or to the person designated by such corporation, company, or association, as one upon whom process may be served. If no such person can be found, then upon any clerk, superintendent, general agent, cashier, principal director, ticket agent, station keeper, managing agent, or other agent having the management, direction, or control of any property of such corporation, company, or association. If none of the persons named in this subdivision can be found in the county in which such action is commenced, then service may be made as provided herein upon any such persons in any county in this state. If there be none of such persons in the state of Utah, and the defendant has, or advertises, or holds itself out as having, an office or place of business in this state, or does business in the state, then upon the person doing such business or in charge of such office or place of business;

6. If the defendant is a minor under the age of fourteen years, to such minor and also to his father, mother, or guardian; or, if there is none within the state, then to any person having the care and control of such minor, or with whom he resides, or in whose service he is employed;

7. If the defendant is a person judicially declared to be of unsound mind

or incapable of conducting his own affairs, and for whom a guardian has been appointed, to such guardian;

8. In all other cases, to the defendant personally, or by leaving such copy at his usual place of abode with some suitable person of at least the age of fourteen years. Am'd '99, p. 74; '05, p. 126.

Cal. C. Civ. P., § 411*. Mont. C. Civ. P., § 636*.

Service upon guardian is service upon ward, § 7877.

Service on agent of partnership, etc., § 6520.

Service by telegraph or telephone, § 7032.

Service upon sheriff, § 1522.

Proof of service, § 6552.

Corporation must have agent upon whom process may be served, Con. art. 12, sec. 9; §§ 915, 917.

Where a foreign corporation has an agent residing in this territory, service of summons can be had on such agent, and after the lapse of the time within which defendant is required to answer, the plaintiff is entitled to judgment by default.

Walker Bros. v. Continental Ins. Co., 2 U. 331.

Where foreign corporation has no designated agent, service upon its attorney having some of its property in charge is valid.

Saunders v. Sioux City Nursery, 6 U. 431; 24 P. 532.

Valid service of summons cannot be made upon one temporarily in the state who is entrusted by a foreign corporation with adjustment of an account with a local company.

Honerine M. & M. Co. v. Tallerday Pipe Co., 31 U. 326; 88 P. 9.

Where the return of the officer does not disclose that a copy was served on the defendant, it is held that there is no service.

Bristol v. Brent, 36 U. 108; 103 P. 1076.

Where none of the officers of a foreign railroad corporation are within the state, and there is no designated agent; held that service on an agent is sufficient where the agent has no assistant, sells no tickets, and issues no bills of lading, but obtains from prospective shippers "routing orders."

Bristol v. Brent, 38 U. 58; 110 P. 336.

The presumption that a man's place of abode is where his family lives is one of fact, and may be overcome.

Grant v. Lawrence, 37 U. 450; 108 P. 931.

6549. (2949.) Id. When service made by publication. When the person on whom the service of a summons is to be made resides out of the state, or has departed from the state, or cannot, after due diligence, be found within the state, or conceals himself to avoid the service of the summons; or when the defendant is a foreign corporation, having no managing or business agent, cashier, secretary, or other officer within the state, and an affidavit stating any of these facts is filed with the clerk of the court in which the action is brought, and such affidavit also states that a cause of action exists against the defendant in respect to whom the service of the summons is to be made, or that he or it is a necessary or proper party to the action, the clerk of the court in which the action is commenced shall cause the service of the summons to be made by publication thereof.

Cal. C. Civ. P., § 412*; see Sup. (1893) p. 951.

Notice by publication of taking of deposition, § 7184.

Service by publication upon unknown defendant, § 6551.

Summons served by publication to contain statement of cause of action, § 6539.

Personal service necessary to personal judgment, note to § 1667.

Party may designate paper for publication, § 7028.

Affidavit should not merely follow the language of the statute, but should show the probatory facts relied on to show the ultimate facts, and service based on an affidavit following the language of the statutes may be set aside on a direct attack.

Liebhardt v. Lawrence, 40 U. 243; 120 P. 215.

6550. (2950.) Id. Order. Mailing copies. Personal service, when complete. The order of the clerk must direct the publication to be made five times, once in each week for five successive weeks, in a newspaper to be designated by him as most likely to give notice to the person to be served. In case of publication, where the residence of a non-resident or absent defendant is known, the clerk must forthwith deposit a copy of the summons and complaint in the postoffice, directed to the person to be served at his place of residence. When publication is ordered, personal service of a copy of the summons and complaint out of the state is equivalent to publication and deposit in the postoffice. The service of summons is complete on the expiration of the thirtieth day after the first publication; or in case of personal service out of the state, on the tenth day after actual service.

Cal. C. Civ. P., § 413*.

Judgment after service by publication, § 6844.

Order not specifying the time that publication should continue, nor directing mailing copy of summons and complaint to defendant, fails to confer jurisdiction.

Park v. Higbee, 6 U. 414; 24 P. 524.

In order to grant an order to publish summons and excuse mailing copy thereof to defendant, the clerk should be satisfied from the affidavit that the defendant is a non-resident, and his place of residence is unknown.

Liebhardt v. Lawrence, 40 U. 243; 120 P. 215.

Slight evidence tending to show that the plaintiff securing publication of summons had knowledge, or such information as would, on reasonable inquiry, lead to knowledge, of the place of residence of the defendant, will justify setting aside the judgment, where no summons or complaint was mailed to the defendant.

Id.

"Is known," means to the plaintiff, and the affidavit should state the residence of the defendant.

Id.

In a divorce action on ground of permanent insanity, the summons must be personally served in this state.

Schafer v. Ritchie, 49 U. 111; 162 P. 618.

6551. (2951.) Service by publication on unknown parties. If any plaintiff shall allege that there are, or that he verily believes that there are, persons interested in the subject matter of the complaint, whose names he cannot insert therein, because they are unknown to him, and shall describe the interest of such persons, and how derived so far as his knowledge extends, the court or the judge thereof shall make an order for publication of summons, reciting, moreover, the substance of the allegations of the complaint in relation to the interest of such unknown parties; and after the completion of service by such publication, the court shall have jurisdiction of such persons, and any judgment or decree rendered in the action shall apply to and conclude such persons with respect to such interest in the subject matter of the action.

Col. Mills' An C. (1896) § 44*.
Proceeding where true name of party unknown, § 6621.
Unknown defendants in suit for partition, § 7264.
The allegations must be made in the complaint, and a statement of them in the affidavit is insufficient.
Lawrence v. Murphy, 45 U. 572; 147 P. 903.
An allegation that the interest of the unknown heirs is that derived as heirs of certain named persons and is such an interest as would descend to them on the death of the named person, is insufficient.
Id.

6552. (2952.) Proof of service, how made. Proof of the service of the summons and of the complaint, if any, accompanying the same, shall be as follows:

1. If served by the sheriff, his certificate thereof, showing place, time, and manner of service;

2. If by any other person, his affidavit thereof, showing place, time, and manner of service, that he knew the person served to be the defendant mentioned in the summons, and left with as well as delivered to him a copy; and if the defendant was not personally served, he shall state in such affidavit, when, where, and with whom such copy was left;

3. The written admission of the defendant;

4. In case of publication, the affidavit of the publisher, or printer, or his foreman or principal clerk, showing the same, and specifying the date of the first and last publications; and an affidavit of a deposit of a copy of the summons and complaint in the postoffice as prescribed by law, and the order therefor, if such deposit shall have been required, by the person making the same.

Cal. C. Civ. P., § 415*.
Acknowledgment of service, § 6545.
Proof of publication, how made, § 7155.
A return of service stating service of summons "attached to a true and correct copy of the complaint" is sufficient to support a judgment by default.
Miller v. Zeigler, 3 U. 17; 5 P. 518.
Recital in decree of service by pubication is conclusive as against collateral attack.
Amy v. Amy, 12 U. 278; 40 P. 705.
A sufficient proof of service of summons is the defendant's indorsement to that effect.
Culmer v. Caine, 22 U. 216; 61 P. 1008.
An officer's return upon a summons of service in a certain precinct does not sustain a finding that defendant was not a resident of another precinct as alleged in the complaint.
Beck v. Lewis, 49 U. 368; 164 P. 480.

6553. (2953.) Lis pendens. Form. Effect of. In an action affecting the title or the right of possession of real property, the plaintiff at the time of filing the complaint, and the defendant at the time of filing his answer, when affirmative relief is claimed in such answer, or at any time afterward, may file for record, with the recorder of the county in which the property or some part thereof is situated, a notice of the pendency of the action, containing the names of the parties, the object of the action or defense, and a description of the property in that county affected thereby. From the time of filing such notice for record only shall a purchaser or incumbrancer of the property affected thereby be deemed to have constructive notice of the pendency of the action, and only of its pendency against parties designated by their real names.

Cal. C. Civ. P., § 409.
Lis pendens in action for partition, § 7263.
Effect of actual notice, § 4875, and note.
Land registration lis pendens, § 4942.
This section does not in any way change the rule of law relating to actual notice of the pendency of the action, nor the effect of such actual notice upon parties dealing with or obtaining possession or title to land in litigation.
Whittaker v. Greenwood, 17 U. 33; 53 P. 736.
The object of notice of lis pendens is to keep the res within the power of the court until final decree.
Dupee v. Salt Lake V. L. & T. Co., 20 U. 103; 57 P. 845.
Where real property was levied upon under an execution as the property of a judgment debtor, the filing of a lis pendens notice of a suit by the grantor of the judgment debtor one day before the execution sale, imparted

notice to the purchasers at such execution sale of plaintiff's claims.
Larson v. Gasberg, 43 U. 203; 134 P. 885.

Query: Does a lis pendens constitute an incumbrance?
Utah S. & T. Co. v. Stout, 36 U. 206; 102 P. 865.

6554. Lis pendens. Form of notice. Time and place of filing. Record. At the time of, or at any time after, the commencement of an action for the recovery of damages or other relief against any person, firm, corporation, or association engaged in the promotion, exploitation, development, management or operation of, or otherwise interested in, any Carey act project or other reclamation project, involving the sale or other disposition of lands or water to settlers, and which said action is based on a claim of fraud, deceit, or misrepresentation in connection with the promotion, exploitation, development, management, or operation of such project, or the sale or exchange of its land or water rights, the plaintiff may file for record with the county recorder of any county in which the defendant owns property, a notice, signed by himself or someone on his behalf, of the pendency of such action, which said notice shall contain the title of the court, the names of the parties, the object of the action, and shall claim the benefit of the lien hereinafter provided for. Such notice need not contain a description of the property of the defendant, but shall be recorded by the county recorder and indexed alphabetically under the name of each defendant, in a book to be kept solely for that purpose, and for the purpose of recording and indexing the clerk's certificates of the termination of such action, as hereinafter provided. '17, p. 347.

6555. Lien secured. Place and date. Any judgment that may thereafter be rendered in such action shall become a lien upon all the property of the judgment debtor, in the county in which said judgment is rendered, and in any other county in which a transcript of such judgment is filed, which said lien shall relate back to and take effect as of the date of the filing of said lis pendens, in those counties in which said lis pendens was filed. '17, p. 347.

6556. Release certificates. Duties of clerks and recorders. Effect. In the event it shall be finally determined that the plaintiff is not entitled to relief in such action, or should such action be sooner finally terminated, the clerk of the court in which such action is pending shall so certify, and such certificate shall be filed by the plaintiffs, at his own cost, with the county recorder of each county wherein a notice of the pendency of said action has been filed. The county recorder shall record such certificate in the book kept for the purpose of recording the notices of pendency of such actions, and shall note on the margin of the record of the notice the date, book, and page of the recording of the clerk's certificate. Such certificate shall likewise be indexed alphabetically under the name of each defendant. The recording of such certificate shall terminate the effect of the original notice of the pendency of such action. '17, p. 347.

6557. Liability for failure to record certificates. Any person who shall have caused any such notice to be recorded, and who, after the final termination of such action, and after twenty days' written demand, shall neglect or refuse to procure the clerk's certificate of the final termination of such action, and record the same in each county in which such notice has been filed, shall be liable to the defendant for the damages caused thereby, and in addition thereto shall pay to each defendant whose property is affected, $25 per day until such certificate shall be recorded, to be recovered in the same manner as other debts. '17, p. 347.

6558. (2954.) Action against joint debtors; service on part. When the action is against two or more defendants jointly or severally liable on a contract, and the summons is served on one or more, but not on all of them, the plaintiff may proceed against the defendants served in the same manner as if they were the only defendants.

Cal. C. Civ. P., § 414.
Execution when service had on one or more, § 6914.
Action against parties severally liable, § 6511.
Judgment against one of several, §§ 6854-6856.
Release of one joint debtor does not release the other, § 5067.
Costs against parties who might have been joined, § 7037.
Parties not served may be ordered to show cause why they should not be bound by judgment, § 6874.
Contribution, § 6950.
Action against partners, judgment, § 6520.

6559. (2955.) Jurisdiction, when acquired. From the time of the service of the summons or the filing of the complaint in a civil action, the court is deemed to have acquired jurisdiction (of the parties), and to have control of all the subsequent proceedings.

Cal. C. Civ. P., § 416*. Col. Mills' An. C. (1896) § 44*.
The words "of the parties" were placed in this section inadvertently and were observed too late to be stricken out by the legislature.
Action commenced by filing of complaint, or by the service of a summons, § 6538.
Decisions on the question of the jurisdiction of the person, note to § 1667.

CHAPTER 9.

PLEADINGS.

6562. (2956.) Defined. The pleadings are the formal allegations by the parties of their respective claims and defenses for the judgment of the court.

Cal. C. Civ. P., § 420.
Parties known as plaintiff and defendant, § 6443.
Title not changed on appeal, § 6993.
The court has the power to expunge from its record scandalous matter which raises no issue and serves no purpose except to injure the reputation of the party at whom it is aimed.
Morrison v. Snow, 26 U. 247; 72 P. 924.
Pleadings are the judicial means of investing the court with jurisdiction of the subject matter, and the court can judicially consider only what is presented thereby.
In re Evans, 42 U. 282; 130 P. 217.

6563. (2957.) Form and sufficiency, how determined. The forms of pleading in civil actions and the rules by which the sufficiency of the pleadings is to be determined, are those prescribed in this code.

Cal. C. Civ. P., § 421.
General rules of pleading, §§ 6596-6623.
But one form of civil action, § 6442.
Law and equity may be administered in same action, Con. art. 8, sec. 19.
Rules of equity prevail over common law, § 5839.
Objections which may be raised for the first time in appellate court, note to § 6994.

6564. (2958.) Pleadings of plaintiff. Of defendant. The only pleadings allowed on the part of the plaintiff are:

1. The complaint;
2. The demurrer to the answer;
3. The reply.

And on the part of the defendant:

1. The demurrer to the complaint;
2. The answer;
3. The demurrer to reply.

Cal. C. Civ. P., § 422*.
The court possesses the inherent power to direct a judgment on the pleading where the complaint does not state a cause of action, or where the answer does not interpose a defense.
Hancock v. Luke, 46 U. 26; 148 P. 452.

CHAPTER 10.

COMPLAINT.

6565. (2959.) Plaintiff's first pleading. The first pleading on the part of the plaintiff is the complaint.

Cal. C. Civ. P., § 425.

6566. (2960.) Complaint, what must contain. The complaint must contain:

1. The title of the action, the name of the court and county in which the action is brought, and the names of the parties to the action;

2. A statement of the facts constituting the cause of action, in ordinary and concise language;

3. A demand of the relief which the plaintiff claims. If the recovery of money or damages be demanded, the amount thereof must be stated.

Cal. C. Civ. P., § 426.
Corporate and representative capacity pleaded generally, § 6610, must be denied under oath, § 6611.
On default, relief cannot exceed demand, §§ 6844, 6857.
Supplemental complaint, § 6608.
Relief which may be granted in other than default cases, § 6857.
Pleadings liberally construed, §§ 6596, 6622.
Sufficiency of complaint as against demurrer, note to § 6568.

Description of property in pleading, § 6599.
Sufficiency of complaint may be raised for the first time in appellate court, note to § 6994.
Performance of contract may be pleaded generally, § 6601.

If facts stated show plaintiff entitled to relief, it is sufficient.
Kuhn v. McAllister, 1 U. 273; affirmed 96 U. S. 87.
Farnsworth v. Holderman, 3 U. 381; 4 P. 337.
Linck v. S. L. City, 6 U. 109; 21 P. 459.

Complaint verified by attorney of non-resident.
Thackara v. Reid, 1 U. 238.

Allegations on information and belief.
Flagstaff S. M. Co. v. Patrick, 2 U. 304.
Thackara v. Reid, 1 U. 238.

Where surety had expressly waived notice of non-payment, complaint need not allege notice.
Victor S. Mach. Co. v. Crockwell, 2 U. 557; and 3 U. 152; 1 P. 470; affirmed 112 U. S. 688.

In tort, plaintiff is not required to aver all the physical injuries which he sustained or which may have resulted from or be aggravated by the wrongful act of defendant. If such injuries can be traced to the act complained of, or are such as would naturally follow from it, they need not be specifically alleged. If special damages are claimed, such damages must be specifically pleaded.
Williams v. O. S. L. R. R. Co., 18 P. 210; 54 P. 991.
Croco v. O. S. L., 18 U. 311; 54 P. 985.
North Point Irr Co. v. Utah & S. L. Canal Co., 23 U. 199; 63 P. 812.
Nichols v. O. S. L., 28 U. 319; 78 P. 866.
Mickleson v. New East Tintic Ry. Co., 23 U. 42; 64 P. 463.
Wilson v. S. P. Co., 13 U. 352; 44 P. 1040.
Vanderberg v. Connoly, 18 U. 112; 54 P. 1097.

Under our system, in a suit upon a written contract, it makes no difference whether a contract is set out in haec verba, or whether it is annexed, and by proper reference made a part of the pleading.
Stephens v. Am. Fire Ins. Co., 14 U. 265; 47 P. 83.

A pleader may allege in a single statement as many acts of negligence relating to one transaction or accident as he may rely on, and upon trial he need only prove one of the acts, if the act proved is sufficient to entitle him to recover.
Ward v. Salt Lake City, 46 U. 616; 151 P. 905.

Where an instrument is attached to the complaint, the statements contained therein may for some purposes be considered in connection with the allegation of the complaint.
Orpheus & Co. v. Clayton, 41 U. 605; 128 P. 575.

An allegation that the effect of a transfer was to enable defendant to secure a greater percentage of his debts than other creditors of the same class, is not a conclusion of law.
Utah Asso. Cred. Men v. Boyle Furn. Co., 43 U. 523; 136 P. 572.

A statement that a city was charged with a duty of maintaining the streets in a safe condition for public travel, is a mere conclusion.
Herndon v. S. L. City, 34 U. 65; 95 P. 646.

An allegation that the defendant received money from plaintiff for certain purposes, is a mere conclusion.
Francis v. Gibson, 30 U. 67; 83 P. 571.

Where injuries are sustained under circumstances where the maxim res ipsa loquitur applies, the plaintiff is not required in the first instance to prove any particular defect by evidence other than that established by the prima facie presumption, even though the facts with respect to some defects are unnecessarily alleged with particularity in the complaint.
Dearden v. S. P., L. A. & S. L. R. Co., 33 U. 147; 93 P. 271.

An averment may be aided by inference or presumption.
Tate v. Rose, 35 U. 229; 99 P. 1003.
Tate v. Shaw, 35 U. 240; 99 P. 1007.

Allegations may be in the alternative.
Rasmussen v. McKnight, 3 U. 315; 3 P. 83; 4 P. 526.

The allegation that a corporation is insolvent raises no question of insolvency at the time of the transaction complained of.
Jensen v. Montgomery, 20 U. 89; 80 P. 504.

FRAUD SPECIFICALLY PLEADED:

The complaint held to contain allegations of fraud sufficiently specific, and to state facts sufficient to constitute a cause of action.
Price v. Utah and Pleasant Valley Ry. Co., 4 U. 72; 6 P. 528.
Rasmussen v. McKnight, 3 U. 315; 3 P. 83; 4 P. 526.

In an action by a creditor to set aside conveyance as fraudulent and void, the insolvency of the grantor at the time of the conveyance need not be alleged.
Ogden State Bank v. Barker, 12 U. 13; 40 P. 765.

An express allegation of the insolvency of defendant in an action to set aside a fraudulent conveyance is not necessary where it may be inferred from the whole bill.
Id.

He who relies upon fraud must aver and prove it.
Deseret Nat. Bank v. Little, Roundy & Co., 13 U. 265; 44 P. 930.
Houser v. Smith, 19 U. 150; 56 P. 683.

A complaint in an action to set aside a fraudulent assignment, and for the appointment of receiver, examined and held not demurrable.
Ottenberg v. Barnes, 10 U. 200; 37 P. 267.

Complaint in action to vacate judgment for fraud and misrepresentation held sufficient.
Riddle v. Quinn, 32 U. 341; 90 P. 893.

One seeking to impeach the settlement of a partnership account for fraud or mistake must set out in his pleading the particular facts constituting the fraud or mistake relied on.
Anderson v. Anderson, 25 U. 164; 70 P. 608.
Roach v. Gilmer, 3 U. 389; 4 P. 221.
Dunham v. Travis, 25 U. 65; 69 P. 468.

Fraud cannot be alleged in general terms, but the facts constituting the fraud must be set out.
Claflin v. Simon, 18 U. 153; 55 P. 376.
Wilson v. Sullivan, 17 U. 341; 53 P. 994.
Muldoon v. Brown, 21 U. 121; 59 P. 720.
Voorhees v. Fisher, 9 U. 303; 34 P. 64.

COMPLAINTS HELD SUFFICIENT:

Against maker and indorser.
Smith v. McCoy, 8 U. 58; 29 P. 1030.

For money had and received.
Musser v. Mears, 8 U. 367; 31 P. 985.

Action against consignee of sewing machines.
Victor S. M. Co. v. Crockwell, 2 U. 557; 3 U. 152; 1 P. 470; affirmed 112 U. S. 688.

In ejectment.
Jones v. Memmott, 7 U. 340; 26 P. 925.

To set aside assignment and for receiver.
Ottenberg v. Barnes, 10 U. 200; 37 P. 267.

For receiver.
U. S. v. The Church, 5 U. 361; 15 P. 473.

Against stockholders of insolvent corporation for unpaid subscriptions.
S. L. Hardware Co. v. Tintic Milling Co., 13 U. 423; 45 P. 200.

Creditor's bill in equity.
Enright v. Grant, 5 U. 334; 15 P. 268.

To determine adverse claims to mining property.
Parley's Park M. Co. v. Kerr, 3 U. 235; 2 P. 709; affirmed 130 U. S. 256.
Perego v. Dodge, 9 U. 3; 33 P. 221; affirmed 163 U. S. 160.
Campbell v. Taylor, 3 U. 325; 3 P. 445.
See Lavignino v. Uhlig, 26 U. 1; 71 P. 1046; affirmed 198 U. S. 443.
Lily M. Co. v. Kellogg, 27 U. 111; 74 P. 518.

For trespass upon real property.
Marks v. Sullivan, 8 U. 406; 32 P. 668.
Peterson v. Bean, 22 U. 43; 61 P. 213.

Action on insurance policy.
Stephens v. Union Ass. Soc., 16 U. 22; 50 P. 626.
Stephens v. Am. Fire Ins. Co., 14 U. 265; 47 P. 83.
Osborn v. Phoenix Ins. Co., 23 U. 428; 64 P. 1103.

On life insurance policy.
Munz v. Stand. Life Ins. Co., 26 U. 69; 72 P. 182.

For personal injury by reason of defective machinery, in absence of demurrer.
Mangum v. Bullion-B. M. Co., 15 U. 534; 50 P. 834.

For damages for negligence of railroad corporation.
Minter v. U. P. Ry. Co., 3 U. 500; 24 P. 911.
Cramer v. U. P. Ry. Co., 3 U. 504; 24 P. 911.
Action by sub-contractor to enforce lien.
Morrison v. Gamble, 14 U. 201; 46 P. 1104.
For specific performance.
Gammon v. Bunnell, 22 U. 421; 64 P. 958.
To recover rents of property granted in decree of divorce.
Boyle v. Boyle, 21 U. 375; 60 P. 1099.
For reformation of mortgage.
Marks v. Taylor, 23 U. 152; 63 P. 897.
Same case, 23 U. 470; 65 P. 203.
Against county to recover an illegal tax.
Centennial-Eureka M. Co. v. Juab Co., 22 U. 395; 62 P. 1024.
For indemnity against a tort feasor.
Hoggan v. Cahoon, 26 U. 444; 73 P. 512.
Culmer v. Wilson, 13 U. 129; 44 P. 833.
To foreclose chattel mortgage.
Johnson v. Hibbard, 27 U. 342; 75 P. 737.
On bail bond.
State v. Davis, 27 U. 368; 75 P. 857.
For seduction.
Peterson v. Crozier, 29 U. 235; 81 P. 860.
For services performed as miner, foreman, and manager, and for moneys expended.
Nelsen v. Henrichsen, 31 U. 191; 87 P. 267.
For damages for breach of contract to sell seed.
Bailey v. Leishman, 32 U. 123; 89 P. 78.
For conversion.
Christensen v. Beebe, 32 U. 406; 91 P. 129.
For an accounting.
Everett v. Jones, 32 U. 489; 91 P. 360.
Against assignee for accounting and to enforce payment of preferred claim.
Utah Natl. Bank v. Forbes, 18 U. 225; 55 P. 61.
For partnership accounting.
Owen v. Oviatt, 4 U. 95; 6 P. 527.
For damages for causing water to overflow.
Ephraim M. & E. Co. v. City of Ephraim, 49 U. 71; 161 P. 1124.
For damages to plaintiff's easement in street.
Morris v. O. S. L. R. Co., 36 U. 14; 102 P. 629.
For claim and delivery.
Nielsen v. Hyland, 51 U. —; 170 P. 778.

COMPLAINTS HELD INSUFFICIENT:

On non-negotiable note.
Felt v. Judd, 3 U. 414; 4 P. 243.
Upon bail bond.
People v. Solomon, 5 U. 277; 15 P. 4.
For debt.
Chesney v. Chesney, 23 U. 503; 94 P. 989.
For wrongful transfer of stock.
Rasmussen v. Sevier Valley Canal Co., 40 U. 371; 121 P. 741.

The common count, "for goods sold," is defective under the code, where it does not state a delivery or a promise to pay.
Kilpatrick-Koch Dry Goods Co. v. Box, 13 U. 494; 45 P. 629.

Where a party relies upon title by prescription, he must allege the facts showing the existence of the right, averring that the existence of the right was under a claim of right, was peaceable, without interruption, and open, notorious, and exclusive.
Larsen v. Onesite, 21 U. 38; 59 P. 234.
Coleman v. Hines, 24 U. 360; 67 P. 1122.
Description of property in complaint, § 2989, and note.

An allegation, in a complaint to recover certain money, that defendant received the money from plaintiff in trust for certain purposes was not an allegation of fact, but a mere conclusion of the pleader.
Francis v. Gisborn, 30 U. 67; 83 P. 571.

In action to recover personal property complaint must allege that plaintiff is the owner or entitled to the possession at the time of the commencement of the action.
Manti Bank v. Peterson, 30 U. 475; 86 P. 414.

Complaint held defective in action for damages for wrongful attachment.
Cahoon v. Hoggan, 31 U. 74; 86 P. 763, and 87 P. 164.

The prayer is no part of the statement of the facts required to constitute a cause of action and no part of the complaint, except as it may be looked to in aid of an ambiguous complaint.
Wheatley v. O. S. L. R. Co., 49 U. 105; 162 P. 86.

Where interest is a legal consequence of a demand without stipulation, it may be recovered, though not claimed in the pleadings, and interest is allowed on a tort, where personal property is destroyed, from the date of the destruction.
Id.

When a complaint asks for the foreclosure of a mechanic's lien and sale of the property, and no demand is made for personal judgment before the case is finally submitted, if the lien fails it is not error to refuse a personal judgment.
Volker v. Vance, 36 U. 348; 103 P. 970.

6567. (2961.) Joinder of causes of action. The plaintiff may unite in the same complaint several causes of action, legal or equitable, or both, where they all arise out of:

1. The same transaction, or transactions connected with the same subject of action; or,

2. Contract, express or implied; or,

3. Injuries, with or without force, to person and property, or either; or,

4. Injuries to character; or,

5. Claims to recover real property with or without damages for the withholding thereof, and the rents and profits of the same, or waste committed thereon; or,

6. Claims to recover personal property with or without damages for the withholding thereof; or,

7. Claims against a trustee by virtue of a contract, or by operation of law.

But the causes of action so united must all belong to one of these classes, and, except in actions for the foreclosure of mortgages, must affect all the parties to the action, and not require different places of trial, and must be separately stated.

Cal. C. Civ. P., § 427*; Kan., § 4166*; Wis., § 2647.
But one form of civil action under the code, § 6442; but the distinction as to causes of action remains, note to § 6442.
Law and equity in same action, Con. art. 8, sec. 19.
Consolidation of actions, § 7219.
Rules of equity prevail over rules of law, § 5839.
Objection on ground of misjoinder or nonjoinder waived, note to § 6573.
Plaintiff may recover on one of two counts in a complaint, though not entitled thereto on the other.
Firman v. Bateman, 2 U. 268.

Count for specific performance and one for money on contract improperly joined in same complaint. Above section construed. (Potter v. Hussey, 1 U. 249; Houtz v. Gisborn, 1 U. 173; and Folsom v. McLaughlin, 1 U. 178, cited, approved, and distinguished.)

Ferguson v. Burt, 2 U. 388.

Plaintiff may unite two causes of action, each for the killing of the same horse, charged in different ways.

Jensen v. U. P. Ry. Co., 6 U. 253; 21 P. 994.

A creditor's bill may include the judgments of several creditors.

Enright v. Grant, 5 U. 334; 15 P. 268.

Maker and indorser of note joined without stating separate cause of action against each.

Smith v. McEvoy, 8 U. 58; 29 P. 1030.

False imprisonment and malicious prosecution should be separately stated.

Johnston v. Meaghr, 14 U. 426; 47 P. 861.

In an action of tort, arising out of certain wrongful continuous official acts, several causes of action are properly joined.

Wilson v. Sullivan, 17 U. 341; 53 P. 994.

Causes of action which may be united in one complaint under this section must be separately stated, and the complaint must contain a demand for the relief claimed under each cause of action.

H. B. Claflin Co. v. Simon, 18 U. 153; 55 P. 376.

Johnston v. Meaghr, 14 U. 426; 47 P. 861.

Where a complaint contains two counts, one on an open account and the other on an account stated for the same cause of action, a motion to compel election between the counts was properly denied, the rule being that when a plaintiff has two or more grounds on which he may have a single cause of action, and there is some uncertainty as to which he will be able to establish, he may set forth his claim in different counts so as to include every ground he may have for recovery. (Distinguishing Anthony v. Savage, 2 U. 466.)

Oberndorfer v. Moyer, 30 U. 325; 84 P. 1102.

Shaw v. Utah N. Ry., 6 U. 253; 21 P. 994.

See Sterling v. Woodmen of W., 28 U. 505; 80 P. 375.

A personal judgment may be granted in an action to foreclose a lien where the lien fails and where the complaint contains necessary facts for both.

Volker v. Vance, 36 U. 348; 103 P. 970.

Though there are many breaches of a single contract, they may not be split up into several causes of action.

Felt v. Felt, 50 U. —; 167 P. 835.

The remedy for commingling in one statement several cases as one cause of action is a motion to require plaintiff to separately state his causes of action.

Kurtz v. Ogden Canyon S. Co., 37 U. 313; 108 P. 14.

Felt v. Felt, 50 U. —; 167 P. 835.

Causes of action, for defendant's sheep trespassing on plaintiff's land and for defendant's sheep infecting plaintiff's sheep with a contagious disease, may be joined.

Thomas v. Blythe, 44 U. 1; 137 P. 396.

Plaintiff alleged he performed labor as a miner on defendant's claim and performed other work thereon as foreman and manager, and that the labor performed and services rendered, and moneys paid out at defendant's request, amounted to $1172; held, this constituted a single cause of action.

Nelson v. Henrichsen, 31 U. 191; 87 P. 267.

A defendant in a counterclaim denied plaintiff's title, and alleged ownership and right of possession in himself, and afterwards amended alleging fee in another, but still relied on right of possession in himself; held, there was but one cause of action relied upon, and no ground to sustain motion for election.

Conner v. Raddon, 16 U. 418; 52 P. 764.

In an action quieting title, plaintiff may also have canceled a fraudulent judgment against him affecting the real estate.

Doyle v. West Temple T. Co., 43 U. 277; 135 P. 103.

A complaint alleging that the defendant had caused large quantities of mud and debris to flow into the plaintiff's fish ponds over a considerable period of time, the wrongful acts being so numerous, continuous, and blended together as to constitute a single wrong, cannot be attacked for commingling different causes of action.

Rees v. Qualtrough, 48 U. 233; 156 P. 955.

A complaint asking for an injunction against the sale of stock for assessment, and that previous assessments be declared null and void because of illegality, that the officers be required to make a full and complete accounting of all assessments on stocks of the corporation, and that a note and other contracts executed in favor of the officers be canceled, improperly joins causes of action in favor of the corporation against its officers, and causes of action in favor of plaintiff against the corporation

Blake v. Boston Dev. Co., 50 U. —; 167 P. 672.

Each assessment was a completed transaction, and, if wrongful, constituted distinct and separate causes of action, and they should be stated separately.

Id.

CHAPTER 11.

DEMURRER TO COMPLAINT.

6568. (2962.) Grounds of demurrer to complaint. The defendant may demur to the complaint within the time required in the summons to answer, when it appears upon the face thereof, either:

1. That the court has no jurisdiction of the person of the defendant, or the subject of the action; or,

2. That the plaintiff has not legal capacity to sue; or,

3. That there is another action pending between the same parties for the same cause; or.

4. That there is a defect or misjoinder of parties, plaintiff or defendant; or,

5. That several causes of action have been improperly united; or,

6. That the complaint does not state facts sufficient to constitute a cause of action; or,

7. That the complaint is ambiguous, unintelligible, or uncertain.

Cal. C. Civ. P., § 430.

Time to answer or demur may be extended, §§ 6619, 7267.

Objections to complaint which may be raised for the first time in appellate court, note to § 6954.

Objections not taken by demurrer or answer deemed waived, § 6573, and note.

Defects as to parties waived if not taken, § 6573, and note.

Joinder of parties, plaintiff and defendant, §§ 6495-6520, and notes.

Joinder of causes of action, § 6567, and note.
Complaints, sufficient and insufficient, note to § 6566.
Objections not appearing on face of complaint must be taken by answer, § 6572.
Sham and irrelevant matter, etc., may be stricken on motion, § 6597.
Demurrer must specify grounds, § 6569.

Joint demurrer of two defendants should be overruled if complaint states a cause of action against either.
Walker v. Popper, 2 U. 96.
Smith v. Clark, 37 U. 117; 106 P. 653.

Where the promise or agreement is alleged generally, the court will not assume, upon demurrer, that it was not in writing.
Kilpatrick-Koch D. G. Co. v. Box, 13 U. 494; 45 P. 629.

As against a general demurrer, a complaint stating a cause of action in general terms is sufficient.
IXL Furn. Co. v. Berets, 32 U. 454; 91 P. 279.
Haig v. Nephi Irr. Co., 16 U. 421; 52 P. 765.
Linck v. S. L. City, 6 U. 109; 21 P. 459.
Potter v. Hussey, 1 U. 249.

A demurrer admits all facts properly pleaded.
Reams v. Taylor, 31 U. 288; 87 P. 1089.
State ex rel. v. Board Ed. S. L. City, 21 U. 401; 60 P. 1013.
Gammon v. Bunnell, 22 U. 421; 64 P. 958.
Thomas v. Blythe, 41 U. 1; 137 P. 396.

So also an objection to the introduction of any evidence because complaint does not state facts sufficient to constitute a cause of action.
Salt Lake County v. Clinton, 39 U. 462; 117 P. 1075.
Orpheus v. Clayton Inv. Co., 41 U. 605; 128 P. 575.

A complaint which permits proof of such facts and inferences as would withstand a motion for non-suit is not vulnerable to general demurrer.
Eddington v. Union C. Co., 42 U. 274; 130 P. 243.

Formal and technical objections are waived unless made in due time.
Child v. Gillis Constr. Co., 42 U. 120; 129 P. 356.

Defendant, by filing a disclaimer, waives its right to a ruling on a demurrer.
S. L. City v. S. L. Inv. Co., 43 U. 181; 134 P. 603.

Where a complaint against several defendants states a cause of action against some, it is good against a joint demurrer by all of them.
Smith v. Clark, 37 U. 117; 106 P. 653.

A general demurrer should always be overruled unless the complaint clearly fails to state some essential fact or states some act of plaintiff preventing recovery.
Eddington v. Union P. C. Co., 42 U. 274; 130 P. 243.

A general demurrer reaches only defects of substance.
Arnold v. Pope, 37 U. 204; 108 P. 351.
Wheelwright v. Nat. Cop. Bank, 42 U. 579; 133 P. 132.

In an action involving the date of the expiration of a lease, the landlord's demurrer to tenant's complaint raises a question of law, and they are bound by the fair construction of the lease in fixing the term granted.
IXL Furn. Co. v. Berets, 32 U. 454; 91 P. 279.

A complaint containing items of damage presented to the city council under § 816, and other items, is not vulnerable to a general demurrer.
Sweet v. S. L. City, 43 U. 306; 134 P. 1167.

A complaint charging conspiracy, and setting forth a number of acts in furtherance thereof, states but one cause of action.
Purcell v. Hickman, 50 U. —; 170 P. 784.

That several causes of action are contained in one statement in one cause of action is not a ground of demurrer, but requires a motion under § 6566.
Kurtz v. Ogden Canyon S. Co., 37 U. 313; 108 P. 14.

If a complaint will sustain a judgment, a general demurrer should be overruled.
Rasmussen v. Sevier Valley C. Co., 40 U. 371; 121 P. 741.

While a plaintiff suing both at law and in equity at the same time for the same matter may be required to elect which suit he will proceed with, the court must not make the election for him.
Dorsett v. Morse, 36 U. 362; 103 P. 969.

The election to stand upon a demurrer is equivalent to a refusal to plead over, and to abide by the final result, even to judgment.
Gammon v. Bunnell, 22 U. 421; 64 P. 958.

Complaint for services and money paid is not demurrable for failure to state each item more specifically, defendant's remedy being by motion for bill of particulars, under § 6598.
Nelson v. Henrichsen, 31 U. 191; 87 P. 267.

Where a complaint shows on its face that the right to maintain the action is not in plaintiff, but in another, such defect may be reached by demurrer.
Hunt v. Monroe, 32 U. 428; 91 P. 269.

WANT OF JURISDICTION:

Jurisdiction of the person and the cause, notes to § 1667, and to Con. art. 8, sec. 5.

A demurrer for want of jurisdiction of the person raises only the question as to whether defendant is such a person as can be subjected to process and jurisdiction of the court. A court having jurisdiction of the subject matter of a suit acquires jurisdiction of a defendant either by his voluntary appearance or by process served on him.
Continental L. Ins. Co. v. Jones, 31 U. 403; 88 P. 229.
Sanipoli v. P. V. Coal Co., 31 U. 114; 86 P. 865.

A general demurrer is a general appearance, though one of the grounds of demurrer is that the court has no jurisdiction of the subject matter.
Farnsworth v. U. P. Coal Co., 31 U. 112; 89 P. 74.
Stone v. U. P. Ry. Co., 31 U. 185; 89 P. 715, 723.

WANT OF LEGAL CAPACITY TO SUE:

Objection that a corporation has not legal capacity to sue cannot be taken by demurrer.
Crane Bros. Mfg. Co. v. Reed, 3 U. 506; 24 P. 1056.

Want of legal capacity to sue, as used in this section, declaring the same to be a ground of demurrer, means as a general rule a want of capacity to appear in court and maintain an action, regardless of in whom is vested the right of action.
Hunt v. Monroe, 32 U. 428; 91 P. 269.

If the objection that the plaintiff has not legal capacity to sue is not raised by demurrer or in the answer, it is waived.
Tooele Meat & Storage Co. v. Eite Candy Co., 50 U. —; 168 P. 427.

Every natural person of legal age has legal capacity to sue.
Kurtz v. Ogden Canyon S. Co., 37 U. 313; 108 P. 14.

ANOTHER ACTION PENDING:

Pendency of former action is a bar.
Davis v. Flagstaff S. M. Co., 2 U. 74.

Judgment in favor of assignee is a bar to another action thereon by assignor.
Anderson v. Yosemite M. Co., 9 U. 420; 35 P. 502.

Where, in such case, first action was against only one of several parties liable thereon, the others may still avail themselves of it as a bar to action brought by assignor.
Id.

AMBIGUOUS, UNINTELLIGIBLE, ETC.:

Allegations on information and belief do not make complaint demurrable.
Thackara v. Reid, 1 U. 238.

Surplusage in a complaint is no ground of demurrer.
Campbell v. Taylor, 3 U. 325; 3 P. 445.

Demurrer that complaint is "multifarious and improperly confounds two distinct causes of action not belonging to the same class," and that the complaint is "ambiguous, unintelligible, and uncertain," is not specific.
Owen v. Oviatt, 4 U. 95; 6 P. 527.

STATUTE OF LIMITATIONS:

Statute of limitations, how pleaded, § 6602, and note.

Defense of statute of limitations may be taken by demurrer.
Burnes v. Crane, 1 U. 179.

Id. Where defendant relies upon statute of limitations in his demurrer, he should refer to the specific section of the statute relied upon.
Thomas v. Glendinning, 13 U. 47; 44 P. 652.
Fullerton v. Bailey, 17 U. 85; 53 P. 1020.
Nelden-Judson Co. v. Com'l Nat. Bank, 27 U. 59; 74 P. 195.

6469. (2963.) Demurrer must specify grounds. Answer at same time. The demurrer must distinctly specify the grounds upon which any of the objections to the complaint are taken. Unless it do so it may be disregarded. It may be taken to the whole complaint or to any of the causes of action stated therein, or the defendant may demur and answer at the same time.

Cal. C. Civ. P., § 431.
May demur and answer at same time, § 6579.
Demurrer not waived by filing answer or reply at same time, § 6618.

6570. (2964.) Amended complaint to be filed and served; answer; default. If the complaint is amended, a copy of the amendments must be filed, or the court may, in its discretion, require the complaint, as amended, to be filed, and a copy of the amendments, or amended complaint, must be served upon the defendants affected thereby, or upon their attorneys if they have appeared by attorney. The defendant must answer the amendment or the complaint as amended, within ten days after service thereof, or such other time as the court may direct, and judgment by default may be entered, upon failure to answer, as in other cases.

Cal. C. Civ. P., § 432*.
All pleadings subsequent to complaint to be filed and served, § 6609.
Amendment generally, §§ 6618, 6619.
Time to amend runs from service of notice, except, § 6623.
Service of notices and papers, §§ 7024-7032.
A verification of an unverified complaint is such an amendment as to require service of the amended complaint.
Thero v. Franklin, 48 U. 587; 160 P. 1188.

6571. (2965.) Pleading over not a waiver of demurrer. The pleading over to any action after the overruling of a demurrer shall not be deemed or considered a waiver of the demurrer.

May demur and answer at the same time, § 6579.
This section was enacted in 1894, and the decisions noted hereunder are all of earlier date.
Exception to ruling on demurrer is not waived by answering either at the same time or subsequently.
Wines v. Stevens, 1 U. 305.
Henderson v. Turngren, 9 U. 432; 35 P. 495.
Contra: Young v. Martin, 3 U. 484; 24 P. 909.
But where defendants' demurrer, filed months after their answer, is overruled, whereupon they go to trial on the answer, which states no objection to the complaint, exception to the overruling of demurrer is waived.
Spanish Fork v. Hopper, 7 U. 235; 26 P. 293.
Where a defendant demurs and afterward answers, but before trial withdraws the answer and allows judgment to be entered, he waives the demurrer.
Evans v. Jones, 10 U. 182; 37 P. 262.

6572. (2966.) Other objections taken by answer. When any of the matters enumerated in § 6568 do not appear upon the face of the complaint, the objection may be taken by answer.

Cal. C. Civ. P., § 433.
When the misjoinder of defendants does not appear upon the face of the complaint, the objection may be taken advantage of by answer under the provisions of this section.
Preshaw v. Dee, 6 U. 360; 23 P. 763.
In an action for conversion of personal property by one claiming a half interest in the property, a defense that defendants owned the other half, and had taken possession for a legitimate purpose, could not be availed of on demurrer to the complaint, but should be pleaded in the answer.
Boley v. Allred, 25 U. 402; 71 P. 869.
Where the fact of another suit pending does not appear on the face of the complaint, such abatement must be set up in the answer.
Vance v. Heath, 42 U. 148; 129 P. 365.

6573. (2967.) Objections to complaint not taken deemed waived. If no objection be taken, either by demurrer or answer, the defendant must be deemed to have waived the same, excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action.

Cal. C. Civ. P., § 434.
Allegations not denied taken as true, § 6606.
Objections to counterclaim not taken deemed waived, § 6589.
Generally speaking, objections to pleadings, proceedings, etc., can not be raised for the first time in the appellate court, note to § 6994.
Questions of variance cannot be raised for first time in appellate court, note to § 6615.
On appeal, the presumptions are in favor of the judgment, note to § 6994.
Application to amend must be made in court below, note to § 6619.
Waiver of right to judgment on the pleadings by failure to demand it before trial, note to § 6575.
The defect in a complaint in failing to allege notice of protest and non-payment, where the answer alleges want of notice of protest and non-payment, is cured by verdict.
Harkness v. McClain, 8 U. 52; 29 P. 964.
Objection that defenses are inconsistent, if not taken by demurrer or motion, is waived.
Conway v. Clinton, 1 U. 215.
An objection on account of nonjoinder of proper parties plaintiff is waived unless raised by demurrer or answer.
Spencer v. Van Cott, 2 U. 337.
Jungk v. Reed, 9 U. 49; 33 P. 236.
An objection on account of misjoinder of parties defendant is waived unless raised by demurrer or answer.
Stevens Imp. Co. v. South Ogden L. B. & I. Co., 20 U. 267; 58 P. 843.
Fields v. Cobbey, 22 U. 415; 62 P. 1020.
Wenner v. Smith, 4 U. 238; 9 P. 293.
Henderson v. Turngren, 9 U. 432; 35 P. 495.
Objections that plaintiff is not the real party in interest, when available by way of defense, must be raised by demurrer or answer, or it will be considered to have been waived.
Fritz v. W. U. Tel. Co., 25 U. 263; 71 P. 209.

Objection to sufficiency of complaint may be raised for the first time in the appellate court, but in such case the defect may have been cured by verdict; the presumptions are in its favor. (Overruling Holt v. Pearson, 12 U. 63; 41 P. 560.)

Mangum v. Bullion-B. M. Co., 15 U. 534; 50 P. 834.

Voorhees v. Manti, 13 U. 435; 45 P. 564.

See McAllister v. Kuhn, 1 U. 273; affirmed 96 U. S. 87.

Where a complaint states a cause of action in general terms, objections that the allegations are indefinite, or uncertain, or ambiguous must be taken advantage of by proper pleading before judgment, or they will be waived.

Maynard v. Locomotive E. M. L. & A. Assn., 16 U. 145; 51 P. 259.

Mangum v. Bullion-B. M. Co., 15 U. 534; 50 P. 834.

Larson v. Utah L. & T. Co., 23 U. 449; 65 P. 208.

Objections to sufficiency of pleadings cannot be raised for first time on appeal, and will not be considered in determining motion for nonsuit.

Jennings v. Pratt, 19 U. 129; 56 P. 951.

Firman v. Bateman, 2 U. 268.

Wimmer v. Simon, 9 U. 378; 35 P. 507.

Where the allegations of fraud are general, but no objections are made thereto in the trial court, the defect is waived and cannot be raised on appeal.

Larson v. Utah L. & T. Co., 23 U. 449; 65 P. 208.

An omission in the complaint of the technical words rendering a note negotiable in form is supplied by the incorporation in the answer of the note itself, containing the words "or order," and defendant is bound thereby.

Johnson v. Hibbard, 27 U. 342; 75 P. 737.

A defendant waives objection that cause of action is split unless he raises the point by answer or demurrer.

Natl. U. Fire Ins. Co. v. D. & R. G. R. Co., 44 U. 26; 137 P. 653.

Unless the objection that the action should be brought by the personal representative, instead of surviving partner, is made by demurrer or answer, it is waived.

Cobb v. Hartenstein, 47 U. 174; 152 P. 424.

The objection that there is a defect of parties can only be taken advantage of by demurrer or answer.

Cole v. Utah Sugar Co., 35 U. 148; 99 P. 681.

An unverified disclaimer, when acted on, is effective and conclusive.

S. L. City v. S. L. Inv. Co., 43 U. 181; 134 P. 603.

Failure to raise a corporate plaintiff's incapacity to sue by answer or demurrer waives such objection.

Tooele M. & S. Co. v. Eite Candy Co., 50 U. —; 168 P. 427.

CHAPTER 12.

ANSWER.

6575. (2968.) What answer must contain. Denial. Counterclaim. The answer of the defendant must contain:

1. A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief, or a specific admission or denial of some of the allegations of the complaint, and also a general denial of all the allegations of the complaint not specifically admitted or denied in the answer;

2. A statement of any new matter constituting a defense or counterclaim.

Mont. Civ. P., § 690; N. Y. Civ. P., § 500*; Wis., S. & B. An S., § 2655; Cal C. Civ. P., 437*.

Defendant may set forth in his answer as many defenses and counterclaims as he may have, § 6579.

Where answer controverts in part, plaintiff may take judgment by default for undisputed portion, § 6845.

Extension of time to answer, §§ 6619, 7023.

Supplemental answer, § 6608.

Verification, §§ 6593-6595.

Material allegations of complaint taken as true if not controverted, § 6606.

Time to answer after demurrer overruled runs from service of notice, exception, § 6623.

Time to answer complaint, § 6539.

Defendant interposing counterclaim entitled to provisional remedies, § 6773.

Defendant entitled to affirmative relief must demand it, § 6582.

Judgment for defendant on counterclaim, § 6863.

Order to make counterclaim a separate action, § 6580.

Reply to new matter in answer, §§ 6590, 6606.

New matter in answer, to which a reply is not required, deemed controverted, § 6606.

Statute of limitations, how pleaded, § 6902, and note.

What objections to complaint are deemed waived if not taken by demurrer or answer, § 6573, and notes.

Objections to complaint which may be raised for the first time in appellate court, note to § 6994.

Statement of a legal conclusion does not raise an issue.

Lyman v. Martin, 2 U. 136.

Voorhees v. Fisher, 9 U. 303; 34 P. 64.

See Hussey v. Smith, 1 U. 241.

It is sufficient if the denials meet and traverse the allegations of the complaint.

Morrison v. O'Reilly, 2 U. 165.

Where the complaint alleged the wrongful and unlawful conversion of certain property, and the answer merely denied that such property was "wrongfully or unlawfully" converted; held, an admission of the conversion.

Podlech v. Phelan, 13 U. 333; 44 P. 838.

Peterson v. Bean, 22 U. 43; 61 P. 213.

Rock Springs Coal Co. v. Salt Lake Sanitarium Ass'n, 7 U. 158; 25 P. 742.

Conway v. Clinton, 1 U. 215.

The denial on information and belief of the authority of an administrator or an executor is insufficient.

Thompson v. Skeen, 14 U. 209; 46 P. 1103.

"Defendant is informed and believes that the time of payment of said note was extended," etc., is not a sufficient allegation of the fact of extension.

Baskin v. Godbe, 1 U. 28.

An answer denying any material allegation of the complaint raises an issue, and a demurrer on the ground that it is insufficient to constitute a defense was properly overruled.

Haslam v. Haslam, 19 U. 1; 56 P. 243.

In an action for conversion, an answer which refers to the "property mentioned and described in the second paragraph in plaintiff's second cause of action," is sufficiently definite.

Spalding v. Allred, 23 U. 354; 64 P. 1100.

Defects in complaint may be supplied by allegations in the answer.

Johnson v. Hibbard, 27 U. 342; 75 P. 737.

The answer does not correct such defect unless it explicitly states the facts.
Chesney v. Chesney, 33 U. 503; 94 P. 989.
A denial of "the material allegations" of a complaint is sufficient.
Toone v. O'Neill, 40 U. 265; 121 P. 10.
An admission in an action for trespass by sheep and cattle that the defendant was the owner of certain animals, sheep and cattle, is not admission that he owned the trespassing animals, especially when the answer denies all the allegations in the complaint.
Surbaugh v. Butterfield, 44 U. 446; 140 P. 757.
Although an answer contains a prayer for general relief only, the defendant is entitled to such specific relief as the evidence and pleadings authorize.
Wheelwright v. Roman, — U. —; 165 P. 513.
Where a demurrer was sutained to defendant's answer and an amended answer was filed, the original answer went out of the record, and improper refusal of the motion to strike the action was not prejudicial.
Metz v. Jackson, 43 U. 496; 136 P. 784.
An answer in a suit on a note and to foreclose a mortgage on realty, denying all the allegations of the complaint and affirmatively alleging the execution of a note to plaintiff, but denying that it was in form or legal effect as set out in the complaint, did not put in issue and sufficiently state a defense to all the material allegations of the complaint.
Brewer v. Romney, 50 U. —; 167 P. 366.
A defendant is bound by the allegations of the answer admitting that plaintiff's land abutted upon a public street and can not contend that the street was never dedicated or established.
Hague v. Juab County M. & E. Co., 37 U. 290; 107 P. 249.
Where a plaintiff sues to recover an agreed price for merchandise sold the defendant, an answer denying he is in any manner indebted, is a mere conclusion.
Heath v. White, 3 U. 474; 24 P. 762.
An answer, by referring to pleadings in a former action, made such pleadings a part of it.
Holt v. Nielson, 37 U. 566; 109 P. 470.
A defendant is bound by the allegation in his answer, and cannot thereafter contend for something different.
Busby v. Century G. M. Co., 27 U. 231; 75 P. 725.
Where suit is brought against administrator before the time for filing claims has run, without a claim having been filed, and the defendant's answer does not raise this point, he cannot after the time for filing the claim has expired, amend the answer and take advantage of the failure to file the claim.
Clayton v. Dinwoodey, 33 U. 251; 93 p. 723.
An allegation of the answer in an action on a fire insurance policy "that the defendant issued to the plaintiff its policy of insurance," admits the unconditional delivery and acceptance of the policy.
DeMichele v. London & L. F. Ins. Co., 40 U. 312; 120 P. 846.
Matter alleged by way of cross-complaint is a part of the answer.
Haslam v. Haslam, 19 U. 1; 56 P. 243.

AFFIRMATIVE DEFENSES PLEADED:

Fraud must be pleaded, note to § 6566.
Quieting title for defendants, note to § 6576.
Estoppel in pais relied on as defense in ejectment must be pleaded.
Poynter v. Chipman, 8 U. 442; 32 P. 690.
Duke v. Griffith, 9 U. 469; 35 P. 512.
While it is a general rule that estoppel by a former judgment must be pleaded, the rule does not apply to cases when no opportunity to plead the estoppel is given.
R. G. W. Ry. Co. v. Telluride P. T. Co., 23 U. 22; 63 P. 995.
Estoppel must be pleaded, to be available.
Reynolds v. Pascoe, 24 U. 219; 66 P. 1064.
Homberger v. Alexander, 11 U. 363; 40 P. 260.
Knudsen v. Omanson, 10 U. 124; 37 P. 250.
That the agreement was not in writing is a matter of defense.
Kilpatrick K. Co. v. Box, 13 U. 492; 45 P. 629.
The plea of the statute of frauds is a personal privilege, which a party may waive; and when the action is on a contract, admitted by defendant, he must interpose the special plea of the statute of frauds to make it available in his defense.
Abba v. Smyth, 211 U. 109; 59 P. 756.
Steed v. Harvey, 18 U. 367; 54 P. 1011.
Wilson v. Sullivan, 17 U. 341; 53 P. 994.
Lauer v. Rich Merc. Inst., 8 U. 305; 31 P. 397.
Contributory negligence should be affirmatively pleaded; but need not be where plaintiff's evidence shows it.
Bunnell v. Rio Grande W. Ry. Co., 13 U. 314; 44 P. 927.
Anderson v. Ogden Union Ry. Co., 8 U. 128; 30 P. 305.
Assumed risk is available only when pleaded.
Faulkner v. Mammoth M. Co., 23 U. 437; 66 P. 799.
In justifying seizure under attachment of property in hands of and claimed by a third person, the proceedings should be averred, since no intendment of regularity can be indulged.
Jones v. McQueen, 13 U. 178; 45 P. 202.
In an action on a contract, a defense in mitigation of damages cannot be shown under a simple denial; it must be specially pleaded.
Reed v. Union Life Ins. Co., 21 U. 295; 61 P. 21.
Loofbourow v. Hicks, 24 U. 49; 66 P. 603.
One seeking to defend against a defectively executed chattel mortgage on the ground that he is a bona fide purchaser of the property must plead such defense.
Deseret Nat. Bank v. Kidman, 25 U. 379; 71 P. 873.
In an action against a telegraph company for failure to transmit a message, a defense that the claim for damages was not presented within sixty days was not available without being specially pleaded in the court below.
Brooks v. Western U. Tel. Co., 26 U. 147; 72 P. 499.
Where a defendant in replevin desires damages for the taking or detention of property, he must set up his claim by a statement of the facts, and a mere clause in the prayer asking for damages is insufficient.
Shafer v. Russell, 28 U. 444; 79 P. 559.
Where answer alleges grounds for affirmative relief without setting out a formal counterclaim, a judgment for affirmative relief to defendant is not erroneous, where such pleading was not objected to.
Perego v. Dodge, 9 U. 3; 33 P. 221; affirmed 163 U. S. 160.
Haslam v. Haslam, 19 U. 1; 56 P. 243.
North Pt. Irr. Co. v. Little, 14 U. 42; 46 P. 268.
An equitable counterclaim may be set up in a legal action.
Westminster Inv. Co. v. McCurtain, 39 U. 544; 118 P. 564.

JUDGMENT ON THE PLEADINGS:

If answer is insufficient, plaintiff is entitled to judgment on the pleadings.
Smith v. Faust, 1 U. 90.
Dickert v. Weise, 2 U. 350.
Plaintiff is not entitled to judgment on the pleadings where material allegation in the complaint is denied.
Reich v. Rebellion S. M. Co., 3 U. 254; 2 P. 703.
Right to judgment on pleadings by reason of insufficient verification or defective denials in answer is waived unless demanded before entering upon the trial.
Smith v. Faust, 1 U. 90.
Firman v. Bateman, 2 U. 268.
Where allegations of complaint are not denied, judgment will be rendered on the pleadings.
Kevser v. Pollock, 20 U. 371; 59 P. 87.
Had plaintiff asked for it, he would have been entitled to judgment on the pleadings in this case.
Busby v. Century M. Co., 27 U. 231; 75 P. 725.
Where no reply was filed to an equitable counterclaim, judgment thereon should have been granted on motion.
Durham v. Travis, 25 U. 65; 69 P. 468.
Where the answer presents a material issue, the court may not, without a hearing and finding on the issue, enter judgment.
Town of Mapleton v. Kelley, 39 U. 252; 117 P. 52.

6576. (2969.) Counterclaim defined. The counterclaim mentioned in the next preceding section must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action:

1. A cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action;

2. In an action arising upon contract, any other cause of action arising also upon contract, and existing at the commencement of the action.

Cal. C. Civ. P., § 438.

Failure to demur or reply admits counterclaim, § 6591.

Improvements allowed as counterclaim, § 7250.

Counterclaim waived if not set up, § 6577.

Defendant entitled to affirmative relief under counterclaim must demand it, § 6582.

Under § 3231, C. L. 1888, and until the revision of 1898, the pleading of a defendant seeking affirmative relief against a party was termed a "cross-complaint" and this term is used in the sense of "counterclaim" in many of the decisions noted hereunder.

Defendant cannot set up a defense in tort, when the tort does not grow out of the cause of action sued on.

Zelle v. Moritz, 1 U. 283.

Allegations of cross-complaint on covenant of warranty in suit to foreclose purchase money mortgage set out and held insufficient.

Kelley v. Kershaw, 5 U. 417; 16 P. 488.

Cannot counterclaim tort against tort, (Approving Marks v. Thompson, 7 U. 421; 27 P. 6.)

Smith v. Alford, 31 U. 346; 88 P. 16.

Condemnation of property for public use cannot be had by way of counterclaim in action brought to restrain a trespass and for damages.

Peterson v. Bean, 22 U. 43; 61 P. 213.

Counterclaim should state clearly and concisely the facts constituting the cause of action, in order that the relief prayed for, if granted, may be decreed in accordance therewith.

Center Creek Irr. Co. v. Lindsay, 21 U. 192; 60 P. 559.

Averments of cross-complaint charging fraud in action of ejectment charging fraud, set out and held sufficient.

Burlock v. Shupe, 5 U. 428; 17 P. 19.

Fraud must be pleaded, note to § 2960.

In an action for damages for trespassing upon a mining claim, a cross-complaint filed by one of the defendants asking to have its title to the Eureka lode quieted held sufficient.

Bullion B. & Champion M. Co. v. Eureka Hill Mining Co., 5 U. 3; 11 P. 515.

Where, in ejectment, defendant files cross-complaint claiming title, and asking affirmative relief, his title may be quieted against plaintiff.

Ayers v. Jack, 7 U. 249; 26 P. 300.

Kahn v. Old. Ted. M. Co., 2 U. 174.

Steele v. Boley, 7 U. 64; 24 P. 755.

Perego v. Dodge, 9 U. 3; 33 P. 221; affirmed 163 U. S. 160.

The suing out and serving of an injunction prohibiting defendant from exercising a right under the contract sued on by plaintiff is a breach of the contract by plaintiff sufficient to form a basis for a counterclaim by defendant.

Driver v. S. L. Gas Co., 22 U. 143; 61 P. 733.

If plaintiff seeks an accounting of rents, issues, and profits of personal property not sold with the realty, and prays for general relief, defendant has a right to file his counterclaim which grew out of the transactions relating to the same property.

Standard S. Laundry v. Dole, 22 U. 311; 61 P. 1103.

Where the answer, to which no reply was filed, alleged that a mutual mistake had been made in the contract and prayed to have it corrected, it constituted a counterclaim and not merely matter alleged in defense, and under § 2981 judgment thereon should have been granted on motion.

Dunham v. Travis, 25 U. 65; 69 P. 468.

It is immaterial what a pleading is called; its character will be determined by the court.

Dunham v. Travis, 25 U. 65; 69 P. 468.

North Pt. Irr. Co. v. Little, 14 U. 42; 46 P. 268.

Perego v. Dodge, 9 U. 3; 33 P. 221; affirmed 163 U. S. 160.

Cross-complaint is a part of the answer.

Haslam v. Haslam, 19 U. 1; 56 P. 243.

Burden of proof is on defendant filing cross-complaint to prove his affirmative allegations.

Stevens v. Higginbotham, 6 U. 215; 21 P. 946.

Where for personal injury only general damages are sought, defendant cannot recoup for hospital fees, etc., expended by it.

Brophy v. Ogden R. Trans. Co., 46 U. 426; 151 P. 49.

An equitable counterclaim may be set up in a legal action.

Westminster Inv. Co. v. McCurtain, 39 U. 544; 118 P. 564.

Where the ground of a special demurrer to a counterclaim is in the nature of abatement merely, the court, on reversing the judgment sustaining it, will not enter or direct a judgment for defendant on the merits of the counterclaim, unless it clearly appears that the demurrer was frivolous, or that no defense to the counterclaim could in any event be made.

Peale v. Clark, 50 U. —; 166 P. 981.

Failure to set up a counterclaim in a former action bars the claim.

Jeremy Fuel & Grain Co. v. Mellen, 50 U. —; 165 P. 791.

6577. (2970.) Effect of failure to set up counterclaim. If the defendant omit to set up a counterclaim in the cases mentioned in the first subdivision of the next preceding section, neither he nor his assignee can afterward maintain action against the plaintiff therefor.

Cal. C. Civ. P., § 439.

Defendant entitled to affirmative judgment must demand it in his answer, § 6582.

Failure to demur or reply admits counterclaim, §§ 6589, 6591.

6578. (2971.) Cross-demands compensated as far as equal. When cross-demands have existed between persons under such circumstances that, if one had brought an action against the other, a counterclaim could have been set up, the two demands shall be deemed compensated so far as they equal each other, and neither can be deprived of the benefit thereof by the assignment or death of the other.

Cal. C. Civ. P., § 440.

Action by assignee not to prejudice set-off or defense, § 6496.

Claims barred by statute of limitations, in so far as recovering judgment thereon, may be set off against an adversary's claim.

Utah Com. & Svgs. Bk. v. Fox, 40 U. 205; 120 P. 840.

6579. (2972.) Several defenses allowed. Answer and demurrer. The

defendant may set forth by answer as many defenses and counterclaims, legal or equitable, or both, as he may have. They must be separately stated, and the several defenses must refer to the causes of action which they are intended to answer in a manner by which they may be intelligibly distinguished. The defendant may also answer one or more of the several causes of action stated in the complaint and demur to the residue, or may demur and answer at the same time.

Cal. C. Civ. P., § 441*.
Demurrer not waived by filing answer or reply at same time, § 6618.
Joinder of causes of action, § 6567,, and notes.
May demur and answer at same time, § 6569.
Affirmative defenses must be pleaded, note to § 6575.
Election between counts not required, note to § 6566.
Equitable as well as legal defenses may be set up in ejectment.
Kahn v. Old Telegraph Mining Co., 2 U. 174.
Steele v. Boley, 7 U. 64; 24 P. 755.
Kimball v. McIntyre, 3 U. 77; 1 P. 167.
A defendant may plead separately as many defenses as he may have, provided, when the answer is verified, they are not contradictory. But a party may not take one of two contradictory positions, and, after being defeated in one, choose the other.
Detroit H. & L. Co. v. Stevens, 20 U. 241; 58 P. 193.
Burnham v. Call, 2 U. 433.
Murphy v. Carter, 1 U. 17.
Under this section, where defendant, through mistake, elects to proceed to trial upon an issue not raised by the pleadings and under which no recovery could be had, he is not estopped from setting up by amended pleadings any defense which he may have had and upon which he has never had a trial.
Detroit H. & L. Co. v. Stevens, 20 U. 241; 58 P. 193.

6580. (2973.) Proceeding when new party necessary to decision on counterclaim. When a new party is necessary to a final decision upon a counterclaim, the court may either permit such party to be made, or direct that it be stricken out of the answer and made the subject of a separate action.

Iowa, McClain's An. C., § 3868.
Kansas (1889), § 4180*.
New parties may be brought in, § 6519.

6581. (2974.) Cross-complaint against co-defendants. When a defendant has a cause of action affecting the subject matter of the action against a co-defendant, he may, in the same action, file a cross-complaint against the co-defendant. The defendant thereto may be served as in other cases, and defense thereto shall be made in the time and manner prescribed in regard to the original complaint, and with the same right of obtaining provisional remedies applicable to the case. The prosecution of the cross-complaint shall not delay the trial of the original action unless the court otherwise directs.

Iowa, McClain's An. C., § 3869*.
Cal. C. Civ. P., § 442*.
Court may determine right of parties on each side as between themselves, § 6854.
Under § 3231, C. L. 1888, and until the revision of 1898, the pleading of a defendant seeking affirmative relief against any party was termed a "cross-complaint," and the term is frequently used in the Utah decisions in the sense of "counterclaim."
New parties may be brought in by cross-complaint.
Chalmers v. Trent, 11 U. 88; 39 P. 488.
The time for serving a cross-complaint not being fixed by statute, it should be served within a reasonable time.
Culmer v. Caine, 22 U. 216; 61 P. 1008.
L., having failed to file a cross-complaint demanding affirmative relief, as authorized by this section, the court, on determining that he was the owner of two of the mortgage notes, had no jurisdiction to render judgment in his favor against the mortgagor.
West v. Shurtliff, 28 U. 337; 79 P. 180
See Naylor v. Jensen, 38 U. 310; 113 P. 73.

6582. (2975.) Defendant entitled to affirmative judgment must demand it. Where the defendant deems himself entitled to an affirmative judgment against the plaintiff, by reason of a counterclaim interposed by him, he must demand the judgment in his answer.

N. Y. Civ. P., § 509.
Verdict when counterclaim exceeds plaintiff's demand, § 6822.
Counterclaim not set up is waived, § 6577.
Statement of facts in answer to entitle defendant to affirmative relief, note to § 6575.

CHAPTER 13.

DEMURRER TO ANSWER.

6586. (2976.) Grounds of demurrer to answer. The plaintiff may, within ten days after the service of the answer, demur to the same or any defense therein, upon one or more of the following grounds:

1. That several causes of counterclaim have been improperly joined;
2. That the answer does not state facts sufficient to constitute a defense;
3. That the answer is ambiguous, unintelligible, or uncertain.

Cal. C. Civ. P., §§ 443*, 444*.
Time to answer or demur may be extended, §§ 6619, 7023.
Sham and irrelevant answers stricken out, § 6597.

Objections which may be raised for the first time in appellate court, note to § 6994.
Decisions on demurrer to complaint, notes to §§ 6566, 6568.
Answer containing one good defense is not demurrable.
Groesbeck v. Bell, 1 U. 338.
Haslam v. Haslam, 19 U. 1; 56 P. 243.
In an action for conversion, an answer which refers to the "property mentioned and described in the second paragraph in plaintiff's second cause of action" is sufficiently definite and not demurrable for want of certainty.
Spalding v. Allred, 23 U. 354; 64 P. 1100.

6587. (2977.) Grounds of demurrer to counterclaim. The plaintiff may also demur to a counterclaim where one or more of the following objections thereto appear upon the face of the counterclaim:

1. That the court has not jurisdiction of the subject thereof:
2. That the defendant has not legal capacity to maintain the same;
3. That there is another action pending between the same parties for the same cause;
4. That there is a defect or misjoinder of parties;
5. That the counterclaim does not state facts sufficient to constitute a cause of action;
6. Because the cause of action stated is not pleadable as a counterclaim to the action;
7. Because it is ambiguous, unintelligible, or uncertain.

Mont. Civ. P., § 714*.
Sufficiency of counterclaim, note to § 6576.

6588. (2978.) Id. How taken. Demurrer and reply. Grounds specified. Such demurrer may be taken to the whole answer, or to any of the alleged defenses or counterclaims therein; and the plaintiff may demur to one or more of the several defenses and counterclaims, and reply to the residue of the counterclaims. The demurrer shall distinctly specify the grounds of objection taken, and when to a counterclaim, in a similar manner to that required in a demurrer to the complaint; otherwise, it may be stricken out.

Mont. Civ. P., §§ 712*, 715*.

6589. (2979.) Objections taken by reply. Not taken, deemed waived. Exceptions. When any of the objections to a counterclaim mentioned in §§ 6586, 6587, do not appear upon the face of the answer, the objection may be taken by reply. If not so taken, either by the demurrer or reply, the plaintiff shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the court, and the objection that the counterclaim does not state facts sufficient to constitute a cause of action.

Cal. C. Civ. P., §§ 433*, 434*.
Objections to complaint not taken deemed waived, § 6573 and note.
Failure to demur or reply admits counterclaim, § 6591.
What objections may be raised for the first time in the appellate court, note to § 6994.

CHAPTER 14.

REPLY.

6590. (2980.) Reply to counterclaim. What to contain. There shall be no reply except:

1. Where a counterclaim is alleged; or,
2. Where some matter is alleged in the answer to which the plaintiff claims to have a defense, by reason of the existence of some fact which avoids the matter alleged in the answer. When a reply must be filed, it shall be served and filed within ten days after the service of the answer or of notice of the overruling of a demurrer, and it shall consist of:

First. A general or specific denial of each allegation or counterclaim controverted, or any knowledge or information thereof sufficient to form a belief; or,

Second. Any new matter not inconsistent with the complaint constituting a defense to the matter alleged in the answer; or the matter in the answer may be confessed, and any new matter alleged, not inconsistent with the complaint, which avoids the same. Am'd '03, p. 182; '07, p. 38.

Mont. Civ. P., § 720*.
Supplemental reply, § 6608.
Time for reply may be extended, §§ 6619, 7023.

Time to reply after demurrer overruled runs from service of notice, exception, § 6623.
New matter in reply deemed controverted, § 6606.
New matter in answer to which reply is not required deemed controverted, § 6606.
Failure to demur or reply admits counterclaim, § 6591 and note.
Under § 3248, C. L. 1888, a replication was not permitted, and new facts in avoidance of new matter alleged in the answer might be proven in response and in avoidance, without having been pleaded. And the plaintiff might introduce evidence of fraud in avoidance, though fraud was not alleged in the complaint or in a replication.
Whitney v. Richards, 17 U. 226; 53 P. 1122.
Steed v. Harvey, 18 U. 367; 54 P. 1011.
Prior to amendment in 1903, a reply was not permissible, except when the answer contained a counterclaim.
Anderson v. Anderson, 24 U. 497; 68 P. 319.
The plaintiff cannot enlarge the complaint by allegations in the reply.
Straw v. Temple, 48 U. 258; 159 P. 44.
In a mortgage foreclosure suit, no reply is necessary to an answer claiming a homestead right.
Wherritt, v. Dennis, 48 U. 309; 159 P. 534.
An averment in a reply that a tax sale and purchase "was not in accordance with law, but was contrary to law," in the absence of special demurrer or motion to make specific, was sufficient.
Bean v. Fairbanks, 46 U. 513; 151 P. 338.
A complaint and reply should be taken together in determining the cause of action stated.
Hudson v. Moon, 42 U. 377; 130 P. 774.
Where the defendant in an action on an insurance policy sets up a proviso that the defendant is not liable in the event the insured suicides, unless he suicides when insane; it is unnecessary for plaintiff to reply in order to prove insanity.
Moran v. Knights of Columbus, 46 U. 397; 151 P. 353.
A reply is not necessary to affirmative matter in answer unless the plaintiff wishes to confess and avoid.
Wherritt v. Dennis, 48 U. 309; 159 P. 534.
Where a reply is required and filed, new matter in the answer not denied is deemed to be admitted.
Cain v. Stewart, 47 U. 160; 152 P. 465.
The absence of a reply admits the allegations of a counterclaim and such admission stands, even though there was a trial upon the issues as if a reply had been filed.
Swanson v. Sims, 51 U. —; 170 P. 774.
Where no objection was taken to a reply improperly made or to the introduction of evidence thereunder, the court will pass on the sufficiency of the evidence to support the findings sustaining the reply.
Anderson v. Anderson, 24 U. 497; 68 P. 319.
Anderson v. Anderson, 25 U. 164; 70 P. 608.
In an action to quiet title, defendant's claim of ownership and possession is not in the nature of a counterclaim, and requires no reply.
Tate v. Rose, 35 U. 229; 99 P. 1003.
Tate v. Shaw, 35 U. 240; 99 P. 1007.

6591. (2981.) Failure to demur or reply admits counterclaim. If the plaintiff fails to demur or reply to the counterclaim, the same shall be deemed admitted.

Mont. Civ. P., § 722*.
New matter in counterclaim not controverted taken as true, § 6606.
Judgment on the pleadings, note to § 6575.
Objections to counterclaim not taken deemed waived, § 6589.
Where no reply was filed to an equitable counterclaim set forth in the answer, judgment thereon should have been granted on motion.
Dunham v. Travis, 25 U. 65; 69 P. 468.

6592. (2982.) Demurrer to reply for insufficiency. The defendant may, within ten days, demur to the reply, or any defense therein, when upon the face thereof it does not state facts sufficient to constitute a defense, stating such grounds.

Mont. Civ. P., § 723*.

CHAPTER 15.

VERIFICATION.

6593. (2983.) Verification, how made and by whom. Every pleading must be subscribed by the party or his attorney. When the complaint is verified, or when the state or any state officer in his official capacity is plaintiff, all subsequent pleadings, except demurrers, must be verified, unless an admission of the truth of the allegation might subject the party to a criminal prosecution, or unless a state officer in his official capacity is defendant. The affidavit of verification must state that the pleading is true to the knowledge of the deponent, except as to the matters therein stated on information and belief, and that as to those he believes it to be true. Such verification must be made by a party, unless all the parties are absent from the county where the action is brought, or from some other cause unable to verify it, or the facts are within the knowledge of the attorney or other person verifying the same. The affidavit may also be made by the agent or attorney, if the action or defense is founded upon a written instrument for the payment of money only, and such instrument be in the possession of the agent or attorney. When the pleading is verified by the attorney or other person, except one of the parties, the verification must show the reason why it is not made by a party, and that the matters stated are true to the best knowledge, information, and belief of the deponent. When a corporation is a party, the verification

may be made by any officer or agent thereof. Amendments may be made without being verified, unless a new and distinct cause of action or counterclaim is thereby introduced, in which case they shall be verified as other pleadings.

Cal. C. Civ. P., § 446*.

Pleading verified by the attorney must be truthful.

Thackara v. Reid, 1 U. 238.

Unverified answer to verified complaint is sham and frivolous.

Crompton v. Crow, 2 U. 245.

Allegations on information and belief are authorized by the statutes.

Flagstaff M. Co. v. Patrick, 2 U. 304.

Denial of matter of record on information and belief is insufficient.

Thompson v. Skeen, 14 U. 209; 46 P. 1103.

Amendment of insufficient verification.

Milner v. Friel, 1 U. 186.

Unverified complaint may be amended by adding verification.

Ruffatti v. Societe des Mines, 10 U. 386; 37 P. 591.

Failure to verify pleadings is waived, unless timely objection is made on that ground; and an unverified disclaimer, when acted on, is effective and conclusive.

Salt Lake City v. Salt Lake Inv. Co., 43 U. 181; 134 P. 603.

The verification of a complaint answers the requirement of a complaint being subscribed by the party or his attorney.

West Mountain Lime & Stone Co. v. Danley, 38 U. 218; 111 P. 647.

6594. (2984.) Certain allegations admitted unless denial verified. In all actions, allegations of the execution of written instruments and indorsements thereon, of the existence of a corporation or partnership, or of any appointment or authority, or the correctness of any account duly verified by the affidavit of the party, his agent or attorney, shall be taken as true, unless the denial of the same be verified by the affidavit of the party, his agent or attorney.

Kan., § 4191.

Corporate capacity pleaded generally, § 6610.

Corporate existence need not be proved unless answer verified and non-existence affirmatively alleged, § 6611.

A specific denial under oath of the execution of note and mortgage sued on is required in order to place plaintiff upon proof of their execution, and the verification by defendant's attorney that it was "true to the best of his knowledge, information, and belief," verified no direct or positive denial of the allegations of the complaint.

Brewer v. Romney, 50 U. —; 167 P. 366.

6595. (2985.) Id. Execution not admitted when inspection refused. Demand. But the execution of the written instruments mentioned in the preceding section is not deemed admitted by a failure to deny the same under oath, if the party desiring to controvert the same is, upon demand, refused an inspection of the original. Such demand must be in writing, served by copy upon the adverse party or his attorney, and filed with the papers in the case.

Cal. C. Civ. P., § 449*.

Demand for copy of writing, etc., §§ 7108, 7204.

Refusal to admit genuineness of writing, costs, § 7203.

Admission of genuineness of writing, § 7112.

CHAPTER 16.

GENERAL RULES OF PLEADING.

6596. (2986.) Pleadings liberally construed. In the construction of a pleading for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties.

Cal. C. Civ. P., § 452.

Statutes in derogation of common law not to be strictly construed, § 5839.

Provisions of statutes liberally construed, § 5839.

Errors or defects not affecting substantial rights disregarded, §§ 6622, 6968.

One form of action under the code, § 6442.

Decisions on sufficiency of pleadings, notes to §§ 6566, 6568, 6575.

Objections to pleadings not taken deemed waived, § 6573, and note.

It is the duty of the court, at every stage of the action, to disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the parties.

Barton v. S. Jordan Merc Inst., 10 U. 346; 37 P. 576.

The allegation of a pleading for the purpose of determining its effect must be liberally construed.

Mangum v. Bullion B. & C. M. Co., 15 U. 534; 50 P. 834.

Farnsworth v. Holderman, 3 U. 381; 4 P. 337.

An omission in a complaint of the technical words rendering a note negotiable in form is supplied by an incorporation of the note itself, containing the words "or order" in the answer, and defendant is bound thereby.

Johnson v. Hibbard, 27 U. 342; 75 P. 737.

Where plaintiff moves for judgment upon the pleadings, the answer must be construed most favorably to the defendant.

Johnson v. Mountain States T. & T. Co., 48 U. 339; 159 P. 526.

Pleadings cannot be so liberally construed as to cure a defect of complaint which fails to allege an indebtedness.

Chesney v. Chesney, 33 U. 503; 94 P. 989.

Secs. 7447, 7426, and 7448 of this code, concerning justice's court practice, are highly technical, and the court will not require more than a substantial compliance with them.

Burt v. District Court, 39 U. 1; 114 P. 143.

Where it is apparent that the answer denies the allegations of the complaint, the form of denial is immaterial.

Hancock v. Luke, 46 U. 26; 148 P. 452.

A general demurrer should always be overruled unless the complaint clearly fails to state some essential element necessary to a cause of action, or states some acts barring plaintiff.

Eddington v. Union Portland Cement Co., 42 U. 274; 130 P. 243.

6597. (2987.) Sham, irrelevant, and redundant matter stricken out. Sham and irrelevant answers and replies, and irrelevant and redundant matter inserted in a pleading, may be stricken out, upon such terms as the court may in its discretion impose.

Cal. C. Civ. P., § 453*.

Unnecessary allegations may be disregarded as surplusage.

Houtz v. Gisborn, 1 U. 173.

Unverified answer to verified complaint is sham and frivolous.

Crompton v. Crow, 2 U. 245.

In no case will a pleading decent and decorous in language be stricken from the files.

Heath v. White, 3 U. 474; 24 P. 762.

It is error to strike from the files a cross-complaint by which defendant seeks affirmative relief and joins necessary parties omitted by plaintiff, though plaintiff amends his complaint by inserting such necessary parties.

Chalmers v. Trent, 11 U. 88; 39 P. 488.

The court has the power to expunge from its record scandalous matter which raises no issue and serves no purpose except to injure the reputation of the party at whom it is aimed.

Morrison v. Snow, 26 U. 247; 72 P. 924.

6598. (2988.) Account, how pleaded. Bill of particulars. It is not necessary for a party to set forth in a pleading the items of an account therein alleged, but he must deliver to the adverse party, within ten days after a demand thereof, in writing, a copy of the account, or be precluded from giving evidence thereof. The court, or a judge thereof, may order a further account when the one delivered is too general or is defective in any particular.

Cal. C. Civ. P., § 454*.

Demand for copy of entries, etc., order, § 7204.

This section does not apply to actions upon an account stated.

Robbins v. Woodhull, 1 U. 317.

Where a complain for services and money paid alleged the different items sought to be recovered, and made brief mention of the character of each class, it was not demurrable for failure to state each item more specifically; defendant's remedy, if he desired a more specific statement, being by motion for a bill of particulars, authorized by this section.

Nelson v. Hendricksen, 31 U. 191; 87 P. 267.

This section is not applicable where it is alleged that the defendant had wrongfully taken from the treasury of the plaintiff various sums of money.

Ut. St. Bldg. & Loan Asso. v. Perkins, 51 U. —; 173 P. 950.

6599. (2989.) Description of real property in pleading. In an action for the recovery of real property, it must be described in the complaint with such certainty as to enable an officer, upon execution, to identify it.

Cal. C. Civ. P., § 455.

Description in notices of location, note to § 3891.

Description in tax title cases, note to § 6018.

Complaint in ejectment against a co-tenant, and verdict and judgment thereon, failing to specify plaintiff's interest, are fatally defective.

Lillianskyoldt v. Goss, 2 U. 292.

In action to quiet title to a vein, it is sufficiently described by its name, if the boundaries of the claim in which it apexes are given.

Bullion-Beck & C. M. Co., v. Eureka Hill M. Co., 5 U. 3; 11 P. 515.

The court cannot render a decree intelligibly upon default, where the mortgage is not set out in the complaint. (Disapproved on appeal, 99 U. S. 20.)

Hussey v. Smith, 1 U. 241.

A description of the property as a "one-half interest of Hyrum Thatcher, of Logan City, in horses and ranch, etc.," is a sufficient description for specific performance where it appears from parol extrinsic evidence that Hyrum Thatcher owned a one-half interest in but one ranch.

Easton v. Thatcher, 7 U. 99; 25 P. 728.

The statute of frauds is not satisfied in a case of specific performance, by a letter that has been lost, where its contents are testified to by the receiver, and the letter does not contain a description of the land with reasonable certainty.

Darke v. Smith, 14 U. 35; 45 P. 1006.

No reformation of a deed can be had where the complaint asking for such reformation is uncertain in description and amount of property claimed.

Center Creek Irr. Co. v. Lindsay, 21 U. 192; 60 P. 559.

Description of property in action by telegraph company against railroad company to condemn right of way for its line sufficient.

Postal Tel. & C. Co. v. O. S. L. R. R. Co., 23 U. 474; 65 P. 735

6600. (2990.) Judgments, how pleaded. Proof. In pleading a judgment or other determination of a court, board, or officer of special jurisdiction, it is not necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation be controverted, the party pleading must establish, on the trial, the facts conferring jurisdiction.

Cal C. Civ. P., § 456.

Similar section, criminal procedure, § 8844.

Judgments, how proved, §§ 7087-7095.

6601. (2991.) Conditions precedent, how pleaded. Proof. In pleading the performance of conditions precedent in a contract, it is not necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part; and if such allegation be controverted, the party pleading must establish, on the trial, the facts showing such performance.

Cal. C. Civ. P., § 457.

Complaints, sufficient and insufficient,, note to § 6566.

6602. (2992.) Pleading statute of limitations. In pleading the statute of limitations, it is not necessary to state the facts showing the defense, but it may be stated generally that the cause of action is barred by the provisions

of section (giving the number of the section in the Compiled Laws of Utah of 1917, and, if the said section has been amended, the section and chapter of the laws of Utah amending the same which is relied upon, and of the subdivision thereof if it is so divided); and if such allegation be controverted, the party pleading must establish, on the trial, the facts showing that the cause of action is so barred. Am'd '05, p. 20; '07, p. 3.

Cal. C. Civ. P., § 458.
Statute of limitations, §§ 6445-6492.
Compiled Laws of 1907 may be referred to by section, § 5829.
The statute does not operate as a payment or extinguishment of the debt, but as a bar.
Leavitt v. Oxford S. M. Co., 3 U. 265; 1 P. 356.
The statute of limitations should be enforced not only on the presumption that the debt has been paid, but because it is essentially a statute of repose; it should be viewed as a wise and beneficial law rather than as a discreditable defense.
Kuhn v. Mount, 13 U. 108; 44 P. 1036.
Statute runs in favor of one claiming under a life estate.
Wells v. Wells, 7 U. 68; 24 P. 752.
Where a third person acquired an interest in mortgaged property under a tax deed, she could invoke the statute of limitations as against the mortgagee, though it may have been waived by, or not available to, the mortgagor.
Graves v. Seifried, 31 U. 203; 87 P. 674.
Boucofsky v. Jacobsen, 36 U. 165; 104 P. 117.
Answer stating merely that the action is barred by the statute of limitations is insufficient hereunder.
Spanish Fork v. Hopper, 7 U. 235; 26 P. 293.
The defense of the statute of limitations not available unless pleaded.
Whittaker v. Greenwood, 17 U. 33; 53 P. 736.
Hayes v. Lavagnino, 17 U. 185; 53 P. 1029.
Leavitt v. Oxford S. M. Co., 3 U. 265; 1 P. 356.
Form of answer pleading the statute approved.
Snow v. Rich, 22 U. 123; 61 P. 336.
A defendant may demur on the ground that an action is barred by the statute of limitations, when the pleadings show the time has elapsed.
Nelden-Judson Co. v. Com'l Nat. Bank, 27 U. 59; 74 P. 195.
Fullerton v. Bailey, 17 U. 85; 53 P. 1020.
Thomas v. Glendinning, 13 U. 47; 44 P. 652.
Burnes v. Crane, 1 U. 179.
O'Donnell v. Parker, 48 U. 578; 160 P. 1192.

6603. (2993.) Private statute, how pleaded. In pleading a private statute, or a right derived therefrom, it is sufficient to refer to such statute by its title and the day of its passage, and the court shall thereupon take judicial notice thereof.

Cal. C. Civ. P., § 459*.
Similar section, criminal procedure, § 8845.
Private statute defined, § 7081.
What private statutes forbidden, Con. art. 6, sec. 26.

6604. (2994.) Libel or slander, how pleaded. Proof. In an action for libel or slander, it is not necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the action arose; but it is sufficient to state, generally, that the same was published, or spoken, concerning the plaintiff; and if such allegation be controverted, the plaintiff must establish, on the trial, that it was so published or spoken.

Cal. C. Civ. P., § 460.
Criminal libel and slander, §§ 8072-8083.
Limitation of action, one year, § 6470.
Freedom of speech and of the press, responsibility for abuse of right, Con. art 1, secs. 1, 15.
Decisions on libel, note to § 3692.
In a suit upon a newspaper article concerning a certain family, a complaint alleging that plaintiff is the head thereof and residing at the place named in the article, and that the publication was made of and concerning him, together with the article itself, and allegations of its falsity, states a cause of action.
Fenstermaker v. Tribune Pub. Co., 12 U. 439; 43 P. 112.
Same case, 13 U. 532; 45 P. 1097.
Fifteen hundred dollars damages for calling a man a liar held not excessive.
Turner v. Stevens, 8 U. 75; 30 P. 24.
Charging one with refusal to pay a debt is not libelous per se.
Nichols v. Daily Rep. Co., 30 U. 74; 83 P. 573.
Where a libelous letter named plaintiff, it was not necessary to allege that the words were written of and concerning plaintiff.
Burton v. Mattson, 50 U. —; 166 P. 979.
An allegation that the matters contained in the alleged libelous letters were false and libelous sufficiently alleges that the communications were made with malice.
Id.
In an action for libel by writing plaintiff's wife letters implying that plaintiff sustained illicit relations with another woman, where the face of the complaint showed that the publication was concerning plaintiff, that it was falsely made with the intent to effect an estrangement between him and his wife, the complaint was not insufficient as containing no inducement, colloquium, or proper innuendoes.
Id.

6605. (2995.) Id. Truth and mitigating circumstances. Evidence. In the actions mentioned in the next preceding section, the defendant may, in his answer, allege both the truth of the matter charged as defamatory, and any mitigating circumstances to reduce the amount of damages, and, whether he prove the justification or not, he may give in evidence the mitigating circumstances.

Cal. C. Civ. P., § 461.
Effect of publication of retraction of libelous article, § 1348.
Elements of damage, note to § 3692.
Defendant may deny material allegations of complaint, and also plead justification in mitigation of damages.
Fenstermaker v. Tribune Pub. Co., 12 U. 439; 43 P. 112.
Same case, 13 U. 532; 45 P. 1097.
Murphy v. Carter, 1 U. 17.

6606. (2996.) Allegations not controverted taken as true; exception,

Each material allegation of the complaint not controverted by the answer, and each material allegation of new matter in the answer not controverted by the reply, where a reply is required, must, for the purposes of the action, be taken as true. But an allegation of new matter in the answer to which a reply is not required, or of new matter in a reply, is to be deemed controverted by the adverse party.

Cal. C. Civ. P., § 462*.
Reply to new matter in answer, § 6590.
Material allegation defined, § 6607.
Judgment on the pleadings, note to § 6575.
Decisions on sufficiency of denial, note to § 6575.
Where complaint is controverted only in part, plaintiff may take judgment by default for undisputed portion, § 6845.
Counterclaim not controverted deemed admitted, § 6591.
Objections to complaint or counterclaim not taken deemed waived, §§ 6573, 6589.
Failure to controvert in garnishment proceedings, §§ 6739, 3100.
Applied to allegations of quantity and value in trespass.
Rhemke v. Clinton, 2 U. 230.
Snell v. Crowe, 3 U. 26; 5 P. 522.
Under laws of 1888, a reply to a counterclaim was not required, and plaintiff could rely upon the defense of the statute of frauds without pleading it.
Steed v. Harvey, 18 U. 367; 54 P. 1011.
Where a finding is verbatim the same as new matter alleged in the answer and deemed denied under this section, the finding is not outside the issues.
Snyder v. Emerson, 19 U. 319; 57 P. 300.
Where a reply is required and filed, new matter in the answer not denied is deemed to be admitted.
Cain v. Stewart, 47 U. 160; 152 P. 465.

6607. (2997.) Material allegation defined. A material allegation in a pleading is one essential to the claim, or defense, and which could not be stricken from the pleading without leaving it insufficient.

Cal. C. Civ. P., § 463.

6608. (2998.) Supplemental complaint, answer, and reply. Either party may be allowed to make a supplemental complaint, answer, or reply, alleging facts material to the case, which have happened, or have come to his knowledge, since the filing of the former pleading; nor shall such new pleading be considered a waiver of former pleadings.

Cal. C. Civ. P., § 464*.
Any title to the premises in dispute that accrued to the defendant after the commencement of the suit must be set up by a supplemental answer, otherwise defendant cannot avail himself of it.
Kahn v. Old Telegraph M. Co., 2 U. 174.
Although the lower court may have decided for the defendant, yet if the case is wholly reversed and plaintiff's rights determined by the supreme court, the plaintiff has a right to file a supplemental complaint alleging and setting forth his damage since the action was commenced, and to make proof under it.
North Pt. C. I. Co. v. Utah & S. L. C. Co., 23 U. 199; 63 P. 812.

6609. (2999.) Pleadings after complaint to be filed and served. All pleadings subsequent to the complaint must be filed with the clerk and copies thereof served upon the adverse party or his attorney.

Cal C. Civ. P., § 465.
Papers, how served, §§ 7024-7032.
Extending time for service, § 7023.
Service of amended complaint, § 6570.
After appearance, a party is entitled to notice of subsequent proceedings, § 7029.
Papers, etc., must be served upon the attorney if one appears, § 7030.
Where a demurrer on the last day to plead is served on plaintiff's attorney's wife at his residence, he being in another county attending court, and then mailed to the clerk; held, this is not equivalent to filing a demurrer, and default judgment will not be disturbed.
Cutler v. Haycock, 32 U. 354; 90 P. 897.

6610. (3000.) Corporate, partnership, etc., capacity pleaded generally. A plaintiff suing as a corporation, partnership, executor, guardian, or in any other way implying corporate, partnership, representative, or other than individual capacity, need not state the facts constituting such capacity or relation, but may aver the same generally, or as a legal conclusion, and where a defendant is held in such capacity or relation a plaintiff may aver such capacity or relation in the same general way.

Iowa, McClain's An. C., § 3923.
Allegations as to corporate existence, etc., admitted unless denial verified, § 6594.
When the caption of the complaint gives the title of the corporation with the addition "a corporation under the laws of the state of Iowa," the averment of corporate capacity is sufficient.
Saunders v. Sioux City Nursery, 6 U. 431; 24 P. 532.
Legal capacity to sue incident to corporate existence.
Crane Bros. Co. v. Reed, 3 U. 506; 24 P. 1050.
When corporate existence denied, it is only necessary to prove a party a corporation de facto.
Kilpatrick Dry Goods Co. v. Box, 13 U. 494; 45 P. 629.
Marsh v. Mathias, 19 U. 350; 56 P. 1074.
Postal Tel. Co. v. O. S. L. R. R. Co., 23 U. 474; 65 P. 735.

6611. (3000x.) Corporate existence need not be proved unless denied. In an action by or against a corporation, the plaintiff need not prove upon the trial the existence of the corporation, unless the answer is verified, and contains an affirmative allegation that the plaintiff or defendant, as the case may be, is not a corporation. '01, p. 41.

Allegations admitted unless denial verified, § 6594.

CHAPTER 17.

VARIANCE, MISTAKES IN PLEADINGS, AND AMENDMENTS.

6615. (3001.) Variance not prejudicial deemed immaterial. Amendment. No variance between the allegations in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it appears that a party has been so misled, the court may order the pleading to be amended, upon such terms as may be just.

Cal. C. Civ. P., § 469.

Failure of proof distinguished from variance, § 6617.

Liberal construction of pleadings and of statutes, §§ 5839, 6596.

Errors and defects not affecting substantial rights disregarded, §§ 6622, 6968, note to § 6994.

Amendment when variance not material, §§ 6616, 6619, and notes.

Objections to pleadings, etc., not taken deemed waived, § 6573, and note.

Objections which may be raised for first time on appeal, note to § 6994.

There is no variance between allegation that plaintiff's leg came in contact with defectively insulated wire and proof that electricity could jump or arc three or four inches, and that plaintiff received his first shock before touching the wire.

Speight v. Rocky Mt. B. Tel. Co., 36 U. 483; 107 P. 742.

IMMATERIAL VARIANCE:

The doctrine that a trespass alleged to have been committed on a certain day cannot be shown to have been committed on another day does not obtain here.

Burnham v. Call, 2 U. 433.

In a suit in equity for relief on the ground of fraud, it is enough if the facts found are not materially and substantially different from those alleged in the bill.

Tufts v. Tufts, 123 U. S. 76; same case, 3 U. 361; 3 P. 390

Variance which ought not to have misled appellant will not justify reversal

Bullion-Beck & Champion Mining Co. v. Eureka Hill Mining Co., 5 U. 3; 11 P. 515.

Farnsworth v. Holderman, 3 U. 381; 4 P. 337.

Duke v. Griffith, 9 U. 469; 35 P. 512.

Difference between pleading and proof of state of appearance of appropriating water held immaterial.

Holman v. Pleasant Grove City, 8 U. 78; 30 P. 72.

Difference in time of payment of consideration of promissory note is immaterial.

Brown v. Pickard, 4 U. 292; 9 P. 573; 11 P. 512.

Where the allegations of the complaint state that plaintiff furnished materials at request of defendant, and the lien filed in proof states that the materials were furnished in pursuance of contract between plaintiff and the principal contractors of defendant, the variance is not such as to mislead defendant.

Culmer v. Clift, 14 U. 286; 47 P. 85.

Where defendant was convicted for stealing sheep owned, as alleged by ten individuals, and the information alleged a several ownership in six of the same ten men, the variance was not fatal.

State v. McKee, 17 U. 370; 53 P. 733.

There is no material variance between the complaint and the proof where complaint alleges a sale and delivery of water to defendant and that defendant promised to pay a sum certain therefor, and the proof showed a contract for sale and delivery of the water and a promise to pay a certain amount therefor.

Hecla G. M. Co. v. Gisborn, 21 U. 68; 59 P. 518.

Allegations of complaint held sufficiently broad to cover oral contract of earlier date than written contract declared on.

Rutan v. Huck, 30 U. 217; 83 P. 833.

Where a compaint alleges that the plaintiff's decedent at the time of his negligent killing was in the discharge of his duties as a mail clerk, a recovery may be had though the evidence shows that the decedent was a gratuitous passenger.

Schuyler v. S. P. R. R. Co., 37 U. 581; 109 P. 458.

Variance as to time of service of a broker is immaterial.

Beason v. Western Meat Co., 40 U. 398; 124 P. 335.

In view of § 6511, in an action on a judgment where the complaint alleged that the judgment was rendered against defendant, and the proof showed that it was rendered against defendant and another, the court should have permitted the complaint to be amended to comply with the proof.

Dobbs v. Rees, 49 U. 270; 163 P. 255.

In an action for personal injury, it is not error to permit defendant to show that its interest in the mine was a leasehold, even though it was alleged and admitted that it was the owner.

Olsen v. Triangle M. Co., 50 U. —; 167 P. 813.

MATERIAL VARIANCE:

Where plaintiff sues for damages for fire caused by the negligent handling of a locomotive, he cannot on the trial abandon the case, and, without amendment, recover under § 5611, making railroads absolutely liable for such fires irrespective of negligence.

Davis v. Utah Southern Ry., 3 U. 218; 2 P. 521.

Defendant cannot, at the trial without amendment, elect to rescind a contract and recover judgment thereon, when, in a cross-complaint, he has alleged a breach and damages therefor.

Detroit H. & L. Co. v. Stevens, 16 U. 177; 52 P. 379.

Plaintiff in ejectment alleging legal title cannot show equitable title.

Tarpey v. Deseret Salt Co., 5 U. 205; 14 P. 338.

Complaint alleged as breach of contract defendant's having put it out of his power to perform: proof showed he had repudiated and refused to perform; held, a fatal variance.

Vance v. Whalon, 7 U. 44; 24 P. 672.

Plaintiff cannot recover where the complaint alleges a contract of insurance, and the evidence shows an agreement to execute an insurance policy in futuro.

Idaho Forwarding Co. v. Fireman's Fund Insurance Co., 8 U. 41; 29 P. 876.

Where complaint alleged that defendants erected and maintained dams across the outlet of a lake, thus preventing the natural flow of water, and causing it to rise and damage his land, and the proof showed the dams were erected under license from plaintiff, permitting the rising of the water to a certain height, but that they were so erected as to raise it to a greater height, thus causing the overflow and damage alleged; held, a fatal variance.

Peay v. S. L. City, 11 U. 331; 40 P. 206.

Where, in an action for the death of a railroad brakeman, alleged to have been caused by a jolt occasioned by a sudden application of the air brakes by the conductor, there was no allegation of defective couplings, or that the cars were derailed, evidence of such facts was not admissible.

Ohlenkamp v. U. P. R. R. Co., 24 U. 232; 67 P. 411.

Edd v. U. P. Coal Co., 25 U. 293; 71 P. 215.

See Peay v. Salt Lake City, 11 U. 331; 40 P. 206.

Hartog v. Tibbitts, 1 U. 328.

Where the complaint in a suit to restrain

defendant from using a certain roadway admitted that defendant acquired rights in the roadway by agreement, but alleged that those rights were limited to the property situate on the east side thereof, and defendant filed a counterclaim asserting a right by prescription acquired anterior to the making of the agreement alleged in the complaint, to which plaintiff answered simply denying the prescriptive right, a decree to the effect that defendant's rights in the roadway had been extinguished by abandonment is a fatal variance from the pleadings.

Tuckfield v. Crager, 29 U. 472; 82 P. 860.
Sowles v. Clawson, 28 U. 74; 76 P. 1067.

Where the purchaser in a contract for the sale of land sued on the contract for specific performance, he could not recover on the theory that his right was that of an equitable owner to redeem the premises.

Free v. Little, 31 U. 449; 88 P. 407.

Allegations of petition in election contest held insufficient to permit evidence as to paper ballots and as to marking of same.

Hamer v. Howell, 31 U. 144; 86 P. 1073.

Under a general denial in a cause of action on a promise to pay for release of plaintiff's interest in certain sheep, defendant cannot prove that plaintiff leased sheep from an incompetent Indian ward of the United States, and that defendant took possession as subagent.

Murdock v. Farrell, 49 U. 314; 163 P. 1102.

VARIANCE WAIVED:

The fact that a complaint contains an allegation of "wrongful taking" does not furnish a sufficient reason for setting aside a verdict for unlawful detention, when such detention was not only the main issue, but was the gravamen of the action, and when the case was tried mainly on that theory and no objection to the complaint based on such allegation was raised by special plea, and the verdict is supported by the evidence.

Nebeker v. Harvey, 21 U. 363; 60 P. 1029.

Defendant cannot on appeal insist that there was a variance in that the complaint was for the purchase price while the proof was for damages for breach of contract, he not having raised the question below, but there insisted, against plaintiff's objections, on trying the case on the theory that the action was for breach of contract.

McCall Co. v. Jennings, 26 U. 459; 73 P. 639.

As a general rule, before a variance is available, the evidence must be objected to when offered.

Geanakoules v. Union Portland Cement Co., 41 U. 486; 126 P. 329.

6616. (3002.) Id. Order, if variance immaterial. Amendment. Where the variance is not material, as provided in the next preceding section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs.

Cal. C. Civ. P., § 470.

Allowance of amendments immaterial or conforming allegations to proof not error.

Walton v. Jones, 7 U. 462; 27 P. 580.

Clerical mistake in name of plaintiff may be corrected.

Greenfield v. Wallace, 1 U. 188.

Variance in ejectment held not to be fatal.

Error not to permit amendment.

Duke v. Griffith, 9 U. 469; 35 P. 512.

Where complaint alleged that goods were turned over to appellant as agent, and the proof showed that they were turned over to the principal, it is such a variance, under §§ 6615-6619, as may be cured by amendment.

Thompson v. Whitney, 20 U. 1; 57 P. 429.

6617. (3003.) Id. Failure of proof distinguished from variance. Where, however, the allegation of the claim or defense to which the proof is directed is unproved, not in some particular or particulars only, but in its general scope and meaning, it is not to be deemed a case of variance within the last two sections, but a failure of proof.

Cal. C. Civ. P., § 471.

6618. (3004.) Amendments as of course. If demurrer overruled, facts deemed denied. Pleading over. Any pleading may be amended once by the party as of course, and without costs, at any time before the time for pleading to it has expired, or after demurrer and before the trial of the issue of law thereon, by filing the same as amended and serving a copy on the adverse party, who may have ten days thereafter in which to answer, reply, or demur to the amended pleading. A demurrer is not waived by filing an answer or reply at the same time; and when the demurrer to a complaint or counterclaim is overruled and there is no answer or reply filed, the court may, upon such terms as may be just, allow an answer or reply to be filed. If a demurrer to the answer or reply be overruled, the facts alleged therein must be considered as denied to the extent mentioned in § 6606.

Cal. C. Civ. P., § 472*.

Liberal amendments allowed in attachment proceedings, § 6728.

Time to amend or plead runs from service of notice, except, § 6623.

Service of amendment to complaint, § 6570.

Service of papers generally, §§ 7024-7032.

May demur and answer at same time, §§ 6569, 6579.

Amendment when variance not material, §§ 6615, 6616, 6619, and notes.

Where a judgment is reversed and new trial granted without explicit directions, the case stands in the lower court precisely as before the first trial was had, and any amendment may be allowed except such as would open questions adjudicated by the appellate court.

Larsen v. Gasberg, 43 U. 203; 134 P. 885.

6619. (3005.) Discretionary power of court as to amendments, defaults, mistakes, neglects, defendant not personally served, etc. The court may, in furtherance of justice, and on such terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect; and may, upon like terms, enlarge the time for answer, reply, or demurrer. The court may likewise, in its discretion, after notice to the adverse party, allow, upon such terms as may be just, an amendment to any

pleading or proceeding in other particulars; and may upon like terms allow an answer or a motion for new trial to be made and filed after the time limited by this code; and may, also, upon such terms as may be just, relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect; and when, for any reason satisfactory to the court, or the judge thereof, the party aggrieved has failed to apply for a new trial or other relief sought during the term at which such judgment, order, or proceeding complained of was taken, the court, or judge thereof in vacation, may grant the relief upon the application made within a reasonable time, not exceeding six months after the adjournment of the term. When, from any cause, the summons in an action has not been personally served on the defendant, the court may allow, on such terms as may be just, such defendant or his legal representative, at any time within one year after the rendition of any judgment in such action, to answer to the merits of the original action. Nothing but the actual, taxable costs of the action accruing, on and after the default, not including attorneys' fees, shall be imposed by the court under the provisions of this section authorizing the imposition of terms as a condition upon which relief is granted.

Cal. C. Civ. P., § 473*.

Time allowed by law in which to plead, etc., may be extended, § 7023.

Objections to pleadings, etc., waived if not made, § 6573, and note.

Amendments as of course, § 6618

Amendment when variance not material, §§ 6615, 6616, and notes.

Amendment of finding, note to § 6829.

Motion may be made by real party in interest though not the nominal party of record.

Thomas v. Morris, 8 U. 284; 31 P. 446.

Application to amend must first be made in lower court.

Hussey v. Smith, 1 U. 304.

Reynolds v. Pascoe, 24 U. 219; 66 P. 1064.

As a prerequisite to relief under this section, on failure to move for new trial in time, an application should be made to the court and a showing made.

Felt v. Cook, 31 U. 299; 87 P. 1092.

Statutes relating to a new trial have no application to a case where motion is made to set aside a judgment taken by default against a party in his absence on account of mistake or excusable neglect. Remedy in such case is under this section.

Thomas v. Morris, 8 U. 284; 31 P. 446.

The court cannot tax costs and impose terms on the sovereign when it is a party in litigation, unless there is a statute authorizing it to be done.

U. S. v. Stevens, 8 U. 3; 28 P. 869.

Action of a trial court on motion to set aside default will not be disturbed, except for abuse of discretion.

Walker v. Continental Ins. Co., 2 U. 331.

Enright v. Grant, 5 U. 334; 15 P. 268.

Where trial court improperly refuses to grant relief, judgment will be reversed.

Utah Com'l Bank v. Trumbo, 17 U. 198; 53 P. 1033.

Cutler v. Haycock, 32 U. 354; 90 P. 897.

An objection and motion to disregard a bill of exceptions not served within the time, is a "proceeding" in an action within the provisions of this section, and the court may relieve against the failure to serve in time and settle the bill, through mistake, inadvertence, surprise or excusable neglect.

Morgan v. O. S. L. R. R. Co., 27 U. 92; 74 P. 523.

An order denying a motion to correct a judgment is not a final judgment from which a separate appeal may be taken.

Cullen v. Harris, 27 U. 4; 73 P. 1048.

It is not error to refuse to allow a defendant to amend his answer after the jury is sworn, and the examination of witnesses begun, when at a former term he had failed to amend knowing the trial court to hold such amendment necessary.

Rhemke v. Clinton, 2 U. 230.

Party having opportunity to amend before trial and failing to do so may be refused leave at trial where the amendment would change the issue.

Kelley v. Kershaw, 5 U. 295; 14 P. 804.

Amendment striking out admission may be properly refused.

Peck v. Rees, 7 U. 467; 27 P. 581.

When a party litigant offers to file an amendment or an additional pleading at the close of the trial without an offer of further proof, the offer to file may be properly rejected, in the absence of variance between the pleadings and proof.

Grand Central M. Co. v. Mammoth M. Co., 29 U. 490; 83 P. 648.

AMENDMENTS PROPERLY ALLOWED:

Insuffcient verification may be amended.

Milner v. Friel, 1 U. 186.

Or verification added to unverified complaint.

Ruffatti v. Societe des Mines, 10 U. 386; 37 P. 591.

Clerical mistake in name of plaintiff may be corrected.

Greenfield v. Wallace, 1 U. 188.

Amendment as to damages claimed held proper.

Rhemke v. Clinton, 2 U. 230.

Amendment dismissing as to one defendant held not prejudicial.

Brown v. Pickard, 4 U. 292; 9 P. 573; 11 P. 512.

Amendment of affidavit on attachment permitted.

McCord Merc. Co. v. Glenn, 6 U. 139; 21 P. 500.

Amendment of complaint held not to dissolve attachment.

Barton Bros. v. S. J. Merc. & Mfg. Inst., 10 U. 346; 37 P. 576.

The allegation "two bundles of carpet and one box of household goods" may be amended by a detailed description of all the articles included in the above.

Benson v. O. S. L. R. Co., 35 U. 241; 99 P. 1072.

On the trial, answer may be amended after introduction of evidence.

Am. Pub. Co. v. Fisher, 10 U. 147; 37 U. 250.

An amendment which does not add a new cause of action nor additioal parties relates back to the time of filing complaint.

Billings v. Parsons, 17 U. 22; 53 P. 730.

Complaint may be amended to conform to the proofs when all the parties have been permitted to introduce their evidence on the issues as presented by the amendments, and when the court can see that no injustice could result.

Walker v. Bamberger, 17 U. 239; 54 P. 108.

Where action is reversed on appeal on account of variance, leave to amend may be granted.

Tarpey v. Madsen, 26 U. 294; 73 P. 411.

Where notice of a proposed amendment setting up the defense of res judicata is given before the trial, and the court offers to grant a continuance if the opposite counsel is taken

by surprise, the granting of the amendment is not erroneous.
Murphy v. Ganey, 23 U. 633; 66 P. 190.

In an action to recover a loan, the court, after rendering judgment for plaintiff, granted defendant's motion for a new trial and permitted him to file an amended answer which disclosed the fact that the debt was the result of a gambling transaction, whereupon judgment was rendered for defendant; held, that the granting of the new trial and permitting the filing of an amended answer were matters resting in the sound discretion of the trial court and no circumstances appeared to show an abuse of discretion.
Collet v. Beutler, 27 U. 540; 76 P. 707.

An amendment to a pleading is properly allowed when the nature of the action is not changed, nor one cause substituted for another, nor an additional cause therein stated.
Cassady v. Cassady, 31 U. 394; 88 P. 32.
Fell v. U. P. Ry Co., 32 U. 101; 88 P. 1003.

Amended cost bill may be filed.
Larsen v. Gasberg, 43 U. 203; 134 P. 885.
Smith v. Nelson, 23 U. 512; 65 P. 485.
Dignan v. Nelson, 26 U. 186; 72 P. 936.

AMENDMENTS IMPROPERLY REFUSED:

It was error to refuse to allow defendant to file an amended answer setting up contract between the parties which was void as against public policy, on the ground that the answer set up no defense.
Haddock v. S. L. City, 23 U. 521; 65 P. 491.

Where an action for wrongful death was erroneously commenced by intestate's widow and children, who were the only parties in interest, instead of by the personal representative, it was error not to allow an amendment of the complaint substituting the widow in her capacity as administratrix. (Distinguishing Skews v. Dunn, 3 U. 186; 2 P. 64.)
Pugmire v. Diamond Coal & C. Co., 26 U. 115; 72 P. 385.

Error to refuse to allow plintiff to amend complaint for damages by adding to period of disability.
Jones v. Ogden City, 32 U. 221; 89 P. 1006.

AMENDMENTS PROPERLY REFUSED:

Amendment bringing in new parties without leave of court is improper, and should be stricken out.
Salt Lake Co. v. Golding, 2 U. 319.

Independently of § 6828, providing that the court may, on notice, change a finding, the lower court has no jurisdiction to modify a finding after term, even though a motion to retax costs be pending.
Hohn v. Davis, 41 U. 200; 125 P. 403.

An application to serve and file a bill of exceptions after the time has expired must set forth the facts justifying the delay; a mere statement of conclusions will not suffice.
Toole Imp. Co. v. Hoffman, 44 U. 532; 141 P. 744.

A party applying for leave to file motion for new trial after time must produce evidence on which the court may make findings that, through no fault of the party, he was prevented from filing motion in time, where no application for extension had been made; and findings on this point should be made so it may be reviewed on appeal.
Audia v. D. & R. G., 45 U. 459; 146 P. 559.

That it was impossible to prepare bill of exceptions because of the voluminous record is not a sufficient reason to permit the filing of the bill of exceptions after the time allowed therefor has expired, and no application for an extension of time had been granted.
Moyle v. McKean, 49 U. 93; 162 P. 63.

The setting aside of a default and allowing defendant to plead on the merits is in the sound discretion of the trial court, which, in the absence of abuse, will not be reviewed.
Aaron v. Holmes, 35 U. 49; 99 P. 450.

It is not error to strike out the names of two deceased partners as the plaintiffs, and permit the action to proceed to judgment under the names of the surviving partners.
Sweetser v. Fox, 43 U. 40; 134 P. 599.

Pleadings may be amended even after trial to show true facts and conform to the proof.
Rosenthyne v. Matthews-McCulloch Co., 50 U. —; 168 P. 957.

The court has no discretion to permit a party to file his cost bill on appeal where it was not filed within time, he not having notice of the filing of the remittitur, the remittitur having been issued prior to the amendment requiring notice of the filing thereof.
Hirsh v. Ogden Furniture & Carpet Co., 51 U. —; 172 P. 318.

JUDGMENTS VACATED:

Facts held to justify setting aside default for inadvertennce and excusable neglect.
Nounnan v. Toponce, 1 U. 168.
Thomas v. Morris, 8 U. 284; 31 P. 446.
McCormick Harvesting Machine Co. v. Marchant, 11 U. 68; 39 P. 483.
Utah Com'l Bank v. Trumbo, 17 U. 198; 53 P. 1033.

Decree of probate court ignoring wife in distribution of estate was vacated though time to appeal had expired.
Benson v. Anderson, 10 U. 135; 37 P. 256.

Where case was set for trial without notice to plaintiff's counsel, who resided in another county, though they wrote several times to the clerk to ascertain if the case had been set for trial, but received no answer till after judgment was entered, plaintiff's failure to appear at the time of trial was excusable, and the judgment should be set aside.
Western L. & S. Co. v. Berg, 24 U. 278; 67 P. 669.

In all doubtful cases, the general rule of courts is to incline towards granting relief from the default, and to bring about a judgment on the merits. Under the facts in this case, trial court should have set aside default.
Cutler v. Haycock, 32 U. 354; 90 P. 897.
Utah Com. Bank v. Trumbo, 17 U. 198; 53 P. 1033.

Where defendants relied on a rule of court requiring notice of the placing of cases on the trial calendar, and plaintiff obtained judgment in defendant's absence by disregarding the rule, it was within the sound discretion of the trial court to vacate the judgment in an equitable action brought for that purpose; defendants being free from culpable negligence.
Riddle v. Quinn, 32 U. 341; 90 P. 893.

Where plaintiff, having a default judgment quieting title, causes defendant by fraud and deceit to believe he will convey the property to him, and after the judgment has been entered for a year refuses to do so, the default should be set aside and defendant permitted to answer.
Liebhardt v. Lawrence, 40 U. 243; 120 P. 215.

Plaintiff brought a friendly mortgage foreclosure suit to aid defendant's mortgagors in settling a third person's claim which purpose was accomplished, and the suit lay dormant for nearly six years pending a dispute over plaintiff's attorney's fee and the question of interest; the dispute not having been adjusted, the plaintiff then took a default judgment for the unpaid part of the debt and attorney's fees, and the defendant moved to set aside the default, tendering an answer denying the default pleaded in the complaint and alleging payment; held, that the motion was improperly overruled as there was no injury to plaintiff through the delay.
Quealy v. Willardson, 35 U. 414; 100 P. 930.

Meritorious defense must be shown.
Kuhn v. McAllister, 1 U. 273.

Where an agent of a foreign corporation fails to inform his principal of the commencement of a suit, and has no power himself to employ counsel to defend such action, the court will not set aside the default. The fact that there was no time in which to prepare and file an answer, owing to the distant residence of defendant, furnishes no ground upon which to set aside judgment by default.
Walker Bros. v. Continental Ins. Co., 2 U. 331.

A final decree after a hearing on the merits cannot be amended or set aside after the term has ended and the time within which a motion for a new trial may be made has passed; it can only be opened upon a bill of review or for fraud; but this rule does not apply to void decrees or clerical errors.
Benson v. Anderson, 14 U. 334; 47 P. 142.
Jones v. N. Y. Life Ins. Co., 14 U. 215; 47 P. 74.

No relief from result of deliberate choice on part of party and his counsel.

Peterson v. Crosier, 29 U. 235; 81 P. 860.

Where defendant's attorney was told that the plaintiff would press the case and would no longer be bound by an oral stipulation by his former attorney extending time to answer, and three weeks thereafter a default judgment was entered, such judgment will not be set aside.

McWhirter v. Donaldson, 36 U. 293; 104 P. 731.

JUDGMENTS NOT VACATED:

Facts held not to justify setting aside default.

Crompton v. Crow, 2 U. 245.

Negligence of attorney or reliance on promises of others not sufficient ground.

Kuhn v. McAllister, 1 U. 273.

Crompton v. Crow, 2 U. 245.

But see Thomas v. Morris, 8 U. 284; 31 P. 446.

TIME OF APPLICATION:

Judgment, though erroneous, will not be vacated on motion made over one year after its rendition.

Darke v. Ireland, 4 U. 192; 7 P. 714.

Judgment void for lack of jurisdiction will be set aside upon motion, though after six months.

Park v. Higbee, 6 U. 414; 24 P. 524.

Power of court to set aside judgment voidable on account of prior death of party against whom it was rendered ceases after six months from adjournment of term.

Elliott v. Bastian, 11 U. 452; 40 P. 713.

A motion to vacate a final judgment on the merits is too late after the term, and after the time has expired within which a motion for a new trial can be made.

Jones v. N. Y. Life Ins. Co., 14 U. 215; 47 P. 74.

Benson v. Anderson, 14 U. 334; 47 P. 142.

Where judgment is rendered against defendant without service of summons or appearance, he may, within one year, enter a motion to set it aside and ask leave to answer. If the motion is served and filed within the year the court may hear it after the year expires, and, upon sufficient proof, set the judgment aside.

Blyth & Fargo Co. v. Swenson, 15 U. 345; 49 P. 1027.

After a reasonable time, not exceeding six months after the term, the court has no jurisdiction to modify a judgment.

Lees v. Freeman, 19 U. 481; 57 P. 411.

A petition and motion for modification of findings and decree filed more than nine months after decree was entered came too late and are properly denied.

Stevens Imp. Co. v. South Ogden Co., 20 U. 267; 58 P. 843.

Where foreclosure was had by publication, defendants, by leave of court, could come in at any time within a year and answer to the merits; therefore, they were not entitled to maintain a suit in equity to set aside the proceedings.

Baer v. Higson, 26 U. 78; 72 P. 180.

On a question as to whether appellant moved for a new trial during the term, the supreme court cannot take judicial notice as to when the term adjourned in the absence of any statutory or constitutional provision fixing the same.

Felt v. Cook, 31 U. 299; 87 P. 1092.

Where a copy of the complaint is not filed within ten days after service of summons, owing to a misunderstanding by the stenographer of the attorney for plaintiff, the lower court should have permitted a copy to be filed and not have dismissed the suit.

West Mountain L. & S. Co. v. Danley, 38 U. 218; 111 P. 647.

6620. (3006.) Officer sued for conversion may plead and prove value. When in an action to recover the possession of personal property, the person making an affidavit did not truly state the value of the property, and the officer taking the property or the sureties on any bond or undertaking are sued for taking the same, the officer or sureties may in their answers set up the true value of the property, and that the person in whose behalf said affidavit was made was entitled to the possession of the same when said affidavit was made, or that the value in the affidavit stated was inserted by mistake, and the court shall disregard the value as stated in the affidavit, and give judgment according to the right of possession of said property at the time the affidavit was made.

Cal. C. Civ. P., § 473*.

Justification of officer, note to § 6713.

Parties in action against sheriff, etc., to recover personal property, § 6515.

6621. (3007.) Defendant's name unknown, fictitious name used. When the plaintiff is ignorant of the name of a defendant, he must state that fact in the complaint, and such defendant may be designated in any pleading or proceeding by any name, and when his true name is discovered, the pleading or proceeding must be amended accordingly.

Cal. C. Civ. P., § 474.

Service by publicattion upon unknown party, § 6551.

6622. (3008.) Errors and defects not substantial, disregarded. The court must in every stage of an action disregard any error or defect in the pleadings or proceedings, which does not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect.

Cal. C. Civ. P., § 475.

Exception not regarded unless substantial right affected, § 6968, and note.

Provisions to be liberally construed, § 5839, 6596.

Similar section, criminal procedure, § 9365.

Proceedings on attachment to be liberally construed, § 6728.

Case will not be reversed on appeal for harmless errors and technicalities, note to § 6994.

Objections to pleadings, etc., not taken deemed waived, § 6573, and note.

Examining criminal jury, § 8927.

It is the duty of the court in every stage of the action, to disregard any error or defect in the pleading or proceedings which does not affect the substantial rights of the parties.

Barton v. S. Jordan Merc. Inst., 10 U. 346; 37 P. 576.

Mills v. Gray, 50 U. —; 167 P. 358.

Where the judgment comes within the issue,

and the facts show a right of recovery in the plaintiff, the mere fact that language is used in the complaint which technically applies to another form of action will not, under the circumstances, warrant a reversal.
Nebeker v. Harvey, 21 U. 363; 60 P. 1029.
A defendant cannot on appeal attack the ruling of the lower court on a special demurrer alleging misjoinder of parties and causes of action without showing he was injuriously affected thereby.
Morris v. Salt Lake City, 35 U. 474; 101 P. 373.
Doyle v. West Temple T. Co., 43 U. 277; 135 P. 103.
Hogge v. S. L. & O. R. Co., 47 U. 266; 153 P. 585.

6623. (3009.) Time to amend, answer, etc., runs from service of notice. Exception. When a demurrer to any pleading is sustained or overruled and time to amend, answer, or reply is given, the time so given runs from service of notice of the decision or order, except when the party against whom the decision is made, or his attorney, is present and asks for and is given time to amend, answer, or reply, in which case no notice of the decision is required.
Cal. C. Civ. P., § 476*.
Time for service, etc., of bill of exceptions, § 6969, and note.
Time to move for new trial does not begin to run until notice of decision has been served, note to § 6980.
Time to answer did not begin to run until notice, though defendant, being in court, had actual knowledge of the order made.
McCord & N. Mer. Co. v. Glenn, 6 U. 139; 21 P. 500.

CHAPTER 18.

ARREST.

6630. (3010.) Arrest in civil action. No person shall be arrested in a civil action except an absconding debtor.
Cal. C. Civ. P., § 478*.
There shall be no imprisonment for debt, except in cases of absconding debtors, Con. art. 1, sec. 16.
Member militia exempt, when, § 2871.

6631. (3011.) Order, by whom made. An order for such arrest must be obtained from a judge of the court in which the action is brought.
Cal. C. Civ. P., § 480.

6632. (3012.) Id. Made on affidavit showing cause. The order may be made whenever it appears to the judge by the affidavit of the plaintiff or of some other person that a sufficient cause of action exists, and that the case is such as is mentioned in § 6630. The affidavit must be either positive or upon information and belief; and when upon information and belief, it must state the facts upon which the information and belief are founded. If an order of arrest be made, the affidavit must be filed with the clerk of the court.
Cal. C. Civ. P., § 481.

6633. (3013.) Undertaking of at least $500. Before making the order, the judge must require a written undertaking on the part of the plaintiff, with sureties in an amount to be fixed by the judge, which must be at least $500, to the effect that the plaintiff will pay all costs which may be adjudged to the defendant, and all damages which he may sustain by reason of the arrest, if the same be wrongful or without sufficient cause, not exceeding the sum specified in the undertaking. The undertaking must be filed with the clerk of the court.
Cal. C. Civ. P., § 482.
If action dismissed, undertaking delivered to defendant, § 6848.
Qualifications of sureties generally, § 7223.
Where undertaking is not given until after arrest, but sureties have full knowledge of the facts and without objection as to time of its execution, they cannot afterward be heard to complain.
Vanderberg v. Connoly, 18 U. 112; 54 P. 1097.

6634. (3014.) Order made at any time before judgment. Contents. The order may be made at the time of the filing of the complaint, or at any time afterward, before judgment. It must require the sheriff of the county where the defendant may be found forthwith to arrest him and hold him to bail in a specified sum, and to return the order at a time therein mentioned to the clerk of the court in which the action is pending.
Cal. C. Civ. P., § 483*.

6635. (3015.) Copy of affidavit and order delivered to defendant. The order of arrest, with a copy of the affidavit upon which it is made, must be delivered to the officer, who, upon arresting the defendant, must deliver to him a copy of the affidavit, and also, if desired, a copy of the order of arrest.
Cal. C. Civ. P., § 484.

6636. (3016.) Arrest, by whom and how made. The sheriff must execute the order by arresting the defendant and keeping him in custody until discharged by law.
Cal. C. Civ. P., § 485.

6637. (3017.) Defendant discharged on bail or deposit. The defendant, at any time before execution, must be discharged from the arrest, either upon giving bail or upon depositing the amount mentioned in the order of arrest.
Cal. C. Civ. P., § 486.

6638. (3018.) Id. Form of undertaking. The defendant may give bail by causing a written undertaking to be executed by two or more sufficient sureties, to the effect that they are bound in the amount mentioned in the order of arrest, that the defendant will at all times render himself amenable to the process of the court during the pendency of the action, and to such as may be issued to enforce the judgment therein, or that they will pay to the plaintiff the amount of any judgment which may be recovered in the action.
Cal. C. Civ. P., § 487. Qualifications of bail, § 3025.

6639. (3019.) Bail may surrender defendant. Voluntary surrender. At any time before judgment or within ten days thereafter, the bail may surrender the defendant in their exoneration, or he may surrender himself to the sheriff of the county where he was arrested.
Cal. C. Civ. P., § 488. Execution against the person, §§ 6913, 6916.

6640. (3020.) Id. Bail may arrest defendant. When exonerated. For the purpose of surrendering the defendant, the bail, at any time or place before they are finally charged, may themselves arrest him; or, by written authority indorsed on a certified copy of the undertaking, may empower an officer to do so. Upon the arrest of the defendant by said officer or upon his delivery to him by the bail, or upon his own surrender, the bail are exonerated, if such arrest, delivery, or surrender take place before the expiration of ten days after judgment; but if such arrest, delivery, or surrender be not made within ten days after judgment, the bail are finally charged on their undertaking, and bound to pay the amount of the judgment within ten days thereafter.
Cal. C. Civ. P., § 489.

6641. (3021.) Action against bail. If the bail neglect or refuse to pay the judgment within ten days after they are finally charged, an action may be commenced against such bail for the amount of the original judgment.
Cal. C. Civ. P., § 490.

6642. (3022.) Bail exonerated by death, etc., of defendant. The bail are exonerated by the death of the defendant, by his imprisonment in the state prison, or by his legal discharge from the obligation to render himself amenable to the process.
Cal. C. Civ. P., § 491.

6643. (3023.) Return of officer. Plaintiff may except to bail. Within the time limited for that purpose, the sheriff must file the order of arrest in the office of the clerk of the court in which the action is pending, with his return indorsed thereon, together with a copy of the undertaking. The original undertaking he must retain in his possession until filed, as herein provided. The plaintiff, within ten days thereafter, may serve upon the sheriff notice that he does not accept the bail, or he is deemed to have accepted them, and the officer is exonerated from liability. If no notice be served within ten days, the original undertaking must be filed with the clerk of the court.
Cal. C. Civ. P., § 492.

6644. (3024.) Notice of qualification of bail. Within five days after the receipt of notice, the sheriff or defendant may give to the plaintiff, or his attorney, notice of the justification of the same, or other bail (specifying the places of residence and occupations of the latter), before the judge of the court, or clerk, at a specified time and place; the time to be not less than five nor more than ten days thereafter, except by consent of parties. In case other bail be given, there must be a new undertaking.
Cal. C. Civ. P., § 493.

6645. (3025.) Qualifications of bail. The qualifications of bail are as follows:

1. Each of them shall be a resident and householder or freeholder within the state;

2. Each must be worth the amount specified in the order of arrest, or the amount to which the order is reduced, as provided in this chapter, over and above all his debts and liabilities, exclusive of property exempt from execution; but the judge or clerk, on justification, may allow more than two sureties to justify severally in amounts less than that expressed in the order, if the whole justification be equivalent to that of two sufficient bail.

Cal. C. Civ. P., § 494. Qualifications of sureties generally, § 7223.

6646. (3026.) Justification of bail, how conducted. For the purpose of justification, each of the bail must attend before the judge or clerk, at the time and place mentioned in the notice, and may be examined on oath, on the part of the plaintiff, touching his sufficiency, in such manner as the judge or clerk in his discretion may think proper. The examination must be reduced to writing, and subscribed by the bail, if required by the plaintiff.

Cal. C. Civ. P., § 495.

6647. (3027.) Allowance of bail exonerates officer. If the judge or clerk find the bail sufficient, he must annex the examination to the undertaking, indorse his allowance thereon, and cause them to be filed, and the officer is thereupon exonerated from liability.

Cal. C. Civ. P., § 496.

6648. (3028.) Deposit in lieu of bail. Certificate. Discharge. The defendant may, at the time of his arrest, instead of giving bail, deposit with the sheriff the amount mentioned in the order. In case the amount of the bail be reduced as provided in this chapter, the defendant may deposit such amount instead of giving bail. In either case, the sheriff must give the defendant a certificate of the deposit made, and the defendant must be discharged from custody.

Cal. C. Civ. P., § 497.

6649. (3029.) Sheriff must pay deposit into court. The sheriff must, immediately after the deposit, pay the same into court, and take from the clerk receiving the same two certificates of such payment, one of which he must deliver or transmit to the plaintiff, or his attorney, and the other to the defendant. For any default in making such payment, the same proceedings may be had on the official bond of the sheriff to collect the sum deposited as in other cases of delinquency.

Cal. C. Civ. P., § 498.

6650. (3030.) Undertaking may be substituted for deposit. If money be deposited, as provided in the two next preceding sections, bail may be given, and may justify upon notice at any time before judgment; and on the filing of the undertaking and justification with the clerk, the money deposited must be refunded to the defendant.

Cal. C. Civ. P., § 499.

6651. (3031.) How deposit disposed of. Where money has been deposited, if it remain on deposit at the time of the recovery of a judgment in favor of the plaintiff, the clerk must, under the direction of the court, apply the same in satisfaction thereof, and after satisfying the judgment must refund the surplus, if any, to the defendant. If the judgment be in favor of the defendant, the clerk must, under the direction of the court, refund to him the whole sum deposited and remaining unapplied.

Cal. C. Civ. P., § 500.

6652. (3032.) When sheriff liable as bail. Discharge. If, after being arrested, the defendant escape, or be rescued, or bail be not taken, or be adjudged insufficient, the sheriff is liable as bail; but he may discharge himself from such liability by giving bail at any time before judgment.

Cal. C. Civ. P., § 501*. Limitation of action against sheriff, one year, § 6470.
Escape, liability of sheriff, § 1514.

6653. (3033.) Id. Recovery on sheriff's official bond. If a judgment be recovered against the sheriff upon his liability as bail, and an execution there-

on is returned unsatisfied, in whole or in part, the same proceedings may be had on his official bond for the recovery of the whole or any deficiency, as in other cases of delinquency.
Cal. C. Civ. P., § 502.

6654. (3034.) Defendant may move to vacate arrest or reduce bail. Hearing. A defendant arrested may, at any time before the trial of the action, or, if there be no trial, before the entry of judgment, apply to the judge who made the order, or the court in which the action is pending, upon reasonable notice, to vacate the order of arrest or to reduce the amount of bail. If the application be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other proofs in addition to those on which the order of arrest was made.
Cal. C. Civ. P., § 503. Motion to obtain discharge from arrest, §§ 6657-6661.
Effect of discharge from arrest, § 6661.

6655. (3035.) Id. Order. If upon application it appears that there was not sufficient cause for the arrest, the order must be vacated; or if it appears that the bail was fixed too high, the amount must be reduced.
Cal. C. Civ. P., § 504.

CHAPTER 19.

DISCHARGE FROM ARREST.

6656. (3036.) Discharge from arrest as provided in this chapter. Any person confined in jail on an execution issued on a judgment recovered in a civil action must be discharged therefrom upon the conditions in this chapter specified.
Cal. C. Civ. P., § 1143. Execution against the person, §§ 6913, 6916.

6657. (3037.) Notice of application to court. Such person must cause a notice in writing to be given to the plaintiff, his agent, or attorney when and where he will apply to the district judge of the county in which he may be confined for the purpose of obtaining a discharge from his imprisonment.
Cal. C. Civ. P., § 1144. Application to vacate order of arrest, § 6654.

6658. (3038.) Id. Service, upon whom and when made. Such notice must be served upon the plaintiff, his agent, or attorney one day at least before the hearing of the application. But if the plaintiff be not a resident of the county, and have no agent or attorney in the county, no such notice will be served.
Mont. Civ. P., § 2062. Cal. C. Civ. P., § 1145*.

6659. (3039.) Hearing. Creditor may have evidence written. At the time and place specified in the notice, such person must be taken under the custody of the sheriff before the district judge and examined on oath concerning his property and effects and the disposal thereof and his ability to pay the judgment for which he is committed. The district judge shall also hear any other legal and pertinent evidence that may be produced by the debtor or creditor. Such examination must, at the election of the creditor, be reduced to writing and subscribed and sworn to by the debtor and other witnesses.
N. Dak. (1895) § 6139. Cal. C. Civ. P., § 1146*.

6660. (3040.) If not discharged, may apply again at end of every ten days. If, upon the examination, the judge is satisfied that the prisoner is entitled to his discharge, he must so order. If such judge does not discharge the prisoner, he may apply for his discharge at the end of every succeeding ten days in the same manner as above provided, and the same proceedings must thereupon be had.
Cal. C. Civ. P., §§ 1148*-1150*.

6661. (3041.) Discharge final for same debt. Exception. The prisoner, after being so discharged, shall be forever exempt from arrest or imprisonment for the same debt, unless he shall be convicted of having wilfully sworn falsely upon his examination or in taking the oath before prescribed.
Cal. C. Civ. P., § 1151.

6662. (3042.) Judgment remains in force though defendant discharged. The judgment against any prisoner who is discharged remains in full force against any estate which may then or at any time afterward belong to him, and the plaintiff may take out a new execution against the goods and the estate of the debtor, in like manner and with like effect as if he had never been committed.

Cal. C. Civ. P., § 1152.

6663. (3043.) Plaintiff may order discharge. Effect. The plaintiff in the action may at any time order the prisoner to be discharged, and he is not thereafter liable to imprisonment for the same cause of action.

Cal. C. Civ. P., § 1153.

6664. (3044.) Plaintiff must advance jailer's costs. Whenever a debtor is committed to jail on execution in a civil action, the creditor, his agent, or attorney must advance to the jailer, on such commitment, sufficient money for the support of the prisoner for one week, and must make the like advance for every successive week of his imprisonment, and in case of a failure to do so, the jailer must forthwith discharge such prisoner from custody; and such discharge shall have the same effect as if made by order of the creditor.

Cal. C. Civ. P., § 1154.

Payment of cost of keeping person committed on civil process, § 1508.

CHAPTER 20.

CLAIM AND DELIVERY.

6670. (3045.) Delivery may be claimed before answer. The plaintiff in an action to recover the possession of personal property may, at the time of issuing the summons, or at any time before answer, claim the delivery of such property to him as provided in this chapter.

Cal. C. Civ. P., § 509.

Limitation on action for personal property, three years, § 6468.

In replevin, the rule that a party who relies upon fraud must allege and prove it does not always apply.

Munns v. Loveland, 15 U. 250; 49 P. 743.

Jones v. McQueen, 13 U. 178; 45 P. 202.

Where an organ was set up in a church by plaintiff upon an agreement made with one who represented that he was the agent of the trustees, when he was not, and trustees refused to ratify the contract and pay for it, plaintiff might recover the organ or its value in case the organ could not be returned.

Farrand & V. O. Co. v. M. E. Church, 18 U. 29; 54 P. 818.

Without alleging special damages plaintiff may recover in replevin what the use of the property was reasonably worth during its detention.

Id.

A cause of action arises when and where the demand is made and the refusal occurs; and the fact that thereafter process may have been served in another county is immaterial, because the question is not where the property was when process was served, but where it was when demand was made for its possession.

Nebeker v. Harvey, 21 U. 363; 60 P. 1029.

Complaint in action to recover personal property must allege that plaintiff is the owner or entitled to the possession at the time of the commencement of the action.

Manti Bank v. Peterson, 30 U. 475; 86 P. 414.

Chambers v. Emery, 36 U. 380; 103 P. 1081.

One cannot maintain replevin against a joint tenant.

Hill v. Saeger, 3 U. 379; 3 P. 545.

Where a person comes lawfully into possession of another's property, a demand by the person entitled thereto must first be made before institution of action, unless the defendant's conduct obviates the necessity for demand.

Nielson v. Hyland, 51 U. —; 170 P. 778.

Where the only issue is as to the alleged wrongful taking, no demand is necessary, and the cause of action arises when the unlawful taking and detention occur.

Woodward v. Edmunds, 20 U. 118; 67 P. 848.

Judgment for defendant, in replevin on a bill of sale unconnected with plaintiff's title, was unjustified where there is uncontradicted evidence that the plaintiff had previously bought the property, and no evidence that it had parted with it.

Hydraulic, etc. v. Christensen, 38 U. 525; 114. P. 524.

Where the defendant in replevin claims only a special interest in the property under an attachment, a judgment for the defendant should state the value of the property and the value of the defendant's interest therein.

Bolitho v. East, 45 U. 181; 143 P. 584.

Where inseverable personal property is held by several persons as joint tenants, the tenant in actual possession may retain it as against the co-tenants.

Rocky Farm Co. v. Lunt, 46 U. 299; 151 P. 521.

A tenant in common of sheep may maintain replevin against his co-tenant for his individual interest.

Manti Savings Bk. v. Peterson, 33 U. 209; 93 P. 566.

Where a party taking up animals fails to impound them as estrays, and deliver them to the poundkeeper, he becomes a trespasser ab initio, and no demand by the owner is necessary.

Neilsen v. Hyland, 51 U. —; 170 P. 778.

No damages for the use of a work horse can be awarded where there is no evidence as to the rental value of horses at the place of defendant's residence or that plaintiff could have used the horses at any time during the period of their wrongful detention.

Id.

The complaint in replevin, alleging in the present tense ownership and right of possession, is sufficient, and allows proof thereof as of the time the action was started, though the

filing of the complaint was a few days after the verification.
James v. Jensen, 50 U. —; 167 P. 827.
Jones v. West Pub. Co., 51 —; 174 P. —.

Ordinarily counterclaims or counterdemands cannot be litigated in replevin actions, though in certain instances setoffs may be allowed to a limited extent.
Beck v. Lee, 51 U. —; 172 P. 686.

6671. (3046.) Requirements of affidavit. By whom made. When a delivery is claimed, an affidavit must be made by the plaintiff, or by some one on his behalf, showing:

1. A description of the property claimed;
2. That the plaintiff is the owner of the property claimed or has a special ownership or interest therein, stating the facts in relation thereto, and that he is entitled to the possession thereof;
3. That the property is wrongfully detained by the defendant;
4. The alleged cause of the detention thereof, according to his best knowledge, information, and belief;
5. That it has not been taken for a tax, assessment, or fine, pursuant to a statute, or seized under an execution or an attachment against the property of the plaintiff; or if so seized, that it is by statute exempt from such seizure; and,
6. The actual value of the property.

Kansas (1889) § 4260*. Cal. C. Civ. P., § 510*. In action to recover personal property taken by an officer under protest, the officer is not bound by the value stated in the affidavit, § 6620.

6672. (3047.) Order to sheriff indorsed on affidavit. The plaintiff or his attorney may, thereupon, by an indorsement in writing upon the affidavit, require the sheriff of the county where the property claimed may be to take the same from the defendant.

Cal. C. Civ. P., § 511.
To excuse omission of sheriff, directions by party or attorney must be in writing, § 1517.
In an action of replevin where, after judgment against plaintiffs, they denied that the attorney who brought the suit was authorized to bring such action, but the evidence showed that they had taken possession of the goods through their agent; held, that by accepting the goods they ratified the attorney's acts in bringing the suit.
Brown v. Parsons, 10 U. 322; 37 P. 346.

6673. (3048.) Undertaking. Sheriff to take property and serve papers. Upon receipt of the affidavit and notice with a written undertaking, executed by two or more sufficient sureties, approved by the sheriff, to the effect that they are bound to the defendant in double the value of the property, as stated in the affidavit, for the prosecution of the action, for the return of the property to the defendant, if return thereof be adjudged, and for the payment to him of such sum as may from any cause be recovered against the plaintiff, the officer must forthwith take the property described in the affidavit, if it be in the possession of the defendant or his agent, and retain it in his custody. He must without delay, serve on the defendant a copy of the affidavit, notice, and undertaking, by delivering the same to him personally, if he can be found, or to his agent, from whose possession the property is taken; or if neither can be found, by leaving them at the usual place of abode of either, with some person of suitable age and discretion, or if neither have any known place of abode, by putting them in the nearest postoffice postpaid directed to the defendant.

Cal. C. Civ. P., § 512.
If action dismissed, undertaking delivered to defendant, § 6848.
Qualifications of sureties hereunder, § 6677.
Qualifications of sureties generally, § 7223.
Return of notice, undertaking, and affidavit, § 6681.
Verdict in action to recover personal property, § 6823; judgment, § 6864; execution, §§ 6913, 6916.

6674. (3049.) Defendant may except to sureties. Notice. Justification. Waiver. The defendant may, within two days after the service of a copy of the affidavit and undertaking, give notice to the sheriff that he excepts to the sufficiency of the sureties. If he fails to do so, he is deemed to have waived all objections to them. When the defendant excepts, the sureties must justify on notice in like manner as upon bail on arrest; and the sheriff is responsible for the sufficiency of the sureties until the objection to them is either waived, as above provided, or until they justify. If the defendant except to the sureties, he cannot reclaim the property, as provided in the next section.

Cal. C. Civ. P., § 513.
Surety company not required to justify, § 1210.

6675. (3050.) Redelivery to defendant on giving bond. At any time

before the delivery of the property to the plaintiff, the defendant may, if he do not except to the sureties of the plaintiff, require the return thereof, upon giving to the sheriff a written undertaking, executed by two or more sufficient sureties, to the effect that they are bound in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may, for any cause, be recovered against the defendant. If a return of the property be not so required within two days after the taking and service of notice to the defendant, it must be delivered to the plaintiff, except as provided in § 6680.

Cal. C. Civ. P., § 514*.

6676. (3051.) Plaintiff may except to sureties. Notice. The defendant's sureties, upon notice to the plaintiff of not less than two nor more than five days, must justify before the judge, or the clerk, in the same manner as upon bail on arrest; and upon such justification, the sheriff must deliver the property to the defendant. The sheriff is responsible for defendant's sureties until they justify, or until the justification is completed or waived, and may retain the property until that time. If they, or others in their place, fail to justify at the time and place appointed, he must deliver the property to the plaintiff.

Cal. C. Civ. P., § 515.

6677. (3052.) Qualifications of sureties and manner of justification. The qualifications of sureties and their justification must be such as are prescribed by this code in respect to bail upon an order of arrest.

Cal. C. Civ. P., § 516*. Qualifications of bail on arrest, § 6645.

6678. (3053.) Concealed property may be taken by force after demand. If the property, or any part thereof, be concealed in a building or inclosure, the sheriff must publicly demand its delivery. If it be not delivered, he must cause the building or inclosure to be broken open, and take the property into his possession, and if necessary, he may call to his aid the power of the county.

Cal. C. Civ. P., § 517.

6679. (3054.) Delivery of property on payment of fees, etc. When the sheriff has taken the property as in this chapter provided, he shall keep it in a secure place and deliver it to the party entitled thereto, upon receiving his fees for taking, and necessary expenses for keeping the same.

Cal. C. Civ. P., § 518.

6680. (3055.) Claim by third person. Plaintiff to indemnify officer. If the property taken be claimed by another person than the defendant, or his agent, and such person make affidavit of his title thereto, or right to the possession thereof, stating the grounds of such title or right, and serve the same upon the sheriff, such officer is not bound to keep the property, or deliver it to the plaintiff, unless the plaintiff, on demand of him or his agent, indemnify the officer against such claim by an undertaking, by two sufficient sureties.

Cal. C. Civ. P., § 519*.

6681. (3056.) Return to be made within twenty days. The sheriff must file the notice, undertaking, and affidavit, with his proceedings thereon, with the clerk of the court in which the action is pending, within twenty days after taking the property mentioned therein.

Cal. C. Civ. P., § 520.

CHAPTER 21.

INJUNCTION.

6687. (3057.) Injunction defined. Granted by court or judge. An injunction is a writ or order requiring a person to refrain from a particular act. The writ or order may be granted by the court in which the action is brought, or by a judge thereof, and when made by a judge may be enforced as the order of the court.

Cal. C. Civ. P., § 525.

When judge may hear ex parte applications from another district, § 1677.

Power of judge at chambers, §§ 1679, 1805.

Original jurisdiction in district court, Con. art. 8, sec. 7, § 1667.

May be issued and served on legal holiday, § 1806.

Appeal does not stay injunction, note to § 6693.

Appeal does not lie from an order granting an injunction pendente lite.

North Point Canal Co. v. Utah & S. L. Canal Co., 14 U. 155; 46 P. 824.

CONTEMPT:

When the court, in allowing an appeal and supersedeas, has expressly refused to suspend the injunction appealed from, it may punish a breach of said injunction pending appeal.

In re Whitmore, 9 U. 441; 35 P. 524.

See Elliot v. Whitmore, 10 U. 238; 37 P. 459.

An order restraining certain officers of a corporation from selling treasury stock was in force when the stock was sold on a judgment obtained by a third person. The defendants were elected directors partly through the votes of the execution purchaser; held, that the defendants constituted a lawful board of directors, and that the officers had committed no breach of the restraining order.

Coit v. Freed, 15 U. 426; 49 P. 533.

To constitute a violation of an injunction, it must satisfactorily appear that the acts performed were included within the scope of the order.

Id.

6688. (3058.) In what cases granted. An injunction may be granted in the following cases:

1. When it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually;

2. When it appears by the complaint or affidavit that the commission or continuance of some act, during the litigation, would produce great or irreparable injury to the plaintiff;

3. When it appears during the litigation that the defendant is doing or threatens or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual;

4. An injunction may also be granted on the motion of the defendant, upon filing an answer praying for affirmative relief upon any of the grounds mentioned in this section, subject to the rules and provisions provided for the issuance of injunctions on behalf of the plaintiff.

Cal. C. Civ. P., § 526*.

Injunction to restrain waste during period of redemption, § 6946.

Restraining order when trial postponed to permit further development of mining claim, § 6787.

Injunction to restrain waste during foreclosure, § 7254.

Injunction to restrain foreclosure of chattel mortgage by advertisement and sale, § 472.

Injunction not to be granted to restrain collection of taxes, etc., exception, §§ 6094-6096.

Injunction to restrain publication of name, portrait, or picture for advertising purposes, § 8179.

Public utility commission may secure against public utility, § 4842.

Injunction, when issued in labor disputes, § 3652.

Injunction, abating nuisance, §§ 8177-8179.

Injunction, not granted against industrial commission, § 3161; dissolution fraternal insurance society, § 3297; public utility commission, except by supreme court, § 4834.

Facts sufficient to warrant relief must be alleged.

Leitham v. Cusick, 1 U. 242.

West Point Irr. Co. v. Moroni Ditch Co., 21 U. 229; 61 P. 16.

Restraining order that goes beyond the prayer of the complaint is improper.

Leitham v. Cusick, 1 U. 242.

MISCELLANEOUS:

It is waste in a tenant for life of real property to tear down a building thereon, although it is done with the intention of erecting a better one; and such an action may be prevented by injunction.

Dooly v. Stringham, 4 U. 107; 7 P. 405.

Injunction will be granted to restrain collection of a void tax.

Kerr v. Woolley, 3 U. 456; 24 P. 831.

Pettit v. Duke, 10 U. 311; 37 P. 568.

Armstrong v. Ogden City, 9 U. 255; 34 P. 53.

Armstrong v. Ogden City, 12 U. 476; 43 P. 119.

Mercur G. M. & M. Co. v. Spry, 16 U. 222; 52 P. 382.

The collection of an illegal tax by sale of a railroad company's cars will not be enjoined on the ground that a cloud will thereby cast on the company's realty, though it does not affirmatively appear that the personal property levied on is of sufficient value to pay the tax, as the presumption always is that a levy is sufficient to satisfy the demand.

O. S. L. Ry. Co. v. Standing, 10 U. 452; 37 P. 687.

Appellants owned the alternate sections of land through a district forty miles long and thirty-six miles wide, which were unfenced, and remaining sections of which belonged to the government. In an action brought for an injunction to restrain defendants from crossing over said alternate sections and from pasturing their sheep thereon, held, that the facts stated in the complaint were not sufficient to warrant the granting of the injunction.

Buford v. Houtz, 5 U. 591; 18 P. 633; affirmed, 133 U. S. 320.

Where acts of trespass are repeated, continuing, and ruinous, or the damage irreparable, and the remedy at law is inadequate, injunction will lie.

Strawberry Valley C. Co. v. Chipman, 13 U. 454; 45 P. 348.

Where an assessment on the capital stock of a corporation has been made by a board of directors de jure, and there is no question as to any irregularity in the levy, or any want of authority on the part of the lawful board to make it, the assessment will be valid, and an injunction to restrain the collection denied.

Chandler v. Sheep Rock M. Co., 15 U. 434; 49 P. 535.

Where, by reason of the destruction of the record, a party has been prevented from appealing, a court of equity may enjoin the execution of the judgment and grant a new trial, but not unless it is made to appear that material errors were committed affecting the substantial rights of the party seeking relief.

Bailey v. Stevens, 11 U. 175; 39 P. 828.

In refusing to permit the board of public works of Salt Lake City to act in accordance with law, and directing the superintendent of waterworks and city engineer to construct im-

provements independent of said board, defendants are acting without authority of law and should be enjoined.

Nelden v. Clark et al., 20 U. 382; 59 P. 524.

Injunction lies to restrain state superintendent of public instruction from entering into contracts for purchase of school books, when law has not been strictly complied with.

Tanner v. Nelson, 25 U. 226; 70 P. 984.

Injunction does not lie to restrain rival telephone company from using same number for trouble call.

R. M. Bell Tel. Co. v. Ind. Tel. Co., 31 U. 377; 88 P. 26.

A party basing his right to enjoin another from interfering with the use of land, upon either adverse user or upon dedication, whether express or implied, must plead facts constituting such right or claim.

Farr v. Wheelwright C. Co., 49 U. 274; 163 P. 256.

The court may, in a proper case where there are both legal and equitable remedies, limit the complaining party to his legal remedy, especially where the injury may be fully compensated by damages and where, to do otherwise, would inflict an unnecessary expense on the wrongdoer.

Lewis v. Pingree Natl. Bank, 47 U. 35; 151 P. 558.

Equity has no jurisdiction to restrain prosecutions for violation of an ordinance prohibiting the sale of liquor in a "dry" city.

Hoffman v. Tooele City et al., 42 U. 353; 130 P. 61.

In a boundary dispute where it is claimed one of the parties has built over the line, but there is uncertainty as to the real line, where no injury would result to complaining party by granting him what he was entitled to according to his possessory rights, and injustice would result if more were given, the doubt should be resolved in favor of the party on whom unnecessary injury would be inflicted by compelling the other to undo what he had done, though in good faith and under a claim of right.

Mayor v. Flynn, 46 U. 598; 150 P. 962.

RAILROADS:

Injunction may command removal of obstruction on railroad.

Henderson v. Ogden City Ry., 7 U. 199; 26 P. 286.

An injunction at the suit of abutting owners will be issued against a street railway which, pursuant to a franchise, is proceeding to construct a railway upon a street already incumbered by two tracks and numerous poles, where the tracks already on the street are sufficient for the public uses and the new track will seriously injure the use of the street for ordinary purposes.

Dooly Block v. S. L. Rapid Transit Co., 9 U. 31; 33 P. 229.

The owner of land who makes no objection to the construction of a railway track thereon does not by his mere silence and inaction lose the right to obtain an injunction restraining the operation of such railway, unless damages are paid for the land.

Coombs v. Salt Lake and Ft. Douglas Co., 9 U. 322; 34 P. 248.

In case of a railroad track about to be laid in a street and across a sidewalk, without lawful authority, in such a way as to become a public and private nuisance, a private citizen specially damaged may have the threatened damage enjoined.

Cereghino v. O. S. L. R. R. Co., 26 U. 467; 73 P. 634.

A switch track which is a part of a general railway system, which is not designed for the exclusive use of any particular shipper, but may be used by all shippers, is a public utility, and the operation thereof in the streets, when properly authorized, will not be enjoined but the extension which runs in private property for individual use may be enjoined.

Stockdale v. Ry. Co., 28 U. 201; 77 P. 849.

TRESPASS ON MINING PROPERTY:

Injunction lies to restrain trespass on mining property and removal of ores.

Smith v. Richardson, 1 U. 245.

Old Tel. M. Co. v. Central S. Co., 1 U. 331.

Leitham v. Cusick, 1 U. 242.

But not where plaintiff's title is disputed and no action has been brought to establish it at law.

Old Tel. Mining Co. v. Central S. Co., 1 U. 331.

McGregor v. Silver King M. Co., 14 U. 47; 45 P. 1091.

One tenant in common of mine will not be enjoined from working the same at suit of his co-tenant, he being pecuniarily able to respond in damages.

Kahn v. Old Tel. Mining Co., 2 U. 13.

An injunction is a preventive remedy only and cannot be invoked to restrain a party from doing an act which he has already done.

Kahn v. Old Tel. Mining Co., 2 U. 13.

But see Henderson v. Ogden City Ry., 7 U. 199; 26 P. 286, and Paragoonah F. & C. Co. v. Edwards, 9 U. 477; 35 P. 487.

The court will not ordinarily exercise the summary and extraordinary remedy of injunction, except where there is probability of irreparable injury, inadequacy of pecuniary compensation, or to prevent a multiplicity of suits, where there is reason to fear substantial, serious, and irreparable damage, for which a court of law would furnish no adequate relief.

McGregor v. Silver King M. Co., 14 U. 47; 45 P. 1091.

The entering upon defendant's mining claim and the digging of a trench and laying of a pipe therein is not such a violation of defendant's rights as to entitle him to an injunction.

Crescent M. Co. v. Silver King M. Co., 17 U. 444; 54 P. 244.

Same case, 14 U. 47; 45 P. 1091.

INTERFERENCE WITH WATER RIGHTS:

To compel removal of obstructions from canal.

Paragoonah F. & C. Co. v. Edwards, 9 U. 477; 35 P. 487.

To prevent the pollution of waters used for irrigation and domestic purposes.

Crane v. Winsor, 2 U. 248.

North Point C. I. Co. v. Utah & S. L. C. Co., 16 U. 246; 52 P. 168.

In order to successfully maintain an injunction proceeding it must appear that the acts of those sued caused the injury, and that if such acts are continued, damages will follow.

West Point Irr. Co. v. Moroni, etc., Ditch Co., 21 U. 229; 61 P. 16.

Before an appropriator of water can be enjoined for diversion by an appropriator farther down the stream, it must satisfactorily appear that, had the water been allowed to pass down the stream, it would have reached plaintiff's ditch.

Id.

6689. (3059.) Notice. Restraining order. Application, how made. Evidence on hearing. An injunction shall not be granted, except upon notice, or upon an order to show cause; but, in the meantime, the defendant may be restrained until the decision of the court or judge, granting or refusing the injunction is rendered. When an order to show cause is granted without notice, a copy of the pleadings and affidavits upon which it was allowed must be served with the order. An application for an injunction or order to show cause may be made on verified pleadings, or on verified pleadings and affi-

davits, and the application for the injunction may be heard upon the pleadings, affidavits, and other evidence. Satisfactory cause must be shown for the issuance of the injunction or restraining order.

Cal. C. Civ. P., § 528*.

6690. (3060.) Undertaking, when required. Justification of sureties. Failure. On granting a restraining order or an injunction, the court or judge must require, except when the state, a county, or a municipal or other public corporation, or a married woman in a suit against her husband, is plaintiff, a written undertaking on the part of the plaintiff, with sufficient sureties, to the effect that the plaintiff will pay to the party enjoined such damages, not exceeding an amount to be specified, as such party may sustain by reason of the injunction, if the court finally decides that the plaintiff was not entitled thereto. Within five days after the service of the restraining order or injunction, the defendant may except to the sufficiency of the sureties. If he fails to do so, he is deemed to have waived all objections to them. When excepted to, the plaintiff's sureties, upon notice to the defendant of not less than two nor more than five days, must justify before a judge or clerk of the court in the same manner as upon bail upon arrest, and upon failure to justify, or if others in their place fail to justify at the time and place appointed, the order granting a restraining order or an injunction shall be dissolved. If an injunction be asked against any person or corporation alleged to be maintaining a nuisance, the court may, if it be a proper case therefor, refuse the granting of an injunction which would prevent the operation of the business creating such nuisance, requiring the defendant, as a condition of such refusal, to execute and file with the clerk of the court a bond or undertaking in such amount as the court may fix, with sureties approved by the court, conditioned to pay to the plaintiff all damages that may be recovered on account of a continuance of the nuisance complained of. Am'd '03, p. 52.

Cal. C. Civ. P., § 529*.
If action dismissed, undertaking delivered to defendant, § 6848.
Justification of bail on arrest, §§ 6645, 6646.
Qualifications of sureties generally, § 7223.

6691. (3061.) Business of corporation suspended only upon notice. Exception. An injunction to suspend the general and ordinary business of a corporation cannot be granted without due notice of the application therefor to the proper officer or agent of the corporation, except when the state is a party to the proceeding.

Cal. C. Civ. P., § 531*.

6692. (3062.) Motion to dissolve or modify. Notice. Hearing. If an injunction be granted without notice, the defendant, at any time before the trial, may apply, upon reasonable notice, to the judge who granted the injunction, or to the court in which the action is pending, or a judge thereof, to dissolve or modify the same. The application may be made upon the complaint and the affidavit or affidavits on which the injunction was granted, if any were used, or upon affidavits or other testimony on the part of the defendant, with or without the answer. If the application be made upon affidavits, or other evidence on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other evidence in addition to those on which the injunction was granted, and the defendant may then, in proper cases, introduce rebutting affidavits or other evidence; *provided,* that for the purpose of allowing the plaintiff to introduce further evidence, the answer or verification thereto attached shall be deemed an affidavit.

Cal. C. Civ. P., § 532*. See Sup. (1889) p. 369.

6693. (3063.) Id. Order dissolving or modifying. If upon such application it satisfactorily appears that there is not sufficient ground for the injunction, it must be dissolved; or if it satisfactorily appears that the extent of the injunction is too great, it must be modified.

Cal. C. Civ. P., § 533.
Where defendants were deprived of possession of mining ground under a restraining order improperly issued, the judge who granted the same cannot without notice, restore defendants to possession.
Leitham v. Cusick, 1 U. 242.
16 U. 246; 52 P. 168.

A restraining order made without jurisdiction is void, and may be set aside though made at the term preceding the making of the motion to set aside.
Bullion-B. & C. M. Co. v. Eureka Hill M. Co., 5 U. 182; 12 P. 660.
Where the allegations of the complaint and affidavits supporting it are substantially denied

and the respective rights of the parties are uncertain and indefinite, and it appears that the continuance of a restraining order until the hearing will work great injury to one of the parties without corresponding benefit to the other; held, that the restraining order should not continue, if the parties in the meantime can be protected by means of an indemnity bond.

Crescent M. Co. v. Silver King M. Co., 14 U. 47; 45 P. 1093.

Appeal does not stay injunction.

Ex parte Whitmore, 9 U. 441; 35 P. 524.

Elliot v. Whitmore, 10 U. 238; 37 P. 459.

Bullion-B. & C. M. Co. v. Eureka Hill M. Co., 5 U. 151; 13 P. 174.

Where defendants, who are land owners under the canals of a quasi public irrigation district and members thereof, were restrained from interferring in any manner with the ditches of the district, such decree became functus officio on the dissolution of the district, whereupon defendants were remitted to their original rights as individual land owners.

Thompson v. McFarland, 29 U. 455; 82 P. 478.

Where a defendant in possession of a fund is enjoined from disposing of the same, and a receiver is appointed for the fund, subsequent discharge of a portion of the fund from the receivership removed the part discharged from the operation of the injunction.

Com. Nat'l. Bank v. Page & Brinton, 45 U. 14; 142 P. 709.

CHAPTER 22.

ATTACHMENT.

6704. (3064.) When and in what cases issued. The plaintiff, at the time of issuing the summons, or at any time afterward, may have the property of the defendant, not exempt from execution, attached as security for the satisfaction of any judgment that may be recovered, unless the defendant give security to pay such judgment, as in this chapter provided, in the following cases: In an action upon a judgment or upon a contract express or implied, which is not secured by any mortgage, or lien upon real or personal property situate or being in this state, or, if originally so secured, when such security has, without any act of the plaintiff, or of the person to whom the security was given, become valueless; against a defendant who—

1. Is not residing in this state; or,

2. Stands in defiance of an officer, or conceals himself so that process cannot be served upon him; or,

3. Has assigned, disposed of, or concealed, or is about to assign, dispose of, or conceal, any of his property with intent to defraud his creditors; or,

4. Has departed or is about to depart from the state to the injury of his creditors; or,

5. Fraudulently contracted the debt, or incurred the obligation respecting which the action is brought.

Cal. C. Civ. P., § 537*.

Sufficiency of affidavits, notes to §§ 6706, 6128.

Property exempt from attachment, §§ 6712, 6923-6927.

No exemption for non-resident or person about to depart except ordinary wearing apparel, § 6927.

Causes for attachment shall not be stated in the alternative, § 6728.

Writ of garnishment may be issued when attachment issued or thereafter, § 6730.

Attachment of property of lessee by landlord, §§ 3778-3782.

Fraudulent sales, etc., void, §§ 5135, 5821.

Fraudulent concealment or disposal of property, a misdemeanor, §§ 8006, 8007.

May not defeat title of transferee under non-negotiable document of title, when, § 5143.

Will not lie against goods for which negotiable document of title issued, when, § 5148.

Will not lie where negotiable warehouse receipt is issued unless surrendered, § 6225.

Under the facts stated; held, that the right of stoppage in transitu prevailed over the attempted levy by an attachment:

Kissel v. U. P. Ry. Co., 6 U. 128; 21 P. 499.

Plaintiff brought suit on a note not asking foreclosure of the mortgage, and obtained a writ of attachment on defendant's property on an affidavit that the mortgage had become nugatory by the act of the defendant; held, that such action was a waiver of the mortgage lien.

Bacon v. Reybould, 4 U. 357; 10 P. 481, 11 P. 510.

Whatever motive or malice prompts the bringing of an attachment suit, and though it terminates in favor of defendant, no action will lie unless the attachment was sued out without probable cause.

Cahoon v. Hoggan, 31 U. 74; 86 P. 763.

Hamer v. First N. Bank, 9 U. 215; 33 P. 941.

One who claims the attached property may intervene in the attachment suit and have his rights determined but he cannot question the regularity and validity of the attachment.

Houston etc. v. Hechler, 44 U. 64; 138 P. 1159.

Under § 6323, the sale of chattels in the vendor's possession without a delivery and actual and continual change of possession is such a fraud as permits the issuance of an attachment irrespective of any actual intent to defraud.

Charleston Co-op. v. Allen, 40 U. 575; 123 P. 578.

Mortgaging property pursuant to an agreement to secure an accommodation indorser of the mortgagor's note is not a fraudulent disposition of the property so as to permit an attachment.

Godbe v. Allen, 8 U. 117; 29 P. 881.

If the res are in the state, the court has jurisdiction.

Thum v. Pingree, 31 U. 348; 61 P. 18.

An attachment proceeding is essentially one in rem.

Bristol v. Brent, 36 U. 108; 103 P. 1076.

Griffin v. Howell, 38 U. 357; 113 P. 326.

But if the court has jurisdiction of the defendant, the proceeding is in the nature of a personal action.

Id.

Where property alleged to belong to defendant was released from attachment on a claimant depositing a sum of money to secure plain-

tiff's recovery, if any, and the property was thereupon returned to the claimant, the court in which the attachment was pending had no jurisdiction, on motion, to enter an order discharging the same or releasing the deposit on affidavits of the claimant that the property attached and deposit made in lieu thereof belonged to him and not to the attachment defendant.

Larsen v. Richards, 43 U. 196; 134 P. 583.

6705. (3065.) Attachment before maturity of claim. Judgment. A creditor may bring an action on his claim before it is due and have an attachment against the property of the debtor in the cases mentioned in subs. 3, 4, and 5 of the next preceding section, and the property attached, or its proceeds, after its disposition as provided in §§ 6718, 6719, may be held subject to the judgment thereafter to be rendered; but no judgment shall be rendered thereon until such obligation shall, by its terms, become due.

Judgment against garnishee for debt not due, § 6746.

Where an attachment is issued on a debt not due, the complaint, to constitute a proper pleading, must contain in addition to the allegations of fraud, a statement of the facts constituting the fraud. Fraud cannot be alleged in general terms.

Claflin Co. v. Simon, 18 U. 153; 55 P. 376.

Selz, Schwab & Co. v. Tucker, 10 U. 132; 37 P. 249.

6706. (3066.) Affidavit required. Contents. The clerk of the court shall issue the writ of attachment upon receiving an affidavit by or on behalf of the plaintiff, which shall be filed, setting forth:

1. That the defendant is indebted to the plaintiff, specifying the amount of such indebtedness as near as may be over and above all legal counterclaims, and whether upon a judgment or an express or implied contract, and that the payment of the same has not been secured by any mortgage or lien upon real or personal property, or any pledge of personal property, situate or being in this state; or, if originally so secured, that such security has, without any act of the plaintiff, or the person to whom the security was given, become valueless; and that the same is an actual bona fide existing demand due and owing from the defendant to the plaintiff;

2. And in all cases that the attachment is not sought and the action is not prosecuted to hinder, delay, or defraud any creditor of the defendant, and also specifying one or more of the causes set forth in § 6704 as the ground of the attachment.

Cal. C. Civ. P., § 538*.

Causes for attachment not to be stated in alternative, § 6728.

Provisions liberally construed, § 6728.

Sufficiency of affidavit, note to § 6726.

Unlawful to issue writ before filing of affidavit, or when affidavit does not substantially conform to this section, § 8512.

Affidavit showing an express contract for direct payment of money in the general statement of how the debt accrued, and that it is the same demand sued for, is sufficient.

Bowers v. London Bank of U., 3 U. 417; 4 P. 225.

Amount stated in writ must conform to amount alleged in complaint.

Id.

When letters "ss" are omitted, county being stated, affidavit is not defective.

McCord & N. Mer. Co. v. Glenn, 6 U. 139; 21 P. 500.

Affidavit that "defendant has disposed of and concealed, and is about to assign, dispose of, and conceal" his property, etc., is good.

McCord & Nave Mer. Co. v. Glenn, 6 U. 139; 21 P. 500.

Deseret Bank v. Little, R. & Co., 13 U. 265; 44 P. 930.

An allegation in the language of the statute under § 6704, sub. 3, held sufficient.

Johnson v. Emery, 31 U. 126; 86 P. 869.

An attachment rests on the affidavit, not the complaint.

Griffin v. Howell, 38 U 357; 113 P. 326.

6707. (3067.) Id. Undertaking required. Before issuing the writ, the clerk must require a written undertaking on the part of the plaintiff, with sufficient sureties, in a sum not less than the amount claimed by the plaintiff, but in no case shall an undertaking be required exceeding $10,000 nor less than $200 in amount. The condition of such undertaking shall be to the effect that if the defendant recover judgment, or if the attachment be wrongfully issued, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking.

Cal. C. Civ. P., § 539*.

If action dismissed, undertaking delivered to defendant, § 6848.

Qualifications of sureties generally, § 7223.

Corporate suretyship, §§ 1201, 1208-1216.

Undertaking may be amended.

McCord & Nave Mer. Co. v. Glenn, 6 U. 139; 21 P. 500.

Amount of undertaking within limits prescribed is in discretion of the clerk.

Powers v. London B. of U., 3 U. 417; 4 P. 225.

6708. (3068.) Exception to sureties. Justification. Within five days after the levy of the attachment, the defendant may except to the sufficiency of the sureties. If he fails to do so, he is deemed to have waived all objections to them. When excepted to, the plaintiff's sureties, upon notice to the defendant of not less than two nor more than five days, must justify before a

judge of the district court, or before the clerk, thereof, and upon failure to justify, or if others in their places fail to justify, at the time and place appointed, the clerk or judge shall issue an order vacating the writ of attachment.

Cal. C. Civ. P., § 539.
Justification of sureties on civil arrest, § 6616.

6709. (3069.) Writ directed to sheriff. Contents. To different counties. The writ must be directed to the sheriff of any county in which property of such defendant may be, and must require him to attach and safely keep all the property of such defendant within his jurisdiction not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, the amount of which must be stated in conformity with the complaint, unless the defendant give him security by the undertaking, of at least two sufficient sureties, in an amount sufficient to satisfy such demand, besides costs, or in an amount equal to the value of the property which has been or is about to be attached, in which case to take such undertaking. Several writs may be issued at the same time to the sheriffs of different counties; and the plaintiff may have other writs of attachment as often as he may require at any time before judgment.

Cal. C. Civ. P., § 540*.
Undertaking to release attachment, § 6725.
Property exempt from attachment, §§ 6712, 6923-6927.
Writ, how executed, § 6713, and note.

6710. (3070.) Return to be made within twenty days. The officer making the service must return the writ of attachment with the summons, if issued at the same time, otherwise within twenty days after its receipt, with a certificate of his proceedings indorsed hereon or attached thereto.

Cal. C. Civ. P., § 559*.
Inventory of property to be returned with writ, § 6717.

6711. (3071.) Writs to be executed in order received. When there are several attachments against the same defendant, they shall be executed in the order in which they were received by the officer.

Ohio, § 5527; Kan. (1889) § 4279.
Goddard v. Parsons, 12 U. 376; 42 P. 1134.

6712. (3072.) Defendant's property not exempt may be attached. The rights or shares which the defendant may have in the stock of any corporation or company, together with the interest and profits thereon, and all debts due such defendant, and all other property in this state of such defendant not exempt from execution, may be attached, and, if judgment be recovered, be sold to satisfy the judgment and execution.

Cal. C. Civ. P., § 541.
Property exempt, §§ 6923-6927.
No exemption, except of wearing apparel, for non-resident or one about to depart, § 6927.

6713. (3073.) Writ, how executed. The officer to whom the writ is directed and delivered must execute the same without delay, and if the undertaking mentioned in § 6709 be not given, as follows:

1. Real property, standing upon the records of the county in the name of the defendant, must be attached by filing with the recorder of the county a copy of the writ, together with a description of the property attached and a notice that it is attached, and by leaving a similar copy of the writ, description, and notice with an occupant of the property, if there is one; if not, then by posting the same in a conspicuous place on the property attached.

2. Real property or an interest therein belonging to the defendant and held by any other person, or standing on the records of the county in the name of any other person, must be attached by filing with the recorder of the county a copy of the writ, together with a description of the property and a notice that such real property and any interest of the defendant therein, held by or standing in the name of such other person, naming him, are attached; and by leaving with the occupant, if any, and with such other person or his agent if known and within the county, or at the residence of either, if within the county, a copy of the writ, with a similar description and notice. If there is no occupant of the property, a copy of the writ, together with such description and notice, must be posted in a conspicuous place upon the property. The recorder must index such attachment when filed, in the names both

of the defendant and the person by whom the property is held, or in whose names it stands on the records.

3. Personal property capable of manual delivery must be attached by taking it into custody.

4. Upon cattle, horses, or sheep running at large and commonly known as range stock, between the 1st day of November and the next succeeding 15th day of May, by the sheriff's filing with the recorder of the county in which such property is running at large, a notice as hereinbefore described, specifying the number as nearly as may be and containing a description of such stock by marks and brands; and such levy shall be equally valid and effectual as if such cattle, horses, or sheep had been seized and the possession and control thereof retained by the officer. The recorder shall receive and file all such notices, numbering the same consecutively, and must keep the same in his office in regular and orderly file, and shall make an entry thereof in his record of chattel mortgages. Notwithstanding the provisions of this subdivision, an attachment may, by direction of the plaintiff or his attorney, be levied upon the property mentioned in this subdivision by taking the same into custody; but if additional costs are made by such levy, the same shall not be allowed to the plaintiff, if, in the judgment of the court, the taking of the property into the custody of the sheriff was unnecessary.

5. Stocks or shares, or interest in stocks or shares, of any corporation or company, must be attached by leaving with the president, or other head of the same, or the secretary, cashier, or other managing agent thereof, a copy of the writ, and a notice stating that the stock or interest of the defendant is attached in pursuance of such writ.

6. Debts and credits and other personal property not capable of manual delivery must be attached by leaving with the person owing such debts, or having in his possession, or under his control, such credits or other personal property, or with his agent, a copy of the writ and a notice that the debts owing by him to the defendant, or the credits or other personal property in his possession or under his control belonging to defendant, are attached in pursuance of said writ.

Cal. C. Civ. P., § 542*. N. Dak. (1895) § 5362*. Mont. Civ. P., § 940.

Attachment of mortgaged personal property, § 476.

Delivery of property subject to claims, § 6716.

Plea when sued for conversion, § 6620.

To excuse omission of sheriff, directions of party or attorney must be in writing, § 1517.

Decisions on wrongful levy and sale under execution, note to § 6928.

An officer has no right to make use of a tenement of another in which to store property attached by him, without the assent of the occupant. A possession by the officer longer than is reasonably necessary to remove the goods or take an inventory is an abuse of his authority, and renders him a trespasser ab initio.

Snell v. Crowe, 3 U. 26; 5 P. 522.

A railroad corporation is subject to garnishment in Utah for wages of an employe earned in Idaho.

Losee v. McCarty, 5 U. 528; 17 P. 452.

Serving copy of writ on person in charge of personal property insufficient—it must be taken into custody.

Kiesel v. U. P. Ry. Co., 6 U. 128; 21 P. 499.

Court cannot direct sheriff how or upon what to levy.

Northwestern W. & F. Co. v. S. L. Copper Mfg. Co., 11 U. 404; 40 P. 702.

Attaching creditors not liable for acts of sheriff unless by interference in some way they make themselves liable.

Munns v. Loveland, 15 U. 250; 49 P. 743.

An officer who seizes property in the hands of the debtor may justify under the execution or process, but when he takes property from a third person who claims to be the owner thereof, if on execution, he must show the judgment and execution; if on attachment, an indebtedness, the writ of attachment, and the proceedings on which it was based.

Newton v. Brown, 2 U. 126.

Same case, 1 U. 287.

Snell v. Crowe, 3 U. 26; 5 P. 522.

Jones v. McQueen, 13 U. 178; 45 P. 202.

Where property is found in the possession or offices having lawful authority to issue it, and the writ under which the levy was made and the property seized was issued by a court or officer having lawful authority to isuue it, and is in lawful form, the officer may justify the levy by producing the writ.

Munns v. Loveland, 15 U. 250; 49 P. 743.

An attaching creditor, as well as a receiver, has an insurable interest in the property attached.

McLaughlin v. Park City Bank, 22 U. 473; 63 P. 589.

A service of a writ, as provided in sub. 6, only prevents the debtor from disposing of the property, and confers no jurisdiction on the court to dispose of it.

Cole v. Utah-I. Sugar Co., 35 U. 148; 99 P. 681.

Bristol v. Brent, 36 U. 108; 103 P. 1076.

6714. (3074.) Attachment of property in hands of third person, on written order. Upon receiving information in writing from the plaintiff or his attorney that any person has in his possession or under his control any credits or other personal property belonging to the defendant, or is owing any debt to the defendant, the officer making the service must serve upon such person a

copy of the writ, and a notice that such credits or other property or debts, as the case may be, are attached in pursuance of such writ.

Cal. C. Civ. P., § 543.
Garnishment statutes, §§ 6730-6753.
Delivery of property when subject to claim of third party, §§ 476, 6716.
Priorities in a case under this statute determined.
Remington v. Weber, 11 U. 181; 39 P. 822.

6715. (3075.) Id. Person served liable for property attached. All persons having in their possession or under their control any credits or other personal property belonging to the defendant, or owing any debts to the defendant at the time of service upon them of a copy of the writ and notice, shall be, unless such property be delivered up or transferred, or such debts be paid to the officer, liable to the plaintiff for the amount of such credits, property or debts, until the attachment be discharged, or any judgment recovered by him be satisfied.

Cal. C. Civ. P., § 544.
Officer's receipt is a discharge, § 6718.
Municipal corporations now subject to attachment and garnishdment, § 6754.
Answer of municipal corporations conclusive, § 6755.

Where it is sought to subject a debtor's interest in partnership property to the payment of his individual debts, the safer and better way is to proceed by trustee process or process of garnishment.

Snell v. Crowe, 3 U. 26; 5 P. 522.

Corporations under laws of United States but doing business in Utah may be garnished in Utah for wages of employe, though earned outside the state.

Losee v. McCarty, 5 U. 528; 17 P. 452.

Where the judgment debtor has died, an order upon a garnishee to pay money upon executions issued after the death of such debtor is absolutely void.

Weaver v. Pickard, 7 U. 296; 26 P. 581.

If garnishee refuses to deliver property of defendant to officer and claims a lien thereon, and plaintiff neither satisfies the lien nor indemnifies officer to take possession of property and contest lien, the responsibility of officer ceases with the return of the writ into court.

Goddard v. Parsons, 12 U. 376; 42 P. 1134.

A municipal corporation cannot be garnisheed in suit between private parties, nor can it waive this exemption from garnishment process.

Van Cott v. Pratt, 11 U. 209; 39 P. 827.
Chamberlain v. Watters, 10 U. 298; 37 P. 566.

Officer is not liable if after garnishee has sold sufficient property to satisfy his lien, officer levies upon and sells balance in pursuance of execution duly issued to him in another action, and applies proceeds on judgment therein.

Id.

Appellant obtained a judgment against defendants, whose indebtedness on the judgment thus obtained was attached by a judgment creditor of appellant and paid by defendants to the sheriff; held, that such attachment was valid under this section.

Snelson v. Harris, 14 U. 495; 48 P. 480.

Where a bank holding funds belonging to a judgment debtor refused to surrender such funds to an officer upon a service on it of the execution issued upon the judgment obtained by the intervenor against the judgment debtor, intervenor could bring an action against the bank to recover such money by intervening in a pending action by the judgment debtor against the bank.

Wheelwright v. Copper Natl. Bank, 42 U. 579; 133 P. 132.

An attachment of a credit prevents the debtor from disposing of the property while a garnishment requires him to answer, and places the debt in the custody of the law.

Bristol v. Brent, 36 U. 108; 103 P. 1076.

6716. (3076.) Id. Examination of defendant and others. Order for delivery. Any person owing debts to the defendant, or having in his possession or under his control any credits or other personal property belonging to the defendant, may be required to attend before the court, or judge, or a referee appointed by the court or judge, and be examined on oath respecting the same. The defendant may also be required to attend for the purpose of giving information respecting his property, and may be examined on oath. The court or judge may, after such examination, order personal property capable of manual delivery to be delivered to the officer on such terms as may be just, having reference to any liens thereon or claims against the same, and a memorandum to be given of all other personal property, containing the amount and description thereof.

Cal. C. Civ. P., § 545.
Similar provisions in proceedings supplementary, §§ 6956.
Attachment of mortgaged property, § 476.
Garnishee may deduct sums due him, § 6742.

6717. (3077.) Officer to make inventory. Statement of person served. The officer making the service must make a full inventory of the property attached and return the same with the writ. To enable him to make such return as to the debts and credits attached, he must request, at the time of service, the party owing the debt, or having the credit, to give him a memorandum stating the amount and description of each; and if such memorandum be refused, he must return the fact of refusal with the writ. The party refusing to give the memorandum may be required to pay the costs of any proceeding taken for the purpose of obtaining information respecting the amount and description of such debt or credit.

Cal. C. Civ. P., § 546.
Return of writ, § 6710.

6718. (3078.) Perishable property to be sold. Proceeds. Officer to col-

lect debts. Receipt. If any of the property attached be perishable, the officer must sell the same in the manner in which such property is sold on execution. The proceeds and other property attached by him must be retained by him, to answer any judgment that may be recovered in the action, unless sooner subjected to execution upon another judgment recovered previous to issuing the attachment. Debts and credits attached may be collected by him. The receipt of the officer is a sufficient discharge for the amount paid.

Cal. C. Civ. P., § 547*.
If defendant recovers judgment, proceeds and property delivered to him, § 6723.

6719. (3079.) Sale of property when interests subserved thereby. Order. Whenever property has been taken by an officer under a writ of attachment, and it is made to appear satisfactorily to the court or a judge thereof that the interest of the parties to the action will be subserved by a sale thereof, the court or judge may order such property to be sold in the same manner as property is sold under an execution, and the proceeds to be deposited in the court, to abide the judgment in the action. Such order can be made only upon notice to the adverse party or his attorney, in case such party has been personally served with a summons in the action.

Cal. C. Civ. P., § 548.

6720. (3080.) Judgment, how satisfied. Sale, notice of. If judgment be recovered by the plaintiff, the officer must satisfy the same out of the property attached by him which has not been delivered to the defendant, or a claimant, as hereinbefore provided, or subjected to execution on another judgment recovered previous to the issuing of the attachment, if it be sufficient for that purpose:

1. By paying to the plaintiff the proceeds of all sales of perishable property sold by him, or of any debts or credits collected by him or so much as shall be necessary to satisfy the judgment;

2. If any balance remains due, and an execution shall have been issued on the judgment, he must sell under the execution so much of the property, real or personal, as may be necessary to satisfy the balance, if enough for that purpose remains in his hands. Notice of the sales must be given, and the sales conducted as in other cases of sales on execution.

Cal. C. Civ. P., § 550.
Appeal does not continue attachment in force unless undertaking given, § 7005.
Where a judgment is had and an order of sale is issued for the attached property, an order recalling the special execution issued pursuant to the order is a nullity. The order of sale is in the nature of a judgment and cannot be set aside only by formal proceedings for that purpose.
Newell v. Third Dist. Court., 37 U. 418; 108 P. 1121.

6721. (3081.) Id. Deficiency. Collected as upon execution. Redelivery. If, after selling all the property attached by him remaining in his hands, and applying the proceeds, together with the proceeds of any debts or credits collected by him, deducting his fees, to the payment of the judgment, any balance shall remain due, the officer must proceed to collect such balance, as upon an execution in other cases. Whenever the judgment shall have been paid, the officer, upon reasonable demand, must deliver over to the defendant the attached property remaining in his hands, and any proceeds of the property attached unapplied on the judgment.

Cal. C. Civ. P., § 551.

6722. (3082.) Action on defendant's undertaking. If the execution be returned unsatisfied, in whole or in part, the plaintiff may prosecute any under taking given pursuant to § 6709, or § 6725, or he may proceed as in other cases upon the return of the execution.

Cal. C. Civ. P., § 552.
Proceedings supplementary to execution, §§ 6955-6964.

6723. (3083.) Proceedings when defendant recovers judgment. If the defendant recovers judgment against the plaintiff, any undertaking received in the action, all the proceeds of sales and money collected by the officer, and all the property attached remaining in his hands must be delivered to the defendant or his agent; the order of the attachment shall be discharged, and the property released therefrom.

Cal. C. Civ. P., § 553.
If action be dismissed, undertaking delivered to defendant, § 6848.

6724. (3084.) Application to discharge or modify on giving bond.

Whenever the defendant has appeared in the action, he may, upon reasonable notice to the plaintiff, apply to the court in which the action is pending, or to the judge thereof, for an order to discharge the attachment, wholly or in part; and upon the execution of the undertaking mentioned in the next section, an order may be made releasing from the operation of the attachment any or all of the property attached; and all of the property so released, and all of the proceeds of the sales thereof must be delivered to the defendant upon the justification of the sureties on the undertaking, if required by the plaintiff.

Cal. C. Civ. P., § 554.

Secs. 3776-3784, relating to lessor's liens, do not afford a complete remedy, and where plaintiff attached and seized goods of defendant, the court had power under §§ 6724, 6725, upon the execution of a bond by defendant, to discharge the writ and release the property.

Woolley v. Maynes-Wells Co., 15 U. 341; 49 P. 647.

6725. (3085.) Id. Undertaking for release. Justification of sureties. Before making such order, the court or judge must require an undertaking on behalf of the defendant, by at least two sureties, residents and freeholders or householders in the state, to the effect that in case the plaintiff recover judgment in the action, defendant will, on demand, deliver the attached property so released to the proper officer, to be applied to the payment of the judgment, or, in default thereof, that the defendant and sureties will, on demand, pay to the plaintiff the full value of the property released. The court or judge making such order may fix the sum for which the undertaking must be executed, and if necessary, in fixing such sum, to know the value of the property released, the same may be appraised by one or more disinterested persons, to be appointed for that purpose. The sureties may be required to justify before the court or judge, and the property attached cannot be released from the attachment without their justification, if the same be required.

Cal. C. Civ. P., § 555.

Qualifications of sureties generally, § 7223.

Undertaking to prevent attachment, § 6709.

6726. (3086.) Motion to discharge writ for irregularity. The defendant may also, at any time, either before or after the release of the attached property, or before any attachment shall have been actually levied, upon reasonable notice to the plaintiff, apply on motion to the court in which the action is brought, or to the judge thereof, for the discharge of the writ of attachment, on the ground that the same was improperly or irregularly issued.

Cal. C. Civ. P., § 556.

Sufficiency of affidavit, note to § 6706.

In proceedings to discharge an attachment, it is first incumbent upon the defendant to negative the cause assigned for suing out the writ, and after this the burden is on the plaintiff.

Godbe-Pitts Drug Co. v. Allen, 8 U. 117; 29 P. 881.

Deseret Bank v. Little, R. & Co., 13 U. 265; 44 P. 930.

Notice of motion to discharge an attachment should specify particularly the grounds of the motion.

Cupit v. Park City Bank, 10 U. 294; 37 P. 564.

Same case, 11 U. 427; 40 P. 707.

A verified motion made on information and belief, without any affidavit, to dissolve an attachment, the affidavit for the latter being positive, is insufficient; and it is not error to exclude parol testimony offered by defendant in support of the motion.

Barnhart v. Foley, 11 U. 191; 39 P. 823.

Where an affidavit offered to sustain an attachment is vague and there is no intrinsic evidence in aid of it, the motion to discharge will be sustained.

Deseret Nat. Bank v. Little, R. & Co., 13 U. 265; 44 P. 930.

The court will not decide whether property levied on is personalty or so fixed to realty as to be appurtenant to it.

Northwestern W. & F. Co. v. S. L. C. Copper Mfg. Co., 11 U. 404; 40 P. 702.

An order dissolving attachments is appealable.

Bristol v. Brent, 35 P. 213; 99 P. 1000.

Where property alleged to belong to the defendant was released on claimant depositing cash to secure plaintiff's recovery, if any, and the property thereupon returned to claimant; held, there was no jurisdiction on motion to enter an order discharging the same or releasing the deposit on an affidavit by claimant that the property attached and cash deposited belonged to him, and not to the defendant.

Larson v. Richards, 43 U. 196; 134 P. 583.

The dissolution of the attachment on defendant's special appearance does not divest the court of jurisdiction to proceed further.

Griffin v. Howell, 38 U. 357; 113 P. 326.

One who claims the attached property may intervene in the attachment suit and have his rights determined, but he cannot question the regularity and validity of the attachment.

Houston, etc. v. Hechler, 44 U. 64; 138 P. 1159.

6727. (3087.) Id. When made upon affidavits. If the motion be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits, or other evidence, in addition to those on which the attachment was made.

Cal. C. Civ. P., § 557.

Parol evidence may be excluded.

Barnhardt v. Foley, 11 U. 191; 39 P. 823.

6728. (3088.) Provisions to be liberally construed. Curing defects. This chapter shall be liberally construed, and the plaintiff, at any time when objection is made thereto, shall be permitted to amend any defect in the complaint,

affidavit, bond, writ, or other proceeding; and no attachment shall be quashed, dismissed, or the property attached released, if the defect in any of the proceedings has been or can be amended so as to show that a legal cause for the attachment existed at the time it was issued; and the court shall give the plaintiff a reasonable time to perfect such defective proceedings. The causes for attachment shall not be stated in the alternative.

Iowa, McClain's An. C. (1888) § 4246*.
Liberal construction, etc., in garnishment proceedings, § 6752.
Provisions of statutes to be liberally construed, §§ 5839, 6596.
Errors and defects disregarded if not affecting substantial rights, §§ 6622, 6968.
Sufficiency of affidavits, notes to §§ 6706-6726.
Amount of plaintiff's claim stated in the writ must conform to statement in the complaint. Difference between amount stated in writ and affidavit is not fatal.
Bowers v. London Bank of Utah, 3 U. 417; 4 P. 225.
An undertaking for an attachment failing to state that "if the attachment be wrongfully issued, the plaintiff will pay all costs that may be awarded to the defendant and all damages which he may sustain by reason of the attachment," may in the discretion of the court be amended by inserting the same.
McCord Mer. Co. v. Glenn, 6 U. 139; 21 P. 500.
Amendment of clerical error in complaint held not to discharge lien of attachment.
Barton v. South Jordan Co-op., 10 U. 346; 37 P. 576.
That grounds for attachment are stated conjunctively is not objectionable; at any rate, not when the facts as stated might be true.
Des. Bk. v. Little R. Co., 13 U. 265; 44 P. 930.
Allegation in language of statute under sub. 3 of § 6704 not defective.
Johnson v. Emery, 31 U. 126; 86 P. 869.
Attachment statute liberally construed.
Cole v. Utah Sugar Co., 35 U. 148; 99 P. 681.
Where the return in garnishment was not attacked below on the ground that it did not show proper service on the garnishee which is the ground of the decision on appeal, so the plaintiff had no opportunity to cure the defect by amendment; judgment discharging the garnishee will not be affirmed unconditionally but proceedings will be remanded with instructions to vacate the order of discnarge and permit an amendment.
Bristol v. Brent, 36 U. 108; 103 P. 1076.

6729. (3089.) Order releasing real property to be filed. Whenever an order has been made discharging or releasing an attachment upon real property, a certified copy of such order must be filed in the office of the county recorder in which the notice of attachment has been filed, and be indexed in like manner.

Cal. C. Civ. P., § 559*.
Sheriff to release on record attachment of realty, § 1501.

CHAPTER 23.

GARNISHMENT.

6730. (3090.) Garnishment issuable with attachment or afterward; or upon commencement of action in certain instances. At the time of issuing a writ of attachment in an action, or at any time thereafter, the plaintiff may have a writ of garnishment issue, and thereupon attach the credits, effects, debts, choses in action, and other personal property of the defendant in the possession or under the control of any third person, as garnishee, for the security of any judgment the plaintiff may recover in such action against the defendant; but any indebtedness owing to a defendant not personally served in this state with summons, when such indebtedness arises and is payable outside the state, shall not be subject to attachment, garnishment, or execution, except in cases where the plaintiff is a citizen of this state and sues in his own right, and not as an assignee; but in such cases these facts must affirmatively appear by affidavit served with the writ of attachment or garnishment. If such facts do not appear, then the garnishee shall be under no liability on account of such writ of attachment or garnishment. Where the indebtedness arises outside of the state the presumption is that it is payable outside of the state. It is further provided that, upon the commencement of any personal action arising upon a contract, express or implied, or upon any judgment or decree already obtained, the plaintiff may obtain a writ of garnishment by making and filing with the justice of the peace in a justice court, or with the clerk of the court in which said action was brought, an affidavit stating that he has good reason to believe and does believe that any certain person, firm, or corporation, private or public, has property, money, goods, chattels, credits, or effects in his or its hands or under his or its control belonging to the defendant or defendants, or any or either of them, or that such person or persons, firm, or corporation is indebted to the defendant; that the defendant is

indebted to him or it on such contract, judgment, or decree sued upon, and that he is justly apprehensive of the loss of the same unless writ of garnishment issue. The garnishee thereupon is liable to the plaintiff from the time of the service of such writ to the amount of the aforesaid property or indebtedness belonging or due to the defendant, and shall make answer to the writ as provided by law. Before issuing said writ of garnishment, the justice or the clerk must require a written undertaking on the part of the plaintiff, with sufficient sureties, in a sum not less than double the amount claimed by the plaintiff, but in no case shall the undertaking required exceed $10,000 or be less than $50 in amount. The condition of said undertaking shall be to the effect that if the defendant recover judgment, or if a writ of garnishment be wrongfully issued, the plaintiff will pay the defendants all costs that may be awarded to the defendants, and all damages which he may sustain by reason of the issuance of the said writ of garnishment, not exceeding the sum specified in the undertaking. If the defendant is a non-resident of the state, said fact must be set forth in the affidavit. Further and subsequent or supplemental proceedings may be had as herein elsewhere provided.

Am'd '11, p. 118; '13, p. 165.

Col., Mills' An. C. (1896) § 118.
Attachment, § 6704.
Attachment of property of debtor in hands of third parties, §§ 6714-6716.
Municipal corporations subject to garnishment, § 6754.
Garnishment statutes are liberally construed.
Cole v. Utah-I. Sugar Co., 35 U. 148; 99 P. 681.
Garnishment proceedings are in aid of the main action.
Bristol v. Brent, 35 U. 213; 99 P. 1000.
The court may issue the writ of garnishment only at the time the action is commenced.
Slaughter v. Robinson, 51 U. —; 172 P. —.
An attachment of a credit prevents the debtor from disposing of the property, while a garnishment requires him to answer, and places the debt in the custody of the law.
Bristol v. Brent, 36 U. 108; 103 P. 1076.
Cole v. Utah Sugar Co., 35 U. 148; 99 P. 681.
Prior to the amendment of 1913 it was held that the debtor's debtor could be garnished regardless of the residence of the debtor or place debt was contracted.
Bristol v. Brent, 38 U. 58; 110 P. 356.
But the amendment lays down a different rule.
Mathison v. Rickard, 48 U. 226; 158 P. 787.

6731. (3091.) When garnishee ordered to appear. Whenever, in any action pending in any court in the state, a writ of attachment has been issued and delivered to the proper officer, and the officer after diligent search shall not be able to find property of the defendant sufficient to satisfy the claim of plaintiff, the officer shall, upon the request of the plaintiff, his agent, or attorney, summon such person or persons as the plaintiff may direct, as garnishees to appear before the court wherein such action is pending. Am'd '09, p. 117.

Col., Mills' An. C. (1896) § 119.
A debt that may be enforced in any jurisdiction by a person against his debtor may also be, by a creditor of such person, attached by garnishment in any jurisdiction where the debtor of said person may be found and served.
Bristol v. Brent, 38 U. 58; 110 P. 356.
This decision was rendered before the amendment of this section in 1911.

6732. (3092.) Writ issued by the officer. Form. The writ of garnishment shall be issued by the officer to whom the writ of attachment is delivered, and may be in substance as follows:

In the district court of ..... county, state of Utah.

....., plaintiff, vs. ....., defendant.

The state of Utah, to ....., garnishee:

You are hereby notified that you are attached as garnishee in the above entitled action, and you are commanded not to pay any debt due or to become due from yourself to the said ....., defendants, or either of them, and that you must retain possession and control of all personal property, effects, and choses in action of said ....., defendants, or either of them, in order that the same may be dealt with according to law; you are required to answer the interrogatories attached hereto within ten days from the date of the service of this writ upon you if you are served in the county in which said action is brought, otherwise within twenty days from the date of such service. In case of your failure within the time aforesaid, the plaintiff may apply to the court for relief against you.

Given under my hand this ..... day of ....., 19.....

Col., Mills' An. C. (1896) § 120.

6733. (3093.) Names of garnishees inserted in writ. Service and return. Alias writ. The names of as many individuals, corporations, or other

persons as are sought to be charged as garnishees may be inserted in the same or different writs of garnishment; and the writ shall be served and returned by the officer issuing the same, in the same manner as a summons in the action; and in like manner alias writs may be issued, served, and returned.

Col., Mills' An C. (1896) § 121.

A notice in garnishment proceeding to a person as "manager" is not notice to the company of which he is manager.

Cole v. Utah-I. Sugar Co., 35 U. 148; 99 P. 681.

The return should be endorsed on or annexed to the writ and and should show that all has been done which is required by statute; there is no presumption that the officer has done his duty, the return must show it. If the return is defective, it may be amended on application.

Bristol v. Brent, 36 U. 108; 103 P. 1076.

6734. (3094.) Service and return of writ give court jurisdiction. It shall not be necessary for the sheriff to return the writ of attachment before serving the writ of garnishment, but the return of the latter writ, showing due service on the person therein named as garnishee, shall give the court jurisdiction to proceed against such garnishee as hereinafter provided.

Col., Mills' An. C. (1896) § 122.

The garnishee cannot, by voluntary appearance, waive jurisdicitonal defects so as to confer jurisdiction over the res, and where the defendant is a non-resident and not personally served, jurisdiction must be had over the res to render a valid judgment.

Bristol v. Brent, 36 U. 108; 103 P. 1076; 38 U. 58; 110 P. 356.

When, with a writ of execution, is served a notice that the property in the hands of the person served belonging to the execution debtor is attached, and shoula not be transferred, with a request to furnish a statement, the court has no jurisdiction to render any judgment, as no writ of garnishment was served, and the appearance of the attachee does not confer jurisdiction.

Cole v. Utah-I. Sugar Co., 35 U. 148; 99 P. 681.

6735. (3095.) Garnishee to answer under oath. Fee. Substance of interrogatories. The garnishee shall answer the interrogatories in writing upon oath or affirmation; but in no case shall the garnishee be required to answer any interrogatories unless and until he is paid or tendered by the plaintiff in the action or the officer serving the writ a fee of $2, and unless such sum is paid or tendered to him or to the person making the answer in his behalf, no answer can be required of such garnishee or any person acting for him. In case such fee is paid or tendered, it is hereby made the duty of the officer serving the writ of garnishment to administer such oath or affirmation and to take and return such answer with the writ, or the garnishee after receiving the fees aforesaid may answer in like manner before anyone authorized to administer oaths and affirmations, and in the latter case it shall be the duty of the garnishee to file his answer, or to cause the same to be filed, in the proper court within the proper time required by the writ, or he shall be deemed in default.

The interrogatories may be in substance as follows:

1. Are you in any manner indebted to the defendants, or either of them, either in property or money, and is the same now due? If not due, when is the same to become due? State full particulars.

Answer. .....

2. Have you in your possession, in your charge, or under your control, any property, effects, goods, chattels, rights, credits, or choses in action of said defendants or either of them, or in which he is interested If so, state what is the value of the same, and state fully all particulars.

Answer. .....

3. Do you know of any debts owing to the said defendant, whether due or not due, or any property, effects, goods, chattels, rights, credits, or choses in action belonging to him, or in which he is interested, and now in the possession or under the control of others? If so, state the particulars.

Answer. .....

.....,

Signature of garnishee.

I, (insert the name of the garnishee), do solemnly swear (or affirm) that the answers to the foregoing interrogatories by me subscribed are true, so help me God.

.....,

Signature of garnishee.

Subscribed and sworn to before me, this ..... day of ....., 19.....

The plaintiff may, in his discretion, add other pertinent interrogatories.

Am'd '05, p. 35.

Col., Mills' An. C. (1896) § 123*.
The defense that a debt is payable at a particular place or under special conditions must be set out in the answer.
Bristol v. Brent, 38 U. 58; 110 P. 356.
Where a garnishee answers that he is not indebted to the defendant, the defendant may intervene in the action to establish that the garnishee is indebted and to establish his exemption.
Dayton v. Free, 49 U. 221; 162 P. 614.

6736. (3096.) Property to be delivered to sheriff. Sale. Judgment against garnishee. If the answer of the garnishee shows that he has personal property of any kind in his possession, or under his control, belonging to the defendant, the court shall enter judgment that the garnishee deliver the same to the sheriff, and if the plaintiff recover judgment against the defendant in the action, such property or so much thereof as may be necessary shall be sold as upon execution, and the proceeds applied toward the satisfaction of such judgment, together with the costs of the action and proceedings, and if there be a surplus of such property, or of the proceeds thereof, it shall be restored to the defendant. If the answer shows that the garnishee is indebted to the defendant, then, if the plaintiff recover judgment against the defendant in the action, the court shall also enter judgment in favor of the defendant for the use of the plaintiff against the garnishee for the amount of the indebtedness admitted in the answer; *provided,* that the judgment against the garnishee shall not be for a greater sum than is necessary to satisfy the judgment of the plaintiff against the defendant, together with costs as aforesaid; and in no case shall the garnishee be chargeable with costs unless his answer shall be successfully controverted as hereinafter provided.

Col., Mills' An. C. (1896) § 124.

6737. (3097.) Garnishee may deliver property or money. Release. Return. In all cases the garnishee, upon making answer, may deliver to the officer serving the writ the property belonging to the defendant, together with the money due to the defendant, as shown by the answer, and the officer shall make return of such property and money with the writ to the court, to be dealt with as provided in the foregoing section; and thereupon the garnishee shall be relieved from further liability in the proceedings, unless his answer shall be successfully controverted as hereinafter provided.

Col., Mills' An. C. (1896) § 125.
Similar provision on attachment, §§ 6715, 6718.
Where a garnishee, because of jurisdictional defects, is not required to pay the money and does so, he has no defense as against the real owner who was not the judgment debtor, nor has the creditor any defense in such suit.
Cole v. Utah-I. Sugar Co., 35 U. 148; 99 P. 681.

6738. (3098.) Judgment against garnishee on failure to answer. If the garnishee, having been duly served with the writ of garnishment and interrogatories, and has been paid or tendered the fee of $2, and the fact of such payment or tender is duly certified by the officer who served the writ over his official signature, or such fact is made to appear by the person serving the writ under oath, by affidavit, and after such payment or tender, when duly certified or proved as above provided, the garnishee fails or refuses to answer the interrogatories within the time required, the plaintiff may enter a default against him and proceed before the court to prove the liability of the garnishee according to the provisions of this chapter (and in such case the garnishee, after the payment of the fee of $2 to him and not before, may be compelled to give testimony orally as a witness as in other cases), and upon a verdict or finding in that behalf the plaintiff may have judgment entered the same as if the garnishee had answered according to such verdict or finding; and if the verdict or finding charge the garnishee with any liability, the plaintiff may recover costs of the proceedings against the garnishee, but if the garnishee answers he shall be discharged without cost; *provided,* that the $2 herein required to be paid to the garnishee shall be paid by the plaintiff in the action and shall be taxed against the defendant in the original action, in cases where the garnishee is found to have credits due the defendant in excess of legal exemptions; and *provided,* that in cases where the garnishee is found to have no credits due the defendant, the said $2 shall not be taxed against the defendant; *provided,* that the payment of costs by the de-

fendant shall not apply in cases provided for in sub. 7 of § 6925; and, *provided further,* that in the event the garnishee shall be required to appear personally in court to testify he shall, in addition to the fee of $2, receive the usual witness fee and mileage, which shall be paid to him in advance if so demanded, otherwise shall be taxed as costs in the action. Am'd '05, p. 37.

Col., Mills' An. C. (1896) § 126*.

6739. (3099.) Answer to garnishee. Reply. If the garnishee answer, the plaintiff may, within ten days after the expiration of the time allowed for the filing of such answer, reply to the whole or any part thereof by an affidavit traversing the same; the plaintiff may also in his reply allege any matters which would charge the garnishee with liability according to the provisions of this chapter, and such affidavit may be upon information and belief If the plaintiff fail to reply within the time aforesaid, he shall be deemed to have accepted the answer of the garnishee as true, and judgment may be entered accordingly.

Col., Mills' An. C. (1896) § 127.
Reply generally, §§ 6590-6592.
Answer of public corporation is conclusive, § 6755.

6740. (3100.) New matter in plaintiff's reply deemed denied. Trial. Judgment. Costs. New matter in the affidavit replying to the answer of the garnishee shall be taken as denied or avoided, and the matter thus at issue without further pleadings shall be tried in the same manner as other issues of like nature, and upon the verdict or finding thereon, judgment shall be entered the same as if the garnishee had answered according to such verdict or finding; *provided,* that if the verdict or finding be as favorable to the garnishee as his answer, he shall recover costs of the proceeding against the plaintiff, otherwise the plaintiff may recover costs against the garnishee.

Col., Mills' An. C. (1896) § 128.
Where the judgment debtor was a party to the garnishment proceedings, he has the right to appeal from the judgment rendered against a garnishee, though the garnishee was satisfied with the judgment and refused to appeal, and the judgment requiring the garnishee to pay plaintiff an amount, and a further amount when it became due, was final.
Giesy-Walker v. Briggs, 49 U. 205; 162 P. 876.

6741. (3101.) Third person may be interpleaded. Notice. Proceedings. When the answer of the garnishee shall disclose that any other person than the defendant claims the indebtedness or property in his hands, and the name and residence of such claimant, the court may on motion order that such claimant be interpleaded as a defendant to the garnishee action; and that notice thereof, setting forth the facts, with a copy of such order, in such form as the court shall direct, be served upon him, and that after such service shall have been made, the garnishee may pay or deliver to the officer or the clerk such indebtedness or property, and have a receipt therefor, which shall be a complete discharge from all liability to any party for the amount so paid or property so delivered. Such notice shall be served in the manner required for service of a summons in a civil action. Upon such service being made, such claimant shall be deemed a defendant to the garnishee action, and shall answer within ten days, setting forth his claim, or any defense which the garnishee might have made. In case of default, judgment may be rendered which shall conclude any claim upon the part of such defendant.

N. Dak. (1895) § 5397.
Interpleader generally, § 6517.
Where a garnishee answers that he is not indebted to the defendant the defendant may intervene in the action to establish that the garnishee is indebted and to establish his exemption.
Dayton v. Free, 49 U. 221; 162 P. 614.

6742. (3102.) Garnishee may deduct sums due him by either party. Record. Every garnishee shall be allowed to retain or deduct out of the property, effects, or credits of the defendant in his hands all demands against the plaintiff and all demands against the defendant of which he could have availed himself if he had not been summoned as garnishee, whether the same are at the time due or not, and he shall be liable for the balance, only after all mutual demands between himself and plaintiff and defendant are adjusted, not including unliquidated damages for wrongs and injuries; *provided,* that the verdict or finding as well as the record of the judgment shall show in all cases

against which party, and the amount thereof, any counterclaim shall be allowed, if any shall be allowed.

Col., Mills' An. C. (1896) § 130*.
Property attached subject to claims, §§ 476, 6716.
If the garnishee claims an offset or counterclaim to the debt, the court should at once arrest the proceedings and require the parties to settle the controversies in a proper proceedings.
Bd. of Home Missions v. Maughan, 35 U. 516; 101 P. 581.

6743. (3103.) Garnishee not liable on negotiable instrument not due. No person shall be liable as garnishee, by reason of having drawn, accepted, made, or indorsed any negotiable instrument, when the same is not due, in the hands of the defendant at the time of service of the writ of garnishment.

Col., Mills' An. C. (1896) § 131.

6744. (3104.) Judgment acquits garnishee for amounts paid. The judgment against a garnishee shall acquit him from all demands by the defendant for all goods, effects, and credits paid, delivered, or accounted for by the garnishee by force of such judgment.

Col., Mills' An. C. (1896) § 132.

6745. (3105.) Discharge of garnishee does not bar action by defendant. If the person summoned as garnishee is discharged, the judgment shall be no bar to an action brought against him by the defendant for the same demand.

Col., Mills' An. C. (1896) § 133.

6746. (3106.) Judgment against garnishee for debt not due. Execution deferred. When the judgment is rendered against any garnishee, and it shall appear that the debt from him to the defendant is not yet due, execution shall not issue until the debt shall have become due.

Col., Mills' An. C. (1896) § 134.
Attachment of debt not yet due, § 6705.

6747. (3107.) Property pledged to garnishee delivered on payment. When any personal property, choses in action, or effects of the defendant in the hands of a garnishee are mortgaged or pledged, or in any way liable for the payment of a debt to him, the plaintiff may, under an order of the court for that purpose, pay or tender the amount due to the garnishee, and thereupon the garnishee shall deliver the personal property, choses in action, and effects to the sheriff, as in other cases.

Col., Mills' An. C. (1896) § 135.
Attachment of mortgaged personal property, § 476.

6748. (3108.) Id. If held to secure performance, plaintiff may perform. If the personal property or effects are held for any purpose other than to secure the payment of money, and if the contract, condition, or other thing to be done or performed is such as can be performed by the plaintiff without damage to the other parties, the court may make an order for the performance thereof by him, and upon such performance, or a tender of performance, the garnishee shall deliver the personal property and effects to the sheriff, as in other cases.

Col., Mills' An. C. (1896) § 136.

6749. (3109.) Id. Disposal of proceeds. Plaintiff reimbursed. All personal property, choses in action, and effects received by the sheriff under either of the two preceding sections shall be disposed of in the same manner as if they had been delivered by the garnishee without condition, except that the plaintiff shall, out of the proceeds thereof, be first repaid the amount paid by him to the garnishee for the redemption of the same, or shall be indemnified for any other act or thing by him done or performed, pursuant to the order of the court for the redemption of the same.

Col., Mills' An. C. (1896) § 137.

6750. (3110.) Garnishee liable for contempt. If any garnishee refuses or neglects to deliver any personal property, choses in action, or effects in his hands, when thereto lawfully required by the court, he shall be liable to be attached or punished for contempt.

Col., Mills' An. C. (1896) § 138.

6751. (3111.) Costs taxed in discretion of court. Garnishee paid witness fee. The court may order the costs of the proceedings in any garnishment to be paid by the plaintiff, or out of the effects or credits garnished, or by the garnishee, or may apportion the same as shall appear to be just and

equitable. The garnishee shall be entitled to fees and mileage as a witness, where he does not improperly resist or make costs.

Col., Mills' An. C. (1896) § 139.

6752. (3112.) Garnishment after judgment. Procedure. Liberal construction. Any person having a judgment remaining unsatisfied in any court in the state, upon which execution has been issued and delivered, and which remains in the hands of the proper officer uncollected and unsatisfied, may have a writ of garnishment issued, and thereupon attach the credits, effects, debts, choses in action, and other personal property of the judgment debtor in the possession or under the control of any third person as garnishee, for the security of such judgment, and all the rights, remedies, and proceedings under this chapter are hereby made specially available and applicable for the relief and security of such judgment creditor, the same as for a plaintiff in attachment, and the same are also made specially available and applicable for the protection and security of the judgment debtor and the garnishee, the same as for the defendant and garnishee in attachment; and the forms of all affidavits, interrogatories, writs, answers, oaths, orders, trials, judgments, and other process and proceedings hereinbefore provided for cases of garnishment before judgment, with appropriate variations, shall apply to cases of garnishment after judgment; and all courts shall be liberal in allowing amendments, and in construing this chapter so as to promote the objects thereof. Am'd '09, p. 118.

Col., Mills' An. C. (1896) § 140.

Liberal amendments, etc., in attachment proceedings, § 6728.

Proceedings supplementary when judgment remains unsatisfied, §§ 6955-6964.

Liberal construction generally, §§ 5839, 6596, 6622.

The city court has the same power to entertain a motion to set aside a garnishment and release the garnishee as has the district court.

Hewlett Bros. v. Mallett, 39 U. 357; 117 P. 68.

6753. (3113.) New trials and appeals as in other cases. Motions for new trial may be made in the same time and manner and shall be allowed for the same grounds in garnishment proceedings as in other civil trials; and appeals may be taken and prosecuted from any final judgment or order in such proceedings as in other civil cases.

Col., Mills' An. C. (1896) § 141.

Where defendant had right of appeal and the time in which garnishee could appeal had not expired at the time of application for writ of prohibition, the appellant had an adequate remedy at law and the proceedings and writ were properly dismissed.

Overland M. Co. v. McMaster, 19 U. 177; 56 P. 977.

After final judgment in original action, an order setting aside and releasing a garnishment was final and appealable.

Hewlett Bros. v. Mallett, 39 U. 357; 117 P. 68.

Where defendant in an action on a note is a non-resident and does not appear, an appeal lies from the judgment dismissing the garnishment.

Bristol v. Brent, 35 U. 213; 99 P. 1000.

6754. (3113x.) Salaries of public officers or employes subject to garnishment. The state of Utah, or any county, city, town, district, board of education, or other subdivision of the state, or any officer, board, or institution, or either of the same having in possession or under control any credits or other personal property of, or owing any debt to the defendant in any action, whether as salary or wages, as a public official or employe, or otherwise, shall be subject to attachment, garnishment, and execution under such rights, remedies, and procedure as are or may be made applicable by statute to attachment, garnishment, and execution, respectively, in other cases, except as hereinafter provided. '05, p. 113.

Salaries of public officers not subject to levy, etc., prior to this enactment.

Chamberlain v. Watters, 10 U. 298; 37 P. 566.

Van Cott v. Pratt, 11 U. 209; 39 P. 827.

Nor could the municipality waive its right to exemption from garnishment, etc.

Van Cott v. Pratt, 11 U. 209; 39 P. 827.

This section does not validate assignment of wages made by public officials. The section is constitutional.

Tribune-Reporter Ptg. Co. v. Homer, 51 U. —; 169 P. 170.

6755. (3113x1.) Id. Process, upon whom served. Answer conclusive. The process shall be served only upon the auditor of the legal subdivision garnished and in case there is no auditor, then on the clerk of the county, city, town, district, board of education, or other subdivision of the state, or board, or institution, or either of the same, and the answer of such auditor or clerk shall be final and conclusive, and the truth of such answer shall not be subject to further examination or proceedings of any kind. '05, p. 113.

CHAPTER 24.

RECEIVERS.

6764. (3114.) Receivers, when appointed. A receiver may be appointed by the court in which an action is pending or has passed to judgment, or by the judge thereof:

1. In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to his claim, or between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff, or of any party whose right to or interest in the property or fund, or the proceeds thereof, is probable, and where it is shown that the property or fund is in danger of being lost, removed, or materially injured;

2. In an action by a mortgagee for the foreclosure of his mortgage and sale of the mortgaged property, where it appears that the mortgaged property is in danger of being lost, removed, or materially injured, or that the condition of the mortgage has not been performed, and that the property is probably insufficient to discharge the mortgage debt;

3. After judgment, to carry the judgment into effect;

4. After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or in proceedings in aid of execution, when an execution has been returned unsatisfied, or when the judgment debtor refuses to apply his property in satisfaction of the judgment;

5. In the cases when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights;

6. In all other cases where receivers have heretofore been appointed by the usages of courts of equity.

Cal. C. Civ. P., § 564*.

Receiver may be appointed for bank failing to keep up reserve, etc., §§ 1007.

Receiver for building and loan association, §§ 1107, 1108; for insurance company, § 1176; for loan, trust, and guaranty association, § 1207.

Receiver of property of judgment debtor, § 6964.

What orders relating to receivers are appealable, note to Con. art. 8, sec. 9.

Courts of equity have no power to appoint a receiver for a corporation in the absence of a statute conferring such power.

Davis v. Flagstaff Mining Co., 2 U. 74.

Allegations of a bill in chancery set out and held sufficient to authorize the appointment of a receiver.

U. S. v. The Church, 5 U. 361; 15 P. 473.

When corporations are mismanaged and their property misappropriated by their officers, and a continuance thereof threatened, receivers will be appointed for them.

Stevens v. S. Ogden L. B. & I. Co., 14 U. 232; 47 P. 81.

A receiver will not be appointed to take possession of property and charge of business in the hands of a defendant, unless the plaintiff's right is sufficiently probable, or when it is not probable that such property will be lost or will sustain injury during the suit, if the same is left in defendant's hands, or that the business will be mismanaged.

Ogden City v. Bear Lake & R. W. W. & I. Co., 16 U. 440; 52 P. 697.

The court may, as a condition of issuing an order appointing a receiver of railroad property, direct the receiver to pay debts for oustanding labor, supplies, etc., out of money coming into his hands from such business.

Central Trust Co. v. Utah Cen. Ry. Co., 16 U. 12; 50 P. 813.

Litzenberger v. Jarvis C. Co., 8 U. 15; 28 P. 871.

Under § 6764, sub. 6, an appointment for the purpose of enforcing stockholders' statutory liabilities over and above the amount of their stock is not authorized.

McLaughlin v. Kimball, 20 U. 254; 58 P. 685.

Steinke v. Loofbourow, 17 U. 252; 54 P. 120.

Where a receiver is appointed of an insolvent corporation, and thereafter, by consent of all parties, many suits against it, some legal and some equitable, are consolidated and tried together, in which the receiver is recognized and takes part, an objection first made after judgment that the appointment of the receiver was illegal because made in an action at law should not be considered.

Pitts v. New Mammoth G. M. Co., 23 U. 623; 65 P. 1076.

An oral understanding between counsel and the judge that an order appointing a receiver, entered prior to the commencement of an action, should not take effect until after its commencement does not validate the appointment.

Popp v. Daisy G. M. Co., 27 U. 83; 74 P. 426.

After the occasion for a receiver has passed, an order declaring void the appointment will not be reversed for technical errors involving no substantial rights.

Id.

6765. (3115.) Appointment on dissolution of corporation. Upon the dissolution of any corporation, the district court of the county in which the corporation carries on its business, or has its principal place of business, on application of any creditor of the corporation, or of any stockholder or member thereof, may appoint one or more persons to be receivers or trustees of the corporation, to take charge of the estate and effects thereof, and to collect the debts and property due and belonging to the corporation, and to pay the

outstanding debts thereof, and to divide the moneys and other property that shall remain over, among the stockholders or members.

Cal. C. Civ. P., § 565.

Voluntary dissolution of corporations, §§ 7418-7424.

6766. (3116.) Party in interest appointed only on consent. Undertaking on ex parte application. No party or attorney, or person interested in the action, can be appointed receiver therein, without the written consent of the parties, filed with the clerk. If a receiver be appointed upon an ex parte application, the court, before making the order, may require from the applicant an undertaking, with sufficient sureties, in an amount to be fixed by the court, to the effect that the applicant will pay to the defendant all damages he may sustain by reason of the appointment of such receiver, and the entry by him upon his duties, in case the applicant shall have procured such appointment wrongfully, maliciously, or without sufficient cause; and the court may, in its discretion, at any time after said appointment, require an additional undertaking.

Cal. C. Civ. P., § 566.

Qualifications of sureties generally, § 7223.

Loan, trust, and guaranty association may act as receiver, § 1201.

A creditor, or his representative, should not be appointed receiver or be allowed to act; nor should an attorney of such creditor, or defendant, or any other party whose interest may conflict with that of other parties, be employed by the receiver.

Geyser M. Co. v. Bank of S. L., 16 U. 163; 51 P. 151.

6767. (3117.) Oath and undertaking of receiver. Before entering upon his duties the receiver must be sworn to perform them faithfully, and with one or more sureties, approved by the court or judge, execute an undertaking to such person and in such sum as the court or judge may direct, to the effect that he will faithfully discharge the duties of receiver in the action, and obey the orders of the court therein.

Cal. C. Civ. P., § 567.

6768. (3118.) Powers of receivers. The receiver has, under the control of the court, power to bring and defend actions in his own name, as receiver; to take and keep possession of the property, to receive rents, to collect debts, to compound for and compromise the same, to make transfers, and generally to do such acts respecting the property as the court may authorize.

Cal. C. Civ. P., § 568.

The receiver of the late Church of Jesus Christ, etc., might attack any assignment of property made prior to the dissolution of the church which was illegal as to third parties.

U. S. v. The Church, 5 U. 538; 18 P. 35.

General discussion of the rights, powers, and duties of a receiver and his attorney.

U. S. v. The Church, 6 U. 9; 21 P. 503, 524.

A reasonable compensation should be allowed a receiver for his services in handling property.

Id.

The attorney of an interested party should not be employed by the receiver, but if such attorney serves without objection, he may be allowed reasonable compensation.

Geyser M. Co. v. Bank of S. L., 16 U. 163; 51 P. 151.

When appointment of receiver is revoked as erroneous, the only expenses allowable are such as would necessarily have been incurred had no receiver been appointed.

Ogden City v. Bear Lake Irr. Co., 18 U. 279; 55 P. 385.

A receiver, either general or special, whether appointed at the suit of a stockholder or at the suit of a creditor, has no power to bring action to enforce stockholders' liability.

McLaughlin v. Kimball, 29 U. 254; 58 P. 685.

Steinke v. Loofbourow, 17 U. 252; 54 P. 120.

The appointment of a receiver by a state court has no extra-territorial effect, and property situated without the state where such appointment is made is subject to attachment.

Thum v. Pingree, 21 U. 348; 61 P. 18.

An attaching creditor, as well as a receiver, has an insurable interest in the property attached.

McLaughlin v. Park City Bank, 22 U. 473; 63 P. 589.

The receiver of an insolvent corporation is authorized to intervene in an attachment suit against the corporation and file a motion to set aside an order of sale of attached property.

Newell v. Third Dist. Court, 37 U. 418; 108 P. 121.

The court may permit an applicant to sell property which is in the hands of a receiver on which he has a lien, the proceeds to be applied on the lien.

Id.

6769. (3119.) Funds invested by consent on order of court. Funds in the hands of a receiver may be invested upon interest, by order of the court; but no such order can be made, except upon the consent of all parties to the action.

Cal. C. Civ. P., § 569.

CHAPTER 25.

DEPOSIT IN COURT.

6770. (3120.) When deposit or delivery of money required. When it is admitted by the pleading, or shown upon the examination of a party, that he has in his possession or under his control any money or other thing capable of delivery, which being the subject of litigation is held by him as trustee for another party, or which belongs or is due to another party, the court may order the same, upon motion, to be deposited in court, or delivered to such party, upon such conditions as may be just, subject to the further direction of the court.

Cal. C. Civ. P., § 572.

6771. (3121.) Id. With whom deposited. Liability of treasurer. If the money is deposited in court, it must be paid to the clerk, who must deposit it with the county treasurer, by him to be held subject to the order of the court. For the safe keeping of the money deposited with him, the treasurer is liable on his official bond.

Cal. C. Civ. P., § 573.

Money paid to clerk or authorized deputy, § 7214.

6772. (3122.) Id. Disobedience. Procedure. Whenever a court has ordered the deposit or delivery of money or other thing, and the order is disobeyed, the court, besides punishing the disobedience, may make an order requiring the sheriff to take the money or thing, and deposit or deliver it in conformity with the direction of the court.

Cal. C .Civ. P., § 574.

CHAPTER 26.

PROVISIONAL REMEDIES ON BEHALF OF DEFENDANT.

6773. (3123.) Defendant asking affirmative relief may have provisional remedies. When the defendant interposes a counterclaim, and thereupon demands an affirmative judgment against the plaintiff, his right to a provisional remedy is the same as in an action brought by him against the plaintiff, for the cause of action stated in the counterclaim, and demanding the same judgment; and for the purpose of applying to such a case the provisions of this code relating to provisional remedies, the defendant is deemed the plaintiff, the plaintiff is deemed the defendant, and the counterclaim so set forth in the answer is deemed the complaint.

Mont. Civ. P., § 981.

Counterclaim, §§ 6575-6577.

CHAPTER 27.

ISSUES, MODE OF TRIAL, AND POSTPONEMENT.

6777. (3124.) Issues defined. Law, fact. Issues arise upon the pleadings when a fact or conclusion of law is maintained by the one party and is controverted by the other. They are of two kinds:

1. Of law; and
2. Of fact.

Cal. C. Civ. P., § 588.

6778. (2125.) Issue of law arises upon a demurrer. An issue of law arises upon a demurrer to the complaint, answer, or reply, or to some part thereof.

Cal. C. Civ. P., § 589*.

6779. (3126.) Issue of fact arises, how. An issue of fact arises:

1. Upon a material allegation in the complaint controverted by the answer; or,

2. Upon a material allegation of any counterclaim in the answer controverted by the reply; or,

3. Upon a material allegation of new matter in the answer, not requiring a reply, unless an issue of law is joined thereon; or,

4. Upon a material allegation of new matter in the reply, unless an issue of law is joined thereon.

Wis., S. & B. An. S. (1889) § 2839; Cal. C. Civ. P., § 590*.

6780. (3127.) Issue of law tried by court, unless referred. An issue of law must be tried by the court, unless it is referred upon consent.

Cal. C. Civ. P., § 591.

All questions of law to be decided by the court, § 7209.

6781. (3128.) Issue of fact, how tried. Issue of law first disposed of. In actions for the recovery of specific real or personal property, with or without damages, or for money claimed as due upon contract, or as damages for breach of contract, or for injuries, an issue of fact may be tried by a jury, unless a jury trial is waived, or a reference is ordered, as provided in this code. Where in these cases there are issues both of law and fact, the issue of law must first be disposed of. In other cases, issues of fact must be tried by the court subject to its power to order any such issue to be tried by a jury or to be referred to a referee, as provided in this code.

Cal. C. Civ. P., § 592*.

Questions of fact to be decided by the jury, § 7208.

Powers of court of equity, note to § 1667.

Questions of law to be decided by the court, § 7209.

Special issues may be tried by jury, order, § 6444.

Court may direct jury to find special verdict, § 6821.

When reference may be directed, §§ 6827, 6831, 6836, 6844, 6955. 7661.

All issues in civil actions tried by the court unless jury demanded, § 6827.

Separate trial between plaintiff and defendants, § 6783.

Parties entitled under § 3350, C. L. 1888, to jury trial of issues of fact in mandamus proceedings.

Chamberlain v. Warburton, 1 U. 267.

In an equity case the court has the power, under our system of practice, to submit special issues to a jury, and a verdict thereon when rendered is only advisory and not binding upon the court.

Smith v. Richardson, 2 U. 424.

Wasatch M. Co. v. Jennings, 14 U. 221; 46 P. 1106.

Grand Cen. M. Co. v. Mammoth M. Co., 29 U. 490; 83 P. 648.

Swanson v. Sims, 51 U. —; 170 P. 774.

Equitable defense first disposed of. When in ejectment two defenses, one legal, one equitable, are interposed, the equitable should first be disposed of.

Kahn v. Old Tel. Mining Co., 2 U. 174.

Steele v. Boley, 7 U. 64; 24 P. 755.

Kimball v. McIntyre, 3 U. 77, 1 P. 167.

In an action for specific performance, where such relief cannot be granted because plaintiff had previously refused to accept such performance, the court should submit the case to a jury instead of itself assessing damages.

Goldthwait v. Lynch, 9 U. 186; 33 P. 699.

Where there are both equitable issues and issues of fact, the court should first determine the equitable issue and then submit the issues of fact to a jury upon proper instructions, and a failure to do so constitutes reversible error.

Park v. Wilkinson, 21 U. 279; 60 P. 945.

Kimball v. McIntyre, 3 U. 77; 1 P. 167.

Actions to quiet title or to determine adverse claims under § 7247 may be legal or equitable, depending upon the pleadings.

Park v. Wilkinson, 21 U. 279; 60 P. 945.

Where, in an equitable action for an injunction, damages are claimed, the court may order, on the stipulation of counsel, that the question of damages be reserved for hearing after the determination of the equitable issues.

North Pt. C. I. Co. v. Utah & S. L. C. Co., 23 U. 199; 63 P. 812.

Goldthwait v. Lynch, 9 U. 186; 33 P. 699.

In an action to quiet title and enjoin defendants, the court, treating the case as having both legal and equitable issues, proceeded with a jury, stating that if it appeared that the case was equitable only, the jury might be considered as merely advisory, and the jury found a verdict for each defendant as to each parcel of land, and, under instructions, brought in a special verdict, in which special separate findings were made as to each defendant, all of which were in harmony with the general verdict and judgment, there was no such irregularity as would warrant a reversal.

Toltec Ranch Co. v. Cook, 24 P. 453; 67 P. 1123.

An action to restrain trespass and for damages, against which prescriptive right pleaded, held to constitute an action at law.

State v. Hart, 26 U. 229; 72 P. 938.

Where the district court refuses to grant a jury trial in an action at law on demand duly made, mandamus will issue.

State v. Hart, 26 U. 229; 72 P. 938.

State v. Cherry, 22 U. 1; 60 P. 1103.

A suit to set aside a transfer of corporate stock because of the transferee's fraudulent representations, for an injunction restraining persons holding the stock in trust for the transferee from disposing of the same, and for a decree compelling the delivery of the certificates representing the stock and requiring the corporation to reissue the stock to plaintiff, is exclusively an equitable action, and neither party has a right to a jury trial.

Morrison v. Snow, 26 U. 247; 72 P. 924.

Where a case, until the rendition of verdict, is treated by the parties and the court as one triable by a jury, the judge was required to render judgment on the verdict, and could not make findings at variance with the verdict and thereon render judgment.

Houston v. Hechler, 47 U. 215; 152 P. 726.

Naylor v. Jensen, 38 U. 310; 113 P. 73.

The court may in an equitable action, even though a jury is impanelled, dismiss the jury and make findings.

Shaffer v. Killpack, 51 U. —; 173 P. 948.

6782. (3129.) Jury trial must be demanded. Deposit. Failure to appear waives demand. Either party to an action of the kind enumerated in the preceding section who desires a jury trial of the same, or of any issue thereof, must demand it, either by written notice to the clerk prior to the time of setting such action for trial, or within such reasonable time thereafter as the

court may order, or orally in open court at the time of such setting, and must at the same time deposit with the clerk the sum of $5; whereupon it shall be the duty of the court to order jurors to be in attendance at the time set for the trial of the cause. Money paid in accordance with this section shall be taxable as costs in the action. But the failure of a party who has demanded a jury to appear at the trial shall be deemed a waiver of such demand.

All issues triable by the court, § 6827.
Deposit of jury fee, § 2553.
Jury waived unless demanded, Con. art. 1, sec. 10; § 6827.
Where record shows trial by the court without jury, on appeal waiver of trial by jury will be presumed.
Perego v. Dodge, 9 U. 3; 33 P. 221.
Refusal of jury trial when demanded in a proper case is error.
Goldthwait v. Lynch, 9 U. 186; 33 P. 699.
Park v. Wilkinson, 21 U. 279; 60 P. 945.
The provisions of this section are not in violation of Con. art. 1, sec. 10.
State v. Cherry, 22 U. 1; 60 P. 1103.
Under provisions of this section, where a case is called for setting three days before commencement of term, a jury is demanded and fees paid, the statute has been complied with, notwithstanding a rule of court requiring such demand at least five days before commencement of term.
Id.
Though no demand was made in time for a jury, it was not error to order one on request of plaintiff.
Wood v. R. G. W. Ry. Co., 28 U. 351; 79 P. 182.
Where a claimant to property sues under § 7247, to quiet title, or in ejectment, and does not demand a jury trial, he waives his right thereto.
Gibson v. McGurrin, 37 U. 158; 106 P. 669.
The provisions of this section are not for the benefit of an adversary, and even though a jury was not demanded at the time prescribed, the court may, in its discretion on demand and payment of fee, proceed with a trial by the jury.
Davis v. D. & R. G. Ry. Co., 45 U. 1; 142 P. 705.
A demand for a jury at the time the case comes on for trial is too late.
Ut. St. Bldg. & Loan Asso. v. Perkins, 51 U. —; 173 P. 950.

6783. (3130.) Separate trial or change in order of issues discretionary. A separate trial between the plaintiff and one or more defendants of some or all of the issues of fact, or a trial of some or all the issues of law, or a change in the order of the disposition of the issues, may be directed by the court, in its discretion.

Mont. Civ. P., § 1035. Kan. (1889) § 4363*.

6784. (3131.) Calendar, how made up. Dropping and restoring cases. The clerk must enter causes upon the calendar of the court according to the date of issue. Causes once placed on the calendar must remain until finally disposed of; but causes may be dropped from the calendar by consent of parties, or by order of the court or judge, and may be again restored upon notice.

Cal. C. Civ. P., § 593*.
Terms cannot be imposed upon the sovereign in absence of statutory authority.
U. S. v. Stevens, 8 U. 3; 28 P. 869.

6785. (3132.) Either party may bring issue to trial. Absence of party. Either party may bring an issue to trial, or to a hearing, and in the absence of the adverse party, unless the court for good cause otherwise direct, may proceed with his case and take a dismissal of the action, or a verdict or judgment, as the case may require.

Cal. C. Civ. P., § 594.
Dismissal of action, § 6848.
In liquor prosecutions, §§ 3355, 3368.
A rule of the court requiring the making up of a calendar and of giving notice to place case thereon for trial, is valid.
Riddle v. Quinn, 32 U. 341; 90 P. 893.

6786. (3133.) Continuance for absence of evidence, etc. Affidavit required. Admission. A motion to postpone a trial on the ground of the absence of evidence can only be made upon affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to procure it. The court may also require the moving party to state, upon affidavit, the evidence which he expects to obtain, and if the adverse party thereupon admit that such evidence would be given, and that it be considered as actually given on the trial, or offered and overruled as improper, the trial must not be postponed; and upon terms, the court may, in its discretion, upon good cause shown, postpone a trial or proceeding upon other grounds than absence of evidence.

Mont. Civ. P., § 1039. Cal. C. Civ. P., § 595*.
Costs on postponement, § 7043.
An order of the court below refusing a continuance cannot be reversed unless there has been an abuse of discretion.
Almy v. Hess, 2 U. 223.
Charter Oak Ins. Co. v. Gisborn, 5 U. 319; 15 P. 253.
Church v. Watson, 30 U. 126; 83 P. 731.
Motion for continuance will be overruled where there is no affidavit showing the facts or the testimony expected to be given.
McGrath v. Tallent, 7 U. 256; 26 P. 574.
Affidavit held insufficient to justify continuance.
Almy v. Hess, 2 U. 223.
People v. Garns, 2 U. 260.
People v. Wiggins, 1 U. 324.
It is not "due diligence" to issue subpoena on the morning of the trial.
Church v. Watson, 30 U. 126; 83 P. 731.
Nor where no attempt is made to subpoena witness about to leave the territory.
People v. Garns, 2 U. 260.
People v. Wiggins, 1 U. 324.
When the trial calendar is several days be-

hind, and a party, relying upon statements of attorneys having cases set for trial before his, fails to be prepared with his witnesses, upon the day set, but learning that such intervening cases have been passed, makes due effort to procure the attendance of his witnesses, it is error to refuse a continuance.
McCormick v. Marchant, 11 U. 68; 39 P. 483.

Where a continuance was granted on an affidavit because of the absence of a party who was the principal witness, a granting of another continuance upon the statement of an attorney that the same grounds exist that existed before is not an abuse of discretion.
Lancino v. Smith, 36 U. 462; 105 P. 914.

6787. (3134.) Id. Testimony of witnesses present may be taken. Order when mining case continued. The party obtaining a postponement of a trial must, if required by the adverse party, consent that the tesitmony of any witness of such adverse party, who is in attendance, be then taken by deposition before a judge or clerk of the court in which the case is pending, or before such other officer as the court may direct, which must accordingly be done, and the testimony so taken may be read on the trial with the same effect, and subject to the same objections, as if the witnesses were produced. In actions involving the title to mining claims, if it be made to appear to the satisfaction of the court that, in order that justice may be done and the action fairly tried on its merits, it is necessary that further developments should be made, and that the party applying has been guilty of no laches and is acting in good faith, the court shall grant the postponement of the trial of the action, giving the party a reasonable time in which to prepare for trial. And in granting such postponement, the court may, in its discretion, annex as a condition thereto an order that the party obtaining such postponement shall not, pending the trial of the action, remove from the premises in controversy any valuable quartz, rock, earth, or ores, and for any violation of an order so made, the court, or judge thereof, may punish for contempt as in the cases of violation of an order of injunction, and may also vacate the order of postponement.

Cal. C. Civ. P., § 596*.
When testimony officially reported may be used at subsequent trial, § 7205.
Order for survey of mining claim, §§ 7251-7252.
Taking of depositions generally, §§ 7178-7188.

CHAPTER 28.

TRIAL BY JURY.

6790. (3135.) Clerk to draw jury. When an action is called for trial by jury, the clerk must draw from the trial jury box the ballots containing the names of the jurors, until the jury is completed or the ballots are exhausted.

Cal. C. Civ. P., § 600.
Number of jurors, Con. art. 1, sec 10; § 3595.
Selection, drawing, and summoning of jury, §§ 3606-3620.
Impaneling of jury in criminal cases, §§ 8936-8964.
When juror may be excused, § 3600.
The court may, when necessary and there is no regular jury in attendance, impanel a jury to try a case properly set and ready for trial.
Bennett v. Tintic Iron Co., 9 U. 291; 34 P. 61.

On the day set for trial, defendant requested a postponement, which was granted, the court stating that he would issue a special venire if the regular jury were discharged by that day. The defendant made no objection at the time, and the regular jury having been discharged, a special venire was summoned for the case; held, that defendant was estopped from objecting to such jury.
Id.

6791. (3136.) Challenge defined. Of two kinds. A challenge is an objection made to the trial jurors and is of two kinds:

1. To the panel;
2. To an individual juror.

Cal. Pen. C., § 1055.

6792. (3137.) Parties united must join in challenge. Either party may challenge the jurors, but where there are several parties on either side, they must join in a challenge before it can be made.

Cal. C. Civ. P., § 601*.

Applied in criminal case.
People v. O'Loughlin, 3 U. 133; 1 P. 653.

6793. (3138.) Panel defined. The panel is a list of jurors returned to serve at a particular court, or for the trial of a particular action.

Cal. Pen. C., § 1057.

6794. (3139.) Challenge to panel defined. A challenge to the panel is an objection made to all the jurors returned.

Cal. Pen. C., § 1058*.

6795. (3140.) Id. Upon what founded. A challenge to the panel can be founded only on a material departure from the forms prescribed in respect to the drawing and return of the jury, or on the intentional omission of the proper officer to summon one or more of the jurors drawn.

Cal. Pen. C., § 1059*.

Drawing, return, summoning, §§ 3606-3620.

Where a jury was not selected and summoned in conformity with the territorial law, a challenge to the array should have been allowed.

Clinton v. Englebrecht (Utah), 80 U. S. 434.

In a criminal case, a challenge to the panel on the ground that members of a certain church had been purposely excluded in the selection thereof, because the officer deemed that they would not be impartial jurors, is properly denied. A defendant cannot claim as a matter of right that a man of his color or his faith should be upon the jury.

People v. Hampton, 4 U. 258; 9 P. 508.

In an action against the sheriff, a reversal for the denial of plaintiff's challenge to the panel on the sole ground that the sheriff served the venire, it not being claimed that he exercised partiality in such service, would not be justified under this section and §§ 597 and 1306 et seq.

Whipple v. Preece, 24 U. 364; 67 P. 1072.

The fact that the judge excused individual jurors is not ground for challenge to the panel.

State v. Bates, 25 U. 1; 69 P. 70.

6796. (3141.) Id. When and how taken. A challenge to the panel must be taken before a juror is sworn and must be in writing or be noted by the stenographer, and must plainly and distinctly state the facts constituting the ground of challenge.

Cal. Pen. C., § 1060.

In absence of stenographer, clerk to take testimony in writing, § 7206.

6797. (3142.) Id. Jury discharged, if allowed; impaneled, if disallowed. If the challenge to the panel is allowed, the court must discharge the jury, so far as the trial in question is concerned. If it is disallowed, the court must direct the jury to be impaneled.

Cal. Pen. C., § 1065*.

6798. (3143.) Peremptory or for cause. Three peremptory challenges, when taken. The challenges to individual jurors are either peremptory or for cause. Each party is entitled to three peremptory challenges. If no peremptory challenges are taken until the panel is full, they must be taken by the parties alternately, commencing with the plaintiff.

Cal. C. Civ. P., § 601*.

6799. (3144.) Grounds of challenge for cause. Challenges for cause may be taken on one or more of the following grounds:

1. A want of any of the qualifications prescribed by law to render a person competent as a juror;

2. Consanguinity or affinity within the fourth degree to either party;

3. Standing in the relation of debtor and creditor, guardian and ward, master and servant, employer and clerk, or principal and agent to either party; or being a member of the family of either party; or a partner, or united in business with either party; or being on any bond or obligation for either party;

4. Having served as a juror or been a witness on a previous trial between the same parties for the same cause of action, or being then a witness therein;

5. Pecuniary interest on the part of the juror in the event of the action, or in the main question involved in the action, except his interest as a member or citizen of a municipal corporation;

6. That a state of mind exists on the part of the juror with reference to the case or to either party which will prevent him from acting impartially and without prejudice to the substantial rights of the party challenging; but no person shall be disqualified as a juror by reason of having formed or expressed an opinion upon the matter or cause to be submitted to such jury founded upon public rumor, statements in public journals, or common notoriety; *provided,* that it satisfactorily appear to the court that the juror can and will, notwithstanding such opinion, act impartially and fairly upon the matter to be submitted to him.

Cal. C. Civ. P., § 602*.

Who competent as jurors, § 3597.

Who exempt from jury duty, § 3599.

Religious belief or absence thereof not to disqualify juror, Con. art. 1, sec. 4.

Challenge for cause, criminal procedure, § 8954.

The grounds of a challenge for cause must be specifically stated.
People v. Hopt, 3 U. 396; 4 P. 250.
Same case, 4 U. 247; 9 P. 407; affirmed 120 U. S. 430.
People v. Thiede, 11 U. 241; 39 P. 837; affirmed 159 U. S. 510.

The necessary qualifications of a juror must exist at the time he is offered as a juror, and it is not enough that he possessed such qualifications when the jury list was prepared.
Conway v. Clinton, 1 U. 215.

A person pardoned under act of congress, 1882, stands before the law precisely as if he had committed no offense, and when summoned as a juror cannot be challenged for formerly being a polygamist.
U. S. v. Bassett, 5 U. 131; 13 P. 237.

Where a juror falsely claims to be a citizen, or where he conceals material facts on his examination, new trial will be granted, note to § 6978.

The object of the examination of jurors on their voir dire is to ascertain whether there are grounds for a challenge for either actual or implied bias, and to enable an accused to exercise intelligently his peremptory challenge.
Tarpey v. Madsen, 26 U. 294; 73 P. 411.
State v. Morgan, 23 U. 212; 65 P. 356.
State v. Thompson, 24 U. 314; 67 P. 789.

When a challenge for cause is disallowed and the juror is thereupon peremptorily challenged and excused and an impartial competent juror obtained in his place, no injury is done to the party if until the jury is sworn he has other peremptory challenges which he can use.
People v. Hopt, 4 U. 247; 9 P. 407; affirmed 120 U. S. 430.
Conway v. Clinton, 1 U. 215.
People v. Thiede, 11 U. 241; 39 P. 837; affirmed 159 U. S. 510.

Not material whether opinion founded on rumor or on fact.
Conway v. Clinton, 1 U. 215.

One who has formed an unqualified opinion which it would take evidence to remove should, upon challenge, be excluded from the jury.
Conway v. Clinton, 1 U. 215.
U. S. v. Reynolds, 1 U. 319; affirmed 98 U. S. 145.
People v. O'Loughlin, 3 U. 133; 1 P. 653.

One having an opinion founded upon public rumor, etc., is not disqualified thereby, if he is able to act impartially and not let such opinion influence his verdict.
People v. Thiede, 11 U. 241; 39 P. 837; affirmed 159 U. S. 510.
People v. O'Loughlin, 3 U. 133; 1 P. 653.
U. S. v. Reynolds, 1 U. 319; affirmed 98 U. S. 145.

That a juror has an erroneous idea of the law governing a case does not make him subject to challenge for cause.
Johnson v. Park City, 27 U. 420; 76 P. 216.

That juror had on another case expressed prejudice against that class of cases not grounds for new trial.
Hern v. S. P. Co., 29 U. 127; 81 P. 902.

That a juror was married to a daughter of a half-sister of one of defendant's secret service employes, which fact, if known, would have induced the exercise of a peremptory challenge, was immaterial.
Id.

Is not a ground for challenge for cause by one being tried for murder committed in the perpetration of robbery that a juror believes that the murders so committed should be punished by death without recommendation for life imprisonment.
State v. Thorne, 41 U. 414; 126 P. 286.

Error in not overruling challenges for cause will not be presumed prejudicial, though the peremptory challenges are exhausted before the last juror is obtained, unless it is shown that an objectionable juror was forced upon defendant after his peremptory challenges had been exhausted, whom he would have removed but for such exhaustion, and such showing is not made unless objection to a juror is thereafter made.
Id.

It is not ground for challenge for cause that a juror believes that in case of guilt the full measure of punishment allowed should be given, without recommendation.
Id.

Acceptance of a juror without the defendant's peremptory challenges having been exhausted, held to waive any right to object to the manner of drawing return to the jury.
State v. White, 40 U. 342; 121 P. 579.

In a prosecution for homicide, the sustaining of objections to questions to venireman held not erroneous, he having already been examined on such matter.
State v. Hillstrom, 46 U. 341; 150 P. 935.

A juror who is personally acquainted with the condition of the walk, and has an opinion, is disqualified.
Johnson v. Park City, 27 U. 420; 76 P. 216.

6800. (3145.) Id. Tried by the court. Witnesses. Challenges for cause must be tried by the court. The juror challenged, and any other person, may be examined as a witness on the trial of the challenge.

Cal C. Civ P., § 603.
Where a juror is challenged for actual bias, an issue of fact is raised, and if no exception is taken to the admission or rejection of evidence upon the voir dire examination, the action of the trial court is conclusive and cannot be reviewed on appeal.
People v. Thiede, 11 U. 241; 39 P. 837; affirmed 159 U. S. 510.

6801. (3146.) Oath of jury. As soon as the jury is completed, an oath must be administered to the jurors, in substance, that they and each of them will well and truly try the matter in issue between ....., plaintiff, and ....., defendant, and a true verdict render according to the evidence.

Cal. C. Civ. P., § 604.

6802. (3147.) Order of trial. Court to instruct in writing at conclusion of evidence. Argument. When the jury has been sworn, the trial must proceed in the following order, unless the judge for special reasons otherwise directs:

1. The plaintiff, after stating the issue, shall open the case and produce the evidence on his part;

2. The defendant may then open his defense, and offer his evidence in support thereof;

3. The parties may then respectively offer rebutting evidence only, unless the court for good reasons, in furtherance of justice, permit them to offer evidence upon their original case;

4. When the evidence is concluded, the court shall instruct the jury in

writing upon the law applicable to the case, and, if it state the testimony of the case, it must inform the jury that they are the exclusive judges of all questions of fact; *provided,* that with the consent of both parties entered in the minutes, the court may instruct the jury orally, in which case the instructions shall be taken down by the court stenographer;

5. When the court has instructed the jury, unless the case is submitted to the jury on either side, or on both sides, without argument, the plaintiff must commence and may conclude the argument;

6. If several defendants, having separate defenses, appear by different counsel, the court must determine their relative order in the evidence and argument.

Kansas (1899) § 4370*; Cal. C. Civ. P., § 607*.
Nonsuit, § 6848.
Jury exclusive judges of credibility of witnesses, § 7122.
Evidence addressed to jury, § 7208.
Discussions of law addressed to the court, § 7209.
Offering of evidence after motion for nonsuit overruled, not a waiver, § 6849.
Exceptions, §§ 6965-6973.
Instructions requested should be in writing and numbered; refusal; modification, § 6803.
Presumption in favor of charge, note to § 6994.
An exception must be taken at the time an order or decision is made, § 6965, and note.
Exception to charge, when and how taken, § 6806, and note.
Admission of evidence etc., discretion of court, page 1322.
Election between counts, page 1323.
Conduct and argument of counsel, page 1323.
Instructions should be applicable, page 1323.
When court has fully charged, page 1324.
Conflicting instructions, page 1324.
Invading province of jury, page 1325.
Directing a verdict, page 1325.
Miscellaneous as to instructions, page 1326.

ADMISSION OF EVIDENCE, ETC.; DISCRETION OF COURT:

Rebutting evidence is such as explains, repeals, or counteracts evidence that comes out on the defense.
Smith v. Richardson, 2 U. 424.
The court may permit plaintiff, after defendant has rested, to introduce evidence in chief.
Godbe v. Young, 1 U. 55.
It is error to refuse to allow a witness to answer questions tending to affect his credibility, which questions are also proper as laying a foundation for impeachment.
Walley v. Des, Nat. Bank., 14 U. 305; 47 P. 147.
The trial court has the power to make the record of the case correspond with the actual ruling, notwithstanding an appeal may have been taken to the supreme court.
Wasatch Mining Co. v. Jennings, 14 U. 221; 46 P. 1106.
What may be admitted in rebuttal rests in the sound discretion of the court.
Harrington v. Chambers, 3 U. 94; 1 P. 362.
Court has discretion in a proper case to limit number of witnesses as to one point, and also time consumed in argument.
Skeen v. Mooney, 8 U. 157; 30 P. 363.
It is discretionary with the court to permit counsel to read from a law book to the jury.
Gilberson v. Miller M. & S. Co., 4 U. 46; 5 P. 699.
Contra, in rape case.
State v. Neel, 23 U. 541; 65 P. 494.
Action of trial court on matters within its discretion will not be reversed except for clear and palpable abuse of such discretion.
Burlock v. Shupe, 5 U. 290; 17 P. 19.
Henderson v. Higgins, 9 U. 290; 34 P. 61.
Walker v. Cont. Ins. Co., 2 U. 331.
Enright v. Grant, 5 U. 334; 15 P. 268.
Utah Com'l Bank v. Trumbo, 17 U. 198; 53 P. 1033.
Cutler v. Haycock, 32 U. 266; 90 P. 897.
Shafer v. Russell, 28 U. 444; 79 P. 559.
Non-prejudicial rulings on admission of evidence, though erroneous, not ground for reversal.
Snell v. Crowe, 3 U. 26; 5 P. 522.
Hyde v. U. P. Ry. Co., 7 U. 356; 26 P. 979.
Cannon v. Pratt, 1 U. 347; affirmed 99 U. S. 619.
State Bank v. Burton Gardner Co., 14 U. 420; 48 P. 402.
Sullivan v. S. L. City, 13 U. 122; 44 P. 1039.
When a witness contumaciously refuses to answer a proper question on cross-examination, it is the duty of the court to strike out his entire testimony and withdraw it wholly from the consideration of the jury.
Hadra v. Utah Nat'l Bank, 9 U. 412; 35 P. 508.
Witness who is a party, refusing to answer, pleading stricken out, § 7133.
The court has discretionary power to admit evidence out of its order.
Stevens v. Union Assurance Soc., 16 U. 22; 50 P. 626.
Neilson v. Nebo Brown Stone Co., 25 U. 37; 69 P. 289.
Admission of evidence largely in discretion of trial court.
Garr v. Cranney, 25 U. 193; 70 P. 853.
Jenkins v. Mammoth M. Co., 24 U. 513; 68 P. 845.
Shafer v. Russell, 28 U. 444 79 p. 559.
Brown v. Markland, 16 U. 360; 52 P. 597.
Johnson v. R. G. W. Ry., 7 U. 346; 26 P. 926.
Whether a case shall be reopened to allow testimony which should have been introduced in chief rests in the discretion of the trial court.
Musgrave v. Studebaker Bros. Co., 48 U. 410; 160 P. 117.
The admission or exclusion of evidence not strictly in rebuttal rests primarily in the discretion of the trial court.
In re Miller's Estate, 36 U. 228; 102 P. 996.
When, and under whatever circumstances, a leading question may be put is a matter which can be assigned for error.
R. G. W. Ry. Co. v. Utah Nursery Co., 25 U. 187; 70 P. 859.
The extent of cross-examination is largely in the discretion of the trial court.
Whipple v. Preece, 24 U. 364; 67 P. 1072.
Cahoon v. West, 20 U. 73; 57 P. 715.
Brigham City v. Crawford, 20 U. 130; 57 P. 842.
Olson v. O. S. L. R. R. Co., 24 U. 460; 68 P. 148.
Stephens v. Union Assurance Soc., 16 U. 22; 50 P. 626.
In a suit to recover the price of corporate stock sold to defendant, he could not be cross-examined, in order to test his credibility, as to a judgment rendered in another suit in favor of one who claimed to have a contract similar to plaintiff's.
Spratt v. Paulson, 49 U. 9; 161 P. 1120.
Where the defendant, in his answer and in open court, conceded the execution and delivery and non-payment of the note sued on, but defended on the ground of false representations, he is entitled to open and close.
Ogden Valley T. & R. Co. v. Lewis, 41 U. 183; 125 P. 687.
Where a question does not indicate that the answer will be objectionable, an objection to it should be overruled, and if the answer contains objectionable matter, the remedy is by motion to strike.
Cromeenes v. S. P., L. A. & S. L. R. Co., 37 U. 475; 109 P. 10.

Where the question indicates that it calls for an incompetent answer and such answer is given without objection, the court may refuse to strike the answer out.
Spiking v. Con. Ry. & P. C., 33 U. 313; 93 P. 838.

The jury should be instructed not to consider letters admitted in evidence, except for the purpose for which they were offered, if the defendant makes such request.
McKinney v. Carson, 35 U. 180; 99 P. 660.

Where an offer of proof is made including some immaterial matters, and is refused, the exclusion of the material evidence is error.
In re Young's Estate, 33 U. 382; 94 P. 731.

Where partnership books were produced in court and were available to either party, defendant could not object that they were not introduced in evidence by plaintiff.
Deming v. Moss, 40 U. 501; 121 P. 971.

ELECTION BETWEEN COUNTS:

When plaintiff rested her case, defendants moved that she be required to elect on which benefit certificate she proposed to stand. Thereupon, her counsel stated, "We are not seeking to recover on one certificate any more than on the other," but claimed to recover, however, only on one. Held, that the refusal to require the plaintiff to elect was error.
Sterling v. Woodmen of W., 28 U. 505; 80 P. 375.

Where a complaint contains two counts, one on an open account and the other on an account stated for the same cause of action, a motion to elect between the counts was properly denied. (Distinguishing Anthony v. Savage, 2 U. 466.)
Oberndorfer v. Moyer, 30 U. 325; 84 P. 1102.
Shaw v. Utah N. Ry., 6 U. 253; 21 P. 994.
See Conner v. Raddon, 16 U. 418; 52 P. 764.

CONDUCT AND ARGUMENT OF COUNSEL:

Misconduct of counsel in making improper remarks to the jury, where no exception is taken thereto and no request for instructions thereon is made, is not reviewable.
Johnson v. U. P. Ry. Co., 35 U. 285; 100 P. 390.
Andrews v. Free, 45 U. 505; 146 P. 555.

Unless so flagrantly improper that no ruling could have cured the harm.
Andrews v. Free, 45 U. 505; 146 P. 555.

Where, in an action for injury to a passenger, a carrier admitted that it had settled with most of the persons injured in the same accident, argument of plaintiff's counsel that such settlements were an admission of liability was not improper.
Johnson v. U. P. R. Co., 35 U. 285; 100 P. 390.

Statement by defendant's counsel to plaintiff's counsel during the noon recess, in hearing of the jury, held not to constitute improper conduct requiring reversal.
Requa v. Daly-Judge M. Co., 46 U. 92; 148 P. 448.

Where counsel, in argument to jury, makes statements in disparagement of a party and the court instructs that such remarks are to be considered as conclusions of counsel and not as statements of fact, refusal to grant a new trial for misconduct of counsel was not erroneous.
Prye v. Kalbaugh, 34 U. 306; 97 P. 331.

Argument of counsel, when it was incidentally shown that the defendant had an indemnity policy, that it would make no difference to the defendant whether judgment was for or against it, was improper.
Andrews v. Free, 45 U. 505; 146 P. 555.

The admission by defendant's counsel in argument that on the trial there was no evidence, independent of that relating to the counterclaim, to dispute plaintiff's evidence as to the amount of its claim, would not estop it from controverting the whole or a part of plaintiff's claim.
Sierra Nevada Mill Co. v. Keith-O'Brien Co., 48 U. 12; 156 P. 943.

INSTRUCTIONS SHOULD BE APPLICABLE:

Party cannot complain of instructions asked by him.
People v. Gough, 2 U. 70.
Davis v. Utah Sou. Ry. Co., 3 U. 218; 2 P. 521.
Wood v. R. G. W. Ry. Co., 28 U. 351; 79 P. 182.

When no request made. Party cannot complain of lack of specific instructions upon a point.
Griffiths v. Clift, 4 U. 462; 11 P. 609.

Request which is too much upon the weight of the evidence, confining jury to particular circumstances stated without notice of others of importance, and selecting a particular fact as controlling to the exclusion of others, should be refused.
Leak v. R. G. W. Ry. Co., 9 U. 246; 33 P. 1045.

Requests should be made before charge.
Flint v. Nelson, 10 U. 261; 37 P. 479; affirmed 166 U. S. 276.

Instructions should be applicable to the evidence.
Firman v. Bateman; 2 U. 268.
Snell v. Crowe, 3 U. 26; 5 P. 522.
Jensen v. Utah L. & Ry. Co., 42 U. 415; 132 P. 8.

Requests not applicable to the evidence should be refused.
Clampitt, v. Kerr, 1 U. 246.
Ogden Clay Co. v. Harvey, 9 U. 497; 35 P. 510.
Thomas v. Springville, 9 U. 426; 35 P. 503.
Fritz v. Western Union T. Co., 25 U. 363; 71 P. 209.
State v. Evans, 27 U. 12; 73 P. 1047.
Casady v. Casady, 31 U. 394; 88 P. 32.
Downey v. Gimini M. Co., 24 U. 431; 68 P. 414.
Lawson v. Thompson, 10 U. 462; 37 P. 732.
Smith v. Cannady, 45 U. 521; 147 P. 210.
Herndon v. S. L. City, 34 U. 65; 95 P. 646.

If not so applicable, though abstractly correct, it is error. Such error does not compel reversal, however, unless it appears that the jury was misled.
Clampitt v. Kerr, 1 U. 246.
Davis v. Utah Southern Ry. Co., 3 U. 218; 2 P. 521.
Snell v. Crowe, 3 U. 26; 5 P. 522.

Instruction not applicable to facts is error.
Holt v. Pearson, 12 U. 63; 41 P. 560.
Belknap v. Widdison, 32 U. 246; 90 P. 393.
State v. Gordon, 28 U. 15; 76 P. 882.
Williamson v. Salt Lake & Utah R. R. Co., 51 U. —; 172 P. 680.

Instructions not applicable to the theory on which case is tried are properly refused.
Swan v. S. L. & O. Ry. Co., 41 U. 518; 127 P. 267.

An instruction on an issue not raised in the pleadings is erroneous.
Lochhead v. Jensen, 42 U. 99; 129 P. 347.
Holt v. Pearson, 12 U. 63; 41 P. 561.
Gondie v. D. & R. G., 34 U. 237; 97 P. 120.
Davidson v. Utah Independent Tel. Co., 34 U. 249; 97 P. 124.

Even though there is evidence.
First Nat. Bank v. Taylor, 38 U. 516; 114 P. 529.

And where there is no evidence.
Tyng v. Constant-Loraine Inv. Co., 37 U. 304; 108 P. 1109.
Manti v. Peterson, 33 U. 209; 93 P. 566.
Smith v. Gilbert, 50 U. —; 164 P. 1026.

If requested, the court must instruct on every material issue as to which there is some evidence.
McKinney v. Carson, 35 U. 180; 99 P. 660.

Where an instruction offered by defendant covered no issue in the case, a modification of it, making it neither better nor worse, was harmless error.
Kimball v. S. L. City, 32 U. 253; 90 P. 395.

Where plaintiff was instructed to work at a particular place, but not to do any particular act, it was error to charge that a servant acting under the direct command of the master does not assume the risks incident to the act commanded to be done unless the danger is appreciated by him.
Bakka v. Kemmerer Coal Co., 43 U. 345; 134 P. 888.

In a negligence case a request to charge that one is only required to exercise reasonable and ordinary care in doing a thing, while abstractly correct, was not applicable to the

facts, and imparted no practical information to the jury, so that its refusal was not error.
Furkovich v. Bingham Coal & L. Co., 45 U. 89; 143 P. 121.

An instruction that it is the duty of a city to keep its streets in repair is inapplicable and misleading where part of the street has not been prepared and used for public travel.
Herndon v. Salt Lake City, 34 U. 65; 95 P. 646.

Where the court is required to charge with respect to conflicting theories of the plaintiff and the defendant, it may not instruct the jury that they may render a verdict for one of the parties, without considering and finding all of the elements necessary to support such verdict both in law and in fact, and it is error, in an action between partners, to ignore, in such instruction, their special agreement defining and limiting their rights as to the sale of partnership property.
Morgan v. Child, Cole & Co., 47 U. 417; 155 P. 451.

An instruction that if the plaintiff was injured as alleged, without fault on his part, he was entitled to a verdict, is not erroneous as casting upon plaintiff the burden of proving that he was free from contributory negligence, where the court also charged that contributory negligence constituted a defense, and that the burden of establishing it by a preponderance of the evidence was on the defendant.
Grow v. U. L. & Ry. Co., 37 U. 41; 106 P. 514.

An instruction charging that train operatives are bound to use ordinary care to avoid injuring plaintiff attempting to board moving freight train, held authorized under the averments of the complaint.
Lawhorn v. D. & R. G. R. Co., 42 U. 244; 130 P. 470.

WHEN COURT HAS FULLY CHARGED:

The court, having charged properly on the whole case, may refuse to insruct further.
Cunningham v. U. P. Ry. Co., 4 U. 206; 7 P. 795.
U. S. v. Musser, 4 U. 153; 7 P. 389.
Reddon v. U. P. Ry. Co., 5 U. 344; 15 P. 262.
Leak v. R. G. W. Ry. Co., 9 U. 246; 33 P. 1045.
People v. Thiede, 11 U. 241; 39 P. 837.
Scoville v. S. L. City, 11 U. *0; 39 P. 481.
Scott v. Provo, 14 U. 31; 45 P. 1005.
Chapman v. Sou. Pac. Co., 12 U. 30; 41 P. 551.
Konold v. R. G. W. Ry. Co., 21 U. 379; 60 P. 1021.
Osborne v. Phoenix Ins. Co., 23 U. 428; 64 P. 1103.
State v. Haworth, 24 U. 398; 68 P. 155.
Fritz v. W. U. Tel. Co., 25 U. 263; 71 P. 209.
State v. Morgan, 27 U. 103; 74 P. 526.
Johnson v. U. P. Coal Co., 28 U. 46; 76 P. 1089.
Wilkinson v. Anderson-T. Co., 28 U. 346; 79 P. 46.
Hickey v. R. G. W. Ry. Co., 29 U. 392; 82 P. 29.
Major v. O. S. L. R. R. Co., 21 U. 141; 59 P. 522.
Morgan v. Mam. M. Co., 26 U. 174; 72 P. 688.
Spiking v. Con. Ry. & Power Co., 33 U. 313; 93 P. 838.
Herndon v. S. L. City, 34 U. 65 95 P. 646.
Morris v. O. S. L. R. Co., 36 U. 14; 102 P. 629.
Wall Rice Mg. Co. v. Continental Sup. Co., 36 U. 121; 103 P. 242.
Evans v. O. S. L., 37 U. 431; 108 P. 638.
Holt v. Neilson, 37 U. 566: 109 P. 470.
Urich v. Utah Apex M. Co., 50 U. —; 169 P. 263.

It is sufficient if the jury are properly instructed in substance, and the court need not adopt the form of language presented by counsel, but may choose that mode of expression which he deems best adapted to intelligently state the law to the jury on the requested matter.
Hickey v. R. G. W. Ry. Co., 29 U. 392; 82 P. 29.

A refusal of instructions covered by those given is not error.
Hirabelli v. Daniels, 40 U. 513; 121 P. 966.
Geanakoules v. Union Portland Cement Co., 41 U. 486; 126 P. 329.
Lindsay L. & L. Co. v. Smart L. & L. Co., 43 U. 554; 137 P. 837.
Boyd v. S. P. L. A. & S. L. R. Co., 45 U. 449; 146 P. 282.

Where a court has instructed a jury on the doctrine "falsus in uno, falsus in omnibus," it is not error to refuse instructions singling out the testimony of prosecutrix.
State v. Reese, 43 U. 447; 135 P. 270.

The court held not bound to charge plaintiff's and defendant's theories on a certain question in separate instructions, but could cover the question in one instruction and still charge their respective theories.
Toone v. O'Neill Constr. Co., 40 U. 265; 121 P. 10.

It is not necessary, in a buyer's action to rescind a sale for false representation, to repeat a charge in every instruction that the false representations must have been related to a material fact.
Smith v. Columbus Buggy Co., 40 U. 580; 123 P. 580

CONFLICTING INSTRUCTIONS:

Where the charge as a whole correctly expressed the law, defects in particular portions are not grounds for reversal where the jury was not misled.
Anderson v. Daly M. Co., 16 U. 28; 50 P. 815.
Olson v. O. S. L. R. R. Co., 24 U. 460; 68 P. 148.
Morgan v. Mam. M. Co., 26 U. 174; 72 P. 688.
Nichols v. Wells, 2 U. 167.
People v. Sensabaugh, 2 U. 473.
Hamer v. First N. Bank, 9 U. 215; 33 P. 941.
State v. McCoy, 15 U. 136; 49 P. 420.
Reese v. Morgan M. Co., 17 U. 489; 54 P. 759.
McCornick v. Queen M. & M. Co., 23 U. 71; 63 P. 820.
Morgan v. Mammoth Min. Co., 26 U. 174; 72 P. 688.
Rogers v. R. G. W. Ry. Co., 32 U. 367; 90 P. 1075.
Smith v. S. P. L. A. S. L. Ry. Co., 35 U. 290; 100 P. 673.
Cromene v. S. P. Ry. Co., 37 U. 475; 109 P. 10.

Error in refusing request cured by verdict, where the facts which were the basis of the request are negatived by the verdict.
Snell v. Crowe, 3 U. 26; 5 P. 522.
Loofbourow v. Utah L. & Ry. Co., 31 U. 283; 88 P. 19.
Rogers v. R. G. W. Ry. Co., 32 U. 367; 90 P. 1075.

Where it does not appear that the jury was misled by an erroneous instruction, it will not be held error; particularly where the charge as a whole appears to state the law fully and correctly.
Holland v. O. S. L. R. R. Co., 26 U. 209; 72 P. 940.
Major v. O. S. L. R. R. Co., 21 U. 141; 59 P. 522.
Martin v. Hill, 3 U. 157; 2 P. 62.

Where correct instructions are first given, and afterwards another instruction is given at the request of the appellant, which is favorable to him, but which is erroneous and in conflict with the previous ones, the error is not cause for reversal.
Wood v. R. G. W. Ry. Co., 28 U. 351; 79 P. 182.
Davis v. Utah South R. R. Co., 3 U. 218; 2 P. 521.

Where conflicting instructions are given, one of which is erroneous, it is to be presumed that the jury may have followed that which is erroneous.
People v. Hancock, 7 U. 170; 25 P. 1093.
People v. Berlin, 10 U. 39; 36 P. 199.
Marti v. Am. S. & R. Co., 23 U. 52; 63 P. 184.

Instructions should be considered together.
Utah A. C. M. v. Boyle Fur. Co., 43 U. 523; 136 P. 572.

An erroneous charge held harmless in view of the whole charge.

Hunt v. Moran Constr. Co., 46 U. 388; 150 P. 953.

The rule that one or more erroneous instructions cannot be cured by other correct instructions does not apply where the instructions objected to are not erroneous, but merely incomplete, and further instructions are given covering the issues, and the verdict shows that the entire instructions were considered by the jury.

Gimnich Fur. Co. v. Sorenson, 34 U. 109; 96 P. 121.

In a will contest, where the court ruled at the beginning of the trial that the burden of proof was on the proponent, but, in charging the jury, charged that as to the issue of insanity only the burden of proof was on the protestant, the court erred in failing to charge as to the burden on issue of undue influence, though the proponent's counsel did not request an instruction thereon.

In re Hansen's Will, 50 U. —; 167 P. 256.

Where the court granted motion for nonsuit on certain questions, it was error thereafter in the charge to submit such questions to the jury.

Derrick v. S. L. & O. Ry. Co., 50 U. —; 168 P. 335.

INVADING PROVINCE OF JURY:

It is error for the court to intimate an opinion as to the weight of evidence or facts.

Hawley v. Corey, 9 U. 175; 33 P. 695.

See Cooper v. D. & R. G. Ry., 11 U. 46; 39 P. 478.

Loofbourow v. Utah L. & Ry. Co., 31 U. 283; 88 P. 19.

In an action for damages, an instruction which assumes that plaintiff has proven damages is in effect a usurpation of the province of the jury by the court, and necessarily prejudicial to the defendant, notwithstanding the fact that another portion of the charge tells the jury that they are the judges of the facts and the credibility of the witnesses.

Marti v. A. S. & R. Co., 23 U. 52; 63 P. 184.

Instruction as to credibility, etc., not an invasion of province of jury.

R. G. W. Ry. Co. v. Utah Nursery Co., 25 U. 187; 70 P. 859.

It is proper for the court, in instructing the jury, to assume the existence of those facts which are shown beyond controversy.

Shafer v. Russell, 28 U. 444; 79 P. 559.

Kipros v. Uintah Ry. Co. 45 U. 389; 146 P. 292.

In an action against a carrier for the death of a railway mail clerk, an instruction that it is presumed that deceased was in the car lawfully and in the discharge of his duties, but such presumption would be overcome if it were shown by preponderance of the evidence that he was not there in discharge of his official duties, was erroneous as invading the province of the jury on the weight to be given a mere inference of fact.

Schuyler v. So. Pac. Co., 37 U. 581; 109 P. 458, 1025.

An instruction which assumes the truth of controverted facts is erroneous.

Davidson v. Utah Ind. Tele. Co., 34 U. 249; 97 P. 124.

Bills v. S. L. City, 37 U. 507; 109 P. 745.

Where the court takes judicial knowledge of a fact and proof thereof is excluded, the court may, in its instructions, assume such fact to be true.

Spiking v. Cons. R. & P. Co., 33 U. 313; 93 P. 838.

In the absence of a statute, the court cannot, as a matter of fact, declare what effect shall be given to any particular fact or circumstance.

Smith v. Cummings, 39 U. 306; 117 P. 38.

Where, in an action for injury in a mine, it appeared without dispute that explosive gas was found in defendant's mine on one occasion about two months prior to the death, the court properly told the jury that defendant's mine was a mine known to generate explosive gas instead of submitting that question to the jury.

Eleganti v. Standard Coal Co., 50 U. —; 168 P. 266.

DIRECTING A VERDICT:

The court has no authority to entertain a motion for judgment notwithstanding the verdict on the ground that there was a failure of proof as to some essential element of the cause of action; but that question must be raised by a motion for nonsuit, a request to direct the verdict, or, after verdict, by motion for a new trial.

Kirk v. Salt Lake City, 32 U. 143; 89 P. 458.

Verdict for plaintiff properly directed, in ejectment case.

Jones v. Memmott, 8 U. 212; 30 P. 752.

Where there is a substantial conflict in the evidence it is error to instruct the jury to find a verdict.

Johnston v. Meaghr, 14 U. 426; 47 P. 861.

Lepper v. Reilley, 47 U. 567; 155 P. 444.

Verdict properly directed under facts in replevin case against sheriff.

Munns v. Loveland, 15 U. 250; 49 P. 743.

Verdict directed where facts undisputed.

Centennial-Eureka M. Co. v. Juab Co., 22 U. 395; 62 P. 1024.

In determining whether lower court should have directed a verdict, the appellate court must consider the evidence in the aspect most favorable to the respondent.

Merrill v. O. S. L. Ry., 29 U. 264; 81 P. 85.

Where it appears that the contract sought to be enforced is contrary to public policy, the court of its own motion should dismiss the action, regardless of whether the parties request it.

Boyd v. Topham, 47 U. 224; 152 P. 1185.

Where defendant, by erecting and maintaining a dam for thirty years, acquired a prescriptive right to divert the flood waters of a stream, it is not entitled to a directed verdict where there is evidence that the original dam has been raised and the diversion increased.

Stephens R. & L. S. Co. v. U. P. R. Co., 48 U. 528; 161 P. 459.

The propriety of an order directing a verdict for defendant is tested by the question whether all reasonable men would draw the same conclusions from the evidence, and whether such conclusion requires a verdict for defendant

Peterson v. Bullion-Beck & C. M. Co., 41 U. 364; 126 P. 310.

A party other than the one against whom a verdict is directed cannot complain of the absence of a reason for such direction.

Morris v. Salt Lake City, 35 U. 474; 101 P. 717.

Where the net damage to grape vines could not be ascertained from the evidence, the court should withdraw it from the jury.

Sagers v. International Smelting Co., 50 U. —; 168 P. 105.

Where there is no evidence of the cost of harvesting crops, the court should withdraw from the jury the question of damages.

Id.

Where plaintiff's evidence and the inferences therefrom would authorize reasonable men to arrive at different conclusions, the question is one of fact, though the evidence on some points may be very unsatisfactory.

Robinson v. Salt Lake City, 37 U. 520; 109 P. 817.

Where, in an action against an initial and connecting carrier for negligence in transporting sheep, there is no evidence that the cars provided by the initial carrier were not proper, nor that there was any delay or injury while sheep were in its possession, the court did not err in directing a verdict for the initial carrier.

Groot v. O. S. L. R. Co., 34 U. 152; 96 P. 1019.

The court is not bound to accept a witness's statement as conclusive because there is no direct testimony of an eyewitness to the contrary, when there are other facts and circumstances from which a jury could properly find otherwise.

Condie v. R. G. W. Ry. Co., 34 U. 237; 97 U. 120.

Motion for a directed verdict must specify the grounds thereof, and in a motion for nonsuit a general statement that the plaintiff has not made a sufficient case to go to the jury

is not sufficient; but the rule is qualified to the extent that where it is manifest on what question of law the case was taken from the jury and the defect does not admit of correction, a failure to specify the ground of motion does not justify a reversal.

Smalley v. D. & R. G. R. Co., 34 U. 423; 98 P. 311.

The trial court is not required to specify its reasons for directing a verdict.

Owens v. S. P., L. A. & S. L. R. Co., 32 U. 208; 89 P. 825.

If the grounds for motion for a directed verdict are not specified, the supreme court will not review the ruling denying the motion.

Bown v. Owens, 37 U. 177; 106 P. 708.

Nor is the overruling of such motion error.

Kytka v. Weber Co., 48 U. 421; 160 P. 111.

In passing on motion to direct a verdict, the court should determine what the undisputed evidence establishes; it does not weigh the evidence to determine what facts are established.

Law v. Smith, 34 U. 394; 98 P. 300.

Where, in an action for negligence, the answer puts in issue the allegations of the complaint and sets up contributory negligence, assumption of risk, settlement, etc., the court, in directing the verdict, must specify the ground therefor.

Smalley v. D. & R. G. R. Co., 34 U. 423; 98 P. 311.

MISCELLANEOUS AS TO INSTRUCTIONS:

When trial court erred in instructing the jury, in spite thereof they found a proper verdict supported by the evidence, on appeal from order setting aside such verdict as against law, and granting new trial, the same will be reversed and original verdict reinstated.

Krantz v. R. G. W. Ry. Co., 12 U. 104; 41 P. 717.

Where it is clear almost beyond reasonable controversy that the instructions of the court to the jury respecting the question of damages had been disregarded, the supreme court may order a new trial; the same influence which caused the jury to disregard the instructions of the court may have misled them in passing upon other questions in the case.

Wright v. Southern Pacific Co., 14 U. 383; 46 P. 375.

Harmless instruction no error.

Leak v. R. G. W. Ry., 9 U. 246; 33 P. 1045.

When evidence is introduced which is not admissible except for a special purpose, the jury should be instructed, upon the request of the party prejudiced thereby, to limit its use to that purpose only.

Neilson v. Nebo Brown Stone Co., 25 U. 37; 69 P. 289.

Marks v. Culmer, 6 U. 419; 24 P. 528.

Instructions as to elements of damage in negligence cases. notes to §§ 6504-6505.

Although the instructions of the court were not set out in the bill of exceptions, it will be presumed that they were in writing in the absence of any showing that they were given verbally in pursuance of this section.

Utah Optical Co. v. Keith, 18 U. 464; 56 P. 155.

Instructions presumed correct.

Flint v. Nelson, 10 U. 261; 37 P. 479; affirmed 166 U. S. 276.

The verdict of a jury in an equity suit on controverted questions of fact submitted to it being merely advisory, error cannot be predicated on instructions given or refused.

Grand Cen. M. Co. v. Mammoth M. Co., 29 U. 490; 83 P. 648.

Smith v. Richardson, 2 U. 424.

The instructions are the law of the case which the jury must follow, whether they consider them correct or not, and whether the instructions are, in fact, correct or not; and where a verdict is in disregard of instructions, it should be set aside by trial court.

Bently v. Brossard, 33 U. 396; 94 P. 736.

Where all the facts alleged as to plaintiff's right to recover were denied in the answer, it is not reversible error for the court to copy the complaint and such parts of the answer as raised the issues in the case, it not appearing that the jury was thereby misled as to the issues.

Smith v. Columbus Buggy Co., 40 U. 500; 123 P. 580.

A party is entitled to have instruction given on its theory of the case, provided there is any evidence to support it.

Pratt v. Utah Light & Traction Co., 51 U. —; 169 P. 868.

Anderson v. Nielson, 43 U. 564; 137 P. 152.

The refusal of instruction not justified by the evidence, though reflecting a party's theory is not error.

Ulrich v. Utah Apex Mining Co., 50 U. —; 169 P. 263.

An instruction that the mere fact that an accident happened was not sufficient to charge defendant with negligence held not objectionable, as there was some evidence of defendant's negligence.

Boyd v. S. P., L. A. & S. L. R. Co., 45 U. 449; 146 P. 282.

An instruction that the jury are to exclude from their minds any special knowledge of the case "except such matters as are of common knowledge" is not erroneous.

Deardon v. S. P., L. A. & S. L. R. Co., 33 U. 147; 93 P. 471.

The court's admonition to jury before viewing premises that it was to merely view the premises "and not to talk about the case at all; to look is all you are to do; not to take account, measurements, or go out to act as detectives; not to be searchers for anything that has not been brought before you or suggested to you"—was proper.

Sorenson v. D. & R. G. Ry. Co., 49 U. 548; 164 P. 1020.

In a will case, where the court ruled at the beginning of trial that the burden of proof was on the proponent, but, in charging the jury, charged that as to the issue of insanity only the burden of proof was on the protestant, the court erred in failing to charge as to the burden on issue of undue influence, though proponent's counsel did not request an instruction thereon.

In re Hansen's Will, 50 U. —; 167 P. 256.

An instruction permitting jury to construe the contract sued on is erroneous.

Bailey v. Spalding-Livingston Inv. Co., 43 U. 535; 136 P. 962.

Where a part of a requested instruction was bad, the court was justified in refusing the whole of it.

Jensen v. D. & R. G. R. Co., 44 U. 100; 138 P. 1185.

Requested instructions containing correct statement but ending by directing the jury to determine the whole case on a single issue not decisive of the whole case, is properly refused.

Herndon v. S. L. City, 34 U. 65; 95 P. 646.

A charge that it is a presumption that every man exercises due care for his own safety when in a place of danger, and that decedent did so when he approached the railroad crossing, and plaintiff need not affirmatively prove he looked and listened, and burden of proof that he did not is on defendant, is not erroneous.

Evans v. O. S. L. R. Co., 37 U. 431; 108 P. 638.

A party requesting the court to charge on a subject may complain that the court erroneously stated the law where it was not stated as requested.

Smith v. Ogden & M. W. R. Co., 33 U. 129; 93 P. 185.

It was not prejudicial error to charge in language of the pleadings as to what constituted the issues in the case, where the issues were stated in plain and concise language.

Dimmick v. Utah Fuel Co., 49 U. 430; 164 P. 872.

Mallett v. Velie M. Co., 49 U. 567; 164 P. 877.

Where a court admits proof of a contract as of a different date than that alleged without requiring any amendment to the pleadings to conform to the proof, it is error to instruct that the jury must find that the contract was performed on the dates alleged.

Beason v. Western Meat Co., 40 U. 398; 124 P. 335.

An instruction that if a jury find "by preponderance of the evidence" that plaintiff has

failed to prove his case the verdict should be for the defendant, was erroneous in requiring defendant to establish his case by a preponderance of the evidence.
Hillyard v. Bair, 47 U. 561; 155 P. 449.
Where the defendant objects to certain evidence which may be admissible for a certain purpose only, the court overrules the objection, and states that it will instruct fully thereon, and counsel excepted to the ruling, and relying on the court's promise to instruct, failed to submit a request thereon, and the court does not instruct thereon, it is erroneous.
State v. McCurtain, 51 U. —; 172 P. —.

6803. (3148.) Requests for instructions; numbered and in writing; refusal; modification. Either party may, before the court has instructed the jury, or later by consent of the court, ask special instructions, which shall be in writing and numbered, and the court must either give such instructions as requested or refuse to do so, or give the instructions with modifications. Those refused shall be so marked; those modified shall be marked in such manner as clearly to point out the changes therein by words indicating the same.

Cal. C. Civ. P., § 609*; Col., Mills' An. C. § 187*; Kansas (1889) § 4370*.
Instructions generally, including requests, note to § 6802.
Instructions requested or given become part of judgment roll, § 6806.

6804. (3149.) Instructions to be numbered and read without comment. The instructions given shall be in consecutively numbered paragraphs, and shall be read to the jury without oral comment or explanation.
Iowa, McClain's An. C., §§ 3993-3995*; Neb. (1895) § 2449*; N. Dak. (1895) § 5433*.

6805. (3150.) Instructions to be signed; may be taken by jury. When the charge is in writing, it must be signed by the judge and delivered to the jury, and may be taken by the jury in their retirement and returned with their verdict into court.

Col., Mills' An. C., § 187*; Kansas (1889) § 4370*.
Court may allow the jury to take the written charge into the jury room.
Scoville v. S. L. City, 11 U. 60; 39 P. 481.

6806. (3151.) Instructions to be filed. Exceptions to charge, when and how taken. All instructions requested or given shall be filed by the clerk and become a part of the judgment roll. Exceptions to the charge or any portion thereof, or to the refusal or modification of any instruction requested, shall be taken at the time the charge is given or before verdict. No reason need be given for such exceptions, but the exceptions shall be noted upon the minutes of the court, or by the court stenographer if one is in attendance.

Iowa, McClain's An. C., § 3994*; N. Dak. (1895) § 5433*.
Exceptions generally, §§ 6965-6973.
Exceptions must be taken at the time the decision is made, § 6965.
Presumption in favor of charge, note to § 6994.
Judgment roll, how made up, § 6867.
No particular form of exception required, except, § 6967.
What deemed excepted to, § 6966.
Appeals decided on the record as made in the court below, § 6990, and note to § 6994.
Errors not properly excepted to are not considered on appeal, note to § 6994.
Assignments of error, note to 6994.
Requests to charge are a part of the judgment roll.
Lindsay L. & L. Co. v. Smart L. & L. Co., 43 U. 554; 137 P. 837.
Where a requested instruction is refused, an exception to the refusal to give it is sufficient.
Farnsworth v. U. P. Coal Co., 32 U. 112; 89 P. 74.

EXCEPTIONS TO CHARGE:

In the absence of exceptions to the charge, it cannot be reviewed.
Jenkins v. Mammoth M. Co., 24 U. 513; 68 P. 845.
Kunkel v. Utah Lumber Co., 29 U. 13; 81 P. 897.
The suggestion that the specific objectionable matter in an instruction was not pointed out by the counsel in taking an exception to the action of the court in the premises cannot avail where the exception relates to a request which was deemed excepted to, and not to an original instruction given by the court of its own motion.
Mickelson v. East Tintic Ry. Co., 23 U. 42; 64 P. 463.
Specific exceptions to parts of charge objected to should be taken before verdict, so that trial court may have opportunity to correct errors, if any.
Marks v. Tompkins, 7 U. 421; 27 P. 6.
People v. Hart, 10 U. 204; 37 P. 330. (Disapproving People v. Berlin, 10 U. 39; 36 P. 199.)
Farr v. Swigart, 13 U. 150; 44 P. 711.
Ruffatti v. Societe des Mines, 10 U. 386; 37 P. 591.
Scoville v. S. L. City, 11 U. 60; 39 P. 481.
Thirkfield v. Mountain V. C. Ass'n, 12 U. 76; 41 P. 564.
Lowe v. Salt Lake City, 13 U. 91; 44 P. 1050.
Wilson v. Sioux M. Co., 16 U. 392; 52 P. 626.
Scott v. Utah Con. M. Co., 18 U. 486; 56 P. 305.
People v. Thiede, 11 U. 24; 39 P. 837;
Notwithstanding the provisions of this section (enacted 1898), an exception to instruction must point out the part that is bad unless the whole is bad; part of the instruction being good, an exception to it as a whole is unavailing.
Farnsworth v. U. P. Coal Co., 32 U. 112; 89 P. 74.
Pool v. So. P. Co., 20 U. 210; 58 P. 326.
Wall v. Niagara M. & S. Co., 20 U. 476; 59 P. 399.
Nebeker v. Harvey, 21 U. 363; 60 P. 1029.
Haun v. R. G. W. Ry. Co., 22 U. 346; 62 P. 908.
Beaman v. Martha W. M. Co., 23 U. 139; 63 P. 631.
Wild v. U. P. R. R. Co., 23 U. 265; 63 P. 886.
Whipple v. Preece, 24 U. 364; 67 P. 1072.
State v. King, 24 U. 482; 68 P. 418.
State v. Haworth, 24 U. 398; 68 P. 155.
Palmquist v. Mine & S. Supply Co., 25 U. 257; 70 P. 994.
State v. Campbell, 25 U. 342; 71 P. 529.
Lebcher v. Lambert, 23 U. 1; 63 P. 628.
State v. Clark, 27 U. 55; 74 P. 119.
Nelson v. Brixen, 7 U. 454; 27 P. 578.
Wilson v. Sioux Con. Min. Co., 16 U. 392; 52 P. 626.

Beaman v. Martha Wash. Min. Co., 23 U. 139; 63 P. 631.

Pennington v. Redman Van & Stor. Co. 34 U. 223; 97 P. 115.

Ryan v. Curlew Irr. & Res. Co., 36 U. 382; 104 P. 218.

Grow v. Utah L. & Ry. Co., 37 U. 41; 106 P. 514.

Where an instruction includes different and independent subjects, a general exception thereto cannot be considered on appeal unless the instruction as a whole is incorrect.

Mathews v. Daly-West M. Co., 27 U. 193; 75 P. 722.

Smith v. Columbus Buggy Co., 40 U. 580; 123 P. 580.

An exception to an instruction on the ground that it contains a partial and incomplete statement of the evidence and an inaccurate statement of the law, but without showing wherein it is inaccurate, raises no question on appeal.

State v. Clark, 27 U. 55; 74 P. 119.

An exception need not give any reason why an instruction is bad, but the word or phrase or paragraph complained of must be specifically pointed out, so that the trial court may have the opportunity of making corrections.

Farnsworth v. U. P. Coal Co., 32 U. 112; 89 P. 74.

Doubtful practice for counsel to agree that exceptions to charge can be taken after retirement of jury.

Ruffatti v. Societe des Mines, 10 U. 386; 37 P. 591.

Farr v. Swigart, 13 U. 150; 44 P. 711.

Without knowledge of plaintiff's counsel, defendant's counsel, with consent of the court, went to the court reporter's room and there caused exceptions to be noted by the reporter to parts of the charge and refusal to charge; held, that errors assigned on exceptions so noted should not be considered.

Ober v. Schenck, 23 U. 614; 65 P. 1073.

General exceptions to a number of paragraphs of a charge is insufficient to preserve for review the propriety of giving any of such instructions.

Murray M. & L. Co. v. Newhouse Realty Co., 47 U. 622; 155 P. 442.

6807. (3152.) View by jury. When, in the opinion of the court, it is proper for the jury to have a view of the property which is the subject of litigation or of the place in which any material fact occurred, it may order them to be conducted in a body under the charge of an officer to the place, which shall be shown to them by some person appointed by the court for that purpose. While the jury are thus absent, no person other than the person so appointed shall speak to them on any subject connected with the trial.

Cal. C. Civ. P., § 610.

The court's admonition to jury before viewing premises, "not to talk about the case at all; to look is all you are to do; not to take accounts, measurements, or go out to act as detectives; not to be searchers for anything that has not been brought before you, or suggested to you"—was proper.

P. A. Sorenson Co. v. D. & R. G. R. Co., 49 U. 548; 164 P. 1020.

The viewing of the premises is within the discretion of the trial court.

Shortino v. S. L. & U. R. Co., 51 U. —; 174 P. 860.

6808. (3153.) Admonition to jury upon separating. If the jury are permitted to separate, either during the trial or after the case is submitted to them, they shall be admonished by the court that it is their duty not to converse with, or suffer themselves to be addressed by, any other person on any subject of the trial, and that it is their duty not to form or express an opinion thereon until the case is finally submitted to them.

Cal. C. Civ. P., § 611.

6809. (3154.) What papers may be taken to jury room. Upon retiring for deliberation, the jury may take with them all papers which have been received as evidence in the cause, except depositions, or copies of such papers as ought not, in the opinion of the court, to be taken from the person having them in possession, and they may also take with them notes of the testimony or other proceedings on the trial, taken by themselves or any of them, but none taken by any other person.

Cal. C. Civ. P., § 612.

6810. (3155.) Jury may decide in court or retire. Duty of officer. When the case is finally submitted to the jury, they may decide in court or retire for deliberation. If they retire they must be kept together in some convenient place under charge of an officer until they agree upon a verdict or are discharged by the court. Unless by order of the court, the officer having them under his charge must not suffer any communication to be made to them, or make any himself, except to ask them if they have agreed upon their verdict; and he must not, before the verdict is rendered, communicate to any person the state of their deliberations or the verdict agreed upon.

Cal. C. Civ. P., § 613*.

6811. (3156.) Further instructions to jury on request; notice. After the jury have retired for deliberation, if there be a disagreement among them as to any part of the testimony or if they desire to be informed of any point of law arising in the cause, they may require the officer to conduct them into court. Upon their being brought into court, the information required must be

given in the presence of, or after notice to, the parties or counsel. Such information must be given in writing or taken down by the stenographer.

Cal. C. Civ. P., § 614*.

Instructions may be given on a legal holiday, § 1806.

Where a jury asks about an instruction which erroneously made the time of employment controlling, and the court fails to withdraw or modify the instruction, it is prejudicial error.

Beason v. Western Meat Co., 40 U. 398; 124 P. 335.

6812. (3157.) Sick juror may be discharged. Effect. If, after the impaneling of the jury and before verdict, a juror becomes sick so as to be unable to perform his duty, the court may order him to be discharged. In that case the trial may proceed with the other jurors, or another juror may be sworn and the trial begin anew, or the jury may be discharged and a new jury then or afterwards impaneled.

Cal. C. Civ. P., § 615.

6813. (3158.) Action retried when jury discharged or fail to render verdict. In all cases where the jury are discharged, or prevented from giving a verdict by reason of accident or other cause during the progress of the trial or after the cause is submitted to them, the action may be again tried immediately or at a future time, as the court may direct.

Cal. C. Civ. P., § 616.

Judge or juror may be called as a witness, effect, § 7125.

6814. (3159.) Court open during deliberation of jury. Sealed verdict. While the jury are absent the court may adjourn from time to time in respect to other business, but it is nevertheless open for every purpose connected with the cause submitted to the jury until a verdict is rendered or the jury discharged. The court may direct the jury to bring in a sealed verdict at the opening of the court, in case of an agreement during a recess or adjournment for the day.

Cal. C. Civ. P., § 617.

Courts open on legal holiday when jury out, § 1806.

6815. (3160.) Return of jury. Three-fourths may render verdict. Poll. When the jury or three-fourths of them have agreed upon a verdict, they must be conducted into court, their names called by the clerk, and the verdict rendered by their foreman; the verdict must be in writing, signed by the foreman, and must be read by the clerk to the jury, and the inquiry made whether it is their verdict. Either party may require the jury to be polled, which is done by the court or clerk asking each juror if it is his verdict; if upon such inquiry or polling more than one-fourth of the jurors disagree thereto, the jury must be sent out again, but if no such disagreement be expressed, the verdict is complete and the jury discharged from the case.

Cal. C. Civ. P., § 618.

Verdict may be received or jury discharged on a legal holiday, § 1806.

Three-fourths of the jurors may find a verdict, Con. art. 1, sec. 10.

Prior to statehood a similar statute held unconstitutional, note to § 3595.

6816. (3161.) Informal or insufficient verdict, how corrected. When the verdict is announced, if it is informal or insufficient, in not covering the issue submitted, it may be corrected by the jury under the advice of the court, or the jury may be again sent out.

Cal. C. Civ. P., § 619.

CHAPTER 29.

THE VERDICT.

6820. (3162.) Verdict either general or special; defined. The verdict of the jury is either general or special. A general verdict is that by which they pronounce generally upon all or any of the issues, in favor of either the plaintiff or defendant; a special verdict is that by which the jury find the facts only, leaving the judgment to the court. The special verdict must present the conclusions of fact as established by the evidence, and not the evidence to prove them; and those conclusions of fact must be so presented that nothing shall remain to the court but to draw from them conclusions of law.

Cal. C. Civ. P., § 624.
Report of referee on the facts has the effect of a special verdict, § 6840.
Presumption in favor of verdict, note to § 6994.
Defects cured by verdict, note to § 6573.
Directing a verdict, note to § 6802.
Judgment to be entered on verdict within twenty-four hours, § 6861.
Cases on chance verdict, § 6978.

Where, in an action against three defendants to rescind a sale, the jury were justified in finding that the defendant wagon company alone made the contract of sale, and it appeared that the jury intended to render a verdict against it alone, failure to find in favor of the other two defendants did not prejudice such defendant.
Smith v. Columbus Buggy Co., 40 U. 580; 123 P. 580.

6821. (3163.) Court may direct special verdict or special findings. In all cases, the court may direct the jury to find a special verdict in writing upon all or any of the issues, or may instruct them, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon. The special verdict or finding must be filed with the clerk and entered upon the minutes. When a special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court must give judgment accordingly.

Cal. C. Civ. P., § 625*.
Special verdict defined, § 6820.
Issues of fact, how tried, §§ 6781, 7208.
Special issues may be tried by jury, order, § 6465.

Verdict containing a finding on the whole issue, also special findings, is good.
Smith v. Ireland, 4 U. 187; 7 P. 749.

Where special verdict is capable of two constructions, one supporting general verdict, the other not, appellate court will adopt the one that sustains the general verdict.
Warner v. U. S. Mutual Accident Ass'n, 8 U. 431; 32 P. 696.
Issues in civil cases tried by the court unless jury demanded, § 6827.

The submission of special findings is within the discretion of the court, and its refusal to do so is not error.
Genter v. Conglomerate M. Co., 23 U. 165; 64 P. 362.
Webb v. R. G. W. Ry., 7 U. 17; 24 P. 616.
Mangum v. Bullion B. M. Co., 15 U. 534; 50 P. 834.
Prye v. Kalbaugh, 34 U. 306; 97 P. 331.
Lindsay v. Smart, 43 U. 554; 137 P. 873.

Advisory jury. Verdict not binding on the court.
Smith v. Richardson, 2 U. 424.
Toltec Ranch Co. v. Cook, 24 U. 453; 67 P. 1123.
Grand Cent. M. Co. v. Mammoth M. Co., 29 U. 490; 83 P. 648.

It is in the discretion of the court to direct a general or special verdict.
Smith v. Ireland, 4 U. 187; 7 P. 749.

In an action for wrongful death of plaintiff's intestate, it is within the discretion of the court to direct special findings.
Webb v. D. & R. G. Co., 7 U. 17; 24 P. 616.

Where a cause is tried as a law action without special interrogatories and a general verdict is returned, such verdict cannot be set aside on the ground that it was advisory on an issue in equity.
Naylor v. Jensen, 38 U. 310; 113 P. 73.
Houston v. Hechler, 44 U. 64; 138 P. 1159.

It was not an abuse of the discretion of the trial court to refuse to submit special issues to the jury because there were different items of damages claimed.
Lindsay L. & L. Co. v. Smart L. & L. Co., 43 U. 554; 137 P. 837.

6822. (3164.) In action for recovery of money, verdict must state amount. When a verdict is found for the plaintiff in an action for the recovery of money, or for the defendant when a counterclaim for the recovery of money is established exceeding the amount of the plaintiff's claim as established, the jury must also find the amount of the recovery.

Cal. C. Civ. P., § 626.
Judgment on counterclaim, § 6863.
Special damages can not be recovered unless specially pleaded, note to § 6566.
Judgment in action for money, etc., § 6864.
Where there are several counts, a verdict should specify the judgment of the jury on each; but where the objection was not made in the court below it was not available on appeal.
Smith v. Fisher, 24 U. 506; 68 P. 849.

6823. (3165.) In action for specific personal property, verdict to state value and damages. In an action for the recovery of specific personal property, if the property has not been delivered to the plaintiff, or the defendant by his answer claims a return thereof, the jury, if their verdict be in favor of the plaintiff, or if, being in favor of the defendant, they also find that he is entitled to a return thereof, must find the value of the property, and, if so instructed, the value of specific portions thereof, and may, at the same time, assess the damages, if any are claimed in the complaint or answer, which the prevailing party has sustained by reason of the taking or detention of such property.

Cal. C. Civ. P., § 627.
Judgment in action to recover personal property, § 6864.
In an action in replevin, brought against the county collector, to recover possession of cattle levied upon for taxes, where the plaintiff between the time of levy and the bringing of the action had paid the taxes, and the jury returned a verdict finding for the defendant and assessing his damages at $24 over and above what has been paid in tax receipts; held, that the verdict meant that the jury found $24 damages for the defendant.
Ryan Cattle Co. v. Slaughter, 6 U. 278; 21 P. 997.
In order to warrant a jury in assessing damages in replevin, the damages claimed must be set up by a statement of the facts, and a mere clause in the prayer asking for damages is insufficient.
Shafer v. Russell, 28 U. 444; 79 P. 559.

6824. (3166.) Clerk to enter verdict, etc. Upon receiving a verdict, an

entry must be made by the clerk in the minutes of the court, specifying the time of trial, the names of the jurors and witnesses, and setting out the verdict at length; and where a special verdict is found, either the judgment rendered thereon, or if the case be reserved for argument or further consideration, the order thus reserving it.

Cal. C. Civ. P., § 628.

Judgment must be entered within twenty-four hours, exception, § 6861.

CHAPTER 30.

TRIAL BY THE COURT.

6827. (3167.) Actions tried by court unless jury demanded or case referred. All issues in civil actions shall be tried by the court, unless, in cases where a jury may be had, the same shall be demanded in the manner prescribed in § 6782, or unless, in a proper case, a referee or master in chancery shall be appointed.

Submitting special issues to jury, §§ 6444, 6781.

Trial by judge pro tempore, Con. art. 8, sec. 5; § 1682.

Jury waived unless demanded, Con. art. 1, sec. 10, § 6782.

Court may direct special verdict or verdict on special issues, § 6821.

References and trials by referee, §§ 6835-6841, and notes.

6828. (3168.) Decision of court; when filed. Modification of findings. Upon a trial of a question of fact by the court its decision must be given in writing, and filed with the clerk within thirty days after the cause is submitted for decision. The court may, however, at any time before a notice of appeal is served and filed, or before a motion for a new trial is ruled upon, if such motion is made, add to or modify the findings in any respect, so as to make the same conform to the issues presented by the pleadings, and to the evidence adduced at the trial. No such additions to, or modifications of, the findings shall be made unless a notice in writing, specifying generally the additions or modifications desired, shall have been served on the adverse party, or his attorney of record. Am'd '07, p. 228.

Cal. C. Civ. P., § 632.

Trial by jury, judgment within twenty-four hours after verdict, § 6861.

Dismissal of action for failure to demand judgment within six months, § 6848.

Judgment in general, §§ 6853-6871.

Decrees and judgments may be entered in vacation, the case having been submitted in open court.

Russell v. Hank, 9 U. 309; 34 P. 245.

In an equity case, the court may treat a verdict of a jury or the findings of a referee as advisory and make such findings as the evidence will warrant, and enter a decree thereon.

Wasatch Mining Co. v. Jennings, 14 U. 221; 46 P. 1106.

Smith v. Richardson, 2 U. 424.

Grand Cent. M. Co. v. Mammoth M. Co., 29 U. 490; 83 P. 648.

Findings left with the clerk to be filed are as effectually filed as if he placed his file mark upon them.

Fisher v. Emerson, 15 U. 517; 50 P. 619.

Billings v. Parsons, 17 U. 22; 53 P. 730.

The provisions respecting time of filing decision are directory merely, and a court has the right to file findings and decree after the expiration of the time designated.

Lynch v. Coviglio, 17 U. 106; 53 P. 983.

Victor M. Co. v. Natl. Bank of Rep., 18 U. 87; 55 P. 72.

Headlund v. Daniels, 50 U. —; 167 P. 1170.

The judgment appointing a guardian in a contested case must be based on findings.

In re Manning, 38 U. 281; 112 P. 167.

ADDITIONAL FINDINGS AFTER JUDGMENT:

The decisions hereunder, except the last two cases, were rendered prior to the amendment of § 6828 in 1907.

Additional findings made after judgment without notice to the adverse party may be stricken from the transcript.

Kahn v. Central Smelting Co., 102 U. S. 641; 2 U. 371.

It is not good practice, in either law or equity cases, nor is it proper in either, after findings and judgment, for the court to file additional findings at the request of either party, while the judgment is allowed to stand.

Clawson v. Wallace, 16 U. 300; 52 P. 9.

Fisher v. Emerson, 15 U. 517; 50 P. 619.

Lynch v. Coviglio, 17 U. 106; 53 P. 983.

Klopenstine v. Hays, 20 U. 45; 57 P. 712.

Amendments to findings, while motion for new trial is pending, are authorized and justified when they are responsive to the issues and are supported by the evidence.

Hayes v. Lavagnino, 17 U. 185; 53 P. 1029.

An opinion of the court in deciding a case, setting forth its reasons for the judgment, is not a finding of facts within the meaning of this section, and the appellate court cannot disregard findings of fact simply because they were filed subsequently to rendering of the opinion.

Victor M. Co. v. Natl. Bank of Rep., 18 U. 87; 55 P. 72.

Grand Cent. M. Co. v. Mammoth M. Co., 29 U. 490; 83 P. 648.

The amendment, effective March 25, 1907, authorizing additional findings and conclusions after the entry of judgment, applies to a judgment entered March 16, 1907, so as to make the time for appeal run from September 21, when the additional findings were made.

Boucofski v. Jacobsen, 36 U. 165; 104 P. 117.

Independent of the provision that after judgment the court may make additional findings, the court had no jurisdiction to so do after the term at which judgment was entered, even though there was pending a motion to retax costs.

Holm v. Davis, 41 U. 200; 125 P. 403.

6829. (3169.) Findings and conclusions to be separately stated. In giving the decision, the facts found and the conclusions of law must be separately stated, and the judgment must thereupon be entered accordingly.

Cal. C. Civ. P., § 633.

Referee to state facts found, and conclusions of law, separately, § 6840.

Additional or modified findings, § 6828, and note.

Opinion of court not a finding, note to § 6828.

Harmless errors and technicalities disregarded, note to § 6994.

Findings left with the clerk for filing, note to § 6828.

Advisory verdict or findings by referee may be disregarded, note to § 6828.

Findings are not construed as strictly as special findings. If the findings and pleadings taken together fairly justify the judgment, notwithstanding a want of precision and an occasional intermixture of matters of fact and conclusions of law, it is sufficient.

O'Reilly v. Campbell, 116 U. S. 418: (Not reported in Utah Reports.)

Where, after the taking of evidence in an action by a client against an attorney for an accounting, and after the judge had found that plaintiff was entitled to an accounting and had ordered defendant to account on a future day, the defendant objected to the judge's future proceeding in the cause and another judge was authorized to try it, the substitute judge could make findings on the whole case.

Everett v. Jones 32 U. 489; 91 P. 360.

In a law case the supreme court may not make findings nor treat as found that which might have been or ought to have been found.

Lyman v. Title Guarantee & Surety Co., 48 U. 230; 158 P. 423.

Duggins v. Colby, 45 U. 335; 145 P. 1042.

In the absence of the testimony, if the findings are supported by the pleadings, the supreme court assumes that there was testimony to support the trial court's findings.

Cain v. Stewart, 50 U. —; 167 P. 265.

NECESSITY FOR FINDINGS:

A judgment must find support in the findings.

Kahn v. Central Smelting Co., 2 U. 371.

Reich v. Rebellion S. M. Co., 3 U. 254; 2 P. 703.

Blumenthal v. Asay, 3 U. 507; 24 P. 1056.

Hennefer v. Hays, 14 U. 342; 47 P. 90.

Walley v. Deseret Nat. Bank, 14 U. 305; 47 P. 147.

Maynard v. Loco. Eng. Ins. Ass'n, 14 U. 458; 47 P. 1030.

A judgment must be based either upon a verdict or upon findings, and cannot be based on a motion.

(Criticised in Kirk v. S. L. City, 32 U. 143; 89 P. 458.)

Reich v. Reb. M. Co., 3 U. 254; 2 P. 703.

Findings of fact are required in all cases where issues of fact are tried without a jury; they should be filed before the entry of the judgment or decree.

Kahn v. Central Smelting Co., 2 U. 371; affirmed 102 U. S. 641.

Nephi Irr. Co. v. Jenkins, 8 U. 369; 31 P. 986.

An express finding that the applicant for a patent is in possession is not necessary where the facts show that he is constructively if not actually in possession.

Eilers v. Boatman, 3 U. 159; 2 P. 66.

Total absence of findings is reversible error.

Reich v. Rebellion M. Co., 3 U. 254; 2 P. 703.

Blumenthal v. Asay, 3 U. 507; 24 P. 1056.

But see Haynes v. Roberts, 4 U. 405; 11 P. 512.

Error is not presumed on appeal, but must be affirmatively shown, and when the trial court filed no findings, it will be presumed, on appeal, that the findings were waived unless the contrary appears from the record.

Haynes v. Roberts, 4 U. 405; 11 P. 512.

Where a judgment is taken by default, no finding of the court is necessary.

Walker Bros v. Continental Ins. Co., 2 U. 331.

No findings necessary where a cause is submitted upon the pleadings to the court, and the court finds that the answer raised no issue.

Dickert v. Weise, 2 U. 350.

Secs. 3379, 3380, C. L. 1888, require findings in case of a final judgment only, and an order refusing to confirm a sale of real estate is not a final judgment.

In re Gibbs, 4 U. 97; 6 P. 525.

Findings of fact are required only in trials on the merits, and findings on a motion for new trial are not required, neither are they necessary nor usual in practice.

Wright v. U. P. R. R. Co., 22 U. 338; 62 P. 317.

In a contested application for appointment of a guardian because of incompetency, findings of fact are essential.

In re Manning, 38 U. 281; 112 P. 167.

Where the defendant set up an affirmative reply, there must be findings on the issue raised, and findings that none of the allegations of the answer are true is a conclusion, and insufficient.

Westminster Inv. Co. v. McCurtain, 39 U. 544; 118 P. 564.

On plaintiff's suggestion that return of service did not correctly show when service of summons was made, and it moved to amend, the court should have made findings as to the actual time of service of summons.

West Mt. L. & S. Co. v. Danley, 38 U. 218; 111 P. 647.

FINDINGS ON ALL MATERIAL ISSUES:

A judgment for plaintiff in an action to recover on certificates of deposit alleged to have been assigned to plaintiff in consideration of $1,000 will be reversed where the consideration is attacked for fraud, and the court fails to find any consideration for the assignment.

Turner v. Utah Title Ins. Co., 10 U. 61; 37 P. 91.

Failure to find on immaterial issues is not error nor is it prejudicial error to fail to find on material issues, when they would necessarily have been prejudicial to appellant, and when those already found are sufficient to sustain the judgment.

Maynard v. Loco. Eng. Ins. Ass'n, 16 U. 145; 51 P. 259.

Connor v. Raddon, 16 U. 418; 52 P. 764.

Hague v. Nephi Irr. Co., 16 U. 421; 52 P. 765.

Billings v. Parsons, 17 U. 22; 53 P. 730.

Groome v. Ogden City, 10 U. 54; 37 P. 90.

Chambers v. Emery, 13 U. 374; 45 P. 192.

Orr v. Rich, 7 U. 519; 17 P. 261.

Farnsworth v. Holderman, 3 U. 381; 4 P. 337.

Mills v. Gray, 50 U. —; 167 P. 358

The findings must support the judgment, and when it affirmatively appears that they fail to do so, the judgment will be reversed on appeal.

Karren v. Karren, 25 U. 87; 69 P. 465

If there be no finding on a material issue the judgment must be set aside.

Mitchell v. Jensen, 29 U. 346; 81 P. 165.

Thomas v. Clayton, 47 U. 96; 151 P. 543.

Unless under the evidence no findings, other than in support of the judgment, were permissible.

Snyder v. Allen, 50 U. —; 168 P. 945.

Under § 6995, as amended in 1907, if the trial court fails to find upon all material issues, the appellate court may remand case with directions to trial court to make complete findings and enter judgment thereon (Distinguishing Dillon Imp. Co. v. Cleaveland, 32 U. 1; 88 P. 670.)

Everett v. Jones, 32 U. 489; 91 P. 360.

The court must find on all the material issues, including those raised by counterclaims, regardless of the insufficiency of the evidence to support them, or though no evidence in their support is introduced. **No judgment can**

properly be rendered until there are such findings.

Everett v. Jones, 32 U. 489; 91 P. 360.

Dillon Imp. Co. v. Cleaveland, 32 U. 1; 88 P. 670.

Failure to find on immaterial issues, or where findings must have been adverse to defeated party, not error, note to § 6994.

In a law case the supreme court is not authorized to find facts or to draw deductions from them, and treat as found that which might have been found, Con. art. 8, sec. 9, and note.

Affirmative matter entitling defendant to findings and decree may be set up in an answer, not by way of counterclaim.

Welch, Driscoll & Buck v. Buck, 48 U. 653; 161 P. 455.

In an action on notes where the facts are stipulated and it is clear that plaintiff cannot recover for a reason not involved in the issue of payment upon which no finding is made, want of such finding is immaterial.

I. X. L. Stores Co. v. Moon, 49 P. 262; 162 P. 622.

A finding that a mechanic's lien claimant had not been paid sufficiently meets the contention that the claimant had been paid by work done for it by the contractor.

Langton Lime & Cement Co. v. Perry, 48 U. 112; 159 P. 49.

Langton Lime & Cement Co. v. Smith, 48 U. 112; 159 P. 49.

In an action for dower, a finding that plaintiff must fail because she failed to establish the existence of a lawful marriage between herself and decedent is a negative finding, and is sufficient to support a judgment for defendant on that ground.

Hilton v. Snyder, 37 U. 384; 108 P. 698.

Where the court makes affirmative findings of fact on the material issues which are necessarily a complete negative of the truth of the matter set forth in the pleadings of the other party, the failure of the court to expressly find on the matters, the truth of which is thus negatived, is not error.

Skliris v. Melis, 50 U. —; 170 P. 968.

FINDINGS MUST BE CERTAIN:

"That there was no such co-tenancy between the plaintiff and defendants in the mine in controversy as entitled the plaintiff to an accounting," is not a sufficient finding of fact upon which to base a decree.

Kahn v. Central Smelting Co., 102 U. S. 641; same case, 2 U. 371.

In an action of replevin for the recovery of one hundred and four cattle described, and finding of fact by the court that the plaintiffs were not at that time the owners of the cattle sued for, describing them, is not inconsistent with another finding, that the defendent levied upon one hundred and two head of cattle described, the two descriptions not being exactly the same.

Blish v. McCornick, 15 U. 188; 49 P. 529.

Findings that are inconsistent with each other and against the pleadings and the preponderance of the evidence will be set aside on appeal, and new findings rendered.

Sandberg v. Victor M. Co., 24 U. 1; 66 P. 360.

Findings and decree as to water rights not sufficiently specific will be set aside or modified.

Nephi Irr. Co. v. Jenkins, 8 U. 369; 31 P. 986.

Nephi Irr. Co. v. Vickers, 15 U. 374; 49 P. 301.

Same case, 20 U. 310; 58 P. 836.

Lost Creek Irr. Co. v. Rex, 26 U. 485; 73 P. 660.

Smith v. Phillips, 6 U. 376; 23 P. 932.

Holman v. Pleasant Grove, 8 U. 78; 30 P. 72.

Findings should be definite and certain.

Bartholomew v. Fayette Irr. Co., 31 U. —; 86 P. 481; 87 P. 707.

Maynard v. Loco. Eng. Ins. Ass'n, 14 U. 458; 47 P. 1030.

Where the ultimate fact is found, no finding of probative facts which may tend to establish that the ultimate fact was found against the evidence, can overcome the finding of the ultimate fact.

Sierra Nev. Lumber Co. v. McCornick, 37 U. 150; 106 P. 666.

A finding that plaintiff was an innocent purchaser for value, without knowledge of any defect in or defense to the notes and acted in good faith in the transaction, and was the holder in due course for a valuable consideration paid before maturity, was sufficient though in the nature of conclusions.

Miller v. Marks, 46 U. 257; 148 P. 412.

A finding that there is an enforcible contract is sufficient.

Chadwick v. Arnold, 34 U. 48; 95 P. 527.

A finding that an action was barred by limitations is a mere conclusion.

Rasmussen v. Sevier Valley Can Co., 40 U. 371; 121 P. 741.

Findings of fact which merely announce legal conclusions deducible from facts not stated will not support a judgment.

Utah Ass'n of Cred. Men v. Home Fire Ins. Co., 36 U. 20; 102 P. 631.

A general finding that all the complainant's material allegations are true, or that the allegations of a pleading, contrary to the findings are untrue, and defendant failed to established its defense by any competent proof, is too indefinite, and a conclusion.

Id.

Munsee v. McKellar, 39 U. 282; 116 P. 1024.

Westminster I. Co. v. McCurtain, 39 U. 544; 118 P. 564.

A finding that plaintiff has consorted with women other than his wife is sufficient as a finding of adultery, and that the plaintiff has deserted the defendant without good cause or any cause, and ever since and still continues to so wilfully and without cause desert said defendant and to live separate and apart from her without any cause or sufficient cause, or any cause or reason, against her will, without her consent, would ordinarily be a sufficient finding of desertion, but is insufficient in view of the plaintiff's showing of cruelty of defendant.

Doe v. Doe, 48 U. 200; 158 P. 781.

In an action to quiet title, a finding that the lease was obtained by defendant's fraud and was void, might be construed to amount to a finding that the lease, as a mere instrument in writing, containing the evidence of the agreement between the parties was obtained by defendant's fraud, justifying a conclusion that the lease was void.

Morgan v. Simons, 34 U. 146; 96 P. 1018.

A finding that it affirmatively appears from the record that summons was not served and the complaint not deposited with the clerk in time is not necessarily equivalent to finding that such acts were not done.

West Mt. L. & S. Co. v. Danley, 38 U. 218; 111 P. 647.

A finding, in an action to quiet title, that all claims of the plaintiff were barred by the provisions of certain statutes and the right of the defendants was perfected by limitations, is a nullity.

Ives v. Grange, 42 U. 608; 134 P. 619.

A finding that the evidence is manifestly insufficient to support the allegations of the complaint is a mere conclusion.

Monataire Mining Company v. Columbus Rexall Con. Mining Co., 51 U. —; 170 P. —.

JUDGMENT SUPPORTED BY EVIDENCE:

If a decree is according to the evidence in a suit in equity, it makes no difference whether it is supported by the findings or not.

Maxfield v. West, 6 U. 379; 24 P. 98.

Fisk v. Patton, 7 U. 399; 27 P. 1.

Where there is no proof to show the existence of a fact found, the finding is nugatory, and the judgment which it is to support is subject to attack and avoidance.

Bacon v. Thornton, 16 U. 138; 51 P. 153.

Where there is no evidence to support the findings, the judgment will be set aside.

Walley v. Deseret Nat. Bank, 14 U. 305; 47 P. 147.

Eastman v. Gurrey, 15 U. 410; 49 P. 310.

Stevens v. Rogers, 16 U. 105; 51 P. 216.

Coates v. Metcalf, 29 U. 209; 81 P. 900.

Hathaway v. United Tintic Mg. Co., 42 U. 520; 32 P. 388.

Greenhalgh v. United Tintic Mg. Co., 42 U. 524; 132 P. 380.

Smoot v. Checketts, 41 U. 211; 125 P. 412.

Fowles v. Case Threshing M. Co., 42 U. 502; 151 P. 53.

Pennington v. Redman Van & Stor. Co., 34 U. 223; 97 P. 115.

Under the constitution, the appellate court has nothing to do with the sufficiency of the evidence to justify the findings or judgment, unless there is no competent evidence to support them, decision under Con. art 8, sec. 9.

A finding on conflicting evidence will not be disturbed where it depended largely upon the determination of the credibility of witnesses.

Utah Black Marble Co. v. American Marble & Onyx Co., 43 U. 68; 133 P. 472.

A finding in equity will not be disturbed where there is evidence supporting it.

Montgomery v. Berrett, 40 U. 385; 121 P. 569.

But where findings in an equity case are clearly against the weight of evidence, the supreme court will vacate them and substitute others.

Leland v. Bourne, 41 U. 125; 125 P. 652.

Where there is evidence to support findings, though conflict, they will not be disturbed on appeal.

D. & R. G. R. Co. v. Bollogenese, 45 U. 65; 143 P. 129.

Where the evidence in support of plaintiff's plea of title was insufficient, and there was no finding on defendant's claim of adverse possession which was not established by the evidence, cause should be remanded.

Peery Estate v. Ford, 46 U. 436; 151 P. 59.

Hearsay evidence could be ignored by the court in making findings on question of facts.

Holt v. Nielson, 37 U. 566; 109 P. 470.

Where the burden of proof cast on one party is not met, or where there is no evidence on a material issue, the adverse party is entitled to a finding which may be either affirmative or negative, depending on the circumstances.

Utah Com'l Svgs. Bank v. Fox, 40 U. 205; 120 P. 840.

Where the amount which the plaintiff admitted to be the value of the labor claimed as an offset, together with the amount found to have been paid on the contract and that allowed as damages, aggregated more than the contract price claimed by plaintiff, the finding that $403 was due on the contract was inconsistent with the facts found.

Miller v. Mt. Nebo L. & I. Co., 37 U. 1; 106 P. 504.

The findings must be viewed in the light of all the evidence and reasonable inferences warranted thereby.

Roberts v. Braffet, 33 U. 51; 92 P. 789.

If the findings on immaterial issues are harmless, or, anyway, not prejudicial to the losing parties, then the losing parties may not complain thereof.

Amunssen v. Hansen, 51 U. —; 172 P. —.

MUST CORRESPOND TO THE ISSUES:

A fact found not included within the issues is nugatory.

Maynard v. Loco. Eng. Ins. Ass'n, 14 U. 458; 47 P. 1030.

In a suit for specific performance of a contract to convey land to plaintiff, findings by the court giving plaintiff a right to a conveyance on a verbal gift, ratified by possession, violated the rule that the findings must correspond to the issues.

Price v. Lloyd, 31 U. 86; 86 P. 767.

Where the findings are not responsive to the pleadings, the judgment on the findings is without support, and must be reversed.

Florence Mfg. Co. v. Pacific Ex. Co., 36 U. 346; 103 P. 966.

Where a finding is properly within the purview of the allegations and responsive thereto, it is proper.

Moyle v. McKean, — U. —; 162 P. 63.

Findings outside the issues and contrary to the theory on which an action is based, are improper.

Kimball v. Success Mining Co., 38 U. 78; 110 P. 872.

It is not necessary for the court to make a finding upon a matter not in issue.

Neuberger v. Robbins, 37 U. 197; 106 P. 933.

Kimball v. Success Mining Co., 38 U. 78; 110 P. 872.

In an action to quiet title, plaintiff claimed to own the land, and prayed that it be quieted in him, a finding that plaintiff had paid taxes on the land which belonged to the defendant and was entitled to lien therefor is within the issues.

Salt Lake Inv. Co. v. Fox, 37 U. 334; 108 P. 1132.

Findings and conclusions, though general, will support a judgment where they follow the allegations of the complaint, but a judgment for an amount in excess of the amount prayed for and any possible award of interest, cannot be sustained.

Cain v. Stewart, 47 U. 160; 152 P. 465.

Where the actual location of the south boundary line of the block in which the lot was situated was in issue, a finding that the south boundary line was marked by plaintiff's picket fence, did not conform to the issues.

Giauque v. S. L. City, 42 U. 89; 129 P. 429.

Upon a complaint alleging a specific contract, and also an account stated as to the balance due; held, that findings that contract had been completed and that, after certain payments, the parties had agreed on a balance due with interest, and finding the amount due as agreed, conformed to the pleadings

Brittain v. Gorman, 42 U. 586; 133 P. 370.

CONCLUSIONS OF LAW:

A finding "that there was no partnership between the plaintiff and the defendants" is not a conclusion of law, but is a finding of fact.

Kahn v. Central Smelting Co., 2 U. 371.

Findings of fact and conclusions of law may be on the same paper.

Fisk v. Patton, 7 U. 399; 27 P. 1.

When findings of fact are correct, the judgment will not be disturbed if in accordance therewith, even if the conclusions of law are incorrect in technical language.

McKibbon v. Brigham, 18 U. 78; 55 P. 66.

It is of no consequence whether a certain finding is a finding of ultimate fact or a conclusion of law, where there are other findings supporting the questionable finding and rendering it practically unnecessary.

Snyder v. Emerson, 19 U. 319; 57 P. 300.

Surplusage in a conclusion of law not reversible error.

Thompson v. Hays, 24 U. 275; 67 P. 670.

Blish v. McCornick, 15 U. 188; 49 P. 529.

A finding of negligence is a conclusion of law.

Warren v. Robison, 25 U. 205; 70 P. 989.

Where the facts found support a conclusion of law, the fact that the conclusion was stated in the findings of fact, instead of in the conclusions of law made by the court, is immaterial.

Gay v. Young Men's, etc., 37 U. 280; 107 P. 237.

In an action on a note which defendant claimed was usurious, the transaction being effected through agents on the part of both parties, a finding that the agreement was entered into "between plaintiff and defendant," held, a conclusion of law, and improper.

Brown v. Johnson, 43 U. 1; 134 P. 590.

A finding, in a suit involving the ownership and use of waters of springs, that plaintiff has no right, title, or interest in or to the waters, is a mere conclusion, and insufficient.

Munsee v. McKellar, 39 U. 282; 116 P. 1024.

In an action for injury to a shipment of sheep, a finding, not based on any pleading or evidence, that the stipulation requiring notice within ten days of claim for damages is reasonable, is a mere conclusion of law, and without effect.

Houtz v. Union Pac. R. R. Co., 33 U. 175; 93 P. 439.

Where the conclusions of law are palpably at variance with the findings as to the amount of plaintiff's recovery, the supreme court will order the lower court to set aide its erroneous

conclusions of law and to substitute conclusions in accordance with the findings.
Parrott Bros. v. Ogden City, 50 U. —; 167 P. 807.
Where there can be only one conclusion of law, the failure to make it is harmless.
Skliris v. Melis, 51 U. —; 170 P. 968.
In an action for damages for breach of contract for failure to furnish water for irrigation as agreed, a finding that the shortage of water was caused by act of God was a mere conclusion which could not aid the judgment.
Miller v. Mt. Nebo Irr. Co., 37 U. 1; 106 P. 504.
A finding that the officer of a corporation, by reason of his relation to it, was chargeable with knowledge of the trust agreement entered into between the corporation and a stranger, whereby the latter conveyed real estate to the corporation in trust, etc., is not finding of fact, but a conclusion of law deducible from the fact.
Gay v. Young Men's, etc., 37 U. 380; 107 P. 237.
A finding that the note sued on, alleged generally by the answer to have been without consideration, was delivered for a valuable consideration, was a finding of an ultimate fact, and not a conclusion of law.
Utah Nat'l Bank v. Nelson, 38 U. 169; 111 P. 907.

6830. (3170.) Findings of fact may be waived. Findings of fact may be waived by the several parties to an issue of fact:

1. By failing to appear at the trial;
2. By consent in writing, filed with the clerk;
3. By oral consent, in open court, entered in the minutes.

Cal. C. Civ. P., § 634.

6831. (3171.) Proceedings after issues of law determined. On a judgment for the plaintiff upon an issue of law, he may proceed in the manner prescribed by the first two subdivisions of § 6844, upon the failure of the defendant to answer. If judgment be for the defendant upon an issue of law, and the taking of an account or the proof of any fact be necessary to enable the court to complete the judgment, a reference may be ordered, as in that section provided.

Cal. C. Civ. P., § 636.

When a reference may be ordered, § 6836, and note.

CHAPTER 31.

REFERENCES AND TRIALS BY REFEREES.

6835. (3172.) Reference on written consent of parties. Fees of referee. All or any of the issues in an action whether of fact or law, or both, may be referred by the court or judge thereof upon the written consent of the parties. The fees of referees shall be fixed by the court and shall in no case exceed $10 per day, except upon the written consent of both parties to the reference.

Cal. C. Civ. P., § 638*.

6836. (3173.) When court may order a reference. When the parties do not consent to the reference, the court may, upon the application of either party or of its own motion, direct a reference in the following cases:

1. When the trial of an issue of fact will require the examination of a long account on either side, in which case the referee may be directed to hear and decide the whole issue or to report upon any specific question of fact therein; or,
2. When the taking of an account is necessary for the information of the court before judgment or for carrying a judgment or order into effect; or,
3. When a question of fact other than upon the pleadings shall arise upon motion or otherwise in any stage of the action; or,
4. Where it is necessary for the information of the court in a special proceeding.

Cal. C. Civ. P., § 639.
Trial by judge pro tempore, Con. art. 8, sec. 5; § 1682.
Court may order reference to try an issue of fact, §§ 6781, 6827.
Appointment of referee to hear evidence on default, § 6844.
Appointment of referee in proceedings supplementary, § 6955.
Appointment of referee in probate proceedings, § 7661.
Referee to take an account, etc., § 6831.
The territorial district courts had exclusive original chancery jurisdiction and the inherent power to refer a case to a master to take testimony and report findings.
Nephi Irr. Co. v. Jenkins, 8 U. 369; 31 P. 986.

6837. (3174.) Referees agreed upon or appointed by court. Number. Qualifications. A reference may be ordered to any person or persons, not exceeding three, agreed upon by the parties. If the parties do not agree, the court or judge must appoint one or more referees, not exceeding three, who

reside in the judicial district in which the action or proceeding is triable and against whom there is no legal objection.

Cal. C. Civ. P., § 640*.

When three appointed, all must meet, but majority may act, § 7211.

6838. (3175.) Objections to referees same as to petit jurors. Either party may object to the appointment of any person as referee for the same cause for which challenges for cause may be taken to a petit juror in the trial of a civil action.

Cal. C. Civ. P., § 641*.

6839. (3176.) Id. Must be heard by court. Evidence. The objections taken to the appointment of any person as referee must be heard and disposed of by the court or judge thereof. Affidavits may be read and witnesses examined as to such objections.

Cal. C. Civ. P., § 642.

6840. (3177.) Trial by referee. Power. Findings and conclusions. Appeal. The trial by referee shall be conducted in the same manner as a trial by the court. Upon such trial the referee shall have the same power to grant adjournments and allow amendments to any pleading as the court would have, and upon the same terms and with like effect. He shall give to the parties or their attorneys at least ten days' notice of the time and place of trial; and, upon the written request of either party, it shall be his duty to fix such time and place for trial and give such notice thereof. He must state the facts found by him and conclusions of law separately, and report the same to the district court, and the district court may review such report and on motion enter judgment thereon, or set aside, alter, or modify the same, and enter judgment thereon so altered or modified, and may require the referee to amend his report when necessary. The judgment so entered by the district court may be appealed from to the supreme court in like manner as from judgments in other cases. When the reference is to report the facts, the report shall have the effect of a special verdict.

Wis., S. & B. An. S. (1889) § 2865*.

Referee to settle and sign bill of exceptions, § 6973.

Postponement by referee, costs, §§ 6786, 7043.

Provisions respecting evidence equally applicable to trial before referee, § 7210.

Special verdict, §§ 6820, 6821.

Contempt before referee, punishment, § 7072.

Findings of referee are advisory only, note to § 6828.

The order of reference may be amended and sent back to the referee at any stage in the proceedings.

U. S. v. The Church, 6 U. 9; 21 P. 503, 524.

Referee may grant a nonsuit, subject to approval of the court.

Reever v. White, 8 U. 188; 30 P. 685.

Findings of referee merely advisory.

Wasatch M. Co. v. Jennings, 14 U. 221; 46 P. 1106.

The referee has the same power in trying a cause that the court would have; the court passes on motion for new trial.

Reever v. White, 8 U. 188; 30 P. 685.

Hanks v. Matthews, 8 U. 181; 30 P. 504.

See Whitmore v. Harris, 10 U. 259; 37 P. 464.

The findings of a referee and a decree of the court thereon may be set aside by the court at a subsequent term.

Wasatch M. Co. v. Jennings, 14 U. 221; 46 P. 1106.

Findings of fact of referee on conflicting evidence held conclusive on appeal, notwithstanding inconsistencies in the testimony of the witnesses of one party; this going only to the weight of evidence and credibility of the witnesses.

Eureka H. M. Co. v. Bullion-B. & C. M. Co., 32 U. 236; 90 P. 157.

Dwyer v. S. L. Copper Co., 14 U. 339; 47 P. 311.

Stahn v. Hall, 10 U. 400; 37 P. 585.

Gallagher v. Yosemite M. Co., 10 U. 189; 37 P. 264.

Hannaman v. Karrick, 9 U. 236; 33 P. 1039.

6841. (3178.) Referee must be sworn. May administer oaths. The referees before proceeding to hear any testimony must be sworn well and truly to hear and determine the facts referred to them and true findings render according to the evidence, and they have power to administer oaths to all witnesses produced before them.

N. Dak. (1895) § 5461.

On default, plaintiff is entitled to relief according to his pleadings and evidence.

Hartog v. Tibetts, 1 U. 328.

Pendency of motion to strike out complaint does not prevent judgment by default.

Greenfield v. Wallace, 1 U. 188.

Where a judgment is taken by default, no finding of the court is necessary.

Walker Bros v. Continental Insurance Co., 2 U. 331.

No judgment entered where there is no liability, though no answer filed.

Munns v. Loveland, 15 U. 250; 49 P. 743.

The recital in a decree of divorce that "defendant was duly served with process by publication," not being contradicted by anything appearing in the judgment roll, is conclusive upon the court's jurisdiction of defendant's person when assailed in a collateral proceeding, even though the affidavit of publication failed to allege that the summons was published as provided by statute.

Amy v. Amy, 12 U. 278; 42 P. 1121.

Where a party has failed to file a pleading within the time required, and the default has been entered of record before the pleading is filed, a judgment entered upon the default after the filing of the pleading was entered is a matter of strict legal right, and can only be set aside by the court for cause.

Cutler v. Haycock, 32 U. 366; 90 P. 897.

CHAPTER 32.

JUDGMENT BY DEFAULT.

6844. (3179.) Failure to answer, etc., judgment by default; verification of complaint; reference; damages. Judgment may be had, if the defendant fail to answer the complaint, as follows:

1. In an action arising upon contract for the recovery of money or damages only, if no answer, demurrer, or motion has been filed with the clerk of the court within the time specified in the summons, or such further time as may have been granted, and the complaint and proof of service of summons shall have been filed, the clerk, upon application of the plaintiff, must enter the default of the defendant, and immediately thereafter enter judgment for the amount specified in the complaint, including the costs, against the defendant, or against one or more of several defendants, in the cases provided for in § 6558. If the complaint shall not have been verified, it must be verified before judgment is entered.

2. In other actions, if no answer, demurrer, or motion has been filed with the clerk of the court within the time specified in the summons, or such further time as may have been granted, and the complaint and proof of service of the summons shall have been filed, the clerk must enter the default of the defendant, and thereafter the plaintiff may apply for the relief demanded in the complaint. If the taking of an account or the proof of any fact is necessary to enable the court to give judgment, or to carry the judgment into effect, the court may take the account or hear the proof, or may in its discretion order a reference for that purpose. And where the action is for the recovery of damages, in whole or part, the court may order the damages to be assessed by a jury; or if, to determine the amount of damages, the examination of a long account is necessary, by a reference as above provided.

3. In actions where the service of the summons was by publication or personal service out of the state, the plaintiff, upon the expiration of the time for answering, may, upon proof of service, and that no answer, demurrer, or motion has been filed, apply for judgment; and the court must thereupon require proof to be made of the demand mentioned in the complaint, and if the defendant be not a resident of the state, must require the plaintiff, or his agent, to be examined on oath respecting any payments that have been made to the plaintiff, or to any one for his use, on account of such demand, and may render judgment for the amount or other relief which he is entitled to recover.

Cal. C. Civ. P., § 585*.

Judgment on failure to answer in garnishment proceedings, § 6738.

Setting aside judgment by default, § 6619.

Time to appear after service, § 6539.

On default, relief cannot exceed demand, § 6857.

Presumption in favor of judgment, note to § 6994.

Judgments may be entered in term time or in vacation; and in any county in the district, § 1678.

The clerk acts ministerially, not judicially, in entering a judgment hereunder. In action for damages for conversion requiring proof to ascertain proper amount of damages, the clerk cannot enter judgment by default.

Nounnan v. Toponce, 1 U. 168

This act is not unconstitutional as imposing judicial functions on the clerk, and if he refuses to enter judgment in cases under Sub. 1, he may be compelled to do so by mandamus.

Utah, etc. v. Bowman, 38 U. 326; 113 P. 63.

A defendant in an action to quiet title whose demurrer was overruled, who then refused to plead further and was in default, was not entitled to object to the introduction of evidence.

Doyle v. West Temple, 43 U. 277; 135 P. 103.

Where an unverified complaint is filed and summons served and judgment entered by the clerk, and then, about eight years thereafter, upon plaintiff's motion, the judgment is set aside and the complaint verified, and no copy of the amended complaint served, held the judgment entered thereon is void.

Thero v. Franklin, 48 U. 587; 160 P. 1188.

A motion to require plaintiff to separately state causes of action is sufficient to prevent the entry of default until it is disposed of.

Felt v. Felt, 50 U. —; 167 P. 835.

6845. (3180.) Judgment for part not controverted. Formalities. If the answer in any case denies or controverts only part of the cause or causes of action alleged in the complaint, the plaintiff may take judgment by default for the undisputed portion, leaving the action to proceed, as to the part controverted by the answer. Any of the formalities of the preceding section, if not insisted on at the proper time, shall be deemed waived.

Col., Mills' An. C. (1896) § 168*.

Judgment on the pleadings, note to § 6575.

Allegations not denied taken as true, §§ 6591, 6606.

CHAPTER 33.

JUDGMENT ON DISMISSAL OR NONSUIT.

6848. (3181.) When action may be dismissed or nonsuit entered. An action may be dismissed or a judgment of nonsuit entered in the following cases:

1. By the plaintiff himself at any time before trial, upon the payment of costs, if counterclaim has not been made, or affirmative relief sought by the answer of the defendant. If a provisional remedy has been allowed, the undertaking must thereupon be delivered by the clerk to the defendant, who may have his action thereon;

2. By either party upon the written consent of the other;

3. By the court when the plaintiff fails to appear on the trial, and the defendant appears and asks for the dismissal;

4. By the court, when upon the trial and before the final submission of the case the plaintiff abandons it;

5. By the court upon motion of the defendant, when upon the trial the plaintiff fails to prove a sufficient case for the jury; *provided,* that the offering of evidence after the overruling of a motion for a nonsuit shall not be deemed or considered a waiver of the exception taken by the defendant to the order overruling such motion;

6. By the court, when after verdict or final submission the party entitled to judgment neglects to demand and have the same entered for more than six months.

The dismissal mentioned in the first two subdivisions is made by an entry in the clerk's register. Judgment may thereupon be entered accordingly.

Cal. C. Civ. P., § 581*. See Sups. (1889) p. 371, and (1895) p. 14, § 581*.

Judgment of dismissal does not bar new action unless rendered upon the merits, § 6859.

Costs on dismissal, etc., § 6860.

Upon an order of reference requiring the referee to make findings of facts and conclusions of law, the referee may grant a nonsuit.

Reever v. White, 8 U. 188; 30 P. 685.

The provisions of sub. 6 are directory, and the failure of the plaintiff to demand entry of judgment within six months after the court rendered its oral decision does not preclude the court from thereafter entering judgment for the plaintiff.

Headlund v. Daniels, 50 U. —; 167 P. 1170.

DISMISSAL BY PLAINTIFF:

But where answer, though demanding affirmative relief, fails to set up facts entitling to it, dismissal on motion of plaintiff is proper.

Flygare v. Maloney, 12 U. 497; 23 P. 879.

Where no counterclaim is made or affirmative relief asked for by the owner, plaintiff is entitled as of course to dismiss the cause pending the selection of the jury.

McCready v. R. G. W. Ry. C., 30 U. 1; 83 P. 331.

GROUNDS FOR NON-SUIT; WHEN GRANTED:

Nonsuit on grounds of variance, note to § 6615.

Non-joinder of necessary parties plaintiff is ground for nonsuit.

Goodspeed v. Wasatch S. L. Works, 2 U. 263.

Fact that plaintiff is a minor is no ground for nonsuit.

Newton v. Brown, 1 U. 287.

Where plaintiffs show contract but no damages, granting nonsuit not reversible error.

Ternes v. Dunn, 7 U. 497; 27 P. 692.

Fraud cannot be presumed from mere suspicious circumstances, but must be proved, and a nonsuit will be granted where there is no testimony offered by the plaintiff in his direct case tending to establish a prima facie case.

Ensign v. Fisher, 14 U. 477; 47 P. 950.

Variance. Motion improperly refused in case of failure of proof and variance.

Vance v. Whalan, 7 U. 44; 24 P. 672.

Nonsuit will not be granted unless a verdict for plaintiff would necessarily have to be set aside.

Saunders v. Sou. Pac. Co., 13 U. 275; 44 P. 932.

Bowers v. U. P. Ry. Co., 4 U. 215; 7 P. 251.

S. P. Co. v. Pool, 160 U. S. 438; reversing 7 U. 303; 26 P. 654.

Where evidence tends to show a case in all its parts, though slight, inconclusive, and far from satisfactory, nonsuit should be denied.

Cunningham v. U. P. Ry. Co., 4 U. 206; 7 P. 795.

Trihay v. Brooklyn Lead M'g. Co., 4 U. 468; 11 P. 612.

McMaster v. Morse, 18 U. 21; 55 P. 70.

Jennings v. Pratt, 19 U. 129; 56 P. 951.

Warren v. Robison, 19 U. 289; 57 P. 287.

Fraser v. Crane, 20 U. 65; 54 P. 983.

First Nat. Bank Nephi v. Brown, 20 U. 85; 57 P. 877.

McGarry v. Tanner, 21 U. 16; 59 P. 93.

McIntyre v. Ajax M. Co., 20 U. 323; 60 P. 552.

Gorringe v. Reed, 23 U. 120; 63 P. 902.

Whitmore v. R. G. W. Ry., 24 U. 215; 66 P. 1066.

Robinson v. S. L. City, 37 U. 520; 109 P. 817.

Where contributory negligence of plaintiff is plainly established by his evidence, a motion for nonsuit should be granted.

Fowler v. P. V. Coal Co., 16 U. 348; 52 P. 594.

Bunnell v. R. G. W. Ry., 13 U. 314; 44 P. 927.

Butte v. P. V. Coal Co., 14 U. 282; 47 P. 77.

Burgess v. S. L. City R. R. Co., 17 U. 406; 53 P. 1013.

Johnson v. R. G. W. Ry., 19 U. 77; 57 P. 17.

Silcock v. R. G. W. Ry., 22 U. 179; 61 P. 565.

Where the court is unable to say that the injury was not caused by defendant's negligence, motion for nonsuit should be denied.

Olson v. O. S. L. R. R. Co., 24 U. 460; 68 P. 148.

Holland v. O. S. L. R. R. Co., 26 U. 209; 72 P. 940.

Lowe v. S. L. City, 13 U. 91; 44 P. 1050.

Pool v. S. P. Co., 7 U. 303; 26 P. 654; reversed 160 U. S. 438.

Wells v. D. & R. G. W. Ry. Co., 7 U. 482; 27 P. 688.

Smith v. R. G. W. Ry Co., 9 U. 141; 33 P. 626.

Woods v. Sou. Pac. Co., 9 U. 146; 33 P. 628.
Wines v. R. G. W. Ry., 9 U. 228; 33 P. 1042.
Hall v. Ogden C. St. Ry. Co., 13 U. 243; 44 P. 1046.
Dederichs v. S. L. St. Ry. Co., 13 U. 34; 44 P. 649.
Saunders v. Sou. Pac. Co., 13 U. 275; 44 P. 932.
Wright v. Sou. Pac. Co., 14 U. 383; 46 P. 374.
Handley v. Daly M. Co., 15 U. 176; 49 P. 295.
Reese v. Morgan S. M. Co., 15 U. 453; 49 P. 824.
Dryberg v. Mercur G. M. Co., 18 U. 410; 55 P. 367.
Miller v. Bullion-B. & C. M. Co., 18 U. 358; 55 P. 58.
Dwyer v. S. L. City, 19 U. 521; 57 P. 535.
Pool v. Sou. Pac. Co., 20 U. 210; 58 P. 326.

On a motion for nonsuit, plaintiff's evidence together with all legitimate inferences therefrom, is to be taken as true, and it can be granted only if plaintiff has failed to prove his case.

McGarry v. Tanner & B. Co., 21 U. 16; 59 P. 3.
Jennings v. Pratt, 19 U. 129; 56 P. 951.
Lowe v. S. L. City, 13 U. 91; 44 P. 1050.
Smith v. Columbus Bug. Co., 40 U. 580; 123 P. 580.
Dunn v. S. L. & Ogden Ry. Co., 47 U. 137; 151 P. 979.

Motion for nonsuit on counterclaim properly denied, where its allegations are fairly established.

First Nat. Bank of Nephi v. Brown, 20 U. 85; 57 P. 877.

MOTION FOR NONSUIT SHOULD BE SPECIFIC:

A party moving for nonsuit is required to state in his motion the specific grounds relied on; he will not be permitted to rely on other grounds on appeal.

Boyle v. U. P. R. R. Co., 25 U. 420; 71 P. 988.
Frank v. Bullion-Beck & C. M. Co., 19 U. 35; 56 P. 419.
McIntyre v. Ajax M. Co., 20 U. 323; 60 P. 552.
Lewis v. Silver King M. Co., 22 U. 51; 61 P. 860.
Wild v. U. P. R. R. Co., 23 U. 265; 63 P. 886.
Boyd v. L. A. & S. L. Ry. Co., 45 U. 449; 146 P. 282.

A motion for a nonsuit must specify the grounds, and the plaintiff should then be permitted, if he desires, to supply the defects.

Gesas v. O. S. L. Ry. Co., 33 U. 156; 93 P. 274.

A motion for a nonsuit "on the ground of a fatal variance between the pleadings and the proof, and also upon the ground that the evidence fails to show any negligence or carelessness whatever on the part of the defendant company," is too general to be considered.

Lewis v. Silver King M. Co., 23 U. 51; 61 P. 860.
White v. R. G. W. Ry. Co., 22 U. 138; 61 P. 568.
Skeen v. O. S. L. R. R. Co., 22 U. 413; 62 P. 1020.

In an action between lessor and lessee, a motion for nonsuit on the ground, among other things, that the proof showed no contract requiring defendant to leave improvements on the premises was sufficiently specific.

Couch v. Welsh, 24 U. 36; 66 P. 600.

MISCELLANEOUS AS TO NONSUIT:

Prior to amendment of 1894, offering of evidence after motion overruled constituted a waiver.

Brown v. Sou. Pac. Co., 7 U. 288; 26 P. 579.
Thompson v. Avery, 11 U. 214; 39 P. 829.

After amendment of 1894, offer of evidence after motion overruled not a waiver.

Ensign v. Fisher, 14 U. 477; 47 P. 950.
Petrovitzky v. Brigham, 14 U. 472; 47 P. 666.

If further evidence is introduced by plaintiff after motion for nonsuit is overruled, defendant should renew his motion.

Wild v. U. P. Ry. Co., 23 U. 265; 63 P. 886.

The directing of a verdict for defendant at the time of granting a nonsuit, while not commendable practice, was not prejudicial error.

Couch v. Welsh, 24 U. 36; 66 P. 600.

The court cannot entertain a motion for judgment notwithstanding the verdict on the ground that there was a failure of proof to some essential element of the cause of action; that question must be raised by a motion for nonsuit, a request to direct the verdict, or, after verdict, by motion for a new trial.

Kirk v. S. L. City, 32 U. 143; 89 P. 458.

Where the jury rendered a verdict, supported by the evidence, necessitating affirmance, the question urged by respondent whether the court should have directed a verdict in favor of the successful party was immaterial.

Rogers v. R. G. W. Ry. Co., 32 U. 377; 90 P. 1075.

Where judgment of nonsuit is reversed on appeal, and case remanded without instructions to grant a new trial, the effect is to place the case in the same position, in the court below, as it was when the progress of the trial was interrupted by the motion for nonsuit.

Warren v. Robinson, 21 U. 429; 61 P. 28.

A judgment of nonsuit, on motion of the defendant, is not on the merits, so as to bar another action for the same cause.

Guthiel v. Gilmer, 27 U. 496; 76 P. 628.
Couch v. Welsh, 24 U. 36; 66 P. 600.
Robinson v. S. L. City, 37 U. 520; 109 P. 817.

Where nonsuit has been granted on plaintiff's evidence, the reviewing court should construe his evidence most favorably to him.

Jeppson v. Jensen, 47 U. 536; 155 P. 429.

Error, if any, in vacating non-suit before trial, is not prejudicial to defendant in view of the practice permitting the commencement of a new action on the same cause of action.

Brittain v. Gorman, 42 U. 586; 133 P. 370.

Defendant, who offered evidence after overruling of his motion for non-suit, might present the ruling on his exceptions for review, and be entitled to a review on the evidence adduced when motion was overruled.

Boyd v. S. P., L. A. & S. L. Co., 45 U. 449; 146 P. 282.

Any error in denying motion for nonsuit for insufficiency of evidence is cured where evidence subsequently introduced by defendant supplies the deficiency, and the error, though not waived, is without prejudice, even though the defendant assigned error on the ruling.

Id.

Where a motion for non-suit is made and the record states, "It is hereby ordered that the motion be and the same is hereby granted and the within case dismissed;" held, to constitute a judgment.

Robinson v. S. L. City, 37 U. 520; 109 P. 817.

The court may direct a verdict.

Smalley v. R. G. W. Ry. Co., 34 U. 423; 98 P. 311.

Defendant, by introducing evidence after his motion for a non-suit has been erroneously overruled, waives the error.

Thompson v. Avery, 11 U. 214; 39 P. 829.

6849. (3182.) Judgment on merits in all other cases. In every case, other than those mentioned in the next preceding section, judgment must be rendered on the merits.

Cal. C. Civ. P., § 582.

CHAPTER 34.

JUDGMENT IN GENERAL.

6853. (3183.) Judgment defined. A judgment is a final determination of the rights of parties in an action or proceeding.

Cal. C. Civ. P., § 577.
Judgment by default, §§ 6844, 6845.
Judgment by confession, §§ 6887-6890.
Judgment on demurrer, § 6831.
Judgment on offer of compromise, § 6893.
Judgment on submission of action, § 6894.
Judgment on dismissal, § 6848.
Judgment docket, entries, § 6870.
Judgment roll, § 6867.
Costs, §§ 7035-7054.
Res adjudicata, note to § 6994.
Judgment on the pleadings, note to § 6575.
Appeal only from final judgment, Con. art. 8, sec 9, and note.
On appeal, court may reverse, affirm, or modify judgment, § 6995, and note.
Interest before and after judgment, §§ 3330, 7050.
Relief against judgments taken by surprise, mistake, etc., § 6619, and note.
Conclusiveness of probate orders and decrees, §§ 7559, 7560, 7564, 7752, 7796, 7867, 7870.
Defects in pleadings cured by judgment, note to § 6573.
Personal service necessary to obtain personal judgment, note to § 1667.
Findings; materiality, certainty, etc., note to § 6829.
Certified copy court-martial judgment filed and enforced in civil court, § 3858.
Judgment in certain cases relates to date of lis pendens, § 6555.
Judgment of industrial commission, § 3135.
Decree in settlement of rights of parties in water cases, §§ 3422, 3485.
Presumptions in favor of judgment, note to § 6994.
Judgments may be entered in term time or in vacation; and in any county in the district, § 1678.
Indefinite and uncertain judgment will be set aside, note to § 6994.
Where judgment directs execution of conveyance, §§ 6963, 7000.

The amount of a judgment upon a promissory note should not be left open for computation. A judgment to be valid must be for a fixed and definite amount.
Baskin v. Godbe, 1 U. 28.

When order for judgment was entered on the 5th, but the amount was not ascertained so as to be entered before the 9th; held, not to be error.
Potter v. Hussey, 1 U. 249.

Clerical error in rendering judgment not material.
McClelland v. Dickenson, 2 U. 100.

Judgment in excess of value of property claimed in claim and delivery is not void but voidable.
Darke v. Ireland, 4 U. 192; 7 P. 714.

Amendment of judgment not entered in conformity with verdict.
R. & R. Cattle Co. v. Slaughter, 6 U. 278; 21 P. 997.
If the judgment of a court having jurisdiction has never been reversed or modified, it is binding upon a party and their privies, and conclusive of the questions litigated.
Hodson v. U. P. Ry. Co., 14 U. 381; 47 P. 859.
First Nat. Bank of Hailey v. Lewis, 12 U. 84; 41 P. 712.

Judgment rendered after party's death not void but voidable.
Elliott v. Bastian, 11 U. 452; 40 P. 713.

On collateral attack, a decree is conclusive unless invalid by defects appearing in the record.
Amy v. Amy, 12 U. 278; 42 P. 1121.
Hoagland v. Hoagland, 19 U. 103; 57 P. 20.

Where an attorney appears without authority, judgment rendered against a party by virtue of such appearance will not be allowed to stand.
Blyth & Fargo Co. v. Swenson, 15 U. 345; 49 P. 1027.

Legislature may validate a voidable judgment, not one that is void.
In re Christensen, 17 U. 412; 53 P. 1003.

Judgment obtained by fraud set aside on direct attack.
Mosby v. Gisborn, 17 U. 257; 54 P. 121.

Distinction between direct and collateral attack.
Id.

Where wife collusively permitted husband to obtain a divorce, she was not entitled to have same vacated.
Karren v. Karren, 25 U. 87; 69 P. 465.

Judgment of an inferior court is not res judicata pending appeal where it will be tried de novo.
Schramm-Johnson Drugs v. Kleeb, 50 U. —; 169 P. 161.

Judgment should be construed as other writings. Judgment for "the sum of 242.98" will be construed as for that many dollars.
Snow v. West, 37 U. 528; 110 P. 52.

An order quashing the service of summons without dismissing the action is not a final judgment.
Honerine v. Tallerday, 30 U. 449; 85 P. 626.

One to whose use a judgment is obtained in another's name can use the judgment by way of offset, and a parol assignment of a judgment is valid in absence of a prohibitory statute.
Snow v. West, 37 U. 528; 110 P. 52.

For the purpose of its enforcement, a judgment is evidence of its own existence immediately upon rendition and entry, and suit may be immediately started thereon.
Sweetser v. Fox, 43 U. 40; 134 P. 599.

A judgment is sufficient if, by the use of proper language, it states what the prevailing party shall receive and what the losing party is required to do.
Robinson v. Salt Lake City, 37 U. 520; 109 P. 817.

A judgment, in the absence of fraud, is conclusive on collateral attack as to the relation of debtor and creditor and the amount of the indebtedness, not only between the parties, but as to a third person on a subsequent action in which said relation and indebtedness are called in question.
Cooper v. Utah L. & Ry. Co., 35 U. 570; 102 P. 202.

A judgment debtor, seeking to enjoin the, collection of a judgment because of insolvency of the judgment creditor, and because he has a valid and subsisting judgment against the creditor which is a setoff, has no cause of action against the sheriff alone to whom an execution has been given by the judgment creditor.
Arnold v. Pope, 37 U. 204; 108 P. 351.

A judgment, in an action against an estate, declaring the claimant to be the widow of the deceased is not binding on the grantees of the decedent in an action by the widow to establish dower in land conveyed to them, and a judgment was not admissible to prove her marriage.
Hilton v. Snyder, 37 U. 384; 108 P. 698.

A judgment is not admissible in evidence to prove a material issue in another case before the time of appeal shall have expired.
Vance v. Heath, 42 U. 148; 129 P. 365.

Where a judgment was recovered on perjured testimony, equity is without power to grant relief, especially where defendant knew in advance that testimony of that character would be introduced.
Cantwell v. Thatcher Bros. Banking Co., 47 U. 150; 151 P. 986.

Unless a judgment accords with and is warranted by the pleadings of the party in whose favor it is rendered, it is fatally defective.
Rosenthyne v. Matthews-McCulloch Co., — U. —; 168 P. 957.

The judgment debtor had title to certain land on the entry of judgment; before execution was issued thereon, suit was commenced against the judgment debtor to cancel the deed for fraud; lis pendens was filed, and judgment rendered canceling the deed. The

judgment creditor purchasing it at execution sale is not bound by the judgment canceling the deed.
Larson v. Gasberg, 30 U. 470; 86 P. 412.
Where a question has been adjudicated, it is conclusive between the parties, though it arises again in a different form even though the findings in the former adjudication, went beyond the allegations of the defendant's answer in the instant case.
Jeremy Fuel & Grain Co. v. Mellen, 50 U. —; 165 P. 791.
A judgment may be set aside in a direct proceeding where the only service of summons was by publication and the affidavit was made by an agent of the plaintiff and states the defendant's residence was unknown when by diligence plaintiff could have learned defendant's address.
Leibhart v. Lawrence, 40 U. 243; 120 P. 215.

6854. (3184.) Judgment for or against one or more parties. Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side, as between themselves.

Cal. C. Civ. P., § 578.
Cross-complaint may be filed against co-defendant, § 6581.
Power of the court in cases involving water rights, §§ 3422-3485.
Judgment against partnership, etc., § 6520.
Action against parties jointly liable, § 6511; judgment against one or more, §§ 6558, 6856, 6914.

6855. (3185.) Judgment in case of principal and sureties. Upon the rendition of any judgment, if it shall be shown that one or more of the defendants against whom the judgment is to be rendered are principal debtors, and others of the said defendants are sureties of such principal debtors, the court may order the judgment so to state, and upon the issuance of an execution upon such judgment, it shall direct the sheriff to make the amount due thereon out of the goods and chattels, lands and tenements of the principal debtor or debtors, or if sufficient thereof cannot be found within his county to satisfy the same, then that he levy and make the same out of the property, personal or real, of the judgment debtor who was surety.

Mont. Civ. P., § 1001*.
Decisions on indorsers and sureties, note to § 4097.
Surety paying may be substituted to rights of judgment creditor, § 7226.
Surety paying may file notice and enforce repayment, § 6950.

6856. (3186.) Judgment against one or more; proceedings as to others. In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the other whenever a several judgment is proper.

Cal. C. Civ. P., § 579.
Action against parties jointly or jointly and severally liable, §§ 6511, 6558.
Judgment against persons associated, § 6520.
Judgment as to parties not originally served, §§ 6874-6879.
Execution against joint property of all defendants and individual property of defendants served, § 6914.

6857. (3187.) Relief not to exceed demand in default case; in other cases. The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint; but in any other case the court may grant him any relief consistent with the case made by the complaint and embraced within the issue.

Cal. C. Civ. P., § 580.
Judgment on the pleadings, note to § 6575.
Special damages must be specially pleaded in order to recover, note to § 6566.
On default, the plaintiff is entitled to such a decree as his allegations and evidence will justify.
Hartog v. Tibbitts, 1 U. 328.
Where one of the defendants fails to make answer, but the plaintiff upon trial fails to show liability as to any of the defendants, it is not error to deny judgment against the defendant thus in default.
Munns v. Loveland, 15 U. 250; 49 P. 743.
Where defendant defaults and third parties intervene, the court may find that at the commencement of the action plaintiff was a creditor of defendant.
Am. Oak Leather Co. v. Union Bank, 9 U. 87; 33 P. 246.

6858. (3188.) Married woman liable as if single. Judgment for or against a married woman may be rendered and enforced as if she were single.

Mont. Civ. P., § 1006.
Equal property and constractual rights of married woman, Con. art 22, sec. 2, and §§ 2983-2992.
Homestead rights, §§ 2862-2882, and notes.
Decisions on dower rights, etc., note to § 6406.
May sue and be sued as if single, § 6497.
May defend for her husband, §§ 6498, 6499.

6859. (3189.) Judgment of dismissal, except on merits, not a bar. A final judgment dismissing the complaint, either before or after a trial, does not prevent a new action for the same cause of action, unless it expressly declares, or it appears by the judgment roll, that it is rendered upon the merits.

Mont. Civ. P., § 1007.
Judgment of dismissal, §§ 6848, 6849.
A judgment of nonsuit, on motion of the defendant, is not on the merits, so as to bar another action for the same cause.
Guthiel v. Gilmer, 27 U. 496; 76 P. 628.
Couch v. Welsh, 24 U. 36; 66 P. 600.

6860. (3190.) Judgment for costs upon dismissal, etc. Upon the dismissal or disposition of an action in which the court has jurisdiction of the subject matter of the action, it is the duty of the court to render judgment for costs.

Mont. Civ. P. § 1008.
Costs when action dismissed for want of jurisdiction, § 7042.

This includes only such costs as are taxable under the statute.
McCready v. R. G. W. Ry. Co., 30 U. 1; 83 P. 331.

6861. (3191.) Entry of judgment on verdict within twenty-four hours; stay. When trial by jury has been had, judgment must be entered by the clerk in conformity to the verdict, within twenty-four hours after the rendition of the verdict, unless the court order the case to be reserved for argument, or further consideration, or grant a stay of proceedings.

Cal. C. Civ. P., § 664.
Entering verdict, § 6824.
Trial by court, decision within thirty days, § 6828.
Entry of judgment on referee's report, § 6840.
Dismissal of action for failure to demand judgment within six months, § 6848.
Judgment may be amended where not entered in conformity with verdict.

Ryan and Ream Cattle Co. v. Slaughter, 6 U. 278; 21 P. 997.
Where a judgment was rendered in open court for plaintiff on motion of his attorneys, and he paid to the clerk the proper fees and demanded that a judgment be entered, but the clerk failed to make the entry, it was proper for the court to order its entry nunc pro tunc.
Oberndorfer v. Moyer, 30 U. 325; 84 P. 1102.

6862. (3192.) Calling up case reserved for argument. When the case is reserved for argument or further consideration, as mentioned in the next preceding section, it may be brought by either party before the court for argument.

Cal. C. Civ. P., § 665.

6863. (3193.) Judgment for defendant on counterclaim, etc. If a counterclaim established at the trial exceed the plaintiff's demand, judgment for the defendant must be given for the excess; or if it appear that the defendant is entitled to any other affirmative relief, judgment must be given accordingly.

Cal. C. Civ. P., § 666.

Verdict on counterclaim, § 6822.

6864. (3194.) Form of judgment in action for personal property. Judgment for kind of money specified. In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession, or the value thereof, in case a delivery cannot be had, and damages for the detention. If the property has been delivered to the plaintiff, and the defendant claims a return thereof, judgment for the defendant may be for a return of the property, or the value thereof, in case a return cannot be had, and damages for taking and withholding the same. In an action on a contract or obligation in writing for the direct payment of money, made payable in a specified kind of money or currency, judgment for the plaintiff, whether it be by default or after verdict, may follow the contract or obligation, and be made payable in the kind of money or currency specified therein; and in all actions for the recovery of money, if the plaintiff allege in his complaint that the same was understood and agreed by the respective parties to be payable in a specified kind of money or currency, and this fact is admitted by the default of the defendant or established by the evidence, the judgment for the plaintiff must be made payable in the kind of money or currency so alleged in the complaint; and in an action against any person for the recovery of money received by such person in a fiduciary capacity, or to the use of another, judgment for the plaintiff must be made payable in the kind of money or currency so received by such person.

Cal. C. Civ. P., § 667.
Interest and costs to be included in judgment, § 7050.
Judgment directing conveyance of real property, proceedings if not delivered, § 6962.
Verdict in action to recover personal property, § 6823.

How judgment entered in judgment docket, § 3199.
Verdict in action to recover money, etc., § 6870.
Judgment in claim and delivery for an amount in excess of that claimed is erroneous, but not void.
Darke v. Ireland, 4 U. 192; 7 P. 714.

6865. (3195.) Judgment book. Entries. The clerk must keep with the records of the court a book to be called the judgment book, in which the judgments and findings of fact must be entered.

Cal. C. Civ. P., § 668*.
An appeal should not be taken before judgment is entered in the judgment book, but it will be presumed on appeal that the judgment

was so entered, and this presumption will not yield to a collateral attack by affidavit, but can only be overcome by amendment to the record.

Robinson v. Salt Lake City, 37 U. 520; 109 P. 818.

6866. (3196.) Judgment rendered when party dies after verdict. Not a lien; paid by estate. If a party dies after a verdict or decision upon any issue of fact, and before judgment, the court may nevertheless render judgment thereon. Such judgment is not a lien on the real property of the deceased party, but is payable in the course of administration of his estate.

Cal. C. Civ. P., § 669.

Death pending action, substitution, § 6513.

Presentment to executor or administrator, § 7657.

Execution of judgment rendered before death, §§ 6918, 7660.

Judgment rendered after party's death is voidable.

Elliott v. Bastian, 11 U. 452; 40 P. 713.

6867. (3197.) Judgment roll. Immediately after entering the judgment the clerk must attach together and file the following papers, which constitute the judgment roll:

1. In case the complaint be not answered by any defendant, the summons, with the affidavit of proof of service, and the complaint, with a memorandum indorsed thereon that the default of the defendant in not answering was entered, and a copy of the judgment;

2. In all other cases, the pleadings, a copy of the verdict of the jury, or findings of the court or referee, all bills of exception taken and filed, all orders, matters, and proceedings deemed excepted to without a bill of exceptions, and a copy of any order made on demurrer, or relating to a change of parties, a copy of the judgment and the order overruling the motion for a new trial. If there are two or more defendants in the action, and any one of them has allowed judgment to pass against him by default, the summons, with proof of its service upon such defendant, must also be added to the other papers mentioned in this subdivision. Am'd '11, p. 136.

Mont. Civ. P., § 1196; Cal. C. Civ. P., § 670*. See Sup. (1895) p. 19, § 670*.

Instructions requested or given become part of judgment roll, § 6806, and note.

Presumption in favor of judgment, note to § 6994.

When appeal decided on judgment roll, note to § 6994.

Appeal decided on record as made in court below, note to § 6994.

The instructions form part of judgment roll and are properly before the court for review.

Utah Optical Co. v. Keith, 18 U. 464; 56 P. 155.

Pleading which has been stricken from the files is still a part of the judgment roll.

Gregg v. Groesbeck, 11 U. 310; 40 P. 202.

Also order overruling demurrer.

Thomas v. Glendinning, 13 U. 47; 44 P. 652.

Unless the record shows that an order denying a motion for new trial was made so as to become a part of the judgment roll, under this section and § 6966, such ruling should be preserved in a bill of exceptions, in order to be considered on appeal; the clerk's certificate of minute entry of such order is not of itself sufficient.

Hecla G. M. Co. v. Gisborn, 21 U. 68; 59 P. 518.

Walker Brothers V. Skliris, 34 U. 353; 98 P. 114.

Warnock v. Peterson, 35 U. 542; 101 P. 699.

(The above cases were decided before the amendment of 1911.)

Where a reply was, on a date after the appeal was perfected, ordered filed nunc pro tunc as of the date of the trial of the case, it will not be considered as a part of the judgment roll.

Swanson v. Sims, 50 U. —; 170 P. 774.

Where the record and judgment itself show the summons issued on an original complaint and under the order of court the same was amended by adding a verification thereto but no new service was made, default judgment was improperly rendered on the amended complaint; and inasmuch as the record shows what was done, there can be no presumption indulged in to aid it.

Thero v. Franklin, 48 U. 587; 160 P. 1188.

The following papers are not a part of the judgment roll, and can be considered only when preserved in a bill of exceptions, viz:

Petition for removal of the case to the federal court.

Neesley v. S. P. R. Co., 35 U. 259; 99 P. 1067.

Affidavits and proceedings in discharge of an attachment.

Bowring v. Bowring, 4 U. 185; 7 P. 716.

Hulse v. Swicegood, 49 U. 89; 162 P. 89.

Affidavit and order for publication of summons.

Amy v. Amy, 12 U. 278; 42 P. 1121.

Hoagland v. Hoagland, 19 U. 103; 57 P. 20.

Additional findings made after judgment.

Kahn v. Central Smelting Co., 2 U. 371.

A motion to quash service of summons and to transfer the case and the rulings thereon.

Lindsay v. Smart, 43 U. 554; 137 P. 837.

Orders extending time to settle bill of exceptions.

Dayton v. Free, 46 U. 277; 148 P. 408.

Hutchinson v. Smart, 50 U. —; 169 P. 166.

Swanson v. Sims, 50 U. —; 170 P. 774.

Taylor v. Paloma M. Co., 50 U. —; 171 P. 147.

Exceptions based on the stenographer's certificate.

Thomas v. Blythe, 44 U. 1; 137 P. 396.

An order of nonsuit attached to transcript but not part of the judgment.

Lukich v. Utah Con. Co., 46 U. 317; 150 P. 298.

Denial of motion for change of venue.

Broadbent v. D. & R. G. R. Co., 48 U. 598; 160 P. 1185.

An order vacating a motion to substitute an administrator and denying motion to modify the judgment.

McCullough v. McCullough, 37 U. 148; 106 P. 665.

Intermediate orders.

Reever v. White, 8 U. 188; 30 P. 685.

Lowell v. Parkinson, 4 U. 64; 6 P. 58.

Affidavits used on motion for new trial.

Hecla G. M. Co. v. Gisborn, 21 U. 68; 59 P. 518.

6868. (3198.) Docketing judgment. Lien for eight years. Filing transcript in other counties. Immediately after filing the judgment roll, the clerk

must make the proper entries of the judgment, under appropriate heads, in the docket kept by him, and from the time the judgment is docketed it becomes a lien upon all the real property of the judgment debtor not exempt from execution in the county in which the judgment is given, owned by him at the rendition of the judgment, or by him thereafter acquired during the existence of said lien in his own right. A transcript of the original docket, certified by the clerk, may be filed with the recorder of any other county, and from the time of the filing, the judgment becomes a lien upon all the real property of the judgment debtor not exempt from execution in such county, owned by him at the time, or which he may afterward, and before the lien expires, acquire. The lien shall continue for eight years unless the judgment be previously satisfied or unless the enforcement of the judgment be stayed on appeal by the execution of a sufficient undertaking as provided in this code, in which case the lien of the judgment ceases. Am'd '99, p. 34.

Cal. C. Civ. P., § 671*. See Sup. (1895) p. 20.
Notes, § 6853.
Judgment docket, form, etc., § 6870.
Lien of judgments entered in U. S. courts, § 3589.
Where change of venue had, clerk must transmit copy of judgment to original county, § 6536.
Limitation of action on judgment, eight years, § 6465.
Judgment rendered after death not a lien, § 6866.
Satisfaction of judgment, §§ 6881-6886.
Revivor of judgment, §§ 6917, 6948.
Docketing judgment in another county, § 6536.
Execution on judgment docketed in another county, § 6912.

This section applies to judgments in favor of the U. S.
Thompson v. Avery, 11 U. 214; 39 P. 829.
In the absence of a statutory provision, a judgment is not a lien on debtor's land.
Id.
Docketing judgments of city courts in district courts; lien; execution, § 1719; from justice's courts, §§ 7501-7503.
The levy of an execution upon real estate during the time that the judgment upon which the execution was a lien upon the same neither extends the lien of the judgment, nor does it create a new lien upon the property.
Smith v. Schwartz, 21 U. 126; 60 P. 305.
Where a judgment is renewed, the lien of the first judgment is lost as against an intervening mortgage.
Id.

6869. (3198x.) Transcript of judgment docketed in any county, effect. A transcript of judgment rendered in a district court of the state of Utah, in any county thereof, may be filed and docketed in the office of the clerk of the district court of any other county in this state, and when so filed and docketed said judgment shall have the same force and effect as a judgment given in the district court in said county. '05, p. 31.

Execution on such judgment, § 6912.
Docketing judgment in another county, §§ 6536, 6868.

Judgments of city courts may be docketed by clerk of any district court; lien; execution, § 1719; from justices' courts, §§ 7501-7503.

6870. (3199.) Judgment docket defined; entries, how made. The docket mentioned in § 6868 is a book which the clerk keeps in his office with each page divided into columns and heads as follows: Judgment debtors, judgment creditors, judgment, time of entry, where entered in judgment book, appeals—when taken, judgment of appellate court, satisfaction of judgment—when entered. If judgment be for the recovery of money or damages, the amount must be stated in the docket under the head of judgment; if the judgment be for any other relief, a memorandum of the general character of the relief granted must be stated. The names of the judgment debtors must be entered in the docket, or in an index kept in connection therewith, in alphabetical order. Am'd '05, p. 17.

Cal. C. Civ. P., § 672.

Entry of satisfaction of judgment, § 6883.

6871. (3200.) Docket open to inspection. The docket kept by the clerk is open at all times during office hours for the inspection of the public without charge; the clerk must arrange the several dockets kept by him in such manner as to facilitate their inspection.

Cal. C. Civ. P., § 673.

Books to be kept by clerk, § 153€.

CHAPTER 35.

PARTIES NOT SUMMONED.

6874. (3201.) Joint debtors not originally served may be summoned to show cause. When a judgment is recovered against one or more of several

persons jointly indebted upon an obligation by proceeding as provided in § 6558, those who were not originally served with the summons and did not appear in the action may be summoned to show cause why they should not be bound by the judgment in the same manner as though they had been originally served with the summons.

Cal. C. Civ. P., § 989.
Execution against joint defendants when service was not had on all, § 6914.
Action against parties jointly or jointly and severally liable, §§ 6511, 6520, 6558.
Judgment against one or more, §§ 6854-6856.
Party not served, time to answer after judgment, § 6619.

6875. (3202.) Id. Summons. Service. New complaint unnecessary. The summons, as provided in the next preceding section, must describe the judgment and require the person summoned to show cause why he should not be bound by it, and must be served in the same manner and returnable within the same time as the original summons. It is not necessary to file a new complaint.

Cal. C. Civ. P., § 990.

6876. (3203.) Id. Affidavit accompanying summons showing amount due. The summons may be accompanied by an affidavit of the plaintiff, his agent, representative, or attorney, that the judgment, or some part thereof, remains unsatisfied, and must specify the amount due thereon.

Cal. C. Civ. P., § 991*.

6877. (3204.) Id. Answer. Defenses allowed. Upon such summons the defendant may answer within the time specified therein, denying the judgment, or setting up any defense which may have arisen subsequently, or he may deny his liability on the obligation upon which the judgment was recovered. Am'd '15, p. 121.

Cal. C. Civ. P., § 992.

6878. (3205.) Id. What constitute the written allegations. If the defendant, in his answer, deny the judgment, or set up any defense which may have arisen subsequently, the summons, with the affidavit annexed, and the answer constitute the written allegations in the case; if he deny his liability on the obligation upon which the judgment was recovered, a copy of the original complaint and judgment, the summons, with the affidavit annexed, and the answer constitute such written allegations.

Cal. C. Civ. P., § 993.

6879. (3206.) Issues tried as in other cases. Judgment. The issues formed may be tried as in other cases, but when the defendant denies in his answer any liability on the obligation upon which the judgment was rendered, if a verdict be found against him, it must be for not exceeding the amount remaining unsatisfied on such original judgment, with interest thereon.

Cal. C. Civ. P., § 994.

CHAPTER 36.

SATISFACTION OF JUDGMENT.

6881. (3207.) Judgment may be satisfied by owner or attorney. Method. A judgment may be satisfied in whole or in part, or as to any or all the judgment debtors, by an instrument in writing, signed and acknowledged by the owner thereof, or, at any time within eight years after the rendition thereof, when no assignment has been filed, by the attorney of record of the judgment creditor, or by a brief acknowledgment of satisfaction, signed as aforesaid and entered on the docket of the judgment in the county where first docketed, with the date affixed, and witnessed by the clerk. Every satisfaction of a part of a judgment, or as to some of the judgment debtors, shall state the amount paid thereon or for the release of such debtors, naming them. Am'd '11, p. 8.

Wis., S. & B. An. S. (1889), § 2908.
Satisfaction of judgment of U. S. Court, record, § 3590.

6882. (3208.) Effect of satisfaction by attorney whose authority is revoked. No satisfaction by an attorney shall be conclusive upon the judgment

creditor in respect to any person who shall have notice of revocation of the authority of such attorney, before any payment made thereon, or before any purchase of property bound by such judgment shall have been effected.

Wis., S. & B. An. S. (1889) § 2909. Authority of attorney, § 326.

6883. (3209.) When satisfaction filed, entries by clerk. On filing with him an instrument of satisfaction, duly executed and acknowledged, the clerk shall file the same with the papers in the case, and enter the same on the court record, if any, of the case, and shall also enter a brief statement of the substance thereof, including the amount paid, on the margin of the judgment docket, with the date of filing the satisfaction.

Wis., S. & B. An. S. (1889) § 2910. Satisfaction to be entered on docket, § 6870.

6884. (3210.) Satisfaction directed by court, when. When a judgment shall have been fully paid and not satisfied, or the instrument of satisfaction shall have been lost, the court in which the same was recovered may, upon satisfactory proof, authorize the attorney of the judgment creditor to satisfy the same, or may by order declare the same satisfied, and direct satisfaction to be entered upon the docket.

Wis., S. & B. An. S. (1889) § 2911.
Where judgment has been satisfied in part by collection under attachment proceedings, the court may order partial satisfaction.
Blake v. Farrell, 31 U. 110; 86 P. 805.

6885. (3211.) Satisfaction discharges lien. Partial satisfaction to be indorsed on execution. When a judgment shall have been satisfied, in whole or in part, or as to any judgment debtor, and such satisfaction entered upon the docket as aforesaid, such judgment shall, to the extent of such satisfaction, be discharged and cease to be a lien; and if any execution shall be thereafter issued thereon, it shall be indorsed with a memorandum of such partial satisfaction, and a direction to collect only the residue thereof, or to collect only from the judgment debtors remaining liable thereon.

Wis., S. & B. An. S. (1889) § 2912.
Lien of judgments, §§ 6868, 6869.
Where execution was issued for full amount of judgment, though more than half had been paid, a levy and sale thereunder of property in excess of the amount remaining unpaid was void.
Young v. Schroeder, 10 U. 155; 37 P. 252; affirmed 161 U. S. 334.

6886. (3212.) Transcript of satisfaction may be filed in other counties. When any satisfaction of a judgment shall have been entered on the docket, as aforesaid, in the county where the same was first docketed, a certified transcript of such docket, or a certificate by the clerk, under his official seal, showing such satisfaction, may be filed with the clerk of the district court in any other county where the same may have been docketed, and such clerk shall thereupon make a similar entry on the docket of such judgment, in his county, which shall have the same effect as in the county where the same was originally entered.

Wis., S. & B. An. S. (1889) § 2913.

CHAPTER 37.

JUDGMENT BY CONFESSION.

6887. (3213.) Confession of judgment for debt or contingent liability. Jurisdiction. A judgment by confession may be entered without action, either for money due or to become due or to secure any person against contingent liability on behalf of the defendant, or both, in the manner prescribed by this chapter. Such judgment may be entered in any court having jurisdiction for like amounts.

Cal. C. Civ. P., § 1132. Offer to allow judgment, effect, § 6893.

6888. (3214.) Verified statement in writing required. A statement in writing must be made, signed by the defendant and verified by his oath, to the following effect:

1. It must authorize the entry of judgment for a specified sum;

2. If the judgment to be confessed be for money due or to become due, it must state concisely the facts out of which the indebtedness arose and show that the sum confessed therefor is justly due or to become due;

3. If the judgment to be confessed be for the purpose of securing the plaintiff against a contingent liability, it must state concisely the facts constituting the liability and show that the sum confessed therefor does not exceed the same.

Cal. C. Civ. P., § 1133.
A confession of judgment must strictly pursue the statute, and a judgment entered thereon without the sworn statement required by this section is void as to creditors of the defendant not made parties to the action.
Bacon v. Raybould, 4 U. 357; 10 P. 481; 11 P. 510.
Confession of judgment entered without compliance herewith is void. Warrant of attorney to confess judgment is abrogated by our statute.
Utah Nat. Bank v. Sears, 13 U. 172; 44 P. 832.

6889. (3215.) Id. To be filed with clerk. Entry of judgment. Judgment roll. The statement must be filed with the clerk of the court in which the judgment is to be entered, who must indorse upon it, and enter in the judgment book, a judgment of such court for the amount confessed, with costs of entry. The statement and affidavit with the judgment indorsed thereupon becomes the judgment roll.

Cal. C. Civ. P., § 1134*. Fee for filing, § 2521. Judgment roll, § 6867.

6890. (3216.) Id. In justice's court. Transcript. In a justice's court, where the court has the authority to enter the judgment, the statement may be filed with the justice, who must thereupon enter in his docket a judgment of his court for the amount confessed, with costs of entry. If a transcript of such judgment be filed with the clerk of the district court, a copy of the statement must be filed with it.

Cal. C. Civ. P., § 1135*.
Judgment by confession in justice's court, § 7490; fee for filing, § 2527.
In city court, §§ 1719, 1722.
Offer to allow judgment, effect, § 7498.

CHAPTER 38.

OFFER OF COMPROMISE.

6893. (3217.) Either party may offer compromise. Effect of acceptance or rejection. Either party in any action may, at any time before the trial or judgment, serve upon the adverse party an offer in writing to allow judgment to be taken against him for the sum or property, or to the effect therein specified. If the latter accept the offer and give notice thereof within five days, he may file the offer with proof of notice of acceptance, and the clerk must thereupon enter judgment accordingly. If the notice of acceptance be not given, the offer is to be deemed withdrawn and cannot be given in evidence upon the trial; and if the party refusing the offer fails to obtain a more favorable judgment, he cannot recover costs, but must pay the costs of the adverse party from the time of the offer.

Cal. C. Civ. P., § 997*.
Similar provision in justice's court, § 7498, and note.
Tender, §§ 7215-7217.
Judgment by confession, §§ 6887-6890.
Tender and deposit, refusal, costs, § 7047.
Where defendants at commencement of trial offered to allow judgment for a certain sum and accrued costs, in satisfaction of plaintiff's claims, plaintiff could file a bill of costs.
Smith v. Nelson, 23 U. 512; 65 P. 485.
A letter written before suit offering to pay a certain amount is privileged.
McKinney v. Carson, 35 U. 180; 99 P. 660.

CHAPTER 39.

SUBMITTING CONTROVERSY WITHOUT ACTION.

6894. (3218.) Parties may submit case upon agreed statement. Hearing. Parties to a question in difference, which might be the subject of a civil action, may without action agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any court which would have jurisdiction if an action had been brought. But it must appear by affidavit that the controversy is real, and the proceeding in good faith, to determine the rights of the parties. The court must thereupon hear

and determine the case and render judgment thereon as if an action were pending.

Cal. C. Civ. P., § 1138.

6895. (3219.) Entry of judgment. Cost. Judgment roll. Judgment must be entered in the judgment book as in other cases, but without costs for any proceeding prior to the trial. The case, the submission, and a copy of the judgment shall constitute the judgment roll.

Cal. C. Civ. P., § 1139. Judgment roll, § 6867.

6896. (3220.) Judgment may be enforced or appeal taken as in other cases. The judgment may be enforced in the same manner as if it had been rendered in an action, and shall be subject to appeal in like manner.

Cal. C. Civ. P., § 1140.

CHAPTER 40.

ARBITRATION.

6899. (3221.) Parties may arbitrate controversy, except title to realty. Persons capable of contracting may submit to arbitration any controversy which might be the subject of a civil action between them, except a question of title to real property in fee, or for life; this qualification does not include questions relating merely to the partition or boundaries of real property, nor to questions involving the title to water or water rights. Am'd '03, p. 48.

Cal. C. Civ. P., § 1281*.

Arbitration of claim against estate of decedent, § 7661.

Submission to arbitration of "certain matters in controversy in relation to the title of a certain piece of land" is invalid hereunder.
Thygerson v. Whitbeck, 5 U. 406; 16 P. 403.

Provisions of the constitution of an unincorporated association, providing that death claims should be arbitrated by a board whose decision shall be final, constitute merely a revocable agreement to arbitrate, and do not preclude resort to the courts, nor is such a submission to arbitration a condition precedent to action.
Daniher v. A. O. U. W., 10 U. 110; 37 P. 245.

The law tends strongly to favor the settlement of controversies by arbitration.
Jensen v. Deep Cr. Farm & L. S. Co., 27 U. 66; 74 P. 427.

An agreement submitting a controversy to arbitration held to include both the question of contract and of damages.
Richards v. Smith, 33 U. 8; 91 P. 683.

Submissions to arbitration are to be liberally construed.
Id.

6900. (3222.) Submission to be in writing and acknowledged. Arbitrators. The submission to arbitration must be in writing, duly acknowledged, and may be to one or more persons.

Cal. C. Civ. P., § 1282*.

6901. (3223.) Id. Entered as order of court. Revocation. Court may compel award. It may be stipulated in the submission that it be entered as an order of the district court, for which purpose it must be filed with the clerk of the district court of the county where the parties, or one of them, reside. The clerk must thereupon enter in his register of actions a note of the submission, with the names of the parties, the names of the arbitrators, the date of submission, when filed, and the time limited by the submission, if any, within which the award must be made. When so entered, the submission cannot be revoked without the consent of both parties. The arbitrators may be compelled by the court to make an award, and the award may be enforced by the court in the same manner as a judgment. If the submission is not made an order of the court, it may be revoked at any time before the award is made.

Cal. C. Civ. P., § 1283.

It is not part of the duty of the arbitrators to file their award with the clerk.
Richards v. Smith, 33 U. 8; 91 P. 683.

The effect of a failure to file a submission in court before the hearing was only to permit the parties to revoke the submission, and prevent the court from acquiring jurisdiction until filed, and did not affect the right of the arbitrators to proceed to a hearing.
Id.

6902. (3224.) Powers of arbitrators. Arbitrators have power to appoint a time and place for hearing, to adjourn from time to time, to administer oaths to witnesses, to hear the allegations and evidence of the parties, and to make an award thereon.

Cal. C. Civ. P., § 1284.

6903. (3225.) Witnesses compelled to appear as in other cases. Wit-

nesses may be compelled to appear before such arbitrators by subpœna to be issued by the clerk of the district court, in the same manner and with like effect, and subject to the same penalties for disobedience, as in other cases.

N. Dak. (1895) § 5984*.
Contempts before other than judicial officers, punishment, § 7072.

6904. (3226.) All arbitrators must meet. Majority controls. Oaths. All the arbitrators must meet and act together during the investigation, but when met, a majority may determine any question. Before acting they must be sworn, before an officer authorized to administer oaths, faithfully and fairly to hear and examine the allegations and evidence of the parties in relation to the matters in controversy, and to make a just award according to their understanding.

Cal. C. Civ. P., § 1285.
When three arbitrators, all must meet, but majority may act, § 7211.
Where authority joint, majority may act, § 5846.

6905. (3227.) Award to be in writing and signed. Becomes a judgment, when. The award must be in writing, signed by the arbitrators or a majority of them, and delivered to the parties. When the submission is made an order of the court, the award must be filed with the clerk and a note thereof made in his register. After the expiration of five days from the filing of the award, upon the application of a party, and on filing an affidavit showing that notice of filing the award has been served on the adverse party or his attorney at least four days prior to such application, and that no order staying the entry of judgment has been served, the award must be entered by the clerk in the judgment book, and thereupon has the effect of a judgment.

Cal. C. Civ. P., § 1286.
Where parties submitted to arbitration generally all claims and controversies arising out of a lease of a number of sheep, and a suit commenced thereon, it was the duty of the arbitrators to pass on every point in difference arising out of the transaction.
Jensen v. Deep Cr. Farm & L. S. Co., 27 U. 66; 74 P. 427.
Presumption in favor of award.
Id.
Where mutual claims submitted to arbitration are all for money damages, an award in a gross sum is sufficient, without findings as to the separate claims.
Id.
No time being specified by a submission to arbitrators, nor by this section, for the filing of the award, mere delay in filing it did not deprive the court of jurisdiction to enter judgment on the award.
Richards v. Smith, 33 U. 8; 91 P. 683.

6906. (3228.) Vacation of award; grounds. The court, on motion, may vacate the award upon any of the following grounds, and may order a new hearing before the same arbitrators, or not, in its discretion:

1. That it was procured by corruption or fraud or other undue means;

2. That the arbitrators were guilty of misconduct or committed gross error in refusing, on cause shown, to postpone the hearing, or in refusing to hear pertinent evidence, or otherwise acted improperly, in a manner by which the rights of the party were prejudiced;

3. That the arbitrators exceeded their powers in making their award; or that they refused or improperly omitted to consider a part of the matters submitted to them; or that the award is indefinite or cannot be performed.

Cal. C. Civ. P., § 1287*.
Where a stipulation submits a matter to arbitration, but reserves the right to have the court determine whether there should be any damages, and the arbitrators submit the evidence with their report and judgment, the court may read the evidence, not to determine its probative value, but to ascertain if there is any evidence to sustain the arbitration judgment.
Bivans v. U. L. L. W. & P. Co., 51 U. —; 174 P. 1128.

6907. (3229.) When award may be modified or corrected. The court may, on motion, modify or correct the award when it appears:

1. That there was a miscalculation in figures upon which it was made, or that there is a mistake in the description of some person or property therein;

2. When a part of the award is upon matters not submitted, which part can be separated from other parts and does not affect the decision on the matters submitted;

3. When the award, though imperfect in form, could have been amended if it had been a verdict, or the imperfection disregarded.

Cal. C. Civ. P., § 1288.

6908. (3230.) Id. Decision on motion appealable, when. The decision upon the motion is subject to appeal in the same manner as an order which is

subject to appeal in a civil action; but the judgment, if entered before a motion is made, cannot be subject to appeal.

Cal. C. Civ. P., § 1289.

Where the court modifies the award and enters judgment, it is appealable.

Bivans v. U. L. L. W. & P. Co., 51 U. —; 174 P. 1128.

6909. (3231.) Damages for revoking submission, limited. If a submission to arbitration be revoked and an action be brought therefor, the amount to be recovered can only be the costs and the damages sustained in preparing for and attending the arbitration.

Cal. C. Civ. P., § 1290.

CHAPTER 41.

EXECUTION.

6912. (3232.) Execution may issue within eight years. The party in whose favor judgment is given may, at any time within eight years after the date of entry thereof, have a writ of execution issued for its enforcement, either in the county in which said judgment was rendered, or in any county in which a transcript thereof has been filed and docketed in the office of the clerk of the district court. Am'd '99, p. 22; '05, p. 30.

Cal. C. Civ. P., § 681.

Limitation on action on judgment, eight years, § 6465.

Receiver may be appointed to carry judgment into effect, § 6764.

Order for the payment of money enforced by execution, § 7021.

Docketing judgments of justices' courts in district courts; execution, §§ 7501-7505.

On court-martial judgment, § 3858.

Docketing judgment of city courts in any county; execution, § 1719.

Docketing judgment in another county, §§ 6536, 6868, 6869.

Sec. 1434, C. L., 1876, providing that an execution may be issued upon a judgment at any time within three years, is intended as a statute of limitation and repose.

Livingston v. Paxton, 2 U. 481.

The common law writ of elegit is not in force in Utah.

Thompson v. Avery, 11 U. 214; 39 P. 829.

Parties who will necessarily be prejudiced by the enforcement of a writ may move the court to recall or quash the execution.

Newell v. Third Dist. Court, 37 U. 418; 108 P. 1121.

In an action to enjoin the collection of a judgment, the judgment creditor, and not the sheriff holding the execution, is the necessary party.

Arnold v. Pope, 37 U. 204; 108 P. 251.

A judgment may be enforced by execution immediately after rendition, unless execution be stayed.

Sweetser v. Fox, 43 U. 40; 134 P. 599.

6913. (3233.) Requirements of execution. The writ of execution must be issued in the name of the state of Utah, sealed with the seal of the court and subscribed by the clerk, and must be directed to the sheriff of the county in which the writ is to be executed, and must intelligibly refer to the judgment, stating the court, the county where the judgment roll is filed, the names of the parties, the judgment, and, if it be for money, the amount thereof, and the amount actually due thereon, and if made payable in a specified kind of money or currency, as provided in § 6864, the execution must also take the kind of money or currency in which the judgment is payable, and must require substantially as follows:

1. If it be against the property of the judgment debtor, it must require the officer to satisfy the judgment, with interest, out of the personal property of such debtor; and if sufficient personal property cannot be found, then out of his real property; or if the judgment be a lien upon real property, then out of the real property belonging to him on the day when the judgment was docketed, or at any time thereafter; or if the execution be issued to a county other than the one in which the judgment was recovered, on the day when the transcript of the docket was filed in the office of the recorder of such county, stating such day, or any time thereafter;

2. If it be against real or personal property in the hands of the personal representatives, heirs, devisees, legatees, tenants, or trustees, it must require the officer to satisfy the judgment, with interest, out of such property;

3. If it be against the person of the judgment debtor, it must require the officer to arrest such debtor, and commit him to the jail of the county until he pay the judgment, with interest, or be discharged according to law;

4. If it be issued on a judgment made payable in a specified kind of

money or currency as provided in § 6864, it must also require the officer to satisfy the same in the kind of money or currency in which said judgment is made payable, and the officer must refuse payment in any other kind of money or currency; and in case of levy and sale of the property of the judgment debtor, he must refuse payment from any purchaser at such sale in any other kind of money or currency than that specified in the execution; the officer collecting money or currency in the manner required by this chapter must pay to the plaintiff or party entitled to recover the same kind of money or currency received by him, and in case of neglect or refusal so to do, he shall be liable on his official bond to the judgment creditor in three times the amount so collected;

5. If it be for the delivery of the possession of real or personal property, it must require the officer to deliver the possession of the same, describing it, to the party entitled thereto, and may at the same time require the officer to satisfy any costs, damages, rents, or profits recovered by the same judgment out of the personal property of the person against whom it was rendered, and the value of the property for which the judgment was rendered to be specified therein; if a delivery thereof cannot be had, and if sufficient personal property cannot be found, then out of the real property, as provided in the first subdivision of this section.

Cal. C. Civ. P., § 6508*.
Writ of possession, § 6508.
Duties of sheriff on receiving process, §§ 1501, 1509-1513, 1517-1520.
The style of all process shall be, "The State of Utah," Con. art. 8, sec. 18.
Personal property, how levied upon, § 6920.

6914. (3234.) Property liable where joint defendants not all served. When a writ of execution is issued on a judgment recovered against two or more persons in an action upon a joint contract, in which action all the defendants were not served with summons or did not appear, it must direct the sheriff to satisfy the judgment out of the joint property of all the defendants and the individual property only of the defendants who were served or who appeared in the action.

Mont. Civ. P., § 1212.
Action against joint and joint and several defendants, §§ 6511, 6520, 6558, 6874.
Contribution as between joint debtors, § 6950.

6915. (3235.) Execution, when returnable. "Execution book." Entries. The execution may be made returnable at any time not less than ten nor more than sixty days after its receipt by the officer, to the clerk with whom the judgment roll is filed. When the execution is returned, the clerk must attach it to the judgment roll. If any real estate be levied upon, the clerk must record the execution and the return thereto at large, and certify the same under his hand as true copies, in a book to be called the execution book, which book must be indexed with the names of the plaintiffs and defendants in execution, alphabetically arranged, and kept open at all times during office hours for the inspection of the public without charge. It is evidence of the contents of the originals whenever they or any part thereof may be destroyed, mutilated, or lost.

Cal. C. Civ. P., § 683*.
Return, if first officer shall die or be incapable of completing service and return, § 6932.
Service may be completed and return made after return day, § 6932.
Return of sheriff, prima facie evidence, § 1510.

6916. (3236.) Judgment, how enforced. When the judgment is for money or the possession of real or personal property, the same may be enforced by a writ of execution; and if the judgment direct that the defendant be arrested, the execution may issue against the person of the judgment debtor, after the return of an execution against his property unsatisfied in whole or in part. When the judgment requires the sale of property, the same may be enforced by a writ reciting such judgment, or the material parts thereof, and directing the proper officer to execute the judgment by making the sale and applying the proceeds in conformity therewith. When the judgment requires the performance of any other act than as above designated, a certified copy of the judgment may be served upon the party against whom the same is rendered, or upon the person or officer required thereby or by law to obey the same, and obedience thereto may be enforced by the court.

Cal. C. Civ. P., § 684.
Judgment directing conveyance of real property; proceeding if not delivered, § 7083.
Application to obtain discharge from arrest under execution, §§ 6656-6661.

6917. (3237.) Revivor of judgment. Procedure. In all cases the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry by leave of the court upon motion, or by judgment for that purpose founded upon supplemental pleadings; but nothing in this section shall be construed to revive a judgment for the recovery of money which shall have been barred by limitation at the time of the taking effect of this revision.

Cal. C. Civ. P., § 865*. See Sup. (1895) p. 21, § 685.
Revivor of judgment after sale, § 6948.
Lien of first judgment is lost on renewal, as against an intervening mortgage.
Smith v. Schwartz, 21 U. 126; 60 P. 305.
In contested action to revive judgment, evidence held sufficient.
Davidson v. Hunter, 22 U. 117; 61 P. 556.

6918. (3238.) Execution after death. Notwithstanding the death of a party after the judgment, execution thereon may be issued, or it may be enforced, as follows:

1. In the case of the death of the judgment creditor, upon the application of his executor or administrator, or successor in interest;

2. In case of the death of the judgment debtor, if the judgment be for the recovery of real or personal property or the enforcement of a lien thereon.

Cal. C. Civ. P., § 686.
Execution in judgment rendered against a deceased during his lifetime, § 7660.
Judgment on verdict or decision rendered before death, § 6866.
Not if it be a money judgment for alimony.
Weaver v. Pickard, 7 U. 296; 26 P. 581.

6919. (3239.) Execution, to whom issued. Where the execution is against the property of the judgment debtor, it may be issued to the sheriff of any county in the state. Where it requires the delivery of real or personal property, it must be issued to the sheriff of the county where the property or some part thereof is situated. Execution may be issued at the same time to different counties.

Cal. C. Civ. P., § 687.

6920. (3240.) Property liable to execution. Personal property not affected until levy. All goods, chattels, money, and other property, both real and personal, or any interest therein of the judgment debtor not exempt by law, and all property and rights of property seized and held under attachment in the action, are liable to execution. Shares and interests in any corporation or company, and debts and credits, and all other property, both real and personal, or any interest in either real or personal property, and all other property not capable of manual delivery, may be attached on execution in like manner as on writs of attachment. Gold dust and bullion must be returned by the officer as so much money collected at its current value, without exposing the same to sale. Until a levy on personal property, it shall not be affected by the execution.

Cal. C. Civ. P., § 688*.
Sale of property previously attached to satisfy judgment, §§ 6705, 6712, 6720.
Levy and sale, § 6928, and note.
Property capable of manual delivery must be taken into possession to constitute a valid levy of attachment, §§ 6712, 6713, and notes.
Salary of officer of municipal corporation is subject to execution, §§ 6754, 6755.
Salary of public officer, prior to law of 1905, was not subject to execution, etc.
Chamberlain v. Watters, 10 U. 298; 37 P. 566.
Van Cott v. Pratt, 11 U. 212; 39 P. 827.
Where a party executes a deed to another for the purpose of securing a loan and also to protect persons who had contracted with him to purchase parcels of land covered by the deed, where it is provided if those purchasers fail to pay for the land, under their respective contracts their interest is forfeited, and if the grantor pays the loan he becomes the sole owner, he has an interest which may be subjected to execution.
Huffaker v. First Nat. B., 51 U. —; 172 P. —.
When a bank holding funds belonging to judgment debtor refused to surrender such funds to the officer upon the service of an execution upon it issued upon a judgment obtained by intervenor against the judgment debtor, intervenor could bring an action against the bank to recover such moneys.
Wheelwright v. National Copper Bank, 42 U. 579; 133 P. 132.

6921. (3241.) Debtor of judgment debtor may pay officer. After the issuing of an execution against property, and before its return, any person indebted to the judgment debtor may pay to the officer the amount of his debt, or so much thereof as may be necessary to satisfy the execution, and the officer's receipt is a sufficient discharge for the amount paid.

Cal. C. Civ. P., § 716.

6922. (3242.) When property claimed by third person, plaintiff must indemnify officer. If the officer, by virtue of an execution issued from any court, shall levy the same on any goods and chattels claimed by any person

other than the defendant, or be requested by the plaintiff to levy on any such goods and chattels, the officer may require the plaintiff to give him an undertaking with good and sufficient sureties to pay all costs and damages that he may sustain by reason of the detention or sale of such property; and until such undertaking shall be given, the officer may refuse to proceed as against such property.

Kansas (1889) § 4546*.

Where debtor's goods are mixed with a third party's the third party should point out his goods to the officer.

Johnson v. Emery, 31 U. 126; 86 P. 869.

EXEMPTIONS.

6923. (3243.) Exemption of earnings of minor child of debtor. The earnings of any minor child of any debtor within this state and the proceeds thereof are exempt from execution against such debtor by reason of any debts or liability of such debtor, not contracted for the special benefit of such minor child.

Minn. (1894) § 5461*.

6924. (3244.) Judgment for unlawfully taking exempt property is exempt. Whenever any personal property exempt, as provided in this title, is levied upon, seized, or sold by virtue of any execution, or wrongfully and unlawfully taken or detained by any person, the damages sustained by the owner thereof by reason of such levy, seizure, or sale, or unlawful detention or taking, and any judgment recovered therefor, shall be exempt from execution.

Minn. (1894) § 5462*.

A judgment for the value of exempt property wrongfully sold under execution is exempt.

Snow v. West, 37 U. 528; 110 P. 52.

One who left the state in 1905 lost the right to claim as exempt a judgment rendered in an action begun in March, 1906, on the ground it was for damages for wrongful levy on exempt property. One to whom he assigned the claim sued on, in 1907, could not claim that the judgment rendered thereon was exempt.

Id.

6925. (3245.) Property exempt from execution. The following property is exempt from execution, except as herein otherwise specially provided:

1. Chairs, tables, and desks, to the value of $200, and the library belonging to the judgment debtor; also musical instruments in actual use in the family;

2. Necessary household, table, and kitchen furniture belonging to the judgment debtor, to the value of $300; also one sewing machine, all family hanging pictures, oil paintings and drawings, portraits, and their necessary frames; all carpets in use; provisions actually provided for individual or family use sufficient for three months; two cows, with their sucking calves; two hogs, with all sucking pigs; all wearing apparel of every person or family; also all beds or bedding of every person or family; *provided,* that if the judgment debtor be the head of a family consisting of five or more members, there shall be a further exemption of two cows and their sucking calves;

3. The farming utensils or implements of husbandry of a farmer not exceeding in value the sum of $300; also two oxen, or two horses, or two mules, and their harness, one cart or wagon; also all seed, grain, or vegetables actually provided, reserved, or on hand for the purpose of planting or sowing at any time within the ensuing six months, not exceeding in value the sum of $200; crops, whether growing or harvested, and the proceeds thereof, not exceeding in value $200;

4. The tools, tool chest, and implements of a mechanic or artisan, necessary to carry on his trade, not exceeding in value the sum of $500; the notarial seal and records of a notary public; the instruments and chests of a surgeon, physician, surveyor, and dentist, necessary to the exercise of their professions, with their scientific and professional libraries, and the law professional libraries and office furniture of attorneys, counselors, and judges, and the libraries of ministers of the gospel, and the typewriting machine of a stenographer, typewritist, copyist, and reporter; and the type, presses, and material of a printer or publisher necessary in the pursuit of his business, not exceeding in value the sum of $500;

5. The cabin or dwelling of a miner, not exceeding in value the sum of

$500; also his sluices, pipes, hose, windlass, derrick, cars, pumps, and tools not exceeding in value $500;

6. Two oxen, two horses, or two mules, and their harness; and a cart and wagon; one dray or truck, by the use of which a cartman, drayman, truckman, huckster, peddler, hackman, teamster, or other laborer habitually earns his living; and one horse, with vehicle and harness, or other equipments, used by a physician, surgeon, or minister of the gospel, in making his professional visits;

7. One-half of the earnings of the judgment debtor for his personal services rendered at any time within thirty days next preceding the levy of execution or levy of attachment by garnishment or otherwise, when it appears by the debtor's affidavit that he is a married man, or head of family, and that such earnings are necessary for the use of his family, residing in this state, supported wholly or in part by his labor; *provided,* that when the earnings are $2 a day or less, such married man or head of family shall be entitled to an exemption of $30 per month; *provided,* that in no case shall the judgment debtor be taxed with the costs of any proceeding to obtain, by levy of execution or otherwise, any part of the earnings of such judgment debtor, for personal services rendered within thirty days next preceding the levy of such execution;

8. All money, benefits, privileges, or immunities accruing, or in any manner growing out of any life insurance on the life of the debtor, if the annual premiums paid do not exceed $500;

9. All arms, ammunition, uniforms, and accoutrements required by law to be kept by any person;

10. All courthouses, jails, public offices and buildings, schoolhouses, houses of public worship, lots, grounds, and personal property appertaining thereto; the fixtures, furniture, books, papers, and appurtenances belonging and pertaining to the courthouse, jail, and public offices belonging to any county in this state, or for the use of schools or houses of public worship; and all cemeteries, public squares, parks and places, public buildings, town halls, public markets, buildings for the use of fire departments and military organizations, and the lots and grounds thereto belonging and appertaining, owned or held by any town or incorporated city, or dedicated by such town or city to health, ornament, or public use, or for the use of any fire or military company, now existing, or which may be under the laws of this state hereafter organized;

11. A homestead selected or claimed as provided in the title Homesteads.

Am'd '99, p. 99; '01, p. 28.

Cal. C. Civ. P., § 690*.

Exemption of homestead and appurtenances, Con. art. 22, sec. 1; and §§ 2898-2902, and notes.

Water rights and water stock exempt, § 2911.

No exemption for non-residents and persons about to depart, except ordinary wearing apparel, § 6927.

Defendant not liable for costs in cases coming under sub. 7 of above section, § 6738.

An execution cannot be levied against the property of the state or of a county or municipality thereof in the absence of a statute expressly granting such right.
Emery Co. v. Burresen, 14 U. 328; 47 P. 91.

Any change or limitation of a remedy which does not abridge the right does not impair the obligation of contracts.
Kirkman v. Bird, 22 U. 100; 61 P. 338.

Exemption is allowed whether or not the judgment debtor is the head of a family.
Snow v. West, 35 U. 206; 99 P. 674.

6926. (3246.) Six months' food for exempt animals is exempt. Whenever by the provisions of this chapter animals are exempted from execution, the necessary food for all such animals for six months' support, either provided or growing, or both, as the debtor may elect, shall be exempt from execution.

Cal. C. Civ. P., § 690*.

6927. (3247.) All property liable for purchase price, mortgages, taxes, etc. Non-residents, etc., no exemption, except. No article or species of property mentioned in this chapter or in the title Homesteads is exempt from execution issued upon a judgment recovered for its purchase price, or any portion thereof, or upon a judgment on foreclosure of a mortgage or mechanic's or laborer's lien thereon, nor exempt from sale for taxes. None of such exemptions are for the benefit of non-residents or persons about to depart from

this state with the intention of removing their effects therefrom, but their property is liable to execution with the exception of ordinary wearing apparel.

Cal. C. Civ. P., § 690*.

Homestead subject to execution, when, § 2907 and note.

A person who sold goods to one who has since died has no lien against the estate, which is valued at less than $1,500, for the amount for which such goods were sold by the administrator. The lien, if any, was against the goods themselves.

In re Farmer's Estate, 17 U. 80; 52 P. 972.

LEVY AND SALE.

6928. (3248.) Writ executed by levy, sale, etc. Disposition of proceeds. The officer must execute the writ against the property of the judgment debtor by levying on a sufficient amount of property, if there be sufficient; collecting or selling the things in action, and selling the other property, and paying to the plaintiff, or his attorney, so much of the proceeds as will satisfy the judgment; any excess in the proceeds over the judgment and accruing costs must be returned to the judgment debtor, unless otherwise directed by the judgment or order of the court. When there is more property of the judgment debtor than is sufficient to satisfy the judgment and accruing costs within view of the officer, he must levy only on such part of the property as the judgment debtor may indicate, if the property indicated be amply sufficient to satisfy the judgment and costs.

Cal. C. Civ. P., § 691.

Omission of sheriff excused only when direction of party or attorney is in writing, § 1517.

Liability for failure to levy and sell, § 1512.

Liability for failure to pay over money, § 1513.

Decisions on wrongful levy of attachment, note to § 6713.

Prohibition does not lie to restrain the enforcement of an execution regular upon its face. Motion to quash is the remedy.

Ducheneau v. Ireland, 5 U. 108; 13 P. 87.

See Overland M. Co. v. McMaster, 19 U. 177; 56 P. 77.

Where a sale under an alias execution issued for the full amount of the judgment, without deducting an amount equal to more than half thereof realized upon the first execution; and on this sale property in excess of the amount remaining unpaid was sold, and the excess was paid over; held, that the levy and sale was absolutely void.

Young and Schroeder, 10 U. 155; 37 P. 252; affirmed 161 U. S. 334.

Punitive damages may be given against an officer for unlawful, malicious, and oppressive trespass in seizing property on execution.

Farr v. Swigart, 13 U. 150; 44 P. 711.

In a suit for damages against an officer for seizing property in defendant's possession under an execution fair on its face, the officer may justify without producing the judgment, though he knew of irregularities or defects that rendered it voidable; otherwise, if he knew the judgment was void.

Hamner v. Ballantyne, 13 U. 325; 44 P. 704.

See Marks v. Sullivan, 9 U. 12; 33 P. 224.

The interest of one partner may be sold to satisfy his individual debt, to effect which the whole partnership property may be disposed of by the officer making the levy; but such levy and sale must, as far as possible, be in harmony with the rights of the other partners, otherwise the officer becomes a trespasser.

Snell v. Crowe, 3 U. 26; 5 P. 522.

Spalding v. Allred, 23 U. 354; 64 P. 1100.

When judgment is against a firm, in firm name, an execution against the property of an individual member of the firm is void.

Hamner v. Ballantyne, 16 U. 436; 52 P. 770.

A purchaser at execution sale being the owner of the judgment by assignmnet subjects himself to the jurisdiction of the court with respect to the sale and purchase, and the court may set the sale aside.

Post v. Foot, 18 U. 235; 54 P. 975.

See Gray v. Denhalter, 17 U. 312; 58 P. 976.

The reason of the rule that an officer who, under execution against one of the co-owners of personal property, sells in severalty the common property commits a trespass for which he is liable to the co-owner not a party to the action, does not exist under this section and §§ 6938, 6940, 7230.

Spalding v. Allred, 23 U. 354; 64 P. 1100.

Officer entitled to seize property, though another may own an interest therein, but he may sell only the debtor's interest.

Spalding v. Allred, 23 U. 354; 64 P. 1100.

Snell v. Crowe, 3 U. 26; 5 P. 522.

Though property may have been lawfully seized by a sheriff under execution, yet, if he thereafter wrongfully converted it to his own use, he is liable.

Christensen v. Beebe, 32 U. 406; 91 P. 129.

By accepting the surplus proceeds, the judgment debtor is not estopped from suing for the seizure and sale of his exempt property, the amount received only liquidates the claim for damages to the extent thereof.

Snow v. West, 35 U. 206; 99 P. 674.

6929. (3249.) Notice of sale, how given. Form. Before the sale of the property on execution, notice thereof must be given as follows:

1. In case of perishable property, by posting written notice of the time and place of sale in three public places of the precinct or city where the sale is to take place, for such a time as may be reasonable, considering the character and condition of the property;

2. In case of other personal property, by posting a similar notice in three public places of the precinct or city where the sale is to take place, for not less than five nor more than ten days;

3. In case of real property, by posting a similar notice, particularly describing the property, for twenty days, in three public places of the precinct or city where the property is situated, and also where the property is to be sold, and publishing a copy thereof once a week for the same period in some newspaper published in the county, if there be one; which notice shall be substantially as follows:

SHERIFF'S SALE.

In ..... Court, ... County, Utah:

.....,
Plaintiff,
vs.
.....,
Defendant.

To be sold at sheriff's sale, on the ..... day of ....., 19....., at ....., in ....., Utah. (Here insert brief description of property.)

.....,
Sheriff.

Any sheriff publishing a notice not in accordance with this form, and which shall cost more than said notice, shall not be entitled to any costs for the publication of the same, but shall be personally liable for the payment of such publication;

4. When the judgment under which the property is to be sold is made payable in a specified kind of money or currency, the kind of money or currency in which bids may be made at such sale must be stated in the several notices required by this section immediately following the description of the property, and shall be substantially as follows: "Purchase price payable in (here insert the kind of money or currency specified in the judgment)."

Cal. C. Civ. P., § 6926.

6930. (3250.) Penalties for selling without notice. Interfering with notice. An officer selling without the notice prescribed by the next preceding section forfeits $500 to the aggrieved party, in addition to his actual damages; and a person wilfully taking down or defacing the notice posted, if done before the sale or the satisfaction of the judgment, if the judgment be satisfied before sale, forfeits $500.

Cal. C. Civ. P., § 693.

6931. (3251.) Officer may postpone sale. Notice. If, at the time appointed for the sale of any real or personal property on execution, the officer shall deem it expedient and for the interest of all persons concerned to postpone the sale for want of purchasers or other sufficient cause, he may postpone the same from time to time until the same shall be completed; and in every such case he shall make public declaration thereof at the time and place previously appointed for the sale, and if such postponement be for a longer time than twenty-four hours, notice thereof shall be given in the same manner as the original notice of such sale is required to be given.

6932. (3252.) Death or incapacity of officer not to affect sale, etc. Certificate. When an officer shall have begun to serve an execution, and shall die, or be incapable of completing the service and return thereof, the same may be completed by any other officer who might by law have executed the same if originally delivered to him; and if the first officer shall not have made a certificate of his doings, the second officer shall certify whatever he shall find to have been done by the first, and shall add thereto a certificate of his own doings in completing the service.

6933. (3253.) Service begun may be completed after return day. When an officer shall have begun to serve an execution issued out of any court of record on or before the return day of such execution, he may complete the service and return thereof after such return day.

Execution returnable, when, § 6915.

6934. (3254.) Execution sale, how conducted. Officer not to purchase. Debtor may direct. All sales of property under execution must be made at auction to the highest bidder, between the hours of nine in the morning and five in the afternoon. After sufficient property has been sold to satisfy the execution, no more can be sold. Neither the officer holding the execution nor his deputy can become a purchaser, or be interested in any purchase at such sale. When the sale is of personal property, capable of manual delivery, it

must be within view of those who attend the sale, and be sold in such parcels as are likely to bring the highest price; and when the sale is of real property, and consisting of several known lots or parcels, they must be sold separately; or when a portion of such real property is claimed by a third person, and he requires it to be sold separately, such portion must be thus sold. All sales of real property must be made at the courthouse of the county in which the property, or some part thereof, is situated. The judgment debtor, if present at the sale, may also direct the order in which the property, real or personal, shall be sold, when such property consists of several known lots or parcels, or of articles which can be sold to advantage separately, and the officer must follow such directions.

Cal. C. Civ. P., § 694*.
Where two lots of land were offered for sale, first separately, and no bids were made, and then were offered together, and bid in for the judgment; held, to be valid.
Dickert v. Weise, 2 U. 350.

6935. (3255.) Bidder refusing to pay, liable for loss on resale. Contempt. If a purchaser refuses to pay the amount bid by him for the property struck off to him at a sale under execution, the officer may again sell the property at any time to the highest bidder, and if any loss be occasioned thereby, the officer may recover the amount of such loss, with costs, from the bidder so refusing, in any court of competent jurisdiction; and the person refusing to pay the costs which have accrued by reason of his bid shall be deemed guilty of contempt of court, and punished accordingly.

Mont. Civ. P., § 1228. Cal. Civ. P., § 695*.
But if part of property remain unsold, creditor may insist upon its being sold for deficiency, and is not confined to the uncertain remedy this section gives.
Kershaw v. Dyer, 6 U. 239; 24 P. 621; 21 P. 1000.

6936. (3256.) Id. Officer may refuse subsequent bid of defaulting bidder. When a purchaser refuses to pay, the officer may, in his discretion, thereafter reject any subsequent bid of such person.

Cal. C. Civ. P., § 696.

6937. (3257.) Id. Liability of officer under two preceding sections. The two preceding sections must not be construed to make the officer liable for any more than the amount bid by the second or subsequent purchaser, and the amount collected from the purchaser refusing to pay.

Cal. C. Civ. P., § 697.

6938. (3258.) Property capable of delivery to be delivered. Certificate. Effect. When the purchaser of any personal property capable of manual delivery pays the purchase money, the officer making the sale shall deliver to the purchaser the property, and if desired, execute and deliver to him a certificate of the sale and payment. Such certificate conveys to the purchaser all the right, title, and interest which the debtor had in and to such property on the day the execution or attachment was levied.

Cal. C. Civ., § 698*.

6939. (3259.) Property not capable of delivery. Certificate. Effect. When the purchaser of any personal property not capable of manual delivery pays the purchase money, the officer making the sale must execute and deliver to the purchaser a certificate of sale and payment. Such certificate conveys to the purchaser all right, title, and interest which the debtor had in and to such property on the day the execution or attachment was levied.

Cal. C. Civ., § 699*.

6940. (3260.) Real property except leaseholds of less than two years subject to redemption. Certificate of sale. Upon a sale of real property, the purchaser is substituted for and acquires all the right, title, interest, and claim of the judgment debtor thereto; and when the estate is less than a leasehold of two years' unexpired term, the sale is absolute. In all other cases, the real property is subject to redemption as provided in this chapter. The officer must give to the purchaser a certificate of the sale, containing:

1. A particular description of the real property sold;
2. The price bid for each distinct lot or parcel;
3. The whole price paid;
4. When subject to redemption, it must be so stated.

And when the judgment under which the sale has been made is made payable in a specified kind of money or currency, the certificate must also show the kind of money or currency in which such redemption may be made, which must be the same as that specified in the judgment. A duplicate of such certificate must be filed by the officer in the office of the recorder of the county.

Cal. C. Civ. P., § 700*. Redemption after mortgage foreclosure, § 3503. Redemption after sale under trust deed, § 3271.

REDEMPTION.

6941. (3261.) Who may redeem. Property sold subject to redemption, as provided in the next preceding section, or any part sold separately, may be redeemed in the manner hereinafter provided by the following persons or their successors in interest:

1. The judgment debtor, or his successor in interest, in the whole or any part of the property;

2. A creditor having a lien by judgment or mortgage on the property sold, or on some share or part thereof, subsequent to that on which the property was sold.

The persons mentioned in the second subdivision of this section are in this chapter termed redemptioners.

Cal. C. Civ. P., § 701.

Where both plaintiff and defendant claimed the right to redeem.

Victor M. Co. v. Nat. Bank Rep., 15 U. 391; 49 P. 826.

6942. (3262.) Id. Six months the period of redemption. Amount payable. The judgment debtor, or a redemptioner, may redeem the property from the purchaser within six months after the sale, on paying the purchaser the amount of his purchase (in the kind of money or currency specified in the judgment, if any be specified), with six per cent thereon in addition, together with the amount of any assessment, or taxes, which the purchaser may have paid thereon after the purchase, and interest on such amount; and if the purchaser be also a creditor, having a lien prior to that of a redemptioner other than the judgment under which the purchase was made, the amount of such lien, with interest.

Cal. C. Civ. P., § 702*. See Sup. (1895) p. 21. When the price obtained on a judicial sale is grossly inadequate, and there were other circumstances impeaching the fairness of the transaction, such sale will be set aside and the judgment debtor allowed to redeem even after the statutory time for redemption has expired, especially when the sale was attended with serious irregularities, and it appeared that the judgment debtor relied upon the assurance of one of the attorneys that the statutory period of redemption would not be insisted upon.

Young v. Schroeder, 10 U. 155; 37 P. 252; affirmed 161 U. S. 334.

6943. (3263.) Id. Subsequent redemptions. Notice thereof and of taxes paid, liens bought, etc., necessary. Deed. If the property be so redeemed by a redemptioner, another redemptioner may, within sixty days after the last redemption, and within six months after the sale, again redeem it from the last redemptioner, on paying the sum paid on such last redemption, with three per cent thereon in addition, and the amount of any assessment or tax which the last redemptioner may have paid thereon, after the redemption by him, with interest on such amount, and, in addition, the amount of any liens held by said last redemptioner prior to his own, with interest; but the judgment under which the property was sold need not be so paid as a lien. The property may be again, and as often as a redemptioner is so disposed, redeemed from any previous redemptioner within sixty days after the last redemption, and within six months after the sale, on paying the sum paid on the last previous redemption, with three per cent thereon in addition, and the amount of any assessments or taxes which the last previous redemptioner paid after the redemption by him, with interest thereon, and the amount of any liens other than the judgment under which the property was sold, held by the last redemptioner previous to his own, with interest. Written notice of redemption must be given to the officer, and a duplicate filed with the recorder of the county; and if any taxes or assessments are paid by the redemptioner, or if he has or acquires any lien, other than that upon which the redemption

was made, notice thereof must in like manner be given to the officer, and filed with the recorder; and if such notice be not filed, the property may be redeemed without paying such tax, assessment, or lien. If no redemption be made within six months after the sale, the purchaser, or his assignee, is entitled to a conveyance; or if so redeemed, whenever sixty days have elapsed, and no other redemption has been made, and notice thereof given, the time for redemption by a redemptioner has expired, and the last redemptioner, or his assignee, is entitled to a sheriff's deed, at the expiration of six months after the sale; but in all cases the judgment debtor shall have the entire period of six months from the date of the sale to redeem the property. If the judgment debtor redeem, he must make the same payments as are required to effect a redemption by a redemptioner. If the debtor redeem, the effect of the sale is terminated, and he is restored to his estate. Upon a redemption by the debtor, the person to whom the payment is made must execute and deliver to him a certificate of redemption, acknowledged and proved before an officer authorized to take acknowledgments of conveyances of real property. Such certificate must be filed and recorded in the office of the recorder of the county in which the property is situated, and the recorder must note the record thereof in the margin of the record of the certificate of sale.

Cal. C. Civ. P., § 703*. See Sup. (1895) p. 22.
Where a purchaser at a marshal's sale waives his rights under the sale, he becomes an equitable mortgagee, with the right of redemption in the judgment debtor; and a subsequent judgment debtor, after sale, could exercise the same right to redeem.
McCormick v. Greenhow, 2 U. 363.
In an action to reform a written instrument on the ground of mistake, a court of equity will not only reform the instrument in which the mistake occurred but all subsequent instruments which have perpetuated such mistake, including sheriff's deed, so as to administer a full measure of relief, avoid circuity of action and promote justice. (Modified on rehearing, 23 U. 470; 65 P. 203, so as to reform mortgage alone.)
Marks v. Taylor, 23 U. 152; 63 P. 897.

6944. (3264.) Id. Payments made to purchaser, etc., or to officer. The payments mentioned in the next two preceding sections may be made to the purchaser or redemptioner, or for him to the officer who made the sale or, in case his term of office has expired, then to his successor in office. When the judgment, under which the sale has been made, is payable in a specified kind of money or currency, payments must be made in the same kind of money or currency, and a tender of the money is equivalent to payment.

Cal. C. Civ. P., § 704*.

6945. (3265.) Proof to be made by redemptioner. A redemptioner must produce to the officer or person from whom he seeks to redeem, and serve with his notice to the officer:

1. A copy of the docket of the judgment under which he claims the right to redeem, certified by the clerk of the court or recorder of the county where the judgment is docketed or filed; or if he redeem upon a mortgage, or other lien, a note of the record thereof certified by the recorder;

2. A copy of an assignment necessary to establish his claim, verified by the affidavit of himself or of subscribing witnesses thereto; and,

3. An affidavit by himself or his agent, showing the amount then actually due on the lien.

Cal. C. Civ. P., § 705*.

6946. (3266.) Waste restrained during period of redemption. Defined. Until the expiration of the time allowed for redemption, the court may restrain the commission of waste on the property by order granted with or without notice, on the application of the purchaser or the judgment creditor. But it is not waste for the person in possession of the property at the time of sale, or entitled to possession afterward, during the period allowed for redemption, to continue to use it in the same manner in which it was previously used; or to use it in the ordinary course of husbandry; or to make the necessary repairs of buildings thereon, or to use wood or timber on the property therefor, or for the repair of fences, or for fuel in his family while he occupies the property.

Cal. C. Civ. P., § 706.
Injunction generally, §§ 6687-6693.
Recovery of damages for injury to property after sale, § 7255.

6947. (3267.) Purchaser or redemptioner entitled to rents. Accounting.

Extension of period. The purchaser from the time of sale until a redemption, and a redemptioner from the time of his redemption until another redemption, is entitled to receive from the tenant in possession the rents of the property sold or the value of the use and occupation thereof. But when any rents or profits have been received by the judgment creditor or purchaser, or his or their assigns, from the property thus sold, preceding such redemption, the amounts of such rents and profits shall be a credit upon the redemption money to be paid, and if the redemptioner or judgment debtor, before the expiration of the time allowed for such redemption, demands in writing of such purchaser or creditor, or his assigns, a written and verified statement of the amounts of such rents and profits thus received, the period for redemption is extended five days after such sworn statement is given by such purchaser or his assigns to such redemptioner or debtor. If such purchaser or his assigns shall for a period of one month from and after such demand fail or refuse to give such statement, such redemptioner or debtor may, within sixty days after said demand, bring an action in any court of competent jurisdiction to compel an accounting and disclosure of such rents and profits, and until fifteen days from and after the final determination of such action, the right of redemption is extended to such redemptioner or debtor.

Cal. C. Civ. P., § 707*.
If a judgment debtor seeks an accounting of rents, issues, and profits of personal property not sold with the realty, and prays for general relief, defendant has a right to file his counterclaim which grew out of the transactions relating to the same property, and plaintiff cannot be heard to complain if all issues thus before it are heard and determined by the trial court.
Standard S. Laundry v. Dole, 22 U. 311; 61 P. 1103.
Execution creditor not entitled to possession and rents before sale and before the time for redemption has expired.
McLaughlin v. Park City Bank, 22 U. 473; 63 P. 589.

6948. (3268.) Remedies of purchaser dispossessed through irregularity or defect. If the purchaser of real property sold on execution, or his successors in interest, be evicted therefrom in consequence of irregularities in the proceedings concerning the sale, or of the reversal or discharge of the judgment, he may recover the price paid, with interest, from the judgment creditor. If the purchaser of property at an officer's sale or his successor in interest fail to recover possession in consequence of irregularity in the proceedings concerning the sale, or because the property sold was not subject to execution and sale, the court having jurisdiction thereof must, after notice, and on motion of such party in interest, or his attorney, revive the original judgment in the name of the petitioner for the amount paid by such purchaser at the sale, with interest thereon from the time of payment at the same rate that the original judgment bore; and the judgment so revived has the same force and effect as would an original judgment of the date of the revival, and no more.

Cal. C. Civ. P., § 708.
Revivor of judgment, § 6917.
Word "property" in second sentence means personal as well as real property. "Possession" means possession with title, not mere naked possession.
Utah Nat. Bank of Ogden v. Beardsley, 10 U. 404; 37 P. 586.

6949. (3269.) Sheriff to deed lands sold by U. S. marshal under territorial laws. Whenever any real estate has been sold on execution or other judicial sale by any United States marshal under the laws of the territory of Utah, and the time for redemption has expired, a deed to the purchaser or purchasers thereof, or assignee of such purchaser or purchasers, or other person entitled to the same, shall be executed by the sheriff of the county where the property or any part thereof is situated.

6950. (3270.) Contribution. Person paying entitled to benefit of judgment. Procedure. When, upon an execution against several persons, more than a due proportion of the judgment is satisfied out of the proceeds of the sale of the property of one of them, or one of them pays, without a sale, more than his proportion, he may compel contribution from the others; and when a judgment is against several, and is upon an obligation of one of them as security for another, and the surety pays the amount or any part thereof, either by sale of his property or before sale, he may compel repayment from the principal. In such cases, the person so paying or contributing is entitled

to the benefit of the judgment, to enforce contribution or repayment, if, within ten days after his payment, he files with the clerk of the court where the judgment was rendered notice of his payment and claim to contribution or repayment. Upon filing of such notice, the clerk must make an entry thereof in the margin of the docket.

Cal. C. Civ. P., § 709*.
Judgment may direct that property of principal debtor be first exhausted, § 6855.
Surety paying may be substituted to rights of judgment creditor, § 7226.
See Culmer v. Wilson, 13 U. 129; 44 P. 833.
Where persons are adjudged co-makers of a note sued on, they are entitled to contribution among themselves.
Allen v. Garner, 45 U. 39; 143 P. 228.

REDEMPTIONS UNDER TRUST DEEDS.

6951. (3271.) Real estate. Water right stock. Subject to redemption. Deeds of trust made to secure the payment of money, and all real estate, including shares of corporate stock evidencing title to a water right used, or intended to be used, or suitable for use, on the land covered by said trust deed, which may be sold by the trustee, or anyone representing him in any deed of trust hereafter made, according to the terms of said deed of trust, and which shall be bought in at said sale by the cestui que trust, or his assignee, or by any other person, shall be subject to redemption by the grantor in said deed of trust, or his executors, administrators, or assigns, or any legal redemptioner, at any time within six months from the date of said sale, on payment of the debt and interest secured by said deed of trust, and all legal charges and costs incurred in making said sale up to the time of redemption; and on such sale the trustee shall issue to the purchaser a certificate setting forth the property sold and the amount of purchase money received, and, at the expiration of said six months, said trustee shall issue a deed to the legal holder of such certificate; *provided,* that upon the death, resignation, or removal from the state of said trustee, or his refusal or inability to act from any cause, the sheriff of the county in which said real estate is situated shall become the successor in trust of said trustee. Am'd '17, p. 44.

Redemption after execution sale, §§ 6940-6949.
Redemption after foreclosure, § 7235.

CHAPTER 42.

PROCEEDINGS SUPPLEMENTARY TO EXECUTION.

6955. (3272.) Execution unsatisfied, debtor cited to answer. When an execution against property of the judgment debtor or of any one of several debtors in the same judgment issued to a proper officer is returned unsatisfied in whole or in part, the judgment creditor, at any time after such return is made, is entitled to an order from the judge of the court in which such judgment was given, or from the judge of the district court of any county in which a transcript of said judgment has been filed and docketed in the office of the clerk of the district court of said county, requiring such judgment debtor, or, if a corporation, any officer thereof, to appear and answer upon oath concerning his or its property before such judge, or a referee appointed by him, at a time and place specified in the order; but no judgment debtor must be required to attend before a judge or referee out of the county in which he resides.

Am'd '05, p. 15.

Cal. C. Civ. P., § 714*.
Garnishment proceedings when execution unsatisfied, § 6752.
Receiver may be appointed to carry judgment into effect, § 6764.
Appointment of referee generally, § 6835.
The provisions of this chapter do not do away with the equitable remedy of a creditor's bill to subject debtor's property to payment of his debts.
Enright v. Grant, 5 U. 334; 15 P. 268.

6956. (3273.) Affidavit, etc. Arrest, when. After the issuing of an execution against property, and upon proof by affidavit of a party, or otherwise, to the satisfaction of the court or the judge thereof, that any judgment debtor has property which he or it unjustly refuses to apply toward the satisfaction of the judgment, such court or judge may, by an order, require the judgment debtor, or, if a corporation, any officer thereof, to appear at a specified time and place, before such judge, or referee appointed by him, to answer concern-

ing the same, and such proceedings may thereupon be had for the application of the property of the judgment debtor toward the satisfaction of the judgment as are provided upon the return of an execution. Instead of the order requiring the attendance of the judgment debtor, the judge may, upon affidavit of the judgment creditor, his agent or attorney, if it appear to him that there is danger of the debtor absconding, order the sheriff of the county to arrest the debtor, and bring him before such judge. Upon being brought before the judge, he may be ordered to enter into an undertaking, with sufficient surety, that he will attend from time to time, before the judge or referee, as may be directed during the pendency of the proceedings, and until the final determination thereof, and will not, in the meantime, dispose of any portion of his property not exempt from execution. In default of entering into such undertaking, he may be committed to prison.

Cal. C. Civ. P., § 715*. Similar proceedings on attachment, § 6716.
Arrest of absconding debtor, Con. art. 1, sec. 16; § 6630.

6957. (3274.) Order to examine debtor of judgment debtor. Affidavit. After the issuing or return of an execution against property of the judgment debtor, or of any one of several debtors in the same judgment, and, upon proof by affidavit or otherwise, to the satisfaction of the judge, that any person or corporation has property of such judgment debtor, or is indebted to him in an amount exceeding $50, the judge may, by an order, require such person or corporation, or an officer or member thereof, to appear at a specified time and place before him, or a referee appointed by him, and answer concerning the same.

Cal. C. Civ. P., § 717. See garnishment, §§ 6730-6753.

6958. (3275.) Witnesses must testify as on trial of issue. Witnesses may be required to appear and testify before the judge or referee, upon any proceeding under this chapter in the same manner as upon the trial of an issue.

Cal. C. Civ. P., § 718.

6959. (3276.) Order to apply property on execution. Judgment. The judge or referee may order any property of the judgment debtor, not exempt from execution, in the hands of such debtor, or any other person, or due to the judgment debtor, to be applied toward the satisfaction of the judgment.

Cal. C. Civ. P., § 719.
In a proceeding supplemental to execution; held, that the court exceeded its jurisdiction, first, in adjudicating the rights of parties who were not parties to the action; second, in determining issues of fact respecting property rights and bona fides of transactions of various persons without pleadings or issues joined; and third, that in supplemental proceedings it is a gross perversion of the statute to hold that a court can exercise all the powers of a court of equity, and pass upon questions of fact, the determination of which is within the province of a jury.
Wallace, Smuin & Co. v. McLaughlin, 12 U. 411; 43 P. 109.

6960. (3277.) Court may authorize action against third party. Restraining order. If it appears that a person or corporation, alleged to have property of the judgment debtor or to be indebted to him, claims an interest in the property adverse to him or denies the debt, the court or judge may authorize, by an order made to that effect, the judgment creditor to institute an action against such person or corporation, for the recovery of such interest or debt; and the court or judge may, by order, forbid a transfer, or other disposition of such interest or debt, until an action be commenced and prosecuted to judgment. Such order may be modified or vacated, by the judge granting the same or the court in which the action is brought, at any time, upon such terms as may be just.

Cal. C. Civ. P., § 720.
Garnishment after judgment, procedure, § 6752.

6961. (3278.) Disobedience to order of referee a contempt. If any person, party, or witness disobeys an order of the referee, properly made, in the proceedings before him under this chapter, he may be punished, by the court or judge ordering the reference, for a contempt.

Cal. C. Civ. P., § 721. Punishment of contempt in such cases, § 7072.

6962. (3279.) Duty of court when conveyance not executed as ordered. When the judgment requires the person against whom it is rendered to exe-

cute and deliver to any other person a conveyance of any specific real property, and the person against whom it is rendered shall refuse or neglect to execute and deliver said conveyance for five days after the service upon him of a certified copy of such judgment, or if he is absent or concealed, so that service of such certified copy cannot be had, upon proof satisfactory to the court that such service has been made, or that it cannot be made by reason of such absence or concealment, the person entitled to the conveyance may obtain from the court an order that the certified copy of the judgment, together with the order, be recorded by the recorder of deeds of the county where the real property is situated; and when recorded, it shall give to the person entitled to such conveyance a right to the possession of the real property described in the judgment, and to hold the same according to the terms of the conveyance ordered, in like manner as if it had been conveyed in pursuance of the judgment. The recording of any judgment as above provided shall not prevent the court rendering such judgment from enforcing the same by any proper process, according to the course of proceedings therein.

Where judgment directs execution of conveyance, appeal does not stay such execution, though it does the delivery, § 7000.

6963. (3280.) No person excused from answering on the ground of fraud, etc. A party or witness examined in proceedings authorized by this chapter is not excused from answering a question on the ground that his examination will tend to convict him of the commission of a fraud, or to prove that he has been a party or privy to, or has knowledge of, a conveyance, assignment, transfer, or other disposition of property for any purpose, or that he or any other person claims to be entitled, as against the judgment creditor, or a receiver appointed or to be appointed in the proceedings, to hold property derived from or through the judgment debtor, or to be discharged from the payment of a debt which was due to the judgment debtor, or to a person in his behalf. But an answer cannot be used as evidence against the person so answering in a criminal action or criminal proceeding.

Mont. Civ. P., § 1268.

6964. (3281.) Receiver for property of judgment debtor. Order to be recorded. The court may appoint a receiver of the property of the judgment debtor, not exempt from execution, and forbid a transfer or other disposition thereof or interference therewith until its further order therein. But before such receiver shall be vested with the real property of the judgment debtor, a certified copy of the order of appointment shall be filed and recorded in the office of the county in which any real estate sought to be affected by such order is situated.

Minn. (1894) § 5492*; N. Dak. (1895) §§ 5568*, 5569*.

Receivers generally, §§ 6764-6769.

CHAPTER 43.

EXCEPTIONS.

6965. (3282.) Exception defined. Taken when decision made. An exception is an objection upon a matter of law to the decision made by a court, judge, referee, or other judicial officer, in an action or proceeding. The exception must be taken at the time the decision is made, except as provided in the next section.

Cal. C. Civ. P., § 646.

Exception to charge to be taken, when and how, § 6806, and note.

Exception may be settled, signed, and filed at the time the decision is made, § 6970.

EXCEPTIONS NOT TAKEN IN TIME:

Objections to pleadings, etc., not taken deemed waived, note to § 6573.

Objections not taken in court below will not be considered on appeal, note to § 6994.

Exception not taken at time is waived, and cannot be urged on appeal.

McGrath v. Tallent, 7 U. 256; 26 P. 574.

Reece v. Knott, 3 U. 451; 24 P. 757.

Naylor v. Salt Lake City, 9 U. 491; 35 P. 509.

Hadra v. Utah Nat'l Bank, 9 U. 412; 35 P. 508.

Ganaway v. S. L. Dram. Ass'n, 17 U. 37; 53 P. 830.

Jenkins v. Mammoth M. Co., 24 U. 513; 68 P. 845.

Kunkel v. Utah Lumber Co., 29 U. 13; 81 P. 807.

Smith v. Fisher, 24 U. 506; 68 P. 849.

Fields v. Daisy G. M. Co., 26 U. 373; 73 P. 521.

The failure to object to proof of special damages, under an allegation of general damages, is a waiver of the objection.
Lashus v. Chamberlain, 6 U. 385; 24 P. 188.

Objection that commissioner before whom case was tried had a partner practicing in the district is waived if not made at trial.
Kaysen v. Steele, 13 U. 260; 44 P. 1042.

In condemnation proceedings, where evidence was submitted to the jury without objection on plaintiff's part, plaintiff therby admitted that it was sufficient to warrant an assessment of damages.
O. S. L. R. R. Co. v. Russell, 27 U. 457; 76 P. 345.

Where record fails to show that exceptions were taken to charge, same will not be considered on appeal.
Braegger v. O. S. L. Ry. Co., 24 U. 391; 68 P. 140.
Boyle v. U. P. Ry Co., 25 U. 420; 71 P. 988.
Burt v. Utah, 26 U. 157; 72 P. 497.

An objection after cross-examination to testimony given on direct examination is not seasonably made.
Garr v. Cranney, 25 U. 193; 70 P. 853.

Misconduct of counsel in making improper remarks to the jury in his argument, to which no objection was made, nor any request for an instruction to the jury on the subject, is not reviewable.
Johnson v. U. P. R. Co., 35 U. 285; 100 P. 390.

6966. (3283.) What deemed excepted to. The verdict of the jury, the final decision in an action or proceeding, an interlocutory order or decision finally determining the rights of the parties, or some of them; an order or decision from which an appeal may be taken; an order sustaining or overruling a demurrer, allowing or refusing to allow an amendment to a pleading, striking out a pleading or a portion thereof, refusing a continuance; an order made upon ex parte application; and an order or decision made in the absence of a party—are deemed to have been excepted to.

Cal. C. Civ. P., § 647
Judgment roll, how made up, § 6867.
Appeals decided on judgment roll, note to § 6994.

No bill of exceptions is necessary where the error alleged is apparent on the record.
Young v. Martin, 75 U. S. 354.

Unless the record affirmatively shows that an error denying motion for new trial was made under such circumstances as to become a part of the judgment roll under § 6867 and this section, such ruling should be preserved in a bill of exceptions, in order to be considered on appeal the clerk's certificate of minute entry of such order is not of itself sufficient.
Hecla G. M. Co. v. Gisborn, 21 U. 68; 59 P. 518.

The sustaining of a motion for non-suit cannot be reviewed unless there is an exception thereto.
Stewart v. O. S. L. R. R. Co., 39 U. 375; 117 P. 465.

Denial of motion for change of venue will not be considered on appeal unless made to appear by bill of exceptions.
Broadbent v. D. & R. G. R. R. Co., 48 U. 598; 160 P. 1185.

6967. (3284.) Form of exceptions. How bill made up. No particular form of exception is required, but when the exception is to the verdict or decision, upon the ground of insufficiency of the evidence to justify it, the objection must specify the particulars in which such evidence is alleged to be insufficient. The objection must be stated, with so much of the evidence or other matter as is necessary to explain it. The stenographer's notes of the evidence may be stated. Documents on file in the action or proceeding may be copied, or the substance thereof stated, or a reference thereto sufficient to identify them may be made. Am'd '03, p. 33.

Cal. C. Civ. P., § 648*.
Bill must contain all the exceptions relied upon, § 6969.
Objections to instructions must specifically point out objectionable proposition, note to § 6806.
Certificates held sufficient as showing that all the evidence was contained in bill of exceptions, note to § 6969.
For decisions as to the extent to which the supreme court will consider the evidence, under the constitution, note to Con. art. 8, sec. 9.
Judgment does not become final until motion for new trial disposed of, note to Con. art. 8, sec. 9.

Rule 26 of the supreme court is in substantial compliance with this section, and the specifications of particulars do not need to be settled in the bill of exceptions.
Eglund v. Fayter, 51 U. —; 172 P. 313.

The court may permit a party to amend the assignments of error.
Thomson v. Reynolds, 51 U. —; 174 P. 164.
Assignments of error should not be considered as merely directory, but absolutely binding upon the court and parties litigant.
Holt v. Great Eastern Casualty Co., 51 U. —; 173 P. 1168.

AS TO INSUFFICIENCY OF EVIDENCE:

Formerly it was held that the objections to the insufficiency of the evidence to justify the findings or verdict must be settled in the bill of exceptions, and that the objections must specify the particulars in which the evidence is alleged to be insufficient.
Van Pelt v. Park, 18 U. 141; 55 P. 381.
O. S. L. R. R. Co. v. Russell, 27 U. 457; 76 P. 345.
Mader v. Taylor, Romney, Armstrong Co., 15 U. 161; 49 P. 255.
Marks v. Taylor, 23 U. 152; 63 P. 897.
Genter v. Conglomerate M. Co., 23 U. 165; 64 P. 362.
Wasatch Irr. Co. v. Fulton, 23 U. 466; 65 P. 205.

And that the judgment would be affirmed without regard to the bill of exceptions unless some fatal error not required to be shown by the bill of exceptions appeared on the face of the record.
Wild v. U. P. R. Co., 23 U. 265; 63 P. 886.

And that the question of the sufficiency of the evidence would not be considered on appeal unless an exception on that ground was settled in the bill of exceptions.
Klenk v. O. S. L. R. Co., 27 U. 428; 76 P. 214.

But later it was held, in view of the change of procedure and that an appeal is made from a judgment and not from an order overruling a motion for new trial, that the specification of the particulars in which the evidence is not sufficient need not be included in the bill of exceptions, but may be made in the assignments of error, and if made with such particularity as to enable respondent to prepare its brief and collect its evidence and show its force and effect as applied to the question at issue, it is sufficient.
Little v. Gorman, 39 U. 63; 114 P. 321.

But where an appeal is taken without a transcript of the evidence, but an abstract thereof, stated in a narrative form, and con-

tains a statement that the substance of all the evidence is embodied in the bill, then a specification of the particulars should be settled in the bill.
Id.

WHAT MAY BE REVIEWED:

Where the record does not purport to contain all the evidence, its sufficiency to support the findings or the verdict is presumed.
Mitchell v. Jensen, 29 U. 346; 81 P. 165.
Kirk v. S. L. City, 31 U. 143; 89 P. 458.
Stone v. Ogden P. Co., 30 U. 460; 85 P. 1004.
Crooks v. Harmon, 29 U. 304; 81 P. 95.
Hannah Bros. v. Waltenspiel, 29 U. 466; 82 P. 859.
Neder v. Jennings, 28 U. 271; 78 P. 482.
S. L. City v. S. L. City Power Co., 25 U. 456; 71 P. 1069.
Fields v. Daisy M. Co., 25 U. 76; 69 P. 528.
Culmer v. Caine, 22 U. 216; 61 P. 1008.
Hecla M. Co. v. Gisborn, 21 U. 68; 59 P. 518.
Snyder v. Emerson, 19 U. 319; 57 P. 300.
Warner v. U. S. Mut. Acc. Ass'n, 8 U. 431; 32 P. 696.
Cochrane v. Bussche, 7 U. 233; 26 P. 294.
U. S. v. Groesbeck, 4 U. 487; 11 P. 542.
Spencer v. Van Cott, 2 U. 337.
Crompton v. Crow, 2 U. 245.
People v. Lyman, 2 U. 30.
Olson v. O. S. L. Ry., 24 U. 460; 68 P. 148.
Stewart v. Gold & Copper Co., 29 U. 443; 82 P. 475.
Raphael v. Wasatch & J. V. R. Co., 34 U. 97; 95 P. 1008.
Mansfield v. Sinaloa Frt. & Ld. Co., 43 U. 417; 134 P. 1017.

But where the court submitted the case to the jury on all the issues presented by the pleadings, and in the bill of exceptions it was certified that there was evidence tending to establish all the issues, the bill was sufficient for review of the instructions.
Bills v. Salt Lake City, 37 U. 507; 109 P. 745.

Whether a motion for non-suit should have been sustained will not be reviewed, unless it is apparent from the record that the motion was made before the trial court and properly included in the record on appeal.
Russell v. Watkins, 49 U. 598; 164 P. 867.

Where trial was to the court and all the evidence was not certified, the admission of a deposition is not reviewable since the court may have disregarded the deposition and based its finding on other evidence.
Mundt v. Commercial Nat'l Bk., 35 U. 90; 99 P. 454.

Where the record shows only a verdict and motion for new trial, the granting of the new trial is not reviewable on appeal, as the lower court may have granted it of its own motion.
McKinney v. Carson, 35 U. 180; 99 P. 660.

Unless the records show that all the evidence is brought up, it will be presumed that there was evidence other than that disclosed which, considered in connection with the evidence in the bill of exceptions, was sufficient to sustain the findings.
Carter v. Cummings-Neilson Co., 34 U. 315; 97 P. 334.

The supreme court will take notice of a jurisdictional defect which precludes it from determining an appeal, whether the question be raised by the parties or not.
McCashland v. Keogh, 32 U. 11; 88 P. 680.

EXCEPTIONS, EXHIBITS, ETC.:

General objections to the admission of evidence are unavailable for any purpose unless the evidence is clearly inadmissible for any purpose. The particular ground of the objection should be stated so the trial court may understand the nature thereof before passing upon it.
Snowden v. P. V. Coal Co., 16 U. 366; 52 P. 599.
Culmer v. Clift, 14 U. 286; 47 P. 85.
Olson v. O. S. L. Ry., 24 U. 460; 68 P. 148.

Objections held sufficiently specific to entitle appellant to a review of the admission of evidence.
Shepherd v. D. & R. G. Ry. Co., 45 U. 295; 145 P. 296.

Reference to documents by their identification marks stating the name and character of such instrument is sufficient.
Bingham Livery & Trans. Co. v. McDonald, 37 U. 457; 110 P. 56.

A bill of exceptions reciting that the court sustained plaintiff's motion for non-suit and stating that the judgment for non-suit might be granted, held insufficient to show entry of judgment.
Lukich v. Utah Constr. Co., 46 U. 317; 150 P. 298.

Where errors assigned by appellant are based on the evidence and are determined against him thereon, respondent cannot complain, although it does not affirmatively appear from the records that the bill of exceptions contains all the evidence.
Honorine v. Tallerday, 31 U. 326; 88 P. 9.

6968. (3285.) Exception disregarded unless substantial right prejudiced. No exception shall be regarded unless the decision excepted to is material and prejudicial to the substantial rights of the party excepting.

Kansas (1889) § 4399.
Errors and defects not affecting substantial rights disregarded, § 6622, and note.
Liberal construction of statutes, pleadings, and proceedings, §§ 2489, 5839, 6596.
Harmless errors and technicalities disregarded, note to § 6994.
Examining criminal jury, § 8927.
Cited in:
Morris v. S. L. City, 35 U. 474; 101 P. 373.
Hogge v. S. L. & O. R. Co., 47 U. 266; 153 P. 585.
Error in admission of evidence will not be ground for reversal of judgment for defendant, where it relates to an issue which was made immaterial because another vital issue is found in defendant's favor.
Madsen v. U. L. & Ry. Co., 36 U. 528; 105 P. 799.
Error in not making findings in all material issues is harmless if, under the evidence, the judgment could not have been changed.
Snyder v. Allen, 50 U. —; 169 P. 945.
Applied where an instruction may be vulnerable in some respects.
Moore v. Utah Idaho Central R. Co., 52 U. —; 174 P. 873.

6969. (3286.) Preparation, settlement, and signing of bill of exceptions. Time allowed. When a party desires to have exceptions taken at a trial settled in a bill of exceptions, he may, within thirty days after the entry of judgment if the action were tried with a jury, or after service of notice of the entry of judgment if the action were tried without a jury, or after service of notice of the determination of a motion for a new trial, prepare a draft of a bill and serve the same, or a copy thereof, upon the adverse party. Such draft must contain all the exceptions taken upon which the party relies. Within ten days after such service, the adverse party may propose amendments thereto, and serve the same, or a copy thereof, upon the other party. The proposed bill and amendments must, within ten days thereafter, be presented by the party seeking the settlement of the bill to the judge who tried or heard

the case, upon five days' notice to the adverse party, or be delivered to the clerk of the court for the judge. When received by the clerk, he must immediately deliver them to the judge, if he be in the county; if he be absent from the county, and either party desires the papers to be forwarded to the judge, the clerk must, upon notice in writing from such party, immediately forward them by mail or other safe channel; if not thus forwarded, the clerk must deliver them to the judge immediately after his return to the county. When received from the clerk, the judge must designate the time at which he will settle the bill, and the clerk must immediately notify the parties of such designation. At the time designated, the judge must settle the bill. If no amendments are served, or if served are allowed, the proposed bill may be presented, with the amendments, if any, to the judge for settlement, without notice to the adverse party. It is the duty of the judge, in settling the bill, to strike out of it all redundant and useless matter, so that the exceptions may be presented as briefly as possible. When settled, the bill must be signed by the judge, with his certificate to the effect that the same is allowed, and shall then be filed with the clerk. A bill of exceptions shall in all cases be prepared, settled, signed, and filed within ninety days after the entry of judgment, or after notice of the same if the action were tried without a jury, or after notice of the determination of a motion for a new trial. Am'd '05, p. 7.

Cal. C. Civ. P., § 650*.

Form of exception not material; how bill made up, § 6967.

Exception must specify particulars wherein evidence insufficient, § 6967, and note.

Assignments of error, note to § 6994.

Papers and orders not considered unless included in bill, § 6867.

TIME:

Time to prepare bills of exception, etc., may be extended, § 7023.

Unless extension is given, bill of exceptions must be served within time.

Willard City v. Woodland, 7 U. 192; 26 P. 284.

Application for stay of proceedings to prepare and file motion and statement on motion for new trial is not waiver of notice of decision required hereby.

Burlock v. Shupe, 5 U. 428; 17 P. 19.

It is sufficient if a bill of exceptions be settled, signed, and filed within ninety days after the determination of a motion for a new trial.

Herriman Irr. Co. v. Butterfield M. Co., 19 U. 453; 57 P. 537.

Judgment does not become final until motion for new trial disposed of, note to Con. art. 8, sec. 9.

Court can extend time to file bill of exception.

Gorringe v. Read, 24 U. 455; 68 P. 147.

Olson v. O. S. L. R. R. Co., 24 U. 460; 68 P. 148.

But not after time has expired.

Butter v. Lamson, 29 U. 439; 82 P. 473.

Bryant v. Kunkel, 32 U. 377; 90 P. 1079.

State v. Martin, 49 U. 346; 164 P. 500.

Tooele Imp. Co. v. Hoffman, 44 U. 532; 141 P. 744.

Metz v. Jackson, 43 U. 496; 136 P. 784.

Except in proceedings to file out of time.

Allen v. Garner, 43 U. 39; 143 P. 228.

If it is served within time allowed, it may be settled thereafter.

Blackburn v. Baker, 47 U. 219; 152 P. 1184.

A bill of exceptions settled after time is a nullity.

Warnock v. Peterson, 35 U. 542; 101 P. 699.

McEwan v. Anderson, 50 U. —; 167 P. 686.

An order extending time to settle bill of exceptions, to be considered by the supreme court, must be included in the bill of exceptions.

Dayton v. Free, 46 U. 277; 148 P. 408.

Hutchinson v. Smart, 50 U. —; 169 P. 166.

Swanson v. Sims, 50 U. —; 170 P. 774.

Taylor v. Paloma M. Co., 50 U. —; 171 P. 147.

The bill of exceptions was allowed in time.

McGuire v. State Bank of Tremonton, 49 U. 381; 164 P. 494.

An objection and motion to disregard a bill of exceptions, because not filed within time required by this section, is a "proceeding" within § 6619, and the court may relieve against the failure to serve in time and settle the bill.

Morgan v. O. S. L. R. R. Co., 27 U. 92; 74 P. 523.

The attorney for the successful party who agreed that a proposed bill of exceptions presented after the time had expired might be settled as the bill of exceptions, but who objected to the time of service, and who insisted that the proposed bill was not served in time, did not waive the delay in the service.

Bryant v. Kunkel, 32 U. 377; 90 P. 1079.

Where proposed amendments are not accepted by appellant, and no notice of presenting bill of exceptions is given within the ten days, a motion on appeal to strike the bill will be sustained.

Van Why v. S. P. Co., 31 U. 15; 86 P. 485.

That it was impossible to prepare bill of exceptions because of the voluminous record is not sufficient excuse to permit the filing after the time expires.

Moyle v. McKean, 49 U. 93; 162 P. 63.

Where judgment became final on May 9, an order on May 27 granting sixty days to serve and file a bill of exceptions, meant sixty days from the date thereof, and on the death of the plaintiff after judgment the time in which defendant was required to serve a bill of exceptions was suspended until the appointment of administrator, or the court, on defendant's application, had the power to extend the time until there was an administrator.

Candland v. Mellen, 46 U. 519; 151 P. 341.

Where the plaintiff served notice of judgment on the defendant, who then prepared a bill of exceptions covering only such part of the proceedings as were material to his appeal, and the plaintiff, objecting to a portion of the judgment, attempted to perfect second appeal, is not entitled to a notice entering judgment in order to start time against the filing of his bill.

Jensen v. Lichtenstein, 45 U. 320; 145 P. 1036.

Where defendants moved separately for new trials, without serving on each other notice of intention to do so, the time for filing and serving the bill of exceptions commenced to run from the time the order was made striking such motions.

Jones v. Williamson, 50 U. —; 168 P. 110.

Where a motion for new trial was denied March 12, the bill of exceptions was served April 4, no amendments were suggested and it was filed before settlement April 24, and signed by the judge on May 10, there is a substantial compliance with the statute, and it will not be stricken.

Love & Meek v. St. Joseph Stock Yards, 50 U. —; 169 P. 951.

AMENDMENTS:

Trial court has discretion to allow amend-

ments by adding specifications of error to statement.

Gill v. Hecht, 13 U. 5; 43 P. 626.

After settlement, bill of exceptions can only be amended by the judge upon notice to the parties, or by both parties with the consent of the judge.

Whipple v. Preece, 18 U. 454; 56 P. 296.

Where no amendments are proposed under this section, but settlement of bill of exceptions is consented to, supplemental findings and decree will be presumed to rest upon evidence contained in the bill.

Nephi Irr. Co. v. Vickers, 20 U. 310; 58 P. 836.

Under Con. art. 8, sec. 9, this section, § 6973, and supreme court rule 25, the supreme court cannot allow amendments to be made to a bill of exceptions after it has been signed, certified, and allowed by the trial judge.

Boyle v. U. P. Ry. Co., 25 U. 420; 71 P. 983.

Where trial judge refuses to allow an exception, § 6972.

While a defect or omission in the bill of exceptions not of substance could be supplied by a nunc pro tunc order, the trial court could not, after the time expired, amend it by inserting a copy of the motion for new trial and order overruling the same.

Warnock v. Peterson, 35 U. 542; 101 P. 699.

CONTENTS:

Where it is not made to appear that bill of exceptions contains all the evidence, objections to its insufficiency not considered on appeal, note to § 6967.

Affidavits used on motion for new trial, etc., may be reviewed on appeal, but not unless preserved in bill of exceptions, note to § 6994, under sub-title "Record as made in court below."

It is the duty of the trial judge to settle a bill of exceptions as briefly as possible, but if anything material is omitted, respondent may object to the settlement, and if his objections are disregarded, he must proceed under § 6972. When he fails to proceed and it does not appear that any material proof has been omitted, the supreme court cannot refuse to consider the assignments of error.

Center Creek Irr. Co. v. Thomas, 19 U. 360; 57 P. 30.

A bill of exceptions, from which redundant and useless matter is not eliminated, does not conform to the provisions of this section, so that the exceptions may be presented as briefly as possible.

Whipple v. Preece, 24 U. 364; 67 P. 1072.

Wild v. U. P. R. R. Co., 23 U. 265; 63 P. 886.

In order that an appellate court may determine whether or not a lower court proceeded in accordance with mandate of appellate court on a former appeal, it is not necessary that the remittitur should be contained in the bill of exceptions.

Warren v. Robinson, 21 U. 429; 61 P. 28.

Bill of exceptions should exhibit errors relied upon, and should show that objections were properly made and exceptions taken.

Fields v. Daisy G. M. Co., 26 U. 373; 73 P. 521.

Braegger v. O. S. L. Co., 24 U. 391; 68 P. 140.

Boyle v. U. P. Ry. Co., 25 U. 420; 71 P. 988.

Burt v. Utah L. & P. Co., 26 U. 157; 72 P. 497.

Where record fails to disclose what instructions were given, the appellate court cannot review the refusal of certain requests.

Garr v. Cranney, 25 U. 193; 70 P. 853.

Kunkel v. Utah L. Co., 29 U. 13; 81 P. 897.

Where bill of exceptions is eliminated from the record, the court can determine only whether the judgment is supported by the pleadings, findings, etc.

Bryant v. Kunkel, 32 U. 377; 90 P. 1079.

It is not necessary to include all the evidence in the bill of exceptions; a party may include such portion thereof as may bear upon a certain point, or he may recite the evidence in a narrative form, and the judge may settle it, providing it includes everything bearing upon the point.

Henriod v. East Tintic Development Co., 51 U. —; 173 P. 134.

THE CERTIFICATE AND SERVICE:

Service of bill of exceptions should be made on the attorneys of record of the appellee rather than upon the appellee, and where a stipulation attached to bill purports to be signed by appellee's attorney, in the absence of showin that he repudiated or did not sign it, it is sufficient to authorize service on him.

Walker Bros. v. Skliris, 34 U. 353; 98 P. 114.

The bill must be served.

Metz v. Jackson, 43 U. 496; 136 P. 784.

A purported transcript of the evidence, authenticated only by a stenographer's certificate, cannot be considered.

State v. Delvecchio, 25 U. 18; 69 P. 58.

Exceptions based on stenographer's certificate cannot be considered.

Thomas v. Blythe, 44 U. 1; 137 P. 396.

Where the parties stipulated that the transcript of evidence might be used by either on appeal, and should be taken as the whole evidence without certificates from the judge, neither party can complain if the court gives the stipulation effect.

Houtz v. Union Pac. R. R. Co., 35 U. 220; 99 P. 997.

A judge's certificate to a bill of exceptions, reciting: "Inasmuch as the foregoing matters do not otherwise appear of record, I hereby certify that that bill of exceptions has been by me settled and allowed," does not show that the bill contains all the evidence.

Stone v. Ogden Packing Co., 30 U. 460; 85 P. 1004.

Statement that the bill of exceptions contains all the "testimony" is not sufficient as showing that it contains all the evidence.

Crooks v. Harmon, 29 U. 304; 81 P. 95.

A bill of exceptions not certified by the trial judge in the manner prescribed by law will, on motion, be stricken from the record.

Hannan Bros. v. Waltenspiel, 29 U. 466; 82 P. 859.

Snow v. Tarpay, 25 U. 126; 69 P. 718.

Where an official stenographer certifies that the transcript contains all the evidence, and it was accepted as and for the bill of exceptions and no amendments were proposed and the bill showed by the court as a true and correct bill of exceptions; held, that though the court's certificate of settlement did not specifically state that the bill contained all the evidence, yet it by implication certified to the truth of the stenographer's certificate, though the better practice is to state that it contains all the evidence.

Mitchell v. Jensen, 29 U. 346; 81 P. 165.

Bowman v. Ogden City, 33 U. 196; 93 P. 561.

Where a stenographer's certificate recites that the transcript contains a full and true transcript of the testimony taken on oral proceedings had on the trial, and an order of the judge settling the bill of exceptions recites that the foregoing is a correct transcript of the proceedings herein; held, it does not show that the transcript contains all the evidence.

Carter v. Cummings-Neilson Co., 34 U. 215; 97 P. 334.

A defaulting contractor need not be served with a bill of exceptions in a mechanic's lien case, since a reversal or modification of the judgment would not adversely affect him.

Langton Lime & Cement Co. v. Peery, 48 U. 112; 159 P. 49.

Langton Lime & Cement Co. v. Smith, 48 U. 112; 159 P. 49.

6970. (3287.) Exception may be settled, signed, and filed at time of decision. An exception to any decision may be presented to the court or judge or judicial officer or referee for settlement at the time the decision is made, and after having been settled shall be signed by the judge, judicial officer, or referee, and filed with the clerk.

Cal. C. Civ. P., § 649*.

Exception must be taken at the time, § 6965, and note.

6971. (3288.) Exception to decision after judgment. Settlement. Ex-

ceptions to any decision made after judgment may be presented to the judge at the time of such decision, and be settled or noted as provided in § 6970, and a bill thereof may be presented and settled afterward, as provided in § 6969, and within like periods after the entry of the order, upon appeal from which such decision shall be reviewable.

Cal. C. Civ. P., § 651.

6972. (3289.) Exception refused; petition to supreme court for allowance. If the judge in any case refuse to allow an exception in accordance with the facts, the party desiring the bill settled may apply by petition to the supreme court to prove the same. The application may be made in the mode and manner and under such regulations as that court may prescribe; and the bill, when proven, must be certified by a justice thereof as correct, and filed with the clerk of the court in which the action was tried, and when so filed, it has the same force and effect as if settled by the judge who tried the cause.

Cal. C. Civ. P., § 652.

In a case where the court granted a new trial on its own motion, and a contest arose over the settlement of a bill of exceptions, the supreme court on appeal refused to settle the same.

Cache County v. Kiesel, 9 U. 379; 36 P. 633.

If matter stricken from a bill of exceptions by a trial judge is regarded as important or necessary by appellant, he has a remedy under this section.

Whipple v. Preece, 18 U. 454; 56 P. 296.

Center Cr. Irr. Co. v. Thomas, 19 U. 360; 57 P. 30.

6973. (3290.) Settlement of bill by referee. Settlement after death, removal, etc., by judge or officer. When the decision excepted to was made by a referee or any judicial officer other than a judge, the bill of exceptions shall be presented to such referee or judicial officer, and be settled and signed by him in the same manner as it is required to be presented to, settled, and signed by a court or judge. A judge, referee, or judicial officer may settle and sign a bill of exceptions after as well as before he ceases to be such judge, referee, or judicial officer. If such judge, referee, or judicial officer, before the bill of exceptions is settled, dies, is removed from office, becomes disqualified, is absent from the state, or refuses to settle the bill of exceptions, or if no mode is provided by law for the settlement of the same, it shall be settled and certified in such manner as the supreme court may, by its orders or rules, direct.

Cal. C. Civ. P., § 653*.

Referee should settle statement on motion for new trial of cause tried by him.

Doane v. Clinton, 2 U. 417.

Whitmore v. Harris, 10 U. 259; 37 P. 464.

The provisions of this section, that a judge may settle and sign a bill of exceptions after he ceases to be a judge, are not in violation of Con. art. 8, sec. 5, limiting the term of office of district judges to four years.

Larkin v. Saltair Beach Co., 30 U. 86; 83 P. 686.

CHAPTER 44.

NEW TRIALS.

6977. (3291.) New trial defined. A new trial is a re-examination of an issue of fact in the same court after a trial and decision by a jury, court, judicial officer, or referee.

Cal. C. Civ. P., § 656.

When the written findings and conclusions were filed, the trial was ended. A new trial is a re-examination of the issues of fact, and has nothing to do with the judgment, which is a sentence of law upon the facts. Proceedings for a new trial may be commenced either before or after entry of judgment.

Fisher v. Emerson, 15 U. 517; 50 P. 619.

6978. (3292.) Grounds for new trial. The former verdict or other decision may be vacated and a new trial granted, on the application of the party aggrieved, for any of the following causes materially affecting the substantial rights of such party:

1. Irregularity in the proceedings of the court, jury, or adverse party, or any order of the court, or abuse of discretion by which either party was prevented from having a fair trial;

2. Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any questions submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors;

3. Accident or surprise, which ordinary prudence could not have guarded against;

4. Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial;

5. Excessive damages, appearing to have been given under the influence of passion or prejudice;

6. Insufficiency of the evidence to justify the verdict or other decision, or that it is against law;

7. Error in law occurring at the trial, and excepted to by the party making the application.

Cal. C. Civ. P., § 657.

Motion for new trial in garnishment proceedings, § 6753.

Exceptions to instructions given or refused, § 6806.

Notice of motion in language of statute, § 6979.

On affidavits or on minutes of the court, § 6979.

Errors relating to instructions to jurors, note to § 6802.

Harmless errors disregarded, note to § 6994.

Discretion of court in conduct of trial, note to § 6802.

When granted by court of its own motion, § 6983.

Errors in allowing or overruling challenge to juror, when ground for new trial, note to § 6799.

The pendency of an appeal does not deprive the lower court of jurisdiction to hear and grant motion for new trial.

Corinne Mill Co. v. Johnston, 5 U. 147; 13 P. 17.

A motion for new trial is not necessary to review all errors during the trial in any case. (Overruling Touse v. Consol. Ry. & Power Co., 29 U. 506; 80 P. 506.)

Law v. Smith, 34 U. 394; 98 P. 300.

In order to review grounds stated in subs. 1-5, or anything occurring after the trial, a motion for a new trial based thereon must be made.

Id.

Motion may be submitted to the referee who tried the case, subject to court's decision.

Wasatch M. Co. v. Jennings, 14 U. 221; 46 P. 1106.

Findings are not required on a motion for new trial.

Wright v. U. P. R. R. Co., 22 U. 338; 62 P. 317.

In case of motion for new trial supported and resisted by ex parte affidavits, and in equity cases where the evidence consists exclusively of depositions, the rule that the findings of the trial court will not be set aside when the evidence is conflicting, unless it is clearly insufficient, does not apply.

Wright v. U. P. R. R. Co., 22 U. 338; 62 P. 317.

Action on motion for new trial is largely in court's discretion.

Monmouth P. Co. v. White, 27 U. 236; 75 P. 622.

State v. Haworth, 26 U. 310; 73 P. 413.

Heath v. White, 3 U. 474; 24 P. 762.

Davis v. Utah Sou. Ry. Co., 3 U. 218; 2 P. 521.

Bate v. Am. Fork, 7 U. 189; 26 P. 296.

White v. U. P. Ry. Co., 8 U. 56; 29 P. 1030.

Tousey v. Etzel, 9 U. 329; 34 P. 291.

Lancino v. Smith, 36 U. 462; 105 P. 914.

Action of trial court in granting new trial for insufficiency of the evidence will not be disturbed on appeal, unless there has been a clear abuse of discretion.

White v. U. P. Ry. Co., 8 U. 56; 29 P. 1030.

Davis v. Utah Southern R. R. Co., 3 U. 218; 2 P. 521.

Newton v. Brown, 2 U, 126.

Collet v. Beutler, 27 U. 541; 76 P. 707.

An order granting a new trial is reviewable on appeal from the final judgment, and if erroneously granted, the subsequent judgment will be set aside and original judgment reinstated.

Hirabelli v. Daniels, 44 U. 88; 138 P. 1172.

Where court improperly refused to grant a continuance, it was error to refuse to grant a new trial.

McCormick Machine Co. v. Marchant, 11 U. 68; 39 P. 483.

A district court has chancery power to enjoin the issuing of an execution and grant a new trial, when by the destruction of the records of the case, an appeal has been prevented.

Bailey v. Stevens, 11 U. 175; 39 P. 828.

Where a case is reversed and a new trial ordered the case is reopened for a trial de novo.

Church v. Watson, 27 U. 538; 76 P. 706.

A new trial cannot be granted on the ground of prejudice of the people of the county where the action was tried, to such extent that an impartial jury could not be obtained.

Anderson v. Mammoth M. Co., 26 U. 357; 73 P. 412.

In an action to recover a loan, the court, after rendering judgment for plaintiff, granted defendant's motion for a new trial, and permitted him to file an amended answer which disclosed the fact that the debt was the result of a gambling transaction, whereupon judgment was rendered for defendant; held, that the granting of a new trial and permitting the filing of the amended answer were matters resting in the sound discretion of the trial court, and no circumstances appeared to show an abuse of such discretion.

Collet v. Beutler, 27 U. 541; 76 P. 707.

Affidavits on motion for new trial may be reviewed on appeal, when, note to § 6994.

A notice of motion for new trial cannot be amended after the expiration of the time by adding a ground not germane to anything contained in the original notice.

Blue Creek Land & Livestock Co. v. Anderson, 35 U. 61; 99 P. 444.

The district court has power to grant a rehearing of its determination on motion for a new trial in a case pending before it on appeal from city court; but the time for appeal starts from the overruling of the motion.

Luke v. Coleman, 38 U. 383; 113 P. 1023.

Where a party has not taken, and the statute has not given him, an exception to a ruling before moving for new trial, he cannot obtain a review of the ruling by simply filing a motion for new trial and excepting to an adverse ruling thereon.

Law v. Smith, 34 U. 394; 98 P. 300.

Where a surety files a separate answer setting up both affirmative and negative defenses, and judgment is rendered against the property, but the surety's motion for non-suit is improperly sustained at the close of plaintiff's evidence, the surety is entitled on a new trial to present its evidence on the issues of fact set up by its answer.

Christensen v. Hamilton Realty Co., 40 U. 70; 129 P. 412.

MISCONDUCT OF JURY:

A conversation had with a juror, pending a trial, which does not tend to influence his mind, or involve any of the material issues, is not sufficient ground for a new trial.

Tiernan v. Trewick, 2 U. 393.

Where a juror states that he is a citizen of the U. S., and after verdict it appears that such answer was false, a new trial will be granted.

People v. Reece, 3 U. 72; 2 P. 61.

Where diligence used in interrogating jury is slight and insufficient to discover the dis-

qualifications, the jurors not being examined individually, new trial will be denied.
People v. Lewis, 4 U. 42; 5 P. 543.

Where a juror denies any knowledge or opinion about the case, and defendant, after conviction first learns that such juror was one of the grand jury that found the indictment, he is entitled to a new trial.
U. S. v. Christensen, 7 U. 26; 24 P. 618.

Where juror conceals fact that relation of debtor and creditor exists, party entitled to new trial.
Tarpey v. Madsen, 26 U. 294; 73 P. 411.
State v. Morgan, 23 U. 212; 64 P. 356.
State v. Thompson, 24 U. 314; 67 P. 789.

That juror had on another case expressed prejudice against that class of cases not grounds for new trial.
Hern v. S. P. Co., 29 U. 127; 81 P. 902.

In order to constitute misconduct which would affect a verdict, it must be made apparent that the acts complained of reached the jurors or some of them.
Paul v. S. L. R. R. Co., 34 U. 1; 95 P. 363.

If a party during the trial thought a juror guilty of misconduct in noting points adverse to him, he should have called the court's attention to the fact when it occurred and not have waited to see whether the controversy would be determined in accordance with his wishes.
Ogden L. & I. Ry. Co. v. Jones, 50 U. —; 168 P. 548.

If a juror is actually guilty of misconduct, one or more of the other jurors may testify to the facts constituting the alleged misconduct, or it may be proved by any witness who observed and knows the facts.
Id.

CHANCE VERDICT:

Where it appears that the amount of the verdict was determined by each juror fixing the amount to be awarded, adding them together and dividing the result by the number of jurors, a new trial will be granted.
Lambourne v. Halfin, 23 U. 489; 65 P. 206.

Where it clearly appears by affidavit that one of the concurring jurors was "induced to assent" to a verdict "by a resort to the determination of chance" a new trial should be granted.
Wright v. U. P. Ry. Co., 22 U. 338; 62 P. 317.

An average verdict is not objectionable where the jurors do not agree before voting to be bound by the result, but accept the average only after further deliberation and discussion as a fair and reasonable finding.
Pence v. California M. Co., 27 U. 378; 75 P. 934.
Archibald v. Kolitz, 26 U. 226; 72 P. 935.
Midgley v. Bergerman, 30 U. 17; 83 P. 466.

A new trial may not be had, on the ground that the jury resorted to the determination of chance, unless it appears that the assent of one or more jurors was thereby obtained to the verdict.
Midgley v. Bergerman, 30 U. 17; 83 P. 466.
Pence v. California M. Co., 27 U. 378; 75 P. 934.
Archibald v. Kolitz, 26 U. 226; 72 P. 935.

The burden of proof to show that the assent of one or more jurors was obtained by the determination of chance, or that it was in fact a chance verdict, is on the party assailing the same.
Pence v. California M. Co., 27 U. 378; 75 P. 934.
Archibald v. Kolitz, 26 U. 226, 72 P. 935.

USE OF AFFIDAVITS:

Affidavits of jurors will not be received to show misconduct except resort to chance.
Homer v. Inter-Mountain Abs. Co., 9 U. 193; 33 P. 700.
People v. Ritchie, 12 U. 180; 42 P. 209.
Black v. Rocky Mt. Bell Tel. Co., 26 U. 451; 73 P. 514.
People v. Flynn, 7 U. 378; 26 P. 1114.

ACCIDENT OR SURPRISE:

Production of pertinent, relevant testimony, no trick or artifice having been perpetrated, is not surprise hereunder.
Snell v. Cisler, 1 U. 298.

Where a cause is called for trial in its regular order, the absence of the defendant's counsel from the court is no ground for a new trial.
Crompton v. Crow, 2 U. 245.

A new trial will not be granted on the ground of accident and surprise to a party who, by the exercise of ordinary diligence, might have avoided the effects of what he complained of as the grounds of surprise.
Stewart M. Co. v. Coulter, 3 U. 174; 5 P. 557.

Affidavits held not to show surprise, such as entitled the defendant to a new trial.
Id.

Affidavits upon the ground of surprise must be made by the attorney and not by the defeated party, and should show that the facts from which the surprise resulted were material, and that the verdict is merely attributable to them.
Martin v. Hill, 3 U. 157; 2 P. 62.

In a criminal action, where it clearly appears by affidavit that defendant was surprised at testimony of prosecutrix, and that much of her testimony was untrue, new trial will be granted.
State v. Halford, 17 U. 475; 18 U. 3; 54 P. 819.

Where a judgment was rendered against defendant by default after answer, he was not entitled to a new trial by reason of the fact that such default was the result of negligence on the part of his attorney.
Peterson v. Crosier, 29 U. 235; 81 P. 860.

An order denying the motion to set aside a judgment rendered on a rehearing in defendant's absence and to grant a new trial on alleged grounds of mistake, inadvertence, surprise, or inexcusable neglect cannot be interfered with on appeal, unless an abuse of discretion is shown.
S. L. Hdwe. Co. v. Neilsen L. & W. Co., 43 U. 406; 134 P. 911.

Where a defendant gives notice to take the deposition of a non-resident whose testimony the plaintiff knows would be favorable to him, and the defendant fails to take such deposition, or to inform plaintiff's counsel of such failure; held, not to authorize a new trial on the ground of misconduct.
Rydalch v. Anderson, 37 U. 99; 107 P. 25.

NEWLY DISCOVERED EVIDENCE:

New trial will not be granted for newly discovered evidence which is merely cumulative or immaterial and irrelevant.
Foster v. Reich, 1 U. 192.
People v. Lyman, 2 U. 30.
U. S. v. Eldredge, 5 U. 161; 13 P. 673.
Long v. Citizens' Bank, 8 U. 104; 29 P. 878.

Where it appears that newly discovered evidence is merely cumulative, and that if it had been produced at the trial, the findings would not necessarily have been different from what they were, a new trial is properly denied.
Larson v. Onesite, 21 U. 38; 59 P. 234.

A new trial should not be granted upon the ground of newly discovered evidence where no proper diligence had been used to procure it at the trial.
Snell v. Cisler, 1 U. 298.
Tiernan v. Trewick, 2 U. 393.
People v. Peacock, 5 U. 237; 14 P. 332.
McKay v. Farr, 15 U. 261; 49 P. 649.
Hydraulic Cement Co. v. Christensen, 38 U. 525; 114 P. 524.

Where newly discovered evidence would not be decisive of the case upon another trial, the judgment will not be reversed.
Turner v. Stevens, 8 U. 75; 30 P. 24.
Tiernan v. Trewick, 2 U. 393.
Baumgarten v. Hoffman, 9 U. 338; 34 P. 294.
Wimmer v. Simon, 9 U. 378; 35 P. 507.

To entitle a party to a new trial on the ground of newly discovered evidence, it must appear:
1st. That he used reasonable diligence to discover and produce such evidence at the former trial, and that his failure was not due to his own negligence.
2nd. That it is not simply cumulative.
3rd. That such evidence does not tend simply to impeach an adverse witness.
4th. That the evidence is material and would likely have produced a different result if introduced at the former trial.
5th. That the defeated party had no opportunity to make the defense, or was prevented from so doing by unavoidable accident or the fraud or improper conduct of the other party.
Klopenstine v. Hays, 20 U. 45; 57 P. 712.

Where defendant moved for a new trial on the ground of newly discovered evidence, which consisted of a lease of the land from her to plaintiff for his life, executed and delivered to him at the time he deeded to her, motion was properly overruled.

Stringfellow v. Hanson, 25 U. 480; 71 P. 1052.

Affidavit of newly discovered evidence must show that it can be produced on a new trail.

Heath v. White, 3 U. 474; 24 P. 762.

Where the order refusing a new trial recites that "it was heard upon the record and statement and upon the affidavits filed by the defendants in support of their motion," it cannot be contended that the trial court did not consider affidavits as to newly discovered evidence presented on the motion.

Haws v. Victoria M. Co., 160 U. S. 303; same case, 7 U. 515; 27 P. 695.

A new trial will not be granted where the only new evidence contradicts defendant's testimony on a collateral matter.

Rydalch v. Anderson, 37 U. 99; 107 P. 25.

New trial may be granted for newly discovered cumulative evidence which renders clear and positive that which was before indefinite and uncertain, as, for instance, photographic enlargements of alleged forged checks which clearly reveal differences not discernible from the originals, and where the bank refused to deliver the checks to the depositor, he is not lacking in diligence in failing to secure an order of court for production.

Van Dyke v. Ogden Savings Bank, 48 U. 606; 161 P. 50.

Where counsel have withheld material evidence or denied the other party access thereto before trial, they are estopped from saying the other side should have applied for order compelling production.

Id.

Ordinarily granting of a new trial for newly discovered cumulative evidence is left wholly to the discretion of the trial court; but in case of abuse of discretion, it is subject to review,

Id.

Where an affidavit of newly discovered evidence is filed thirty days after the motion for new trial was filed, and the party and attorney filed affidavits alleging want of knowledge on their part as to what the witness would testify, the discretion of the lower court in rejecting the affidavit will not be interfered with.

Eglund v. Fayter, 5 U. —; 172 P. 330.

EXCESSIVE OR INADEQUATE DAMAGES:

Under the constitution, the question of damages is one for the jury, and the supreme court cannot interfere if there is any legitimate proof in the record to sustain the verdict, note to Con. art. 8, sec. 9.

Prior to adoption of constitution, verdicts held not excessive in the following cases.

Farr v. Griffith, 9 U. 416; 35 P. 506.
Griffiths v. Clift, 4 U. 462; 11 P. 609.
Thirkfield v. Mt. View Cem. Ass'n, 12 U. 76; 41 P. 564.
Naylor v. Salt Lake City, 9 U. 491; 35 P. 509.
Lowe v. Herald Co., 6 U. 175; 21 P. 991.
Bowers v. U. P. Ry. Co., 4 U. 215; 7 P. 251.
Bitner v. Utah Central Ry. Co., 4 U. 502; 11 P. 620.
Reddon v. U. P. Ry. Co., 5 U. 344; 15 P. 262.
Lashus v. Chamberlain, 6 U. 385; 24 P. 188.
Daniels v. U. P. Ry. Co., 6 U. 357; 23 P. 762.
Webb v. D. & R. G. W. Co., 7 U. 363; 26 P. 981.
Turner v. Stevens, 8 U. 75; 30 P. 24.
Durfee v. U. P. Ry. Co., 9 U. 213; 33 P. 944.
Chapman v. S. P. Co., 12 U. 30; 41 P. 551.
Chipman v. U. P. Ry. Co., 12 U. 68; 41 P. 562.

Where the damages are excessive, the trial court or the supreme court may authorize the remission of the excess as a condition of refusing new trial.

Brown v. S. P. Co., 7 U. 288; 26 P. 579.
Mayhood v. P. V. Coal Co., 8 U. 85; 30 P. 149.
Riley v. S. L. Rapid Transit Co., 10 U. 248; 37 P. 681.
English v. S. P. Co., 13 U. 407; 45 P. 47.
Yost v. Tracy, 13 U. 431; 45 P. 346.

The action of the trial court in granting a new trial on account of an excessive or unjust verdict, due solely to passion or prejudice may be reviewed as a question of law and not of fact upon an alleged abuse of discretion or capricious or arbitrary exercise of power.

Jensen v. D. & R. G. Co., 44 U. 100; 138 P. 1185.

The trial court may grant a new trial on the ground of inadequacy of damages.

Hirabelli v. Daniels, 44 U. 88; 138 P. 1172.

Where a court orders a new trial, unless the plaintiff shall consent to a reduction, a remittitur by plaintiff without service is sufficient acceptance.

Prye v. Kalbaugh, 34 U. 306; 97 P. 331.

The supreme court cannot say that the trial court abused its discretion in refusing a new trial on the ground that a verdict of $7620 for the death of a 14-year-old son at a crossing was excessive.

Jensen v. D. R. G. Ry. Co., 44 U. 100; 138 P. 1185.

INSUFFICIENCY OF THE EVIDENCE:

Sufficiency of evidence to support findings, note to § 6829.

Sufficiency of exceptions to evidence, note to § 6967.

Motion for new trial necessary in order to review evidence in case tried by jury, § 6994, and note.

Before statehood it was the rule that where the evidence was conflicting, new trial would not be granted on ground that verdict or findings are contrary thereto, unless there was clear and marked preponderance against them.

Newton v. Brown, 2 U. 126.
Firman v. Bateman, 2 U. 268.
Harrington v. Chambers, 3 U. 94; 1 P. 362.
Chamberlain v. Raymond, 3 U. 117; 1 P. 850.
Smith v. Ireland, 4 U. 187; 7 P. 749.
Lehi Irrigation Co. v. Moyle, 4 U. 327; 9 P. 867.
McDonough v. Smith, 5 U. 276; 15 P. 3.
Brooks v. Warren, 5 U. 118; 13 P. 175.
Orr v. Rich, 5 U. 519; 17 P. 261.
Wells v. Wells, 7 U. 68; 24 P. 752.
Slater v. Cragan, 7 U. 412; 27 P. 4.
Victoria Mining Co. v. Haws, 7 U. 515; 27 P. 695; 160 U. S. 303.
Dooly Block v. Rapid Tr. Co., 9 U. 31; 33 P. 229.
Smith v. R. G. W. Ry. Co., 9 U. 141; 33 P. 626.
Stahn v. Hall, 10 U. 400; 37 P. 585.
Darke v. Smith, 14 U. 35; 45 P. 1006.

Since statehood the supreme court will not review the evidence in cases at law except to determine questions at law, and will not ordinarily disturb the judgment in an equity case, note to Con. art. 8, sec. 9.

A party challenging the sufficiency of the evidence must do so by a motion for new trial, unless, during the trial, he raised the question of motion for non-suit or for a directed verdict, in which case a motion for new trial is not necessary to obtain a review on appeal.

Law v. Smith, 34 U. 394; 98 P. 300.

A motion for new trial must be based on insufficiency of evidence to justfy the verdict, not the judgment.

Bellion v. Durand, 39 U. 532; 117 P. 798.

6979. (3293.) Application for new trial. In an application for a new trial, it shall be sufficient for the party applying for the same to state, in the language of the statute only, one or more grounds as specified in § 6978; *provided*, that when the application is made upon subs. 1, 2, 3, or 4 of § 6978, it must be supported by affidavit. In all other cases it may be made upon the minutes of the court. Am'd '99, p. 82.

Cal. C. Civ. P., § 658*.

Affidavits, note to § 6978.

6980. (3294.) Notice to be filed and served within five days after verdict

or after notice of decision of court or referee. Grounds. The party intending to move for a new trial must, within five days after the verdict of the jury, if the action were tried by a jury, or after notice of the decision of the court or referee, if the action were tried without a jury, file with the clerk, and serve upon the adverse party a notice of his intention, designating the grounds upon which the motion will be made, and whether the same will be made upon affidavits or upon the minutes of the court.

Cal. C. Civ. P., § 659*.
Extension of time generally, § 7023.
Notices and services, §§ 7024-7032.
Motion for new trial may be made and filed after time limited, on terms, § 6619.

Order extending time for filing statement does not embrace notice of motion nor bill of exceptions.
McGrath v. Tallent, 7 U. 256; 26 P. 574.
East v. Mooney, 7 U. 414; 24 P. 4.

Order extending time granted though not filed withtin statutory time is valid.
Elliot v. Whitmore, 10 U. 253; 37 P. 463.

Under § 3400, C. L. 1888, only the defeatedf party has the right to move for a new trial; if notice is served within ten days after notice of the decision of the court, it is in full compliance.
Hamilton v. Dooly, 15 U. 280; 49 P. 769.

Right to move for a new trial is waived if not taken.
Cereghino v. Cereghino, 4 U. 100; 6 P. 523.

Though judgment has not been entered, motion for new trial may be made upon the filing of findings and conclusions.
Fisher v. Emerson, 15 U. 517; 50 P. 619.

Notice of motion must be filed and served within five days after verdict, unless time extended under § 7023, or unless relief granted under § 6619.
Felt v. Cook, 31 U. 299; 87 P. 1092.

The court cannot extend the time for filing a motion for new trial beyond the period of time allowed for appeal.
Minneapolis Threshing Machine Co. v. Fox, 51 U. —; 172 P. 699.

Notice does not need to be served upon co-defendants, where they all joined in preparing the bill of exceptions, and joined in the appeal.
Jones v. Williamson, 50 U. —; 168 P. 110.

A second notice of motion for new trial, filed more than five days after the jury rendered its special verdict, though within five days after judgment denying probate was entered, was properly stricken from the files as too late.
In re Hansen's Will, 50 U. —; 167 P. 256.

A second motion for a new trial setting forth an additional ground should not be permitted to be filed after time without sufficient application and showing, and if a showing is sufficient, findings thereon should be made.
Audia v. D. & R. G., 45 U. 459; 146 P. 559.

Where an appeal is taken within six months from the denial of motion for a new trial, but the judgment and the records show that a notice of motion for new trial was not given in time, there is no presumption that the time was extended for filing the motion for new trial and appeal is not within time.
Progress v. Dixie Ins. Co., 43 U. 303; 134 P. 1166.

An extension of time must be granted before the expiration of time.
Id.

Where the trial court sets aside the verdict and it makes findings and enters judgment thereon, notice may be served and filed within statutory time after judgment has been entered on the original verdict in obedience to mandate of the appellate court ordering the finding set aside and judgment to be entered upon the verdict.
Yerrick v. District Court, 48 U. 619; 161 P. 55.

NOTICE OF DECISION:

Written notice of a decision may be waived, but, to constitute a waiver, the party must do some affirmative act pointed out in the statute as not necessary to be done until after the notice.
Everett v. Jones, 32 U. 489; 91 P. 360.

One intending to move for new trial has a right to wait for a notice in writing of the decision from the adverse party before giving notice of intention though the movant participated in the final proceedings, objecting to the findings and the signing of a decree.
Everett v. Jones, 32 U. 489; 91 P. 360.
Mercantile Co. v. Glenn, 6 U. 139; 21 P. 500.
Burlock v. Shupe, 5 U. 429; 17 P. 19.

Where plaintiff is granted a decree of divorce, and the finding and decree was prepared by her attorney, no notice of decision is necessary in order to set in motion the time for filing and serving a motion for new trial by plaintiff, because of refusal of permanent alimony.
Cody v. Cody, 47 U. 456; 154 P. 952.

6981. (3295.) Affidavits filed and served within five days. Counter affidavits. If the motion is to be made upon affidavits, the moving party must, within five days after serving the notice, file such affidavits with the clerk, and serve a copy upon the adverse party, who shall have five days to file counter affidavits, a copy of which must be served upon the moving party.

Cal. C. Civ. P., § 659*.

6982. (3297.) Time of hearing application. Proceedings. The application for a new trial shall be heard at the earliest practicable period after notice of the motion, if the motion is to be heard upon the minutes of the court, and in other cases after the affidavits are filed, and within sixty days thereafter unless no session of the court is held in the county within that time. It may be brought to a hearing upon motion of either party. On such hearing, reference may be had in all cases to the pleadings and the orders of the court, and, when the motion is made on the minutes, reference may also be had to the depositions, documentary evidence, and the stenographic report of the testimony.

Cal. C. Civ. P., § 660*.
Motion for new trial may be heard at chambers, § 1679.

Motion may be oral, proper notice having been given.
Needham v. Salt Lake City, 7 U. 319; 26 P. 920.
East v. Mooney, 7 U. 414; 27 P. 4.

Lack of diligence in prosecuting motion for new trial is question in discretion of trial court.
Burlock v. Shupe, 5 U. 428; 17 P. 19.

Allowance of a substituted statement under pretense of amendment is error.
Wines v. Stevens, 1 U. 305.

Motion for new trial made within proper time

may be heard and granted at a subsequent term of court.
Wasatch M. Co. v. Jennings, 14 U. 221; 46 P. 1106.
Under provisions of this section, if a motion for a new trial is to be heard upon the minutes of the court, it shall be heard at the earliest practicable moment after notice of the motion; but if it is to be heard upon affidavits, then within sixty days after the affidavits are filed, unless no session of the court is held in the county within that time.
Smidt v. Cherry, 23 U. 302; 64 P. 869.
Respondent having sought delay in the hearing of motion for new trial, and having stipulated that it be heard at a definite date, cannot complain that it was not heard at an earlier date.
Id.

6983. (3298.) When court may grant new trial on its own motion. The verdict of a jury may also be vacated and a new trial granted by the court in which the action is pending, on its own motion, without the application of either of the parties, when there has been such a plain disregard by the jury of the instructions of the court, or the evidence in the case, as to satisfy the court that the verdict was rendered under a misapprehension of such instructions, or under the influence of passion or prejudice.

Cal. C. Civ. P., § 662*.

Cited: Law v. Smith, 34 U. 394; 98 P. 300.
McKinney v. Carson, 35 U. 180; 99 P. 660.

6984. (3299.) When motion heard in another county. When the action is tried by a district judge out of the county of his residence, the motion for a new trial may, upon the consent of the parties, be brought to a hearing before such judge at chambers or in open court in any other county in the state.

Parties may stipulate in writing that a matter be heard at any place, § 1680.

CHAPTER 45.

APPEALS.

6990. (3300.) Appeal lies from final judgments. Record. Equity and law cases. Probate matters. From all final judgments of the district courts, there shall be a right of appeal to the supreme court. The appeal shall be upon the record made in the district court. In equity cases the appeal may be on questions of both law and fact; in cases at law the appeal shall be on questions of law alone. Appeals shall also lie from the final orders and decrees of the court in the administration of decedent estates, and in cases of guardianship.

The provisions of this section are taken from Con. art. 8, sec. 9; decisions construing same have been placed thereunder.
Appeals to supreme court lie from final judgments only, Con. art. 8, sec. 9, and note.
Where actions shall be begun, Con. art. 8, sec. 9, and note.
Review by supreme court in cases at law, in equity cases, and in probate cases, Con. art. 8, sec. 5, and note.
Appeals in cases commenced in justice's courts, Con. art. 8, sec. 9, and notes.
Appeal from final judgment on garnishment proceedings, § 6753.
Record on appeal, assignments of error, etc., note to § 6994.
Appeal from land registration judgments, § 4930.
Appeal in intoxicating liquor prosecutions, §§ 3360, 3363.
Right of appeal does not exist unless given by statute expressly or by necessary implication.
Golding v. Jennings, 1 U. 135.
Benson v. Anderson, 9 U. 154; 33 P. 691.
State v. Olson, 39 U. 177; 115 P. 958.
A writ of error is a writ of right allowable at common law.
Reece v. Knott, 3 U. 436; 24 P. 759.
The policy of the law is to discourage unnecessary appeals.
North Point Irr. Co. v. Utah & S. L. Canal Co., 14 U. 155; 46 P. 824.
A statutory right to have any particular question reviewed on appeal may be taken away by a repeal of the statute.
Eastman v. Gurrey, 14 U. 169; 46 P. 828.
North Point Irr. Co. v. Utah & S. L. Canal Co., 14 U. 155; 46 P. 824.
Consent cannot confer jurisdiction on appeal.
White v. Seely, 1 U. 191
Thomas v. U. P. Ry. Co., 1 U. 184.
Case in which the supreme court, at request of parties, declared the point at issue, though there was a vital defect of parties, but no demurrer.
Fritsch v. Bd. Com., 15 U. 83; 47 P. 1026.
Where the court modifies an arbitrators' award and enters judgment thereon, it is appealable.
Bivans v. U. L. L. W. & P. Co., 51 U. —; 174 P. 1126.

APPEAL IN CONTEMPT CASES:

Where a contempt proceeding is remedial, for the benefit of the opposing party, to compel the doing or omission of an act necessary to the administration of justice, appeal lies.
Snow v. Snow, 13 U. 15; 43 P. 620.
Ex parte Whitmore, 9 U. 441; 35 P. 524.
In re Kelsey, 12 U. 393; 43 P. 106.
Davidson v. Munsey, 27 U. 87; 74 P. 431; same case, 29 U. 181; 80 P. 743.
No appeal lies from conviction for contempt where the proceedings are criminal in their nature, for the purpose of vindicating the dignity and authority of the court, or to prevent the doing of an act injurious to the opposite party, and where the punishment is purely punitive.
People v. Owens, 8 U. 20; 28 P. 871.
Ex parte Whitmore, 9 U. 441; 35 P. 524.
Elliot v. Whitmore, 10 U. 246; 37 P. 461.
Ex parte Whetstone, 9 U. 156; 36 P. 633.

REVIEW OF EVIDENCE ON APPEAL:

Under the constitution the supreme court will not interfere with the verdict of a jury or the judgment of a court in a law case, if there is any legal evidence to sustain it, Con. art. 8, sec. 9, and note.

Prior to the adoption of the constitution, the supreme court would not interfere with the verdict of the jury or the judgment of the trial court where there was any substantial conflict in the evidence.
Dewey v. Snyder, 2 U. 344.
Walker v. Popper, 2 U. 281.
Roach v. Gilmer, 3 U. 389; 4 P. 221.
Bowers v. U. P. Ry. Co., 4 U. 215; 7 P. 251.
Griffiths v. Clift, 4 U. 462; 11 P. 609.
Hopkins v. Ogden City, 5 U. 390; 16 P. 596.
Hoponce v. Corinne M. C. & S. Co., 6 U. 437 24 P. 534.
Pratt v. Clawson, 7 U. 254; 26 P. 300.
Goodwin v. Hamilton, 7 U. 475; 27 P. 584.
Hurd v. U. P. Ry. Co., 8 U. 241; 30 P. 982.
Wimmer v. Simon, 9 U. 378; 35 P. 507.
Farr v. Griffiths, 9 U. 416; 35 P. 506.
Gallagher v. Yosemite M. Co., 10 U. 189; 37 P. 264.
Nelson v. Rapid Tr. Co., 10 U. 196; 37 P. 268.
Sharp v. Pierce, 11 U. 29; 39 P. 475.
Tarpey v. Sharp, 12 U. 383; 43 P. 104.
In equity cases, prior to statehood, the findings and decree were not set aside unless manifestly against the clear preponderance of evidence or so erroneous as to demonstrate some oversight or mistake. (This is substantially the rule under the constitution, Con. art. 8, sec. 9, and note.)
Hannaman v. Karrick, 9 U. 236; 35 P. 1039.
Dooly Block v. S. L. Rapid Transit Co., 9 U. 31; 33 P. 229.
Whitesides v. Green, 13 U. 341; 44 P. 1032.

NON-APPEALABLE ORDERS PRIOR TO STATEHOOD:

No appeal lies from order sustaining demurrer, no final judgment having been entered thereon.
Thomas v. U. P. Ry. Co., 1 U. 184.
Zeile v. Moritz, 1 U. 283.
Lowell v. Parkinson, 2 U. 370.
Nor from order overruling demurrer.
Smith v. McCoy, 8 U. 58; 29 P. 1030.
Nor from order changing place of trial.
Nounnan v. Aspinwall, 1 U. 140.
Nor from an order refusing to retax costs.
Id.
Nor from judgment that has been vacated.
Id.
Nor from order discharging prisoner on habeas corpus.
Mead v. Metcalf, 7 U. 103; 25 P. 729.
In re Clasby, 3 U. 183; 1 P. 852.
Order allowing amendments to a pleading and refusing to dismiss appeal from a lower court is not appealable.
In re Faust, 1 U. 197.
Nor are orders permitting parties to intervene and refusing to strike out an answer as sham.
Jones v. N. Y. Life Ins. Co., 11 U. 401; 40 P. 702.
No appeal lies from order in divorce suit for payment of temporary alimony, suit money, and counsel fees.
In re Kelsey, 12 U. 393; 43 P. 106.
Neither this section nor § 7382 authorizes an appeal from an allowance for support of a child made incident to a decree of divorce.
Thompson v. Thompson, 5 U. 401; 16 P. 400.
Where demurrer of one of several defendants is sustained and the action dismissed as to him, this is not an appealable final judgment.
Lowell v. Parkinson, 2 U. 370.

NON-APPEALABLE ORDERS SINCE STATEHOOD:

See decisions under Con. art. 8, sec. 9.

6991. (3301.) Appeal taken within six months. An appeal may be taken within six months from the entry of the judgment or order appealed from.

Cal. C. Civ. P., § 939*.
Time may not be extended, § 7023.
Notice of appeal, filing, service, § 6996.
Court cannot extend the time limited by statute for taking an appeal.
Brough v. Mighell, 6 U. 317; 23 P. 673.
Time to appeal cannot be extended by stipulation.
Anderson v. Halthusen Merc. Co., 30 U. 31; 83 P. 50.
Order refusing or granting motion for new trial not a final judgment, and an appeal does not lie therefrom; for the purpose of an appeal, judgment does not become final until motion for new trial has been disposed of, note to Con. art. 8, sec. 9.
Eastman v. Gurry, 14 U. 169; 46 P. 828.
Mader v. Taylor, R. A. Co., 15 U. 161; 49 P. 255.
White v. Pease, 15 U. 170; 49 P. 416.
Watson v. Mayberry, 15 U. 265; 49 P. 479.
Bear R. Co. v. Hanley, 15 U. 506; 50 P. 611.
Bacon v. Thornton, 16 U. 138; 51 P. 153.
Stoll v. Daly M. Co., 19 U. 271; 57 P. 295.
Snow v. Rich, 22 U. 123; 61 P. 336.
Felt v. Cook, 31 U. 299; 87 P. 1092.
Everett v. Jones, 32 U. 489; 91 P. 360.
Bowman v. Ogden City, 33 U. 196; 93 P. 561.
Luke v. Coleman, 38 U. 383; 113 P. 1023.
Audia v. D. & R. G. Ry. Co., 45 U. 459; 146 P. 559.
Walker Bros. v. Skliris, 34 U. 353; 98 P. 115.
An appeal not taken in time will be dismissed.
Felt v. Cook, 31 U. 299; 87 P. 1092.
Anderson v. Halthusen Merc. Co., 30 U. 31; 83 P. 560.
Henderson v. Barnes, 27 U. 348; 75 P. 759.
Blyth & F. Co. v. Swenson, 15 U. 345; 49 P. 1027.
Ryan & R. Cattle Co. v. Murdock, 8 U. 497; 33 P. 136.
Hanks v. Mathews, 8 U. 181; 30 P. 504.
Brough v. Mighell, 6 U. 317; 23 P. 673.
Mount v. Simons, 3 U. 230; 5 P. 563.
Dismissal of appeal generally, note to § 7009.
Where the record affirmatively shows the appeal was not taken in time, it must be dismissed.
Progress v. Dixie Ins. Co., 42 U. 263; 134 P. 1166.
An appeal in forcible entry and detainer must be taken within the time prescribed in § 7326.
Hunsaker v. Harris, 37 U. 226; 109 P. 1.
An appeal may be taken upon the entry of the judgment in the judgment book, and time does not begin to run until it is so entered.
Robinson v. S. L. City, 37 U. 520; 109 P. 817.
If taken before such entry, it must be dismissed and judgment cannot be entered.
Luckich v. Utah Con. Co., 48 U. 452; 160 P. 270.
An application for a rehearing of the order of the district court denying a motion for a new trial, not being recognized by the practice of this state, does not extend the time for appeal.
Luke v. Coleman, 38 U. 383; 113 P. 1023.
The time for appeal starts from the entry of judgment or overruling of motion for a new trial, not from the service of notice thereof, even though notice is served.
Jones v. Evans, 39 U. 291; 116 P. 333.
Lindley v. Bradshaw, 45 U. 83; 141 P. 300.
Lorntzen v. Hansen, 50 U. —; 171 P. 515.
Fuller v. Ferrin, 50 U. —; 168 P. 1179.
Provided the motion for new trial is filed within the period allowed for appeal, the court having no power to grant an extension of time beyond such period.
Minneapolis Threshing Machine Co. v. Fox, 51 U. —; 172 P. 699.
An appeal on the final decree of divorce, taken more than six months after the entry of interlocutory and within six months of entry of final decree, does not bring up for review the proceedings resulting in the interlocutory decree.
Custer v. Custer, 41 U. 575; 126 P. 880.
Where a motion for a new trial was overruled June 5, notice of appeal served December 6 following is too late.
Fuller v. Ferrin et al., 50 U. —; 168 P. 1170.

6992. (3302.) Record on appeal. The judgment roll and bill of ex-

ceptions, if there be one, shall constitute the record on appeal to the supreme court.

Cal. C. Civ. P., § 161*.
Judgment roll, § 6867.
Bill of exceptions, § 6969.
When appeal considered on judgment roll, note to § 6994.
Appeal shall be on record as made in court below, Con. art. 8, sec. 9.
Record on appeal; assignments of error, etc., note to § 6994.
Statutes contemplate but one record on appeal.
San Pedro, etc. v. S. L. City, 35 U. 13; 99 P. 263.
Where respondent has no cross-appeal and does not assign cross-errors the supreme court cannot review a decision in favor of appellant.
Gilbourne v. O. S. L. Ry. Co., 39 U. 80; 114 P. 532.
The opinion of the trial court, if properly a part of the record, cannot be looked to to ascertain what the court found or decided, but may be examined to ascertain the court's reason for its decision.
Miller v. Marks, 46 U. 257; 148 P. 412.
The record on appeal cannot, as a general rule, be amended by the appellate court.
State ex rel. Snell v. Third Dist. Court, 36 U. 267; 103 P. 261.

6993. (3303.) Any party may appeal. Designation of parties. Title unchanged. Any party to a judgment or decree may appeal therefrom. The party appealing is known as the appellant, the adverse party as the respondent. The title of the action or proceeding is not changed in consequence of the appeal.

Cal. C. Civ. P., § 938*.
Parties designated as plaintiff and defendant, § 5983.
On appeal to the district court, a guardian ad litem may properly be substituted for a general guardian appointed in another state.
Hyndman v. Stowe, 9 U. 23; 33 P. 227.
One of two or more defendants may appeal, the other not having been served with process nor appearing in the action.
Winters v. Hughes, 3 U. 438; 24 P. 907.
Parties having an interest in an estate can appeal from an order refusing to remove an administrator, and revoke letters of administration.
In re Reese Estate, 9 U. 171; 33 P. 698.
A brother of a deceased person who dies intestate without issue, but leaving a mother and father, cannot appeal from an order of the probate court made in the administration of the estate of the deceased.
Jones v. Jones, 12 U. 72; 41 P. 563.
Under provisions of § 7558, a failure to demur below to a petition to set aside the appointment of an administrator is a waiver of the objection, and, under this section, the petitioner cannot appeal from a denial of his petition, because not a party to the probate proceedings.
In re Tasanen's Estate, 25 U. 396; 71 P. 981.
Where plaintiff does not appeal, he cannot obtain a review of a ruling of the court against him, though he excepted to it when the ruling was made.
Betz v. People's Bldg. & L. S. Ass'n, 23 U. 604; 65 P. 592.
Sandberg v. Victor M. Co., 24 U. 1; 66 P. 360.
See Snyder v. Pike, 30 U. 102; 83 P. 692.
If an appeal is from a specific part of the judgment, and respondent desires review of matters not coming within the appeal taken, he must take a cross appeal; but when the whole judgment is appealed from, he needs only to serve and file his cross-assignments of error.
San Pedro, etc. v. Board of Education, 35 U. 13; 99 P. 263.
Gwilliam v. Ogden City, 49 U. 555; 164 P. 1022.
Co-parties desiring relief against each other on appeal must present such matters by cross-appeals, and one co-defendant may not, by merely filing cross-errors, assail the judgment in favor of plaintiff upon his co-defendant's appeal.
McCornick & Co. v. National Copper Bk., 49 U. 296; 163 P. 1097.
Big Cottonwood T. D. Co. v. Shurtliff, 49 U. 569; 164 P. 856.
To modify an independent portion of the decree not touched by the appeal is not the office of mere cross-assignments, but the peculiar province of a cross-appeal.
Id.
Where, in consolidated actions by material men against a contractor and a school district, the trial court rendered judgment in favor of the contractor's trustee in bankruptcy for the fund due the contractor from the school district, and part only of the material men appealed, those not appealing waived their rights to participate in the fund, and were not entitled to relief on appeal.
Geo. A. Lowe & Co. v. Leary, 49 U. 506; 164 P. 1052.
The defendant in a habeas corpus proceeding may appeal; it is not an attempted appeal by the state.
Winnovitch v. Emery, 33 U. 345; 93 P. 988.
In an action on a note where stock is pledged and personal judgment is waived, denial by the defendant administrator that the deceased owned any property in the county alleged is not a denial that he left property elsewhere, nor does it disclaim any interest in the stock, and the court has jurisdiction of an appeal.
Robison v. Gull, 51 U. —; 173 P. 905.

6994. (3304.) What may be reviewed on appeal. Necessity of motion for new trial. Upon an appeal from a judgment, all orders, rulings, and decisions in the action or proceeding to which exceptions have been taken in the court below, or which are deemed excepted to as provided by this code, are before the supreme court for review, and in equity cases any question of fact shall be reviewable by the supreme court without a motion for a new trial, and in all cases at law tried before the court without a jury, all questions of errors in findings of fact and conclusions of law legally reviewable by the supreme court shall be before the supreme court for review without a motion for a new trial, and either party to the appeal may assign any errors in findings of fact or conclusions of law, or that any findings of fact by the court are not supported by evidence, on appeal to the supreme court, without filing a motion for a new trial in the court below; *provided,* that this section shall apply to appeals hereafter taken, in all cases herein provided. Am'd '01, p. 25.

Cal. C. Civ. P., §956*.
Appeals to supreme court lie from final judgment only, Con. art. 8, sec. 9, and note.
Where actions shall be begun, Con. art. 8, sec. 5, and note.
Review by supreme court in cases at law, in equity cases, and in probate cases, Con. art. 8, sec. 9, and note.
Supreme court may reverse, affirm, or modify judgment; may direct trial court to cor-

rect findings and enter judgment thereon, etc., § 6995, and note.

Appeals in cases commenced in justices' courts, Con. art. 8, sec. 9, and note.

Discretion of court in the conduct of a trial, note to § 6802.

Discretion of court as to pleadings, amendments, defaults, etc., note to § 6619.

Sufficiency of the findings to support the judgment, note to § 6829.

Instructions to jury, generally, note to § 6802.

Trial court invading province of jury, note to § 6802.

Dismissal of appeals, § 7009, and note.

Appeals in cases commenced in city court, § 1717; municipal court, § 1756.

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The supreme court of this state has no power to review, on appeal, an order of a federal court declining jurisdiction and remanding the cause to the state court.

R. G. W. Ry. Co. v. Telluride P. T. Co., 23 U. 22; 63 P. 995.

Where a court of its own motion attempts to determine questions which are not before it, the judgment will be set aside.

Lily M. Co. v. Kellogg, 24 U. 195; 66 P. 875.

An error of the trial court, in directing or refusing to direct a verdict, is one of law, and reviewable by the supreme court.

Law v. Smith, 34 U. 394; 98 P. 300.

NECESSITY OF MOTION FOR NEW TRIAL:

Where record does not set forth any motion for new trial, but only order denying such motion, the appeal will be considered as though no such motion had been made. Evidence not considered.

Thompson v. Hays, 24 U. 275; 67 P. 670, which

On appeal, in a cause tried by the court without a jury, the sufficiency of the evidence to support the findings and the conclusions of law might be reviewed, though there had been no motion for a new trial. (Distinguishing Thompson v. Hays, 2 4U. 275; 67 P. 670, which was decided before amendment of 1901.)

Paulson v. Lyon, 26 U. 438; 73 P. 510.

A motion for new trial is not necessary in any case in order for the supreme court to review all matters which the lower court had an opportunity to pass on.

(Touse v. Con. Ry. & Power Co., 29 U. 95; 80 P. 506 overruled.)

Law v. Smith, 34 U. 394; 98 P. 300.

But respecting matters covered by subs. 2 to 5, § 6978, a motion for new trial involving such matters must be made, or same cannot be reviewed.

Id.

Sargent v. Union Fuel Co., 37 U. 392; 108 P. 928.

RECORD AS MADE BELOW:

Sufficiency of certificate as showing that bill of exceptions contains all the evidence, note to § 6969.

Sufficiency of the evidence to support the findings or the verdict not considered on appeal unless the record purports to contain all the evidence, note to § 6967.

Sufficiency of evidence on disputed points not considered unless bill of exceptions purports to contain all the evidence on such points, note to § 6967.

Dismissal of appeal for imperfect record, etc., note to § 7009.

Imperfect record may be cured, § 7011.

Exceptions not taken in time deemed waived, § 6965, and note.

Papers filed with the record, but not made a part thereof, cannot be considered.

Hussey v. Smith, 1 U, 129.

Bachman v. Smith, 1 U. 237.

Upon an appeal from the judgment alone, the appellate court may order records affecting the judgment to be certified up, although they form no part of the judgment roll.

McClelland v. Dickenson, 2 U. 100.

The supreme court will not review a cause upon an agreed statement of the evidence not referred to in the record.

Klimer v. Schnorf, 3 U. 442; 24 P. 909.

Intermediate orders will not be reviewed unless presented to the appellate court by bill of exceptions or statement on motion for new trial.

Reever v. White, 8 U. 188; 30 P. 685.

Lowell v. Parkinson, 4 U. 64; 6 P. 58.

An affidavit not included in the bill of exceptions or transcript and not presented to the trial judge on motion for new trial, which is brought to the attention of the supreme court for first time on argument on appeal, without notice to the other side, can form no part of the record in the appellate court, and is without legal merit.

State v. Morgan, 22 U. 162; 61 P. 527.

McKay v. Farr, 15 U. 261; 49 P. 649.

See Bowring v. Bowring, 4 U. 185; 7 P. 716.

Affidavits used on motion for new trial may be reviewed on appeal. But not unlesss preserved in bill of exceptions.

Wright v. U. P. Ry. Co., 22 U. 338; 62 P. 317.

Archibald v. Kolitz, 26 U. 226; 72 P. 935.

Midgley v. Bergerman, 30 U. 17; 83 P. 466.

Pence v. Cal. M. Co., 27 U. 378; 75 P. 934.

White v. Pease, 15 U. 170; 49 P. 416.

Nelson v. Brixen, 7 U. 454; 27 P. 578.

Perego v. Dodge, 9 U. 3; 33 P. 221; affirmed 163 U. S. 160.

Hecla G. M. Co. v. Gisborn, 21 U. 68; 59 P. 518.

Recitals in record cannot be impeached by anything outside the record.

Center Cr. Irr. Co. v. Thomas, 19 U. 360; 57 P. 30.

The instructions form a part of the judgment roll under § 6806, and being a part of the record, were properly before the court for review.

Utah Opt. Co. v. Keith, 18 U. 464; 56 P. 155.

Where the bill of exceptions is eliminated from the record on appeal, the court can determine only whether the judgment is supported by the pleadings, findings of fact, and conclusions of law.

Bryant v. Kunkel, 32 U. 377; 90 P. 1079.

Thompson v. Hays, 24 U. 275; 67 P. 670.

An order denying a motion to correct a judgment may be reviewed on appeal from the judgment, if properly preserved in the record.

Cullen v. Harris, 27 U. 4; 73 P. 1048.

The written opinion of a trial judge, stating the reasons for his action or judgment, cannot qualify or limit the finding or decision.

Grand Central M. Co. v. Mammoth M. Co., 29 U. 490; 83 P. 648.

Victor M. Co. v. Natl. Bank of Rep., 18 U. 87; 55 P. 72.

If preserved in a bill of exceptions it may be examined to ascertain the court's reason for its decision, but not what it found or decided.

Miller v. Marks, 46 U. 257; 148 P. 412.

The appellate court will pass on a point where error is assigned, though it was not argued in the lower court.

Holland v. C. W. & M. Co., 49 U. 43; 161 P. 922.

The supreme court, in reviewing a ruling on a motion for new trial, is ordinarily limited to the review of the specific rulings made by the trial court.

Law v. Smith, 34 U. 394; 98 P. 300.

The question of jurisdiction may be raised for the first time on appeal.
Davidson v. Munsey, 27 U. 87; 74 P. 431.
Jurisdiction of the appellate court must be made to appear from the record.
State ex rel. Snell v. Third Dist. Court, 36 U. 267; 103 P. 261.
The appellate court is restricted to the issues below, and the only question on appeal from findings is the sufficiency of evidence to support them.
Woolf v. Gray, 48 U. 239; 158 P. 788.
Where there might have been reasons for refusing to distribute an estate, and the trial court's reason did not appear, the appellate court will not search the record to ascertain whether a distribution should be ordered.
In re Pickard's Estate, 42 U. 105; 129 P. 353.

Pleadings:

Where defendant has obtained a ruling sustaining objections to any evidence on the ground that the complaint does not state a cause of action, and the complaint is dismissed, the sufficiency of the complaint is the only question before the appellate court, and the allegations of the answer are not available to defendant for any purpose.
Salt Lake County v. Clinton, 39 U. 462; 117 P. 1075.
A party whose counsel filed a motion invoking the action of the court, and on the hearing thereof repeatedly stated that pleadings were unnecessary, and all other parties who acquiesced in such action, were estopped thereafter from complaining that pleadings were not filed.
Salt Lake City v. Salt Lake County Canal Co., 43 U. 591; 137 P. 638.
Plaintiff cannot urge negligence or estoppel upon appeal, where the complaint does not allege either.
Simpson v. Denver & Rio Grande R. Co., 43 U. 105; 134 P. 883.
An objection to an assessment on corporate stock, not within any issue raised by the pleadings, will not be considered on appeal.
Smith v. Sinaloa L. & F. Co., 42 U. 445; 132 P. 556.

Instructions and Requests:

Instructions generally and decisions thereon, § 6802, and note.
Exceptions to instructions, when and how taken, § 6806, and note.
Exceptions to charge, when and how taken, note to § 6806.
Where the record fails to show what instructions were given, the supreme court cannot review the refusal of the court to give those which were requested.
Garr v. Cranney, 25 U. 193; 70 P. 853.
Kunkel v. Utah L. Co., 29 U. 13; 81 P. 897.
Where no exception to an erroneous charge is shown by the record on appeal, and error in giving such charge is not assigned, the judgment will not be reversed on that account.
Braegger v. O. S. L. R. R. Co., 24 U. 391; 68 P. 140.
Burt v. Utah L. & P. Co., 26 U. 157; 72 P. 497.
Boyle v. U. P. R. R. Co., 25 U. 420; 71 P. 988.
Where plaintiff requests that an issue be submitted to the jury, he cannot complain if such issue is found against him.
Gibson v. Doyle Co., 37 U. 21; 106 P. 512.
Where the jury could properly render a verdict for plaintiff by following either of two conflicting instructions, defendant, whose request induced the conflict and caused the error, cannot complain thereof.
Pulos v. Denver & Rio Grande R. Co., 37 U. 238; 107 P. 241.
A party who induced a trial court to give an improper instruction cannot complain thereof on appeal.
Hunter v. Roylance, 45 U. 135; 143 P. 140.
Where the only exception taken to an instruction was to one portion, the appellate court cannot consider as ground for a reversal complaints of other portions of the instruction urged for the first time in appellant's brief.
Dimmick v. Utah Fuel Co., 49 U. 430; 164 P. 872.
Where an instruction given and excepted to made proof of the time laid in the complaint material, requesting an instruction that such proof was not material, was not a condition precedent to review on appeal.
Beason v. Western Meat Co., 40 U. 398; 124 P. 335.
On appeal from a judgment awarding compensatory and punitive damages for assault and battery, appellant is not entitled to complain of plaintiff's failure to show right to punitive damages where he did not object to instructions thereon, nor present requests to charge thereon.
Hirabelli v. Daniels, 40 U. 513; 121 P. 966.
Where a requested instruction was given, word for word, except for the addition of two small phrases, an exception to the refusal of the instruction as requested and to the giving of the same as modified, was sufficient to warrant a review on appeal.
Jensen v. Ut. L. & Ry. Co., 42 U. 415; 132 P. 8.
Where evidence as to damages, not alleged, was admitted without objection, and defendant merely excepted to the charge given and failed to request withdrawal of such issue from the jury, he could not allege the error, if any, for the first time on appeal.
Woodward v. Daly West M. Co., 47 U. 411; 154 P. 782.

Evidence:

Where the court knows what the answer of the witness will be to a question, not indicating that the testimony sought is objectionable, and overrules the objection thereto, a motion to strike out the answer is not necessary for review on appeal.
Cromeenes v. S. P., L. A. & S. L. R. Co., 37 U. 475; 109 P. 10.
Where evidence is admitted conditionally upon other evidence being introduced, and such other evidence is not introduced, motion should be made, and excepted to if denied, to strike out the evidence conditionally admitted, in order to present the question for review on appeal.
Hydraulic C. B. Co. v. Christensen, 38 U. 525; 114 P. 524.
Where defendant objected to testimony of expert witness on the ground that no proper foundation had been laid and that he was not qualified, it could not on appeal claim that the admission of his opinion was erroneous in that he stated his "own opinion" as to value instead of his opinion as to market value.
S. L. Inv. Co. v. Oregon Short Line R. Co., 46 U. 203; 148 P. 439.
Where evidence of a damage, not alleged, was admitted without objection, defendant cannot on appeal urge that pleadings were not sufficient to warrant submission to the jury on such issue.
Woodward v. Daly West M. Co., 47 U. 411; 154 P. 782.

Orders and Rulings:

In determining whether error was committed in overruling a motion for a non-suit, the supreme court will consider only the evidence and record before the court when the motion was overruled.
Boyd v. S. P., L. A. & S. L. R. Co., 45 U. 449; 146 P. 282.
An order granting a new trial is reviewable on appeal from the second or final judgment.
Hirabelli v. Daniels, 44 U. 88; 138 P. 1172.
The ruling on a motion for non-suit will not be considered unless it is preserved in the record.
Russell v. Watkins, 49 U. 598; 164 P. 867.
Where the court dismisses an action and no exception is entered, the dismissal cannot be reviewed.
Beck v. Lee, 51 U. —; 172 P. 686.

Theory of Case:

Where trial court, at appellant's request, passed upon but one issue in rendering judgment, the supreme court cannot consider other issues.
Fee v. Natl. Bank of Rep., 37 U. 28; 106 P. 517.
A party is restricted on appeal to the theory of the case adopted by him at the trial.
Aaron v. Holmes, 35 U. 49; 99 P. 450.
Salt Lake Inv. Co. v. Fox, 37 U. 334; 108 P. 1133.

Schuyler v. Southern Pac. R. Co., 37 U. 581, 612; 109 P. 458-1025.

The rule that appellant may not depart from the theory of his case followed by him in the trial court does not apply to an appeal from a judgment dismissing the action upon sustaining a demurrer to the complaint, where the question is whether the complaint entitled the plaintiff to the relief prayed for or to any substantial relief.

Neilson v. Sanpete County, 40 U. 560; 123 P. 334.

Where an action is tried in lower court as for property damaged without just compensation, judgment for plaintiff cannot be sustained, on appeal, on the ground that the acts complained of constitute a private nuisance.

Twenty-second Corporation of Church, etc. v. O. S. L. R. Co., 36 U. 238; 103 P. 243.

Where case is tried as at issue upon a material point involved, plaintiff could not for the first time on appeal assume that the allegations regarding that point were not denied by the answer.

Surbaugh v. Butterfield, 44 U. 446; 140 P. 757.

Where, in an action for goods sold, defendant set up a breach of warranty, and plaintiff made no claim to the court below for recovery on the ground that the goods were of some value and that they had not been returned, such claim cannot be asserted on appeal.

Roylance Co. v. Pyne, 45 U. 75; 141 P. 301.

In an action for the death of a servant, held that the plaintiff did not base her entire right to recover upon the federal employers' liability act, and was not prevented from claiming on appeal that she was entitled to recover under the common law.

Grow v. Oregon Short Line R. Co., 44 U. 160; 138 P. 398.

Where the return on garnishment was not attacked below on the ground that it did not show proper service of garnishment, on which decision an appeal is based, the proceedings will be remanded with instructions to vacate the order of discharge and permit an amendment.

Bristol v. Brent, 36 U. 108; 103 P. 1076.

Where defendant merely excepted to the charge given and failed to request withdrawal of the issue of rib fractures from the jury because not complete, he should not urge the error, if any, for the first time on appeal.

Woodward v. Daly West M. Co., 47 U. 411; 154 P. 782.

Where the defendant adopted a definite theory in the trial court as to the facts established by the evidence, he would not be permitted to change that theory on appeal, and to assert that such facts were not established, and that he is entitled to a new trial.

Schuyler v. Southern Pacific Company, 32 U. 612; 109 P. 1025.

Assignments of Error:

General assignments of error for insufficiency of evidence without stating the particulars in which evidence is insufficient cannot be considered on appeal.

Marks v. Taylor, 23 U. 152; 63 P. 897.

Genter v. Conglomerate M. Co., 23 U. 165; 64 P. 362.

Wasatch Irr. Co. v. Fulton, 23 U. 466; 65 P. 205.

Van Pelt v. Park, 18 U. 141; 55 P. 381.

O. S. L. Ry. v. Russell, 27 U. 457; 76 P. 345.

Houtz v. U. P. Ry. Co., 35 U. 220; 99 P. 997.

Where record fails to show that exceptions were taken, assignments of error for instructions refused and given will not be considered on appeal.

Burt v. U. L. & P. Co., 26 P. 157; 72 P. 497.

Boyle v. U. P. Ry. Co., 25 U. 420; 71 P. 988.

An assignment that defendant excepts to a certain finding of fact or conclusion of law, without stating that such finding or conclusion is erroneous, is not an assignment of error.

Thompson v. Hays, 24 U. 275; 67 P. 670.

Where a judgment is based on findings of fact, an assignment of error against the judgment on the ground that it is not supported by the evidence raises no question as to sufficiency of the evidence to support the findings, and presents no question for review.

Crooks v. Harmon, 29 U. 304; 81 P. 95.

The only questions before an appellate court on appeal are those raised by assignments of error and also presented in appellant's brief.

Herriman Irr. Co. v. Keel, 25 U. 96; 69 P. 719.

Jenkins v. Mammoth M. Co., 24 U. 513; 68 P. 845.

First Natl. Bank v. Brown, 20 U. 85; 57 P. 845.

Errors assigned, but not argued in the brief or on oral argument, are deemed to be waived.

Jenkins v. Mammoth M. Co., 24 U. 513; 68 P. 845.

France v. Salt Lake & O. Ry. Co., 31 U. 302; 88 P. 1.

Firman v. Bateman, 2 U. 268.

State v. Campbell, 25 U. 342; 71 P. 529.

S. P., L. A. & S. L. R. Co. v. Board of Education, 35 U. 13; 99 P. 263.

Blue Creek L. & L. Co. v. Anderson, 35 U. 61; 99 P. 444.

Morris v. Salt Lake City, 35 U. 474; 101 P. 373.

Bowes v. Stilwell, 39 U. 377; 117 P. 876.

Vance v. Heath, 42 U. 148; 129 P. 365.

Connell v. O. S. L. R. Co., 50 U. —; 168 P. 337.

Where neither the transcript on appeal nor the abstract contains any assignments of error nor any points relied on for a reversal of the judgment, as required by supreme court rules 6 and 26, the appeal will be dismissed.

Ferris v. Modern Woodmen, 29 U. 309; 81 P. 141.

Supreme court rule 26, requiring appellant to assign errors in writing, signed by himself or counsel, to be served on the respondent and filed with the clerk of the supreme court, is not complied with by appellant placing in his abstract what purports to be an assignment of errors.

Lyon v. Mauss, 31 U. 283; 87 P. 1014.

Failure to file amended abstract and assignments of error within time allowed when they had been served in time is not jurisdictional, and where appellee is not prejudiced thereby, appeal will not be dismissed.

Bean v. Fairbanks, 46 U. 513; 151 P. 338.

Direction of a verdict for defendant cannot be reviewed on appeal where ruling is not assigned as error.

Teakle v. S. P., L. A. & S. L. R. Co., 32 U. 276; 90 P. 102.

An assignment of error that the decision is against the law is sufficient to present the failure of the court to find on all the material issues for review on appeal.

Dillon Imp. Co. v. Cleveland, 32 U. 1; 88 P. 670.

An assignment of error for overruling of demurrer is abandoned by failure to argue or refer to it in brief or in oral argument; but the sufficiency of the complaint to support the judgment may, nevertheless, be considered.

Dayton v. Free, 46 U. 277; 148 P. 408.

A question raised by appellee is not presented for review without a cross-assignment of error.

LeVine v. Whitehouse, 37 U. 260; 109 P. 2.

Propositions discussed in the brief, but not mentioned in assignments of error, will not be considered on appeal.

Beatty v. Shelley, 42 U. 592; 132 P. 1160.

Where defendant objected to admission of evidence, then moved to strike it out, and then requested the court to charge the jury to disregard it, assigning error only for the refusal of the court so to charge was not a waiver of the error.

Sweet v. Salt Lake City, 43 U. 306; 134 P. 1167.

Where an assignment of error for the refusal of a new trial relates to matters involving the discretion of the trial court, the supreme court can interfere only upon a showing of abuse of discretion.

Anderson v. S. L. & Ogden Ry. Co., 35 U. 509; 101 P. 579.

Unless proper assignments of error as to rulings on evidence are made on appeal, so that it appears what questions were raised in the trial court and what exceptions were reserved, error in rulings are deemed to be waived.

Loftis v. Pac. Mutual Life Ins. Co., 38 U. 532; 114 P. 134.

Assigning as error that the court erred in refusing a request does not raise the question of error in failing to charge the jury on a material issue, since if request did not correctly

state the law applicable to the facts, it was not error to refuse it.
McKinney v. Carson, 35 U. 180; 99 P. 660.

A question raised for the first time in the petition and argument for rehearing will not be considered.
Harrison v. Harker, 44 U. 541; 142 P. 716.
Swanson v. Sims, 51 U. —; 170 P. 774.

If an appeal is from a specified part of the judgment, and respondent desires to review matters not coming within the appeal taken, he must take a cross-appeal; but where the whole judgment is appealed from, he need only file an assignment of errors, in which event dismissal of the appeal by the appellant does not affect respondent's right to be heard on his assignment; and all parties affected by cross-error assigned should be served.
S. P., L. A. & S. L. R. Co. v. Board of Education, 35 P. 13; 99 P. 263.

Finding not assigned as error is not presented for review
Mountain Lake Mining Co. v. Midway Irr. Co., 47 U. 371; 154 P. 584.

Where several appellants jointly assign errors, an assignment bad as to one of them must be bad as to all.
McGuire v. State Bank of Tremonton, 49 U. 381; 164 P. 494.

Assignments that the findings are not supported by the evidence are sufficient, where there is no bill of exceptions, to permit the court to set aside the findings where the judgment roll is not sufficient to support the findings.
Swanson v. Sims, 51 U. —; 170 P. 774.

An assignment which simply says, "The court erred in rendering the following findings of fact," is not sufficient to permit a review of the evidence.
Eglund v. Fayter, 51 U. —; 172 P. 313.
Holt v. Great Eastern Casualty Co., 51 U. —; 173 P. 1168.

OBJECTIONS NOT MADE BELOW NOT CONSIDERED ON APPEAL:

Failure to take exceptions at proper time, § 6965, and note.
Objections to pleadings, etc., not taken deemed waived, § 6593, and note.
Objections to evidence must be specific or they will not be considered, § 6967, and note.

Matters not urged in court below cannot be considered on appeal.
Firman v. Bateman, 2 U. 268.
Walker v. Cont. Ins. Co., 2 U. 331.
Rhemke v. Clinton, 2 U. 438.
Miller v. Zeigler, 3 U. 17; 5 P. 518.
Young v. Martin, 3 U. 484; 24 P. 909.
People v. Peacock, 5 U. 237; 14 P. 332.
Wimmer v. Simon, 9 U. 378; 35 P. 507.
Cooper v. D. & R. G. Ry. Co., 11 U. 46; 39 P. 478.
Wasatch M'g Co. v. Crescent M'g Co., 148 U. S. 293; 7 U. 8; 24 P. 586.
Blish v. McCornick, 15 U. 188; 49 P. 529.
Whittaker v. Greenwood, 17 U. 33; 53 P. 736.
Summit Co. v. Boyden, 18 U. 351; 54 P. 977.
Warren v. Robinson, 25 U. 205; 70 P. 989.
Kunkel v. Utah Lumber Co., 29 U. 13; 81 P. 897.
Karren v. Rainey, 30 U. 7; 83 P. 333.

Appellate court will not consider any questions not properly brought before it by demurrer, exception, or otherwise.
Garner v. Van Patten, 20 U. 342; 58 P. 684.
State v. Morgan, 22 U. 162; 61 P. 527.

Objection to contempt proceedings having been heard on a legal holiday, contrary to § 1806, goes to the jurisdiction of the court, and may properly be raised for the first time on appeal.
Davidson v. Munsey, 27 U. 87; 74 P. 431.

Where defendant objected and excepted to the granting of a motion for new trial, his participation in a new trial without further objection is not a waiver of his right to urge upon appeal from final judgment the error in granting the new trial.
Hirabelli v. Daniels, 44 U. 88; 138 P. 1172.

Judgment will not be modified or reversed because of error of which no one complained in the lower court.
Snow v. West, 37 U. 528; 110 P. 52.

Pleadings:

The failure of the complaint to state a cause of action may be raised for the first time on appeal.
Aaron v. Holmes, 35 U. 49; 99 P. 450.

Where a complaint is amended without objection in the lower court by changing the name of the plaintiff, defendant is estopped from demanding a dismissal of the case on appeal.
Sargent v. Union Fuel Co., 37 U. 382; 108 P. 928.

Instructions and Requests:

Argument of counsel is not reviewable in the absence of a request for action by lower court thereon.
Andrews v. Free, 45 U. 505; 146 P. 555.

Evidence:

Where counsel on a trial remain silent and permit testimony, now complained of, to go to the jury, all objections that might legally have been interposed to its introduction are waived, and this court will not review the same on appeal.
Lebcher v. Lambert, 23 U. 1; 63 P. 628.

Where the cross-examination discloses that a witness giving expert evidence has no knowledge entitling him to testify, the matter cannot be reviewed in the absence of a motion to strike such evidence; and where objections to a hypothetical question did not point out what facts were erroneously included or omitted they may not later be reviewed on appeal.
Sargent v. Union Fuel Co., 37 U. 392; 108 P. 928.

A party objecting to evidence upon one ground may not, on appeal, complain of its admission upon other grounds.
Kipros v. Uintah Ry. Co., 45 U. 389; 146 P. 292.

In an action for death, where the complaint alleged that the widow was the sole heir, and no objection was made at the trial to evidence showing there was also a father surviving, it cannot be first claimed on appeal that the court should have granted a motion to dismiss because of such variance.
Sargent v. Union Fuel Co., 37 U. 392; 108 P. 928.

Where the defendant objected in the lower court to evidence as not proper for any purpose, it could not, on appeal, urge an additional specific objection.
Evans v. O. S. L. R. Co., 37 U. 431; 108 P. 638.

Orders and Rulings:

Where plaintiff both demurred and answered to cross-complaint, it not appearing that demurrer was ever called to court's attention, failure to rule thereon is not reversible error.
Darke v. Smith, 14 U. 35; 45 P. 1006.

Theory of Case:

Where the want of good faith in making a claim of a mechanic's lien was first raised on appeal, it will not be considered.
Sandberg v. Victor M. Co., 24 U. 1; 66 P. 360.

Where, in an action for trespass, the objection that plaintiff could not recover more than one-half of the costs was not made in the trial court, it will not be considered on appeal.
Smith v. Nelson, 23 U. 512; 65 P. 485.

In a suit to determine the ownership of a part of the consideration for the conveyance of realty, which was claimed as commissions by the grantee, the question of grantee's right to commissions for procuring the sale, not having been urged in the trial court, cannot be raised on appeal.
Hall v. McNally, 23 U. 606; 65 P. 724.

A point upon which error has been assigned and which has been argued in appellant's brief may be considered by the supreme court, though it was not argued in the court below.
Holland-Cook Mfg. Co. v. Con. W. & M. Co., 49 U. 43; 161 P. 922.

OBJECTIONS TO PLEADINGS, PARTIES, ETC., NOT MADE BELOW:

Objections to pleadings, etc., not taken in time deemed waived, § 6573, and note.

Where both parties have admitted certain facts to be true, neither of them, on appeal,

will be heard to contest or deny such admitted facts.
Metz v. Schweitzer, 8 U. 184; 30 P. 683.
Hamilton v. Dooly, 15 U. 280; 49 P. 769.

Pleadings:

Parties who admit a fact in their pleadings cannot question such fact on appeal.
Rogers v. Ogden Bldg. & S. Ass'n, 30 U. 188; 83 P. 754.

Objections to sufficiency of complaint may be raised for the first time in the appellate court, but in such case the defect may have been cured by verdict; the presumptions are in its favor. (Overruling Holt v. Pearson, 12 U. 63; 41 P. 560.)
Mangum v. Bullion-B. M. Co., 15 U. 534; 50 P. 834.
Voorhees v. Manti, 13 U. 435; 45 P. 564.
See Kuhn v. McAllister, 1 U. 273; affirmed 96 U. S. 87.
Auerbach v. S. L. Co., 23 U. 103; 63 P. 907.

Where the allegations of fraud in a complaint are general, but no objections are made thereto in the trial court, the defect is waived and cannot be raised on appeal.
Larsen v. Utah Loan & T. Co., 23 U. 449; 65 P. 208.

Where a complaint states a cause of action in general terms, objections that the allegations are uncertain, or indefinite, or ambiguous, must be taken advantage of by proper pleading before judgment or they will be waived.
Maynard v. Locomotive E. M. L. & A. Ass'n, 16 U. 145; 51 P. 259.

Objections to sufficiency of pleadings cannot be raised for the first time on appeal, and will not be considered in determining motion for nonsuit.
Jennings v. Pratt, 19 U. 129; 56 P. 951.

Defendant cannot for the first time object on appeal to prolixity of statement or mingling of causes of action in the complaint.
Brittain v. Gorman, 42 U. 586; 133 P. 370.

Where an ordinance is pleaded and made part of the complaint, whether a particular provision is legal or illegal, in connection with the other provisions and the allegations of the complaint, may present a mere question of law, and if it does, the grounds of illegality of the particular provision need not be specially pleaded to authorize its consideration on appeal.
Brummitt v. Ogden Waterworks Co., 33 U. 285; 93 P. 829.

A defense, to be available on appeal, must have been pleaded.
Mills v. Gray, 50 U. —; 167 P. 358.

Parties:

An objection on the ground of non-joinder of parties plaintiff is waived unless raised by demurrer or answer.
Spencer v. Van Cott, 2 U. 337.
Jungk v. Reed, 9 U. 49; 33 P. 236.

An objection on account of misjoinder of parties defendant is waived unless raised by demurrer or answer.
Stevens Imp. Co. v. S. Ogden L. B. & I. Co., 20 U. 267; 58 P. 843.
Fields v. Cobbey, 22 U. 415; 62 P. 1020.
Henderson v. Turngren, 9 U. 432; 35 P. 495.
Wenner v. Smith, 4 U. 238; 9 P. 293.

The objection that the plaintiff is not the real party in interest, when available by way of defense, must be raised by demurrer or answer, or it will be considered to have been waived.
Fritz v. Western Union T. Co., 25 U. 263; 71 P. 209.

PRESUMPTIONS IN FAVOR OF JUDGMENT:

Evidence presumed to have been sufficient to support the findings or the verdict, where the record does not purport to contain all the evidence, note to § 6969.

Unless the bill of exceptions purports to contain all the evidence on contested points, objections to its sufficiency on such points cannot be considered, note to § 6969.

Presumption in favor of action of court on motion for nonsuit, note to § 6848; on directing a verdict, note to § 6802; on conduct of trial generally, note to § 6802; in favor of findings, etc., note to § 6829; on motion for new trial, note to § 6978.

On appeal, all presumptions are in favor of the judgment; where record does not show grounds urged on motion for new trial, question will not be considered.
Thompson v. Hays, 24 U. 275; 67 P. 670.
McKay v. Farr, 15 U. 261; 49 P. 649.

Error appearing in the record can be avoided only by matter affirmatively shown by the record.
Conway v. Clinton, 1 U. 215.

Where appeal is taken on judgment roll alone, findings of lower court are conclusive.
Doane v. Snow, 2 U. 417.
Spencer v. Van Cott, 2 U. 337.
Coombs v. S. L. & Ft. D. Ry. Co., 11 U. 137; 39 P. 503.
Voorhees v. Manti, 13 U. 435; 45 P. 564.
Thompson v. Hays, 24 U. 275; 67 P. 670.
Bryant v. Kunkel, 32 U. 377; 90 P. 1079.
Raphael v. Wasatch & J. U. R. Co., 34 U. 97; 95 P. 1008.
McGuire v. State Bank of Tremonton, 49 U. 381; 164 P. 484.

In an equity case where record contains evidence justifying the decree, no errors in admitting or rejecting testimony will be considered on appeal.
Rogers v. Cook, 8 U. 123; 30 P. 234.
S. L. F. & M. Co. v. Mammoth M. Co., 6 U. 351; 23 P. 760.

Same rule in law cases tried without a jury.
Victoria Mining Co. v. Haws, 7 U. 515; 27 P. 695; affirmed 160 U. S. 303.

Error must affirmatively appear. It will not be presumed.
Walker v. Continental Ins. Co., 2 U. 331.
Firman v. Bateman, 2 U. 268.
Ruth v. Long, 3 U. 466; 24 P. 756.
Haynes v. Roberts, 4 U. 405; 11 P. 512.
Wright v. Ascheim, 4 U. 455; 11 P. 580.
Smyth v. Lawson, 7 U. 410; 27 P. 4.
Haws v. Victoria Mining Co., 7 U. 515; 27 P. 695; 160 U. S. 303.
Hyndman v. Stowe, 9 U. 23; 33 P. 227.
Henderson v. Higgins, 9 U. 290; 34 P. 61.
McKay v. Farr, 15 U. 261; 49 P. 649.

Charge not shown in full by the record will be presumed to have been correct.
Clampitt v. Kerr, 1 U. 246.
Ryan & Ream Cattle Co. v. Slaughter, 6 U. 278; 21 P. 997.
Garr v. Cranney, 25 U. 193; 70 P. 853.
Kunkel v. Utah L. Co., 29 U. 13; 81 P. 897.
Flint v. Nelson, 10 U. 261; 37 P. 479; affirmed 166 U. S. 276.

The rule that the lower court is presumed to have acted regularly and for sufficient cause has no application where the record affirmatively shows upon what ground the court based its action, and where the record speaks, presumptions will not be indulged.
Moyle v. McKean, 49 U. 93; 162 P. 63.

Judgment is presumed to be regular on appeal until the contrary is made to appear from the face of the record.
Hulse v. Swicegood, 49 U. 89; 162 P. 89.

In the absence of objection to the findings, they will be presumed to have been sustained by the evidence.
Larsen v. O. S. L. R. Co., 38 U. 130; 110 P. 983.

It is presumed that the jury has followed the instructions of the court.
Harris v. Ogden Steam L. Co., 39 U. 436; 117 P. 700.

Where findings are based merely on a presumption of fact, and such presumption is entirely dissipated, the findings are unsupported by the evidence, and the question becomes one of law.
Leland v. Bourne, 41 U. 125; 125 P. 652.

Unless it can be shown that the jury considered other causes of damage than that submitted to it by the court, it must be presumed that it followed the court's instruction.
Dee v. S. P., L. A. & S. L. R. Co., 50 U. —; 167 P. 246.

Where, under the findings, the court rendered judgment for the plaintiff on two theories, the judgment must, on defendant's appeal on the judgment roll without bill of exceptions, be upheld if either theory was correct.
Swanson v. DeVine, 49 U. 1; 160 P. 872.

In a law case, the findings of the trial court, if supported by some substantial evidence, are binding, and cannot be disturbed on appeal.
In re Frandsen's Will, 50 U. —; 167 P. 362.

Where the plaintiff's evidence tends to support the findings, they will not be disturbed on appeal.
Henker v. Lindsay, 34 U. 298; 97 P. 329.

On appeal, the presumption is that the findings of the lower court are correct, and unless this presumption is overcome, the judgment will be affirmed.
Roberts v. Bertram, 49 U. 280; 163 P. 787.

In cases involving water rights in arid regions, the appellate court should be very slow to interfere with judgments unless it is clear that equity and justice require such interference.
Big Cottonwood T. D. Co. v. Shurtliff, 49 U. 569; 164 P. 856.

Every presumption must be indulged on appeal in favor of the correctness of the judgment below, and in the absence of anything in the record to the contrary, the supreme court must presume that the trial court properly directed judgment for defendant.
Hutchinson v. Smart, 50 U. —; 169 P. 166.

HARMLESS ERRORS AND TECHNICALITIES:

Failure to find on immaterial issues, surplusage in findings, etc., note to § 6829.
Harmless errors in selecting jurors, notes to §§ 6795, 6799, 8927.
Non-prejudicial errors in instructions, note to § 6802.
Discretion of court in the conduct of the trial, admission of evidence, etc., note to § 6802.
Invading of province of jury, note to § 6802.
Errors disregarded unless prejudicial to substantial rights, §§ 6622, 6968, and notes.

Under § 9231, judgment will not be reversed for error which resulted in no prejudice to the appellant; and appellant cannot complain that judgment quiets title to property which he does not claim.
Worthen v. Peruvian Con. M. Co., 32 U. 8; 88 P. 679.
Azzalia v. St. Claire, 23 U. 401; 64 P. 1106.

Unless it affirmatively appears from the record that the ruling of the court was in fact, or in all probability, injurious to the rights of the objecting party, such ruling will not be reviewed by the court on appeal.
R. G. W. Ry. Co. v. Utah Nursery Co., 25 U. 187; 70 P. 859.

Appellant will not be heard to complain of an error in his favor.
Peck v. O. S. L. R. R. Co., 25 U. 21; 69 P. 253.

It may be shown from the record that what seems to be error is not fatal.
Madsen v. Utah L. & Ry. Co., 36 U. 528; 105 P. 799.

Where there was no jurisdiction of the garnishee or of the property, any error in the proceedings previous to the discharge was not prejudicial to the plaintiff.
Bristol v. Brent, 36 U. 108; 103 P. 1076.

Harmless errors in the admission and exclusion of evidence will not be considered on appeal.
Morris v. Salt Lake City, 35 U. 474; 101 P. 373.
Webber v. Salt Lake City, 40 U. 221; 120 P. 503.

Erroneous Admission of Evidence—Harmless:

Mere technical errors in respect to the form of questions or the admission of evidence, where no substantial right has been affected or denied.
Hempstead v. S. L. City, 32 U. 261; 90 P. 397.

That defendant was protected by automobile accident insurance, where verdict for only $1500 was rendered for miscarriage and possible permanent injuries.
Boeddcher v. Frank, 48 U. 363; 159 P. 634.

To receive evidence outside of the return on certiorari, as to whether the justice exceeded his jurisdiction by failing to fix a date for the trial and to notify the parties thereof.
Griffiths v. Justice's Court, 35 U. 443; 100 P. 1064.

Where a non-expert witness details the facts on which he bases his opinion, where it is evident that the jury must have reached the same conclusion as the witness.
Johnson v. U. P. R. Co., 35 U. 285; 100 P. 390.

Error in admitting hearsay evidence of facts established by other competent evidence.
Neesley v. S. P. R. Co., 35 U. 259; 99 P. 1067.

Evidence improperly admitted, if it does not change the result.
Kurtz v. Ogden Canyon S. Co., 37 U. 313; 108 P. 14.

Though the measure of damages was the diminution in the value of land, to admit evidence of injury to crops where the court correctly charged on the measure of damages, and the verdict showed that the jury had not been misled.
Jensen v. Davis & Weber C. C. Co., 44 U. 10; 137 P. 635.

Rulings on evidence, where the result would not have been changed.
Utah Banking Co. v. Newman, 44 U. 194; 138 P. 1146.

Hearsay testimony, which was brief and direct, and then ordered stricken out and the jury directed not to consider it.
Lindsay L. & L. S. Co. v. Smart L. & L. S. Co., 43 U. 554; 137 P. 837.

Evidence on a matter not in dispute.
Swan v. Salt Lake & Ogden Ry. Co., 41 U. 518; 127 P. 267.

Error in permitting witness to testify as to his opinion of the actual value of land rather than his opinion of its market value held to have been cured by the charge to the jury.
Salt Lake Invt. Co. v. O. S. L. Ry. Co., 46 U. 203; 148 P. 439.

Plaintiff's privileged communication to his physician, where the jury found that the defendant was not negligent.
Madsen v. Utah L. & P. Co., 36 U. 528; 105 P. 799.

Where a witness has frequently visited with testator and his wife, and held conversation with them, a denial of motion to strike a statement of witness that testator was afraid of his wife, "and dare not reply, though goaded beyond endurance, by her attack on his family."
In re Miller Estate, 36 U. 228; 102 P. 996.

Where, in an action for death of a railroad conductor in charge of the first section of a train, caused by the second section's running into it, the error in admitting a statement by a division superintendent to conductor in charge of second division, to the effect that the conductor had been discharged for running down a train which was on time, that he was dismissed from the service because of his total disregard of time table rules and instructions.
Meyers v. San Pedro, etc., 36 U. 307; 104 P. 736.

The admission of photographs illustrating condition of railroad track.
Johnson v. U. P. R. Co., 35 U. 285; 100 P. 390.

Where witness, without objection, testified that the speed of the train was between forty and fifty miles an hour, the error, if any, in admitting the testimony of another witness that the speed was over forty-five to fifty miles.
Id.

Where the uncontradicted evidence showed that a switch engine was equipped with a red lantern, the only conflict being as to whether it was burning at a particular time, the error, if any, in permitting the witness to identify the frame of a broken lantern as being the same one which was on the engine at the time.
Gilbourne v. O. S. L. R. Co., 39 U. 80; 114 P. 532.

Where appellant prevailed in his claim, error in admission or exclusion of evidence relating thereto.
Smith v. Gilbert, 49 U. 510; 164 P. 1026.

Where the action was tried to the court, the admission of incompetent evidence, where there was sufficient competent evidence to sustain the finding.
Spratt v. Paulson, 49 U. 9; 161 P. 1120.
Mower v. Olsen, 49 U. 373; 164 P. 482.

The same rule applies in a jury case, provided there is an abundance of competent evidence to prove the point.
Baird v. D. & R. G. Ry. Co., 49 U. 58; 162 P. 79.

Under the circumstances, error of the court in permitting a witness to answer a leading question and in refusing to strike out an answer which stated a conclusion, where the

basis of the conclusion was known to the jurors.
Barker v. Savas, 51 U. —; 172 P. 672.

Erroneous Exclusion of Evidence—Harmless:

Which could not have affected result of trial.
Ogden Valley Co. v. Lewis, 41 U. 183; 125 P. 687.

Where questions erroneously excluded were later allowed to be asked, the prior exclusion was harmless.
Dunn v. Salt Lake & Ogden Ry. Co., 47 U. 137; 151 P. 979.

The question as to whether witness noticed anything in plaintiff's condition that indicated that she was hurt not prejudicial where the evidence developed all the witness observed or heard concerning the plaintiff.
Sharpe v. Ogden Rapid Trans. Co., 48 U. 481; 160 P. 438.

A question on re-direct examination as to how much defendant could get for a certain lot of sheep not involved in the action, could not have injured defendant.
Holt v. Neilson 37 U. 566; 109 P. 470.

A portion of a deposition without introduction of the remainder, where the whole deposition was read in evidence.
Niebling & Co. v. James Coal & Ice Company, 44 U. 50; 137 P. 834.

Refusal to permit witness to testify to particular sales of similar property, as bearing on the question of value was harmless, where he was permitted to testify that he had bought and sold land and knew of sales of similar lands, and knew the market value of the land of the defendant.
Telluride Power Co. v. Bruneau, 41 U. 4; 125 P. 309.

Where testimony excluded on defendant's exception was or could have been later introduced by plaintiff, the error, if any, in excluding it was harmless.
P. A. Sorensen Co. v. D. & R. G. R. Co., 49 U. 548; 164 P. 1020.

Where defendant in a personal injury action was asked whether work on his property had been suspended because of insolvency but the question was withdrawn, there was no prejudicial error.
Requa v. Daly-Judge M. Co., 46 U. 92; 148 P. 448.

Erroneous Instruction—Harmless:

Defendant cannot complain of an erroneous instruction favorable to itself and prejudicial to plaintiff.
Smith v. S. P., L. A. & S. L. R. Co., 35 U. 360; 100 P. 673.

In an action by a brakeman against a railroad company for injuries, an instruction presenting the last clear chance rule, though erroneous, was not prejudicial, where the evidence clearly showed that plaintiff's injury resulted from the negligence of his fellow servant.
Bunker v. U. P. R. R. Co., 38 U. 575; 114 P. 764.

Where, in a suit for goods sold and delivered, the buyer relied on his refusal to accept them because they were not of the quality represented, refusal to submit the issue whether buyer could reject them because the seller shipped a quantity in excess of that ordered was not prejudicial to the seller.
Wall Rice M. Co. v. Continental S. Co., 36 U. 121; 103 P. 242.

An improper instruction as to the weight of evidence on an issue, as to which the jury found in plaintiff's favor, was not prejudicial to plaintiff.
Gibson v. Doyle, 37 U. 21; 106 P. 512.

An instruction in an action for wrongful death given at plaintiff's request which is equivocal as to whether it allows recovery of interest will be presumed prejudicial to defendant.
Grow v. O. S. L. Ry. Co., 47 U. 26; 150 P. 970.

That instructions are long and to some extent repeated, will not affect a verdict.
Evans v. O. S. L. Ry. Co., 37 U. 431; 108 P. 638.

Plaintiff may not complain of the court's instructions, which, though irreconcilable and inconsistent, were prejudicial only to defendants.
Connell v. O. S. L. R. Co., 50 U. —; 168 P. 337.

An erroneous instruction may be harmless where the controlling facts in the case show the liability on another ground than covered in the instruction.
Staton v West. Mac. Mfg. Co., 51 U. —; 174 P. 821.

Erroneous Orders and Rulings—Harmless:

The error in overruling a demurrer to a counterclaim was not prejudicial to plaintiff, where the court and jury found plaintiff had no cause of action, and damages allowed under the counterclaim were remitted.
Smith v. Alvord, 31 U. 346; 88 P. 16.

The overruling of a demurrer to complaint as uniting two distinct causes of action is harmless where the court withdraws one cause of action from the jury.
Skeen v. Paine, 32 U. 295; 90 P. 440.

After the occasion for a receiver has passed, an order declaring void the appointment will not be reversed for technical errors.
Popp v. Daisy G. M. Co., 27 U. 83; 74 P. 426.

Where plaintiff, suing to quiet title, does not prove title, either in law or equity, error in finding for defendant on insufficient evidence of title, or in permitting defendant to set up an additional title in supplemental answer, is harmless.
Fares v. Urban, 46 U. 609; 151 P. 57.

Where a cause of action is stated only as to one who is not a party to the action, the sustaining of a general demurrer is not prejudicial to plaintiff.
Arnold v. Pope, 37 U. 204; 108 P. 331.

Error in a finding which is contrary to all the evidence is immaterial where the judgment corrects the error.
Utah Commercial & Savings Bk. v. Fox, 40 U. 205; 120 P. 840.

Refusal to permit amendment of complaint to conform to proof, where plaintiff is not entitled to recover under the proof.
Lawley v. Wade, 39 U. 537; 118 P. 484.

Error, if any, in vacating a non-suit before trial is not prejudicial to defendant.
Brittain v. Gorman, 42 U. 586; 133 P. 370.

Where issues not expressly found are necessarily negatived by specific findings, or where it clearly appears from the specific findings that such issues would necessarily be found adverse to the defeated party, a failure to find on such issues is a harmless error if the findings support the judgment.
Munsee v. McKellar, 39 U. 282; 116 P. 1024.

SECOND APPEAL. RES ADJUDICATA:

Decisions on validity and conclusiveness of judgments generally, note to § 6853; of probate orders and decrees, §§ 7559, 7560, 7564, 7752, 7756, 7867, 7870.

Decisions on former appeal is the law of the case, and judgment below in accordance therewith, the questions of law and fact being the same, will not be reviewed.
Venard v. Green, 4 U. 456; 11 P. 337.
Whittemore v. Cope, 11 U. 344; 40 P. 256.
Krantz v. R. G. W. Ry. Co., 13 U. 1; 43 P. 623.
Brimm v. Jones, 13 U. 440; 45 P. 46; 165 U. S. 180.
First Nat'l Bank of Hailey v. Lewis, 13 U. 507; 45 P. 800.
Potter v. Ajax M. Co., 22 U. 273; 61 P. 999.
Silva v. Pickard, 14 U. 245; 47 P. 144.

Former opinion based on different evidence will not bind the court on second appeal.
Societe des Mines v. Mackintosh, 7 U. 35; 24 P. 669.
Herriman Irr. Co. v. Keel, 25 U. 96; 69 P. 719.

A decision of the supreme court is the law of the case on a re-trial thereof.
Brooks v. W. U. Tel. Co., 28 U. 21; 76 P. 881.
Potter v. Ajax M. Co., 22 U. 273; 61 P. 999.
Silva v. Pickard, 14 U. 245; 47 P. 144.
Tyng v. Constant-Loraine Inv. Co., 47 U. 330; 150 P. 767.

And on a second appeal.
Houtz v. U. P. R. Co., 35 U. 220; 99 P. 997.
Teackle v. L. A. & S. L. R., 36 U. 29; 102 P. 635.
Grow v. O. S. L. R. Co., 47 U. 26; 150 P. 970.
Utah A. C. M. v. Boyle, etc., 43 U. 523; 136 P. 572.

The supreme court may reverse a former decision in a case where the weight of authority is against such decision, and it is apparent

that injustice will be done in all cases of like character, and where the court is not a court of last resort.

U. S. v. Elliot, 12 U. 119; 41 P. 720.

Where plaintiff was awarded damages but denied injunction, and appeals from the refusal to grant the injunction, and the appellate court decides such refusal to be error, and reverses the judgment, defendant is not entitled to a new trial on the question of damages, as the judgment for damages is res judicata.

Coombs v. Salt Lake & Ft. D. Ry. Co., 11 U. 137; 39 P. 503.

No appeal lies from judgment of district court in substantial compliance with mandate of appellate court.

Krantz v. R. G. W. Ry., 13 U. 1; 43 P. 623.

First Nat. Bank of Hailey v. Lewis, 13 U. 507; 45 P. 890.

People's B. L. & S. Ass'n v. Fowble, 18 U. 206; 55 P. 57.

Fenton v. S. L. County, 4 U. 466; 11 P. 611.

The decision of an appellate court constitutes the law of the case only as to such questions as were necessarily involved in such decision, and were presented to the court and expressly or impliedly decided.

Herriman Irr. Co. v. Keel, 25 U. 96; 69 P. 719.

Where a case is reversed and a new trial ordered without any restrictions or limitations, the entire case is reopened, and the parties hold the same relative positions with respect to the introduction of evidence, burden of proof, etc., as if the case had never been tried.

Church v. Watson, 27 U. 538; 76 P. 706.

The decision of the supreme court on appeal from a judgment denying a motion for new trial based on the ground of the misconduct of the jury is res judicata on a subsequent application for a new trial based on the same ground, though the affidavits supporting the second motion show more in detail the misconduct complained of.

State v. Mortensen, 27 U. 16; 74 P. 120, 350.

The duty of a trustee to account for all funds received by him, including the proceeds of a mortgage sale to him of a part of the trust property, having been determined in a prior action, the decision is res judicata in a subsequent action against him by other cestui que trust in so far as it related to his duty to account to them with respect to the same funds.

Felkner v. Dooly, 27 U. 350; 75 P. 854.

A judgment is conclusive not only as to matters actually determined, but also as to every other matter which might have been litigated between the parties as part of the subject in controversy, but which was omitted from the case by negligence, inadvertance, or accident.

Peay v. Salt Lake City, 11 U. 331; 40 P. 206.

Everill v. Swan, 20 U. 56; 57 P. 716.

The fact that the finding in the former action quieting title to the crusher and motor in the defendant went beyond the allegations of defendant's answer in the instant case is immaterial, and in no way affects the question of res adjudicata.

Jeremy etc. v. Mellen, 50 U. —; 165 P. 791.

The decision of the supreme court that a certain defendant is not liable in an action for personal injuries controls that question on a subsequent appeal.

Requa v. Daly-Judge M. Co., 46 U. 92; 148 P. 448.

A decision affirming a judgment is of no controlling force in a subsequent case as to any question involved, but not argued or presented, and left unnoticed or not passed on by the court.

Salt Lake Inv. Co. v. O. S. L. R. Co., 46 U. 203; 148 P. 439.

Where the supreme court, on a prior appeal from a judgment dismissing a counterclaim, decided that the judgment was final and appealable, it also necessarily decided that the case was divisible, and that the judgment dismissing the counterclaim was independent of the case named in the original complaint.

Grand Central v. Mammoth, 36 U. 364; 104 P. 573.

DISCRETION OF LOWER COURT:

As to amendments, pleadings, etc., § 6620, and note.

The supreme court may not exercise the discretion which the lower court should have exercised in granting a new trial, and where the trial court has refused a new trial, the supreme court may only look to the evidence to ascertain whether any substantial evidence supports the verdict.

James v. Robertson, 39 U. 414; 117 P. 1068.

It is within the discretion of the lower court to submit or refuse to submit particular questions of fact to the jury, and error therein cannot be imputed without a showing of abuse of discretion.

Prye v. Kalbaugh, 34 U. 306; 97 P. 331.

In the absence of an abuse of discretion the denial of a motion for new trial will not be disturbed on appeal.

Lancino v. Smith, 36 U. 462; 105 P. 914.

Ruling of the trial court allowing amendments will not be disturbed except for abuse of discretion.

Benson v. O. S. L. R. Co., 35 U. 241; 99 P. 1072.

Denial of motion for continuance on the ground of absence of witness will not be disturbed on appeal, unless an abuse of the discretion of the court appears.

Lancino v. Smith, 36 U. 462; 105 P. 914.

It is within the discretion of the trial court to permit a witness to examine an instrument before testifying whether his alleged signature to it is genuine.

Fee v. National Bank of Republic, 37 U. 28; 106 P. 517.

6995. (3304x.) May reverse, affirm, or modify. Remittitur. Decision in writing. The court may reverse, affirm, or modify any order or judgment appealed from, and may, in case the findings are incomplete in any respect, order the court from which the appeal is taken to add to, modify, or complete the findings, so as to make the same conform to the issues presented and the facts as the same may be found to be by the trial court from the evidence, and may direct the trial court to enter judgment in accordance with the findings when corrected as aforesaid, or may direct a new trial, in any case, or further proceedings to be had. Its judgments or orders must be remitted to the court from which the appeal is taken. The decisions of the court shall be given in writing; and in giving a decision, if a new trial is granted, the court shall pass upon and determine all the questions of law involved in the case presented upon such appeal and necessary to the final determination of the case. Any justice dissenting may give the reasons thereof in writing over his signature, and file the same in the case. R. S. '98, § 655; '07, p. 260.

Decisions to be in writing and filed, Con. art 8, sec. 25.

Shall prepare a syllabus of all points adjudicated, Con. art. 8, sec. 26.

Review by supreme court in equity cases and in cases at law, note to Con. art. 8, sec. 9.

Jurisdiction of supreme court, Con. art. 8, secs. 4, 9.

Decisions on record on appeal, presumptions, etc., note to § 6997.

Remittitur to lower court within thirty days, § 7013.

Appeals lie to supreme court from final judgments only, Con. art. 8, sec. 9, and note.

Sufficiency of findings to support judgment, note to § 6829.

Instructions to jury, generally, note to § 6802, exceptions to same, note to § 6806.

Judgment roll, how made up, § 6867, and note.

The supreme court is the exclusive judge of its own jurisdiction.

First Nat. Bank v. Lewis, 13 U. 507; 45 P. 890.

It is not necessary or usual for the supreme court to pass upon each and every question raised on appeal when the case is reversed. It is sufficient to pass upon and determine such questions raised on the appeal as are necessary to the final determination of the case.

Wright v. S. P. Co., 15 U. 421; 49 P. 309.

MODIFICATION OF JUDGMENTS, ETC.:

Supreme court may modify judgments.

Salt Lake City v. Colladge, 13 U. 522; 45 P. 891.

First Nat. Bank of Hailey v. Lewis, 13 U. 507; 45 P. 890.

Having all the evidence before it, court may modify decree as seems just, irrespective of findings below.

Salina Creek Irr. Co. v. Salina Stock Co., 7 U. 456; 27 P. 578.

Paragoonah F. & C. Co. v. Edwards, 9 U. 477; 35 P. 487.

Findings and decree as to water rights not sufficiently specific will be set aside or modified.

Nephi Irr. Co. v. Vickers, 15 U. 374; 49 P. 301.

Same case, 20 U. 310; 58 P. 836.

Lost Cr. Irr. Co. v. Rex, 26 U. 485; 73 P. 660.

Smith v. Phillips, 6 U. 376; 23 P. 932.

Holman v. Pleasant Grove, 8 U. 78; 30 U. 72.

The opinion of a justice concurring in the reversal of judgment for plaintiff held to have necessarily concurred in the affirmative judgment for defendant.

Mountain L. M. Co. v. Midway Irr. Co., 47 U. 371; 154 P. 584.

Where the evidence in an action to determine the right to certain waters is conflicting and insufficient upon which to base a decree, the cause will be remanded with directions to the trial court to permit the introduction of additional evidence in order to determine definitely the rights of the parties.

Nephi Irr. Co. v. Vickers, 20 U. 310; 58 P. 836.

Same case, 15 U. 374; 49 P. 301.

Immaterial findings may be set aside and others modified and judgment allowed to stand.

Conner v. Raddon, 16 U. 148; 52 P. 764.

The supreme court has power to order judgment entered for plaintiff on the demurrer in the court below.

Gammon v. Bunnell, 22 U. 421; 64 P. 958.

Fenton v. S. L. County, 4 U. 466; 11 P. 611.

Findings that are inconsistent with each other, and against the pleadings and the preponderance of the evidence, will be set aside on appeal.

Sandberg v. Victor M. Co., 44 U. 1; 66 P. 360.

In a law case the supreme court is not authorized to find facts or to draw deductions from them, and treat as found that which might have been found.

Mitchell v. Jensen, 29 U. 346; 81 P. 165.

In an equity case, where findings and decree were against the weight of the evidence, case remanded with directions to adopt findings and decree proposed by appellant.

Nephi Irr. Co. v. Vickers, 29 U. 315; 81 P. 144.

Copper Globe M. Co. v. Allman, 23 U. 410; 64 P. 1019.

Under this section, as amended in 1907, if the trial court fails to find upon all material issues, the appellate court may remand case with directions to trial court to make complete findings and enter judgment thereon. (Distinguishing Dillon Imp. Co. v. Cleaveland, 32 U. 1; 88 P. 670.)

Everett v. Jones, 32 U. 489; 91 P. 360.

Utah Ass'n Credit Men v. Home Fire Ins. Co., 36 U. 20; 102 P. 631.

A judgment entered according to such a direction is appealable.

Id.

Where plaintiff's actual damages were certain and ascertainable, amounting to $54.60, and he was erroneously permitted to recover exemplary damages and the verdict called for $854.60, the court on appeal would not reverse the judgment unconditionally, but will affirm it for $54.60 conditioned on remittitur of $800.

Rugg v. Tolman, 39 U. 295; 117 P. 54.

Where a judgment is reversed, and it is apparent from the entire record that plaintiff cannot make a proper case for relief under the facts as set forth in the complaint, nor under any proper amendment thereof, the lower court will be directed to dismiss the action.

Jones v. Bonanza M. Co., 32 U. 489; 91 P. 273.

Where, in an equity case, it appears that the lower court erroneously overruled a demurrer to the complaint, and that if the demurrer had been sustained the complainants would probably have amended their complaint to permit the introduction of evidence sustaining their claim, the supreme court, instead of making or directing findings for a judgment for appellant, will remand the case for another trial.

Farr v. Wheelwright C. Co., 49 U. 274; 163 P. 256.

Where the supreme court is satisfied that the findings are clearly against the evidence, or that the presumption of their correctness has been overcome by the record, it must make or direct findings according to the evidence and the law applicable thereto.

Little v. Stringfellow, 46 U. 576; 151 P. 347.

Where findings are uncertain and insufficient, the supreme court may remand case with instructions to vacate findings and judgment, to make findings of fact on all issues, and to make conclusions of law on the facts so found, and to enter judgment accordingly.

Utah Ass'n of Credit Men v. Home Ins. Co., 36 U. 20; 102 P. 631.

In an equity case, the supreme court may try the case de novo on the record, and make or direct the necessary findings before any question of law can be considered or conclusion reached either on the law or facts.

Doe v. Doe, 48 U. 200; 158 P. 781.

Where inadmissible evidence was received in an action for damages, the judgment will be reversed, notwithstanding there is evidence to support the verdict.

Cleary v. Shand, 48 U. 640; 161 P. 453.

A judgment in favor of defendant upon its counterclaim for conversion will be reversed without remand, where evidence is not sufficient to sustain it, and the judgment was rendered in obedience to an erroneous instruction, and where the verdict on a previous trial, when the evidence was the same but no such instruction was given, was in favor of plaintiff.

Utah Foundry Co. v. Utah Gas & Coke Co., 42 U. 533; 131 P. 1173.

Where the lower court held that the evidence of defendant was immaterial and struck it out and thereupon plaintiff did not cross-examine, the court upon reversing the case should not enter the judgment but should remand it for new trial.

Thomson v. Reynolds, 51 U. —; 174 P. 164.

Where it appears, in an action at law, that the plaintiff is not entitled to any damages for breach of contract, the supreme court, on reversing judgment, will not remand the case for a new trial, but will direct its dismissal.

Depp v. Richards, 43 U. 332; 135 P. 98.

Where the evidence did not establish a mechanic's lien, but would support a judgment for a specified sum, the court, on appeal, will not enter judgment where claimant may be able to establish a lien, but will remand the case for a new trial.

Hathaway v. United Tintic Co., 42 U. 520; 132 P. 388.

Greenhalgh v. United Tintic Co., 42 U. 524; 132 P. 390.

The supreme court will not finally determine the rights of parties where the issues raised were not disposed of in the court below, and evidence was not heard thereon.

Brunswick Realty Co. v. University Inv. Co., 43 U. 75; 134 P. 608.

Where judgment was reversed and a new trial directed, without explicit directions being given, the case stands in the lower court as it did before the first trial, and the lower court may allow amendments except such as would open questions adjudicated by the appellate court.

Larsen v. Gasberg, 43 U. 203; 134 P. 885.

In a suit to enjoin the collection of an improvement assessment in which the trial court refused all relief, and it appears that only a portion of the tax was valid, and the record does not sufficiently show on appeal what portion of the tax is valid, the appellate court, on reversing the case, will not order new trial, but will remand to ascertain the extent to which the tax is invalid and should be enjoined.

Gwilliam v. Ogden City, 49 U. 555; 164 P. 1022.

After two appeals had previously been taken and four juries had passed on the facts and found in the plaintiff's favor, judgment will not be interfered with unless defendant has been prejudiced in some substantial right during progress of trial or in submission of case to jury.

Tyng v. Constant-Loraine Inv. Co., 50 U. —; 165 P. 509.

Where it was more convenient to make and enter conclusions of law in the district court, the supreme court will do no more than indicate and direct what the findings, conclusions of law, and judgments shall be, and remand.

Wheelwright v. Roman, 50 U. —; 165 P. 513.

6996. (3305.) Notice of appeal; filing; service; undertaking within five days. Undertaking not required, when. An appeal is taken by filing with the clerk of the court in which the judgment or order appealed from is entered a notice stating the appeal from the same, or some specific part thereof, and serving a similar notice on the adverse party or his attorney. The order of service is immaterial, but within five days after service of the notice of appeal an undertaking shall be filed or a deposit of money be made with the clerk, as hereinafter provided, or the undertaking be waived in writing by the adverse party; *provided*, that where the appellant makes and files with the clerk of the court from which the appeal is taken an affidavit in the form set out in § 2577, no bond on appeal shall be required; and where such affidavit is filed, the clerk of the court from which the appeal is taken shall certify that the appellant has made and filed an affidavit as provided for in § 2577.

Am'd '99, p. 83.

Cal. C. Civ. P., § 940*.

Appeal taken within six months, § 6991.

Imperfect appeal may be cured by permission, § 7011.

Notices, and filing and service of papers, §§ 7024-7032.

Record as made in court below, note to § 6994.

When executors, etc., need not give bond on appeal, § 7005, and note.

Time to file undertaking may be extended, § 7023.

Where findings only show service of notice of appeal from inferior court, it will be sufficient as against collateral attack.

Kinney v. Lewis, 2 U. 512.

One notice and undertaking only are required on appeal from judgment and order denying new trial in same case.

Mount v. Simons, 3 U. 230; 5 P. 563.

Judgment on appeal from probate court is not binding on parties who are not made such in the appellate court.

In re Gibbs, 4 U. 97; 6 P. 525.

Appeal will be dismissed where record fails to show service of notice.

Voorhees v. Manti City, 13 U. 435; 45 P. 564.

That the notice of appeal shows an attempt thereby to appeal from the order overruling motion for new trial is immaterial if the notice is otherwise sufficient, as such part is mere surplusage.

Lyon v. Mauss, 31 U. 283; 87 P. 1014.

An appeal on a pauper oath is constitutional.

Eddington v. Union Portland Cement Co., 42 U. 274; 130 P. 243.

Sheppick v. Sheppick, 44 U. 131; 138 P. 1169.

Where a pauper oath is filed on appeal, typewritten abstract and brief may be filed.

Dunn v. S. L. & Ogden Ry. Co., 47 U. 137; 151 P. 979.

The insertion of the wrong date of rendition of the judgment does not vitiate the appeal.

Price v. Western L. & S. Co., 35 U. 379; 100 P. 677.

Where the court makes an allowance to the defendant on his counterclaim and renders judgment for the plaintiff for the balance due, plaintiff's notice of appeal from the specific part of the judgment entered therein, wherein the court on the counterclaim entered judgment in favor of the defendant and deducted the same from the balance due, is not sufficient, as there is only one judgment.

Sierra Nevada Mill Co. v. Keith-O'Brien, 48 U. 12; 156 P. 943.

Where the plaintiff appealed from only so much of the judgment as decreed a lien upon the land against her, the defendants merely assigning cross-errors thereon, the main judgment for cancellation of the deed could not be disturbed on appeal.

Rosenthyne v. Matthews-McCulloch Co., 50 U. —; 168 P. 957.

ADVERSE PARTIES, ETC.:

Appeal dismissed for failure to serve all adverse parties with notice.

Com'l Nat. Bank v. U. S. Sav. Co., 13 U. 189; 44 P. 1043.

Rache v. Stanley, 15 U. 314; 49 P. 648.

Stephens v. Stevens, 27 U. 261; 75 P. 619.

Nelden Judson Co. v. Com'l Nat. Bank, 31 U. 42; 86 P. 498.

Griffin v. S. P. Co., 31 U. 296; 87 P. 1091.

Walker Bros. v. Skliris, 34 U. 353; 98 P. 114.

Where in a water case various defendants owned separate, not joint interests, and the judgment was several not joint, failure to join all of the defendants in an appeal is not fatal.

Gunnison Irr. Co. v. Gunnison High Canal Co., 51 U. —; 174 P. 852.

Where there is a joint judgment against two, and only one appeals, if the other is not served with notice, the appeal must be dismissed.

Mallett v. Velie Motor Car Co., 50 U. —; 164 P. 877.

The supreme court is bound by the record as certified, and the service of notice of appeal on the attorneys of record is conclusive, even though they filed no pleadings.

Walker Bros. v. Skliris, 34 U. 353; 98 P. 114.

In an action in rem notice must be served on adverse party, even though he is a nonresident, and service of summons was by publication.

Allen v. Garner, 45 U. 39; 143 P. 228.

The filing and service of notice of appeal within the time required by law is essential to clothe the supreme court with jurisdiction. Consent cannot confer jurisdiction.

Anderson v. Halthusen Merc. Co., 30 U. 31; 83 P. 560.

Adverse party herein means every party to the action, however brought in, whose interests require that the order, decree, or judgment appealed from be sustained.

Com'l Nat. Bank v. U. S. Sav. L. & B. Co., 13 U. 189; 44 P. 1043.

Rache v. Stanley, 15 U. 314; 49 P. 648.

On appeal by one of three defendants from an order overruling motion to set aside a judgment as to himself, it is not necessary to serve notice on those not appealing, when they con-

cede it correct as to themselves but not as to him. In that case, under § 3636, C. L. U. 1888, they cannot be regarded as adverse parties.

Blyth & Fargo Co. v. Swenson, 15 U. 345; 49 P. 1027.

Co-defendants not served with notice of appeal may waive same in writing and consent to jurisdiction of appellate court.

Works v. Samuelson, 16 U. 119; 51 P. 150.

Provided such waiver be filed within the time an appeal may be taken.

Allen v. Garner, 45 U. 39; 143 P. 228.

Where additional parties were made defendants, and findings and decree recited that judgment could be entered against them for excess required to be paid by original defendants, on application to the court, they were adverse parties under this chapter, providing for service of notice of appeal on adverse parties.

Stephens v. Stevens, 27 U. 261; 75 P. 619.

All defendants who are made parties and served, and against whom judgment is had, are adverse parties who must be served with notice of appeal.

Griffin v. S. P. Co., 31 U. 296; 87 P. 1091.

An assignment of judgment, under provisions of this section, does not abate the action, but the same may be carried on in the name of the original party, or the court may allow substitution of the transferee, but, until substitution has actually been made, a notice of appeal may be served on the judgment creditor.

Schroeder v. Pratt, 21 U. 176; 60 P. 512.

Defendants disclaiming all interest in the subject matter, or who did not answer and are shown to have no interest, are not necessary parties to an appeal.

Plough v. Nelson, 45 U. 35; 161 P. 1134.

A contractor who defaulted in a mechanic's lien case need not be joined in an appeal.

Langton Lime & Cement Co. v. Perry, 48 U. 112; 159 P. 49.

Langton Lime & Cement Co. v. Smith, 48 U. 112; 159 P. 49.

UNDERTAKING:

Failure to file undertaking or make deposit within time hereunder renders appeal a nullity, and its dismissal imperative. Sec. 3650, C. L. 1888, has no application.

Cook v. O. S. L. Co., 7 U. 416; 27 P. 5.

Dismissal for failure of sureties to justify.

Pratt v. Jarvis, 8 U. 5; 28 P. 869.

Prior to amendment of this section in 1899, the filing of an affidavit of poverty, under §§ 2576, 2580, relieved the necessity of advancing officers' fees which belong to the state, but not the filing of an undertaking on appeal.

Hoagland v. Hoagland, 18 U. 304; 54 P. 978.

Benson v. Anderson, 9 U. 154; 33 P. 691.

The undertaking is filed for the benefit of the respondent, and is a right which he may waive.

Id.

The clerk's certificate that an undertaking on appeal in due form has been properly filed, is conclusive.

Hathaway v. United Tintic Mg. Co., 42 U. 520; 132 P. 388.

Greenhalgh v. United Tintic Mg. Co., 42 U. 524; 132 P. 390.

When new undertaking may be filed, §§ 7004, 7011, and note.

6997. (3306.) Requisites of undertaking. The undertaking on appeal must be in writing, and must be executed on the part of the appellant, by at least two sureties, to the effect that the appellant will pay all damages and costs which may be awarded against him on the appeal, or on a dismissal thereof, not exceeding $300; or that sum must be deposited with the clerk with whom the judgment or order was entered, to abide the event of the appeal.

Cal. C. Civ P., § 941.

Sureties on undertaking are liable though appeal dismissed because undertaking not filed in time.

Pratt v. Gilbert, 8 U. 54; 29 P. 965.

Undertaking need not be signed by appellant, he being already bound by judgment.

Butterfield v. Mountain Ice Cold Storage Co., 11 U. 194; 39 P. 824.

An undertaking is sufficient as an undertaking on appeal, where its terms are broad enough to constitute it such, though they are also broad enough under § 6998, and it is for a greater amount than required by § 6997.

Peale v. Clark, 50 U. —; 166 P. 981.

6998. (3307.) Undertaking on appeal from money judgment. If the appeal be from a judgment or order directing the payment of money, it does not stay the execution of the same, unless a written undertaking be executed on the part of the appellant by two or more sureties, to the effect that they are bound in double the amount named in the judgment or order; that if the judgment or order appealed from, or any part thereof, be affirmed or the appeal be dismissed, the appellant will pay the amount directed to be paid by the judgment or order, or the part of such amount as to which the judgment or order is affirmed, if affirmed only in part, and all damages and costs which may be awarded against the appellant upon the appeal, and that if the appellant does not make such payment within thirty days after the filing of the remittitur from the supreme court in the court from which the appeal is taken, judgment may be entered on motion of the respondent, in his favor against the sureties, for such amount, together with the interest that may be due thereon, and the damages and costs which may be awarded against the appellant upon the appeal. If the judgment or order appealed from be for a greater amount than $2,000, and the sureties do not state in their affidavits of justification accompanying the undertaking that they are each worth the sum specified in the undertaking, the stipulation may be that the judgment to be entered against the sureties shall be for such amounts only as in their affidavits they may state they are severally worth, and judgment may be entered against the sureties by the court from which the appeal is taken, pursuant to the stipulations herein designated. When the judgment or order ap-

pealed from is made payable in a specified kind of money or currency, the judgment entered against the sureties upon the undertaking must be made payable in the same kind of money or currency.

Cal. C. Civ. P., § 942.
Qualifications of sureties generally, § 7223.
Receiver may be appointed to preserve property pending an appeal, § 6764.
Dismissal for failure to file undertaking, note to § 6996.
Undertaking may be in one or in several instruments, § 7002.
When undertaking is or becomes insufficient, §§ 7004, 7011.
When undertaking on appeal not required, § 6996.

6999. (3308.) Id. When judgment directs delivery of personal property, etc. If the judgment or order appealed from direct the assignment or delivery of documents or personal property, the execution of the same cannot be stayed by appeal unless the things required to be assigned or delivered be placed in the custody of such officer or receiver as the court or the judge thereof may appoint, or unless an undertaking be entered into on the part of the appellant, with at least two sureties, and in such amount as the court or the judge thereof may direct, to the effect that the appellant will obey the order of the appellate court upon the appeal.

Cal. C. Civ. P., § 943.

7000. (3309.) Id. When judgment directs conveyance. If the judgment or order appealed from direct the execution of a conveyance or other instrument, the execution of the same cannot be stayed by the appeal until the instrument is executed and deposited with the clerk with whom the judgment or order is entered, to abide the judgment of the appellate court.

Cal. C. Civ. P., § 944.
When judgment directing conveyance not complied with, § 6260.

7001. (3310.) Id. When judgment directs sale or possession of real property. If the judgment or order appealed from direct the sale or delivery of possession of real property, the execution of the same cannot be stayed unless a written undertaking be executed on the part of the appellant, with two or more sureties, to the effect that during the possession of such property by the appellant, he will not commit, or suffer to be committed, any waste thereon, and that if the judgment be affirmed or the appeal dismissed, he will pay the value of the use and occupation of the property from the time of the appeal until the delivery of the possession thereof and of any waste committed thereon, pursuant to the judgment or order, not exceeding a sum to be fixed by the judge of the court by which the judgment was rendered or order made, and which must be specified in the undertaking. When the judgment is for the sale of mortgaged premises, and the payment of a deficiency arising upon the sale, the undertaking must also provide for the payment of such deficiency.

Cal. C. Civ. P., § 945*.
Judgment giving plaintiff certain water, and restraining defendant from taking or using same, is one directing delivery of possession of real property under this section.
Elliot v. Whitmore, 10 U. 238; 37 P. 459.

7002. (3311.) Id. May be in one or several instruments. The undertakings prescribed by the foregoing sections may be in one instrument or several, at the option of the appellant.

Cal. C. Civ. P., § 947.

7003. (3312.) Exception to sureties. Justification. Failure. Deposit. The adverse party may except to the sufficiency of the sureties to the undertakings mentioned in this chapter at any time within ten days after the filing of such undertakings; and, unless they or other sureties, within ten days after the appellant has been served with notice of such exception, justify before a judge of the court below, or clerk thereof, upon five days' notice to the respondent, of the time and place of justification, execution of the judgment, decree, or order appealed from is no longer stayed. In all cases where an undertaking is required on appeal by the provisions of this chapter, a deposit in the court below of the amount of the judgment appealed from and such additional amount as the court may order, and the $300 in addition, is equivalent to filing the undertaking. In all cases the undertaking or deposit may be waived by the written consent of the respondent.

Cal. C. Civ., P. § 948*.
Qualifications of sureties generally, § 7223.
Where sureties fail to justify within time under § 3660, C. L. 1888, appeal must be dismissed.
Pratt v. Jarvis, 8 U. 5; 28 P. 869.

7004. (3312x.) Id. When undertaking is or becomes insufficient. In proceedings on appeal from any court, when any surety on the undertaking is or becomes insufficient, or when such undertaking is or becomes insufficient in form or in amount, the appellate court, on motion, may order a new and sufficient undertaking to be filed. On failure to comply with such order, such appeal may be dismissed, in the discretion of the court. '07, p. 229.

When a new undertaking may be filed, note to § 7011.

7005. (3313.) Effect of stay. Court may relieve administrator, etc., from giving bond. Attachment not continued, unless. Whenever an appeal is perfected, as provided in the preceding sections of this chapter, it stays all further proceedings in the court below, upon the judgment or order appealed from, or upon the matter embraced therein, and releases from levy property which has been levied upon under execution issued upon said judgment; but the court below may proceed upon any other matter embraced in the action and not affected by the order appealed from. The court below may, in its discretion, dispense with or limit the security required by this chapter, when the appellant is an executor, administrator, trustee, or other person acting in another's right. An appeal does not continue in force an attachment, unless an undertaking be executed and filed on the part of the appellant, by at least two sureties, in double the amount of the debt claimed by him, that the appellant will pay all costs and damages which the respondent may sustain by reason of the attachment, in case the judgment of the court below be sustained or the appeal be dismissed.

Cal. C. Civ. P., § 946*.

Provision hereof that court may dispense with undertaking in certain cases does not embrace action brought by collector in his own right for delinquent taxes.

Crismon v. Bingham C. &. C. F. Ry. Co., 3 U. 249; 2 P. 208.

An administrator who has been removed and his letters revoked by the probate court could appeal under rule 24 of the supreme court, without filing any undertaking on appeal.

Uebel v. Maltese, 2 U. 430.

The supreme court rule 24 (9 U. 521) providing that an administrator who has given an official bond may appeal without giving an additional undertaking, does not apply to a case where the sureties have been discharged before the appeal is taken. (For former opinion see 11 U. 421; 40 P. 705.)

Wells v. Kelley, 12 U. 437; 42 P. 1133.

Bond covers rents and profits pending appeal.

Tarpey v. Sharp, 12 U. 383; 43 P. 104.

Where the appellant had sued out a writ of error, and filed a supersedeas bond, and had taken all the steps necessary to remove the cause to the U. S. supreme court; held, that the territorial supreme court had not lost jurisdiction to remit its judgment to the lower court.

Openshaw v. Utah & Nevada Ry. Co., 6 U. 268; 21 P. 999.

Perfecting an appeal and giving a supersedeas bond in a case where an injunction has been granted does not nullify decree or suspend injunction.

Bullion-Beck & Champion M. Co., v. Eureka Hill M. Co., 5 U. 151; 13 P. 174.

Elliot v. Whitmore, 10 U. 238; 37 P. 459.

But appeal in a water case from decree dividing waters of a stream and enjoining defendant from taking more than his share, when the court has refused to suspend such injunction pending the appeal, does not deprive lower court of jurisdiction to punish as contempt violation of such injunction.

Ex parte Whitmore, 9 U. 441; 35 P. 524.

Upon appeal an attachment will not continue in force unless appellant files a separate bond therefor.

Wells v. Loofbourow, 49 U. 200; 162 P. 375.

7006. (3314.) Undertaking where judgment directs or prohibits particular act. Stay. If the judgment appealed from directs or prohibits the doing of any particular act or thing, and no express provision is made by statute in regard to the undertaking to be given on appeal therefrom, the execution thereof shall not be stayed by an appeal therefrom, unless an undertaking be entered into on the part of the appellant, in such sum as the court or judge shall direct, and by at least two sureties, to the effect that the appellant will pay all damages which the opposite party may have sustained by the not doing or the doing of the particular act or thing directed to be done or prohibited from being done by the judgment appealed from, and to such further effect as the court or judge shall, in discretion, direct.

Wis., S. & B. An. S. (1889) § 3059*.

A judgment revoking a liquor license, being self-executing, an appeal therefrom does not suspend it or stay its force, at least where a supersedeas bond is not given.

In re Grant, 44 U. 386; 140 P. 226.

7007. (3315.) No stay in case of usurpation of office. Sale of perishable property. Where the defendant is adjudged guilty of usurping, intruding into, or unlawfully holding public office, civil or military, within this state, the execution of the judgment shall not be stayed by an appeal. Where the judgment appealed from directs the sale of perishable property and proceedings are stayed, the court may order the property to be sold and the proceeds thereof to be deposited, to abide the judgment of the appellate court.

Cal. C. Civ P., § 949*.

Judgment of ouster not stayed by appeal, § 7371.

7008. (3316.) Appeal perfected. Papers sent. Upon an appeal being perfected, the clerk of the court from which the appeal is taken shall, at the expense of the appellant, forthwith transmit to the supreme court the papers constituting the record on appeal. The court may, however, for good cause shown, direct copies to be sent in lieu of the originals. The clerk shall also, in all cases, transmit to the supreme court the notice of appeal, together with a certificate of the clerk that an undertaking on appeal, in due form, or a stipulation of the parties waiving an undertaking, or an affidavit under § 2577, has been properly filed; and he shall annex to the papers so transmitted a certificate under his hand and the seal of the court from which the appeal is taken, certifying that they are the original papers, or copies, as the case may be, and that they are transmitted to the supreme court pursuant to such appeal. No further certificate or attestation shall be necessary.

Am'd '99, p. 84; '03, p. 186.

Wis., S. & B. An. S. (1889) § 3050*.

What constitutes record on appeal, § 6992.

7009. (3317.) Id. Dismissal for failure to file transcript in thirty days. If the appellant shall fail to cause such papers to be transmitted and filed in the supreme court within thirty days after the perfecting of the appeal, the appeal may be dismissed on motion of the respondent.

Cal. C. Civ. P., § 954*. See Sup. (1895) p. 28.
Costs on dismissal, §§ 6860, 7042.
Assignments of error, note to § 6994.

DISMISSAL FOR FAILURE TO FILE:

Extension of time to settle bill does not extend time to file transcript.
Butter v. Lamson, 29 U. 439; 82 P. 473.

Dismissal for failure to file transcript within thirty days.
Butter v. Lamson, 29 U. 439; 82 P. 473
Howell v. Clark, 16 U. 410; 52 P. 631.

A failure to file the transcript or the briefs in accordance with the rules of the supreme court is cause for dismissal.
Utah Com'l Bank v. Morgan, 9 U. 369; 36 P. 632.
Borlase v. Morgan, 9 U. 370; 36 P. 633.
Bailey v. Stevens, 9 U. 370; 36 P. 633.
Bonesteel v. Fairchild, 9 U. 371; 36 P. 633.
Emerick v. Ogden City, 9 U. 372; 36 P. 633.
Corinne Mill Co. v. Johnston, 5 U. 147; 13 P. 17.
Smith v. Fisher, 3 U. 24; 5 P. 545.

Unless satisfactory showing of reasonable diligence be made.
Corinne Mill Co. v. Johnston, 5 U. 147; 13 P. 17.

Where a transcript is not filed until nearly eight months after settlement of the bill of exceptions, appeal will be dismissed.
State v. Grisolio, 49 U. 195; 162 P. 613.

DISMISSAL OF APPEAL GENERALLY:

Appeal on judgment roll, note to § 6994.
Imperfect appeal may be cured, § 7011.
Appeals dismissed because not taken in time, note to § 6991.
Dismissal for failure to serve notice on all adverse parties, note to § 6996.
Dismissal for failure to file undertaking, etc., notes to §§ 6996, 7003, 7004.
When new undertaking may be filed, § 7004, and note to § 7011.

Motion to dismiss must be based on all grounds then existing therefor; grounds not specified are waived.
Stevens v. Higginbotham, 6 U. 341; 23 P. 757.

When motion to dismiss appeal is denied, the appellant is estopped from claiming that he afterward abandoned the appeal.
Corinne Mill Co. v. Johnston, 5 U. 147; 13 P. 17.

Where upon appeal the only errors assigned are such as have either been waived in the court below, or such as cannot be considered by reason of the laches of the appellant, the appeal will be dismissed on proper motion.
Young v. Martin, 3 U. 484; 24 P. 909.

Where an appeal is regular, a motion to dismiss on the ground that no exceptions were saved to any of the rulings of the court below in a bill of exceptions will be denied, since the appeal must stand as an appeal upon the judgment roll.
U. S. v. Duggins, 11 U. 430; 40 P. 707.
People v. March, 11 U. 432; 40 P. 708.

Where the abstract on appeal is in disregard of the rules of the court, and does not show that any motion for a new trial was made nor that any appeal was taken from the judgment, the court will dismiss the appeal on its own motion.
Anderson P. B. Co. v. Dubois, 10 U. 60; 37 P. 90.

Where record shows findings of fact and conclusions of law; that no judgment was entered; that notice of appeal was filed but never served; that statement on motion for new trial was settled but motion never heard—attempted appeal will be dismissed.
Voorhees v. Manti City, 13 U. 435; 45 P. 564.

Appeal from orders which are not final, dismissal. No bill of exceptions in record.
Welsh v. Lambert, 18 U. 1; 54 P. 975.

Where the transcript on appeal does not contain a chronological arrangement of the proceedings and papers in the cause, and is not prefaced by an alphabetical index, required by rule 2, and there is no statement of the contents of each paper embodied in the transcript, as required by rule 6, nor any reference in any of the assignments of error to the pages of the abstract on which the error is based, the appeal will be dismissed.
Hannan Bros. v. Waltenspiel, 29 U. 466; 82 P. 859.
Standard Steam Laundry v. Dole, 20 U. 469; 58 P. 1109.

Where neither the transcript on appeal nor the abstract contains any assignment or specifications of error, nor any points relied on for a reversal of the judgment, as required by rules 6 and 26, the appeal will be dismissed.
Ferris v. Modern Woodmen, 29 U. 309; 81 P. 141.

Supreme court rule 26, requiring appellant to assign errors in writing, signed by himself or counsel, to be served on the respondent and filed with the clerk of the supreme court, is not complied with by the appellant placing in his abstract what purports to be an assignment of errors, and appeal will be dismissed.
Lyon v. Mauss, 31 U. 283; 87 P. 1014.

Where the parties stipulated to use an abstract which was used in a former appeal but it did not contain the judgment, the appeal will not be dismissed as the provision for printing the judgment is directory.
Lukich v. Utah Constr. Co., 48 U. 452; 160 P. 271.

Though the supreme court rules 6 and 10, as to contents of the abstract, the time of filing and serving brief, be not complied with, yet where no prejudice results and there is no delay in the hearing, the appeal will not be dismissed.
Grosteit v. Miller, 48 U. 511; 160 P. 769.

Appeal will be dismissed, the trial clerk certifying that no notice of or undertaking on appeal has been filed there, and no assignment

of errors, abstracts, or briefs having been served or filed by appellant, though the transcript has been on file in the appellate court for nearly a year.

McEwan v. Anderson, 50 U. —; 167 P. 685.

7010. (3318.) Dismissal affirms judgment. Exception. Amendments permitted. The dismissal of an appeal is in effect an affirmance of the judgment or order appealed from, unless the dismissal is expressly made without prejudice to another appeal.

Cal. C. Civ. P., § 955.

7011. (3319.) Imperfect appeal may be cured by permission. When a party shall in good faith give notice of appeal, and shall omit, through mistake or accident, to do any other act necessary to perfect the appeal or make it effectual, or to stay proceedings, the court from which the appeal is taken or the judge thereof, or the supreme court or one of the justices thereof, may permit an amendment or the proper act to be done, on such terms as may be just.

Wis., S. & B. An. S. (1889) § 3068. Minn. (1894) § 6134*.

When undertaking is or becomes insufficient, § 7004.

Where a motion to dismiss an appeal is made upon the ground that no undertaking on appeal has been filed in the court below, and such motion is met by an affidavit that the appeal has been taken in good faith, the court will allow a new and additional undertaking on appeal to be filed.

Almy v. Raybould, 2 U. 277.

Sec. 3650, C. L. 1888, did not authorize the giving of an undertaking in the supreme court in the first instance, but only in a case where an insufficient undertaking has been given in the lower court within the time prescribed by law.

Cook v. O. S. L. Ry., 7 U. 416; 27 P. 5.

Prior to amendment of § 6996 in 1899, the affidavit of poverty did not obviate the necessity of undertaking on appeal, but the appeal having been taken in good faith, the defect might be cured.

Smith v. Hoagland, 18 U. 304; 54 P. 978.

But see Benson v. Anderson, 9 U. 156; 36 P. 633.

An appeal will not be dismissed because the undertaking is defective in giving the wrong date of judgment; if necessary, the supreme court could permit a new undertaking to be filed.

Price v. Western Loan & Svgs. Co., 35 U. 379; 100 P. 677.

7012. (3320.) Restitution. Innocent parties protected. Damages for appeal for delay. When the judgment or order is reversed or modified, the appellate court may make complete restitution of all property and rights lost by the erroneous judgment or order, so far as the restitution is consistent with the protection of a purchaser of property at a sale ordered by the judgment or had under process issued upon the judgment on the appeal from which the proceedings were not stayed; and for relief in such cases, the appellant may have his action against the respondent enforcing the judgment for the proceeds of the sale of the property, after deducting therefrom the expenses of the sale. When it appears to the appellate court that the appeal was made for delay, it may add to the cost such damages as may be just.

Cal. C. Civ. P., § 957.

Costs on appeal, § 7041.

Supreme court, how constituted, quorum, powers, etc., §§ 1642-1660.

Damages for appeal for delay from justice's court, § 7520.

Where, pending an appeal, an execution is issued, and the property of the defendant levied upon, there being no supersedeas bond, and afterward the judgment is reversed and case dismissed, the lower court cannot entertain any motion on behalf of the party redeeming from the execution, and render judgment for costs in his favor against the plaintiff.

Wall v. Dodge, 3 U. 168; 2 P. 206.

Where appellant executes a good supersedeas bond, he will not be penalized on the ground that the appeal was taken merely for delay.

Brophy v. Ogden Rapid Transit Co., 46 U. 426; 151 P. 49.

7013. (3321.) Remittitur within thirty days. Exception. The clerk of the supreme court shall remit to the lower court the papers transmitted to the supreme court on the appeal, together with the judgment or decision of the supreme court thereon, within thirty days after the same shall have been made, unless the supreme court, on application of either of the parties, shall direct them to be retained for the purpose of enabling such parties to move for a rehearing.

Cal. C. Civ. P., § 958*.

Cost bill must be filed within thirty days, § 7048.

Judgment to be remitted, § 6995.

On notice, remittitur may be ordered at any time, § 7014.

Supreme court may reverse, affirm, or modify judgment; may direct trial court to correct findings and enter judgment thereon, etc., § 6995, and note.

No appeal lies from judgment entered in substantial compliance with terms of remittitur, note to § 6994.

Judgment in supreme court is effective before remititur. Where it dismisses the action, the lower court can take no further proceedings therein.

Wall v. Dodge, 3 U. 168; 2 P. 206.

Judgment upon remittitur, directing demurrer to be sustained, plaintiff having elected to stand upon complaint, leaves no error to be considered.

Fenton v. Salt Lake County, 4 U. 466; 11 P. 611.

If a cause is reversed and remanded without instructions, where the findings are full and are not excepted to, the trial court must enter such judgment as the record and opinion warrant without a retrial.

Coombs v. S. L. & Ft. D. Ry. Co., 11 U. 137; 39 P. 503.

Where a judgment of nonsuit, entered by a court of equity, is ordered set aside by appellate court and the cause is remanded, and neither the opinion nor the mandate requires a trial de novo to be granted, the effect is to place the case in the same position, in the court below, as it was in at the time when the progress of the trial was interrupted by the motion for nonsuit.

Warren v. Robinson, 21 U. 429; 61 P. 28.

Where the supreme court remanded a cause with directions to enter judgment awarding plaintiff railroad a title to a right-of-way, a decree adjudging that plaintiff was the owner of the right-of-way (describing it) conforms to the mandate, though it did not adjudge plaintiff to be the owner in fee simple of the right-of-way described.

R. G. W. Ry. Co. v. Stringham, 39 U. 236; 115 P. 967.

Where no petition for rehearing has been filed, it is proper for either party to secure and file the remittitur.

Hirsh v. Ogden F. & C. Co., 50 U. —; 171 P. —.

7014. (3322.) Petition for rehearing; contents; stay. Remittitur at any time. A petition for a rehearing shall operate as a stay of proceedings until a decision of the motion therein. The petition therefor shall state the grounds upon which it is based, and shall present at large the points, authorities, and reasons relied upon therefor, and shall be supported by the certificate of the attorney of the party, if he has appeared by attorney, to the effect that, in his opinion, there is good reason to believe the judgment objected to is erroneous and that the cause ought to be re-examined. In all cases where, on notice to the party against which the judgment is entered in any case, the party does not signify an intention to move for a rehearing, the court may order a remittitur at any time.

Petition for rehearing is a pleading, and not an argument. Points and authorities should be submitted in a separate paper.

Enright v. Grant, 5 U. 400; 16 P. 595.

The question whether one of the justices who sat in a hearing of a case upon appeal, but who dissented from the decision, was legally a member of the court will not be examined on motion for rehearing, no such question having been raised before, and no facts being shown to warrant the inquiry.

People v. Tidwell, 5 U. 88; 12 P. 638.

Error of lower court not presented upon the hearing will not be considered upon motion for rehearing.

Farrell v. Pingree, 5 U. 531; 17 P. 735.

A rehearing may be granted, even when the result must be the same as announced in the original opinion, when the concurrence of one of two judges constituting the court delivering the judgment on appeal is limited to the result, and thereby the law of the case is not made; and (2) the original opinion fails to consider a point raised upon the appeal, which, if tenable, might be fatal to the cause of action set forth in the complaint; and (3) the former opinion announces certain rules of law which, in the judgment of the court as constituted when the motion for rehearing is considered, require modification to prevent misapplication of same upon a new trial of the cause.

Fenstermaker v. Tribune Pub. Co., 13 U. 532; 45 P. 1097.

Rehearing will be denied unless the court is convinced either that it failed to consider some material point in the case, that it erred in its conclusions, or that some matter has been discovered that was unknown when the case was argued.

Venard v. Green, 4 U. 67; 7 P. 408; 6 P. 415.
Same case, 4 U. 456; 11 P. 337.
People v. Rogerson, 4 U. 231; 7 P. 255, 410.
Brown v. Pickard 4 U. 292; 11 P. 512; 9 P. 573.
In re McKnight, 4 U. 237; 9 P. 299.
Ducheneau v. House, 4 U. 483; 11 P. 618.
Jones v. House, 4 U. 484; 11 P. 619.
Cunnington v. Scott, 4 U. 497; 11 P. 619.
People v. Olsen, 5 U 87; 12 P. 638.
People v. Tidwell, 5 U. 88; 12 P. 638.
U. S. v. Smith, 5 U. 273; 15 P. 1.
Wasatch M. Co. v. Jennings, 5 U. 385; 16 P. 399.
Switzgable v. Worseldine, 5 U. 386; 16 P. 400.
Cummings v. Neilson, 42 U. 157; 129 P. 619.

A petition for rehearing could not be entertained, it appearing that the identical questions raised were those twice considered.

State v. Mortensen, 27 U. 16; 74 P. 120, 350.

Question raised for the first time in the petition and argument for rehearing will not be considered.

Harrison v. Harker, 44 U. 541; 142 P. 716.
Swanson v. Sims, 50 U. —; 170 P. 774.

In a capital case, a rehearing, after considering an assignment shown by the records to have been deliberately and intentionally abandoned, may be granted.

State v. Riley, 41 U. 225; 126 P. 294.

CHAPTER 46.

MOTIONS AND ORDERS.

7017. (3323.) Order and motion defined. Every direction of a court or judge made or entered in writing, and not included in a judgment, is denominated an order. An application for an order is a motion.

Cal. C. Civ. P., § 1003.

7018. (3324.) Motions and orders, where made. Motions must be made in the court in which the action is pending. Orders made out of court may be made by the judge of the court in any part of the state.

Cal. C. Civ. P., § 1004*.
Powers at chambers, §§ 1678, 1679, 1817.
When order refused, application not to be made to another judge, § 1820.

Parties, by taking part in proceedings, waive any defect in the motion by which the action of the court was invoked.

S. L. City v. Salt Lake & Utah Canal Co., 43 U. 591; 137 P. 638.

7019. (3325.) Five days' notice of motion. Shortening time. Affidavits. When a written notice of a motion is required by this code, or by a

rule of the supreme or district court, it must be given, if the court be held in the same county with both parties, five days before the time appointed for the hearing; otherwise, ten days. When the notice is served by mail, the number of days before the hearing must be increased one day for every twenty-five miles of distance between the place of deposit and the place of service; such increase, however, not to exceed in all thirty days; but in all cases the court, or a judge thereof, may prescribe a shorter time. Testimony to sustain or resist a motion may be in the form of affidavits, or in such other form as the parties may agree on or the court or judge direct. If by affidavit, the person making the same may be required to appear by the court or judge and submit to cross-examination upon the matters contained in his affidavit. On failure to submit to such cross-examination, the court, in its discretion, may strike out the affidavit of such witness, and take such other measures as it may deem proper. Am'd '01, p. 11.

Cal. C. Civ. P., § 1005*.

Where motion to set aside default was made orally and does not appear in the record but notice stated the grounds, motion will be held sufficient, no objection having been made.

Utah Com. Bank v. Trumbo, 17 U. 198; 53 P. 1033.

7020. (3326.) Hearing of motion or order continued or transferred, when. When a notice of motion is given, or an order to show cause is made returnable before a judge out of court, and at the time fixed for the motion or on the return day of the order, the judge is unable to hear the parties, the matter shall stand continued until the further order of the court or judge, or it may be transferred by his order to some other judge.

Cal. C. Civ. P., § 1006*.

7021. (3327.) Order to pay money enforcible as if a judgment. Whenever an order for the payment of a sum of money is made by a court, or judge thereof, pursuant to the provisions of this code, it may be enforced by execution in the same manner as if it were a judgment.

Cal. C. Civ. P., § 1007.

7022. (3328.) Vacating order made out of court without notice. An order made out of court without notice to the adverse party may be vacated or modified without notice by the judge who made it, or may be vacated or modified on notice, in the manner in which other motions are made.

Cal. C. Civ. P., § 937.

This section applies to temporary injunction.

Leitham v. Cusick, 1 U. 242.

Where a party appears in opposition to an ex parte motion, he is thereafter precluded from treating the order as ex parte.

Smith v. Fisher, 3 U. 24; 5 P. 545.

7023. (3329.) Time may be extended in all cases, except notice of appeal. When an act to be done as provided in this code relates to the pleadings in the action, or the undertakings to be filed, or the justification of sureties, or the preparation, service, filing, or presentment of bills of exception, or of amendments thereto, or to the service or filing of notices other than of appeal, the time allowed by this code may be extended, upon good cause shown, by the court in which the action is pending, or by a judge thereof. Am'd '05, p. 9.

Cal. C. Civ. P., § 1054*. See Sup. (1889) p. 406, and Sup. (1895) p. 30.

Service of notices, §§ 7024-7032.

Time to answer demurrer, or reply may be extended, § 6619.

Motion for new trial may be allowed after time limited, § 6619.

Time to file bill of exceptions may be extended.

Gorringe v. Read, 24 U. 455; 68 P. 147.

Olson v. O. S. L. R. R. Co., 24 U. 460; 68 P. 148.

But after the time limited by statute for settling bill of exceptions has expired, court can not give an extension.

Butter v. Lamson, 29 U. 439; 82 P. 473.

Bryant v. Kunkel, 32 U. 377; 90 P. 1079.

Tooele Imp. Co. v. Hoffman, 4 U. 532; 141 P. 744.

An extension cannot be granted after expiration of time for filing transcript on appeal in the supreme court.

Smith v. Fisher, 3 U. 24; 5 P. 545.

Order extending need not necessarily be filed before the original time allowed by statute has expired.

Elliot v. Whitmore, 10 U. 253; 37 P. 463.

Court cannot extend time to appeal.

Brough v. Mighell, 6 U. 317; 23 P. 673.

Jones v. Evans, 39 U. 291; 116 P. 333.

Time to appeal cannot be extended by stipulation.

Anderson v. Halthusen Merc. Co., 30 U. 31;

Where copy of complaint was not served on defendant nor deposited with the clerk of court, as required by § 6546, owing to mistake, upon application, the court should have permitted plaintiff to deposit copy of complaint, and should not have dismissed the action.

West Mt. L. & S. Co. v. Danley, 38 U. 218; 111 P. 642.

The court cannot extend the time for filing a motion for new trial beyond the period of time allowed for appeal.

Minneapolis Threshing Machine Co. v. Jesse W. Fox et al., 51 U. —; 172 P. 699.

CHAPTER 47.

NOTICES, AND FILING AND SERVICE OF PAPERS.

7024. (3330.) Notices must be in writing. Service when not prescribed. Notices must be in writing, and notices and other papers may be served upon the party or attorney in the manner prescribed in this chapter, when not otherwise provided by this code.

Cal. C. Civ. P., § 1010.
Pleadings subsequent to complaint to be filed and served, § 6609.
Time for service of notice may be extended, § 7023.
Order granted without notice may be vacated without notice, § 7022.
Written notice of a decision may be waived; but, to constitute a waiver, the party must do some affirmative act pointed out in the statute as not necessary to be done until after the notice.
Everett v. Jones, 32 U. 489; 91 P. 360. 83 P. 560.

The giving of a notice in writing of the setting of a trial by justice's court is jurisdictional.
Griffiths v. Justice Court, 35 U. 443; 100 P. 1064.
One intending to move for new trial has a right to wait for a notice in writing of the decision from the adverse party before giving notice of intention, though the movant participated in the final proceedings, objecting to the findings and the signing of a decree.
Everett v. Jones, 32 U. 489; 91 P. 360.
Mercantile Co. v. Glen, 6 U. 139; 21 P. 500.
Burlock v. Shupe, 5 U. 429; 17 P. 19.

7025. (3331.) Service of notices, etc., how made. The service may be personal, by delivery to the party or attorney on whom the service is required to be made, or it may be as follows:

1. If upon an attorney, it may be made during his absence from his office by leaving the notice or other papers with his clerk therein, or with a person having charge thereof; or when there is no person in the office, by leaving them, between the hours of six in the morning and nine in the evening, in a conspicuous place in the office; or if it be not open so as to admit of such service, then by leaving them at the attorney's residence, with some person of suitable age and discretion; and if his residence be not known, then by putting the same, inclosed in an envelope, into the postoffice directed to such attorney;

2. If upon a party, it may be made by leaving the notice or other paper at his residence, between the hours of six in the morning and nine in the evening, with some person of suitable age and discretion; and if his residence be not known, by putting the same, inclosed in an envelope, into the postoffice directed to such party.

Cal. C. Civ. P., § 1011*.
Service upon sheriff, § 1522.
Notice by telegraph or telephone, §§ 6117-6120, 7032.
Service must be made upon attorney, § 7030.

Service of pleading is ineffectual unless same be filed within time limited by statute, or before entry of default is ordered.
Cutler v. Haycock, 31 U. 366; 90 P. 897.

7026. (3332.) Id. Service by mail. Service by mail may be made when the person making the service, and the person on whom it is to be made, reside or have their offices in different places, between which there is a regular communication by mail.

*Cal. C. Civ. P., § 1012.

7027. (3333.) Id. How made. When complete. In case of service by mail, the notice or other paper must be deposited in the postoffice, addressed to the person on whom it is to be served at his office or place of residence, and the postage paid. The service is complete at the time of the deposit, but if within a given number of days after such service a right may be exercised, or an act is to be done by the adverse party, the time within which such right may be exercised or act be done is extended one day for every twenty-five miles distance between the place of deposit and the place of address; such extension, however, not to exceed thirty days in all.

Cal. C. Civ. P., § 1013*.
Service by telegraph or telephone, §§ 6117-6120, 7032.

Mailing a copy of notice of appeal on the thirtieth day is sufficient service.
Greenwood v. Bramel, Judge, 51 U. —; 174 P 637.

7028. Newspaper selected by applicant to be designated. Proviso. In all actions, suits, and proceedings where summons or other notice is required to be published, and the judge or clerk of court is authorized or directed to give notice or to designate the newspaper in which such publication shall be made, the judge or clerk, upon the request of the party applying for such publication, shall designate the newspaper that such party may select, and shall

authorize and direct that such publication be made therein; *provided,* that the newspaper selected is a newspaper published in the English language, and of general circulation in the county where such publication is required to be made. '15, p. 199.

Probate notices, § 4026.
Summons, § 2949.
Summons on unknown heirs, § 2951.
Powers of clerk, § 7561.

7029. (3334.) Appearance defined. After appearance, defendant entitled to notice. A defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him. After appearance a defendant or his attorney is entitled to notice of all subsequent proceedings of which notice is required to be given. But where a defendant has not appeared, service of notice or papers need not be made upon him unless he is imprisoned for want of bail.

Cal. C. Civ. P., § 1014.
Guardian may appear for ward and waive service of process, § 7877.
Appearance or acknowledgment of service, § 6545.
Filing and service of pleadings subsequent to complaint, § 6609.
Service must be upon attorney, if one appears, § 7030.
Defendant's appearance on motion to dismiss appeal precluded him from treating the order dismissing the appeal as an ex parte order.
Smith v. Fisher, 3 U. 24; 5 P. 545.
General appearance of defendant waives all objections to service of summons.
Keyser v. Pollock, 20 U. 371; 59 P. 87.
Kuhn v. Mount, 13 U. 108; 44 P. 1036.
Houtz v. Gisborn, 1 U. 173.
Where a corporation domiciled in Utah was sued in Illinois, appeared and filed a pleading, without challenging the court's jurisdiction, it submitted to the jurisdiction of the Illinois court, precluding it from assailing the judgment in an action thereon in Utah.
Richardson v. Utah Stove & H. Co., 28 U. 85; 77 P. 1.
A court having jurisdiction of the subject matter of a suit acquires jurisdiction of a defendant either by his voluntary appearance or by process served upon him.
Continental L. Ins. Co. v. Jones, 31 U. 403; 88 P. 229.
Keyser v. Pollock, 20 U. 371; 59 P. 87.
Page v. Commr. National Bank, 38 U. 440; 112 P. 816.
A general demurrer is a general appearance, though one of the grounds of demurrer is that the court has no jurisdiction of the subject matter.
Farnsworth v. U. P. Coal Co., 32 U. 112; 89 P. 74
Stone v. U. P. Ry. Co., 32 U. 185; 89 P. 715, 723.

7030. (3335.) Service on non-residents. On attorney. When a plaintiff or a defendant who has appeared resides out of the state, and has no attorney in the action or proceeding, the service may be made on the clerk for him. But in all cases where a party has an attorney in the action or proceeding, the service of papers when required must be upon the attorney instead of the party, except of subpœnas, writs, and other process issued in the suit, and of papers to bring him into contempt.

Cal. C. Civ. P., § 1015.
Notice of entry of judgment for plaintiff in a justice court was properly served on defendant's attorney.
Tooele, etc. v. Morse, Judge, 43 U. 515; 136 P. 965.

7031. (3336.) Provision not applicable to process or contempt. The foregoing provisions of this chapter do not apply to the service of a summons or other process, or of any paper to bring a party into contempt.

Cal. C. Civ. P., § 1016.

7032. (3337.) Summons, writs, etc., may be sent by telegraph or telephone. Any summons, writ, or order in any civil suit or proceeding, and all other papers requiring service, may be transmitted by telegraph or telephone for service in any place, and the telegraphic or telephonic copy of such writ or order or paper so transmitted may be served or executed by the officer or person to whom it is sent for that purpose, and returned by him, if any return be requisite, in the same manner, and with the same force and effect, in all respects, as the original thereof might be delivered to him, and the officer or person serving or executing the same has the same authority, and is subject to the same liabilities as if the copy were the original. The original, when a writ or order, must also be filed in the court from which it was issued, and a certified copy thereof must be preserved in the telegraph or telephone office from which it was sent. In sending it, either the original or the certified copy may be used by the operator for that purpose. Whenever any document to be sent by telegraph or telephone bears a seal, either private or official, it is not necessary for the operator in sending the same to telegraph or telephone a description of the seal or any word or device thereon, but the same may be expressed in the telegraphic or telephonic copy by the letters "L. S.," or by the word "Seal." Am'd '07, p. 28.

Cal. C. Civ. P., § 1017*.
Warrant sent by telegraph or telephone, §§ 8728-8730.
Notices, conveyances, notes, etc., may be sent by telegraph or telephone, §§ 6117-6120.

UTAH STATE PROPERTY

CHAPTER 48.

COSTS.

7035. (3338.) Compensation of attorneys left to agreement. Costs. The compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties; but parties to actions or proceedings are entitled to costs and disbursements, as hereinafter provided.

Cal. C. Civ. P., § 1021.
Compensation of attorneys left to agreement of parties, liens, § 346, and note.

7036. (3339.) When costs allowed as of course. Costs are allowed of course to the prevailing party in the following cases:

1. In an action for the recovery of real property;
2. In an action to recover the possession of personal property;
3. In an action for the recovery of money or damages;
4. In a special proceeding;
5. In an action which involves the title or possession of real estate, or the legality of any tax, impost, assessment, toll, or municipal fine.

Cal. C. Civ. P., § 1022*.
Costs on appeal in special proceedings, § 7046.
Costs where party acts in representative capacity, § 7045.
When costs in discretion of court, § 7038.
What taxable as costs, note to § 7047.

COSTS IN SPECIAL PROCEEDING:

Where a writ of certiorari is directed to a justice of the peace, who is the only party to the proceedings in the district court, it is error, upon setting aside the judgment of the justice, to enter judgment for costs against him.
In re Hamilton v. Spiers, 24 U. 225.

Upon obtaining a perpetual injunction restraining all further proceedings to collect the tax, including all proceedings upon a judgment, the complainant will be allowed his costs in defending the action in the inferior court.
Kerr v. Woolley, 3 U. 456; 24 P. 831.

The costs of the proceeding in which a writ of prohibition issues from the district court to arrest the doing of a ministerial act by a justice of the peace, when such justice is wilfully assuming an unauthorized jurisdiction, are properly taxed against him.
Ducheneau v. House, 4 U. 369; 10 P. 838.

Where court commissioner refuses in good faith to pay fees of a witness, costs will not be awarded against him.
People v. Pyper, 6 U. 160; 21 P. 722.

Mandamus to compel the canvassing board to issue a certificate of election is a special proceeding hereunder, so as to entitle plaintiff on a judgment in his favor to an allowance for costs, as of course.
Page v. Utah Com., 11 U. 119; 39 P. 499.

Prosecution in the name of a city for the violation of its ordinance is in its nature criminal, and one acquitted is not entitled to costs.
Nephi City v. Forrest, 41 U. 433; 126 P. 332.

When one convicted of a breach of a city ordinance appeals, and there is no claim of impecuniosity, cost on appeal, except clerk's fees, may be taxed against him.
S. L. City v. Robinson, 39 U. 260; 116 P. 442.

Costs in certiorari and mandamus proceedings rest in the discretion of the court, and where a party suggests to the district court that it had no jurisdiction to hear an appeal, and the court so decides, and mandamus is brought against the judge, who resists only to settle the law, and the party making the suggestion did not appear in the proceedings, costs will not be taxed against him.
State v. Ritchie, 32 U. 91; 91 P. 24.

In mandamus proceedings against a judge of the district court, costs may be taxed against the parties to the original action who resist the mandamus.
Christensen v. Christensen, 51 U. —; 173 P. 383.

COSTS GENERALLY:

A party to an action has no vested right to costs until the rendition of the judgment, and the statute as to costs in existence at that time will control the question.
Hepworth v. Gardner, 4 U. 439; 11 P. 566.

Statute void so far as it made the rights to costs dependent on amount recovered, being a penalty for bringing suit in district court, which had general equity and law jurisdiction under organic act.
Hepworth v. Gardner, 4 U. 439; 11 P. 566.
See also Miller v. Zeigler, 3 U. 17; 5 P. 518.

Although one of the rules of equity is that costs are in the discretion of the chancellor, yet the legislature can regulate the question of costs in causes in equity.
Dudley v. Facer, 8 U. 403; 32 P. 668.

Where a party who obtained judgment in an action in which the referee refused to sign a proposed statement on motion for a new trial appears by counsel and resists the application for a writ of mandate to compel the referee to sign the statement, costs will be awarded against him and not against the referee.
Whitmore v. Harris, 10 U. 259; 37 P. 464.

Where an action is continued in the name of the original plaintiff after he deeded the land in controversy, costs may be awarded against defendant, though, after issue is found against him, he purchases the land from plaintiff's grantee.
Christofferson v. Craghead, 26 U. 483; 73 P. 639.

In an action for personal property, though plaintiff recovered a portion only of the property sued for, the court is not authorized to apportion the costs, but should allow costs as a matter of course to the prevailing party.
Freed F. & C. Co. v. Sorensen, 28 U. 419; 79 P. 564.
Miller v. Zeigler, 3 U. 17; 5 P. 518.
Dudley v. Facer, 8 U. 403; 32 P. 668.

Where a plaintiff in an action for personal property recovers only a part, he is entitled to costs, and the court cannot apportion them.
Freed v. Sorensen, 28 U. 419; 79 P. 564.

Where, in a decree quieting title, it is found that the defendant wrongfully removed a division fence, a judgment dividing the costs and dismissing the claim for damages is erroneous.
Swenson v. Snell, 22 U. 191; 61 P. 555.

Judgment for costs against a defendant, was erroneous where the findings and judgment were in her favor.
Moyle v. McKean, 49 U. 93; 162 P. 63.

Where a counterclaim was pleaded, the court's action will not be disturbed except for abuse of discretion.
Smith v. Gilbert, 49 U. 511; 164 P. 1026.

7037. (3340.) Costs in several actions which might have been joined. When several actions are brought on one bond, undertaking, promissory note, bill of exchange, or other instrument in writing, or in any other case for the same cause of action, against several parties who might have been joined as

defendants in the same action, no costs can be allowed to the plaintiff in more than one of such actions, which may be at his election, if the party proceeded against in the other actions were at the commencement of the previous action openly within the state. But the disbursements of the plaintiff must be allowed to him in the action.

Cal. C. Civ. P., § 1023.

Action against parties severally liable, §§ 6511, 6558.
Judgment in such action, § 6520.

7038. (3341.) When costs in discretion of court. In other actions than those mentioned in § 7036, costs may be allowed or not, and, if allowed, may be apportioned between the parties, on the same or adverse sides, in the discretion of the court.

Cal. C. Civ. P., § 1025*.
Cost in garnishment proceedings, § 6751.

Costs on dismissal, §§ 6860, 7042.
Decisions on costs generally, note to § 7036.

7039. (3342.) Defendants making separate defenses; costs. When there are several defendants in the actions mentioned in § 7036, not united in interest, and making separate defenses by separate answers, and the plaintiff fails to recover judgment against all, the court must award costs to such of the defendants as have judgment in their favor.

Cal. C. Civ. P., § 1026.

7040. (3343.) Costs on appeal from justice's court. In civil actions tried before a justice of the peace, if the prevailing party appeals, and does not recover in the district court a sum greater than the first judgment and costs on appeal, he shall not recover costs on appeal; if the losing party appeals and the prevailing party's judgment before the justice is reduced by an amount greater than the costs on appeal, the former shall be entitled to costs on appeal. In all other cases of appeal from the judgment of a justice of the peace in such actions, the prevailing party shall be entitled to costs.

Minn. (1894) § 5511*. Cal. C. Civ. P., § 1027*.
Appeal from justices' courts, general provisions, §§ 7514-7521.

Appeal from justices' to supreme court, note to Con. art. 8, sec. 9.
Costs on dismissal, §§ 6860, 7042.

7041. (3344.) When costs of appeal are discretionary; when not. In the following cases, the costs of appeal are in the discretion of the court:

1. When a new trial is ordered;
2. When a judgment is modified.

In all other cases the prevailing party shall recover from the other party his costs.

Mont. Civ. P., § 1855.
Costs on appeal generally, § 7048.
Except where a judgment of the lower court is unconditionally affirmed, the apportionment of the costs on appeal rests in the sound discretion of the court.
Schwab S. & L. Co. v. Snow, 47 U. 199; 152 P. 171.
Where a new trial is granted, and the costs greatly exceed the amount involved, the costs will be awarded appellant.
Smith v. Cummings, 39 U. 306; 117 P. 38.
Costs will not be awarded where appellants file an affidavit of impecuniosity.
Cody v. Cody, 47 U. 456; 154 P. 952.
Where counsel for appellant was personally served with notice of trial, but did not appear, the court, on reversing the judgment, will deny appellant his costs on appeal.
Hathaway v. United Tintic Mg. Co., 42 U. 520; 132 P. 388.
Greenhalgh v. United Tintic Mg. Co., 42 U. 524; 132 P. 390.

7042. (3345.) Costs on dismissal for want of jurisdiction or for irregularity. When an action is dismissed from any court for want of jurisdiction or because it has not been regularly transferred from an inferior to a superior court, the costs must be adjudged against the party attempting to institute or bring up the action.

N. Dak. (1895) § 5582.
Costs on dismissal generally, § 6860.
Damages added to costs when appeal taken for delay, § 7012.
Where district court dismisses action for want of jurisdiction in justice's court, appellee may recover costs. (Apparently overruling Wall v. Dodge, 3 U. 168; 2 P. 206, which holds that costs under such circumstances cannot be allowed in absence of statute authorizing it).
Cereghino v. Third Dist. Ct., 8 U. 455; 32 P. 697.

7043. (3346.) Costs on granting continuance. When an application is made to a court or referee to postpone a trial, the payment of costs occasioned by the postponement may be imposed, in the discretion of the court or referee, as a condition of granting the same.

Cal. C. Civ. P., § 1029.
Postponement, costs, § 6786.

Referee may postpone, § 6840.

7044. (3347.) Costs when tender made before suit. Deposit. When, in

an action for the recovery of money only, the defendant alleges in his answer that before the commencement of the action he tendered to the plaintiff the full amount to which he was entitled, and thereupon deposits in court, for the plaintiff, the amount so tendered, and the allegation be found to be true, the plaintiff cannot recover costs, but must pay costs to the defendant.

Cal. C. Civ. P., § 1030.
Offer of executor to allow claim in part, effect as to costs, § 7658.
Tender, § 7215.
Offer to allow judgment, costs, § 6893.
Where the purchaser on an equity of redemption tendered more than the amount due upon the mortgage; costs and attorney's fees expended by the mortgagee in foreclosure cannot be assessed against the land.
Brunswick Realty Co. v. University Inv. Co., 43 U. 75; 134 P. 608.
Where check is mailed in payment of an account, and no objections are made thereto, the bringing of an action waives all objections to the tender and stops interest and costs, and where it is shown at the trial that there was sufficient at the bank at all times to meet the check, the failure to produce the money in court is waived unless special objection was made to the tender on that ground.
Hirsh v. Ogden Fur. & Carpet Co., 48 U. 434; 160 P. 283.

7045. (3348.) Costs when party acts in representative capacity. In an action prosecuted or defended by an executor, administrator, trustee of an express trust, or a person expressly authorized by statute, costs may be recovered as in actions by and against a person prosecuting or defending in his own right; but such costs must, by the judgment, be made chargeable only upon the estate, fund, or party represented, unless the court directs the same to be paid by the plaintiff or defendant personally for mismanagement or bad faith in the action or defense.

Cal. C. Civ. P., § 1031.
Cost of bond included, when, § 1214.
When executor, etc., individually liable for costs, §§ 7662, 7876.
Applied in Moyle v. McKean, 49 U. 93; 162 P. 63.

7046. (3349.) Costs on review of special proceedings, same as on appeal. When the decision of a court of inferior jurisdiction in a special proceeding is brought before a court of higher jurisdiction for review, in any other way than by an appeal, the same costs must be allowed as in cases on appeal, and may be collected by execution or in such manner as the court may direct, according to the nature of the case.

Cal. C. Civ. P., § 1032.
Costs in special proceeding, § 7036.

7047. (3350.) Filing and service of verified cost bill. Retaxing. The party in whose favor judgment is rendered, and who claims his costs, must deliver to the clerk, and serve a copy upon the adverse party, within five days after the verdict or notice of the decision of the court or referee, or, if the entry of the judgment on the verdict or decision be stayed, then before such entry is made, a memorandum of the items of his costs and necessary disbursements in the action or proceeding, which memorandum must be verified by the oath of the party, or his attorney or agent, or by the clerk of his attorney, stating that to the best of his knowledge and belief the items are correct, and that the disbursements have been necessarily incurred in the action or proceeding. A party dissatisfied with the costs claimed may, within five days after notice of filing of the bill of costs, file a motion to have the same taxed by the court in which the judgment was rendered, or by the judge thereof at chambers.

Cal. C. Civ. P., § 1033.
Stenographer's fees taxed up as costs, § 1907.
Costs of surety bond included, §§ 1214, 1215.
Witness fees and mileage paid are taxable.
Grant v. U. P. Ry. Co., 6 U. 270; 21 P. 996.
Cost bill containing sheriff's fees for subpoenaing witnesses should show upon whom and where subpoenas were served and number of miles traveled. Where witness fees are taxed, the name, residence, distance traveled from residence to court, and number of days' attendance of each witness should be stated.
Cole v. Ducheneau, 13 U. 42; 44 P. 92.
Smith v. Nelson, 23 U. 512; 65 P. 485.
A party may serve his own subpoena and need not file the return until after the time limited for objections to the cost bill.
Smith v. Nelson, 23 U. 512; 65 P. 485.
Fees for witnesses subpoenaed in good faith and attending, though not actually sworn, may be taxed.
Cole v. Ducheneau, 13 U. 42; 44 P. 92.
Smith v. Nelson, 23 U. 512; 65 P. 485.
In an action for trespass, where the objection that plaintiff could not recover more than one-half of the costs was not made in the trial court, it will not be considered on appeal.
Smith v. Nelson, 23 U. 512; 65 P. 485.
In taxing the costs in an action for damages caused by the trespass of sheep, it was prejudicial error not to apply § 58, providing that the fees in an action for trespass by certain animals shall be one-half the fees in other civil cases.
Smith v. Valentine, 23 U. 539; 66 P. 295.
Where plaintiff filed cost bill, which did not comply with the statute, and within time allowed, filed a second one in proper form, costs were properly taxed under the latter.
Smith v. Nelson, 23 U. 512; 65 P. 485.
Where party securing judgment files cost bill within time, the court may permit the filing of a supplemental bill, as an amendment, his right not being necessarily exhausted by filing of the first bill.
Dignan v. Nelson, 26 U. 186; 72 P. 936.
Where the defendant in his suit for injunction filed his memorandum of costs after

special findings by the jury in his favor, but before any findings or conclusions were made by the court, and the plaintiff appeared and objected to the memorandum on the merits, he could not thereafter, on motion for retaxation of costs, assert that the memorandum was filed prematurely.

Smith v. Alvord, 31 U. 346; 88 P. 16.

A cost bill filed within five days after entry of final judgment is in time.

Moapa v. L. A. & S. L. Ry. Co., 45 U. 151; 143 P. 218.

The filing of a cost bill before the entry of judgment is not a compliance with the statute, and it should be stricken.

Houghton v. Barton, 49 U. 611; 165 P. 471.

7048. (3351.) Costs on appeal. Judgment and execution therefor. Whenever costs are awarded to a party by an appellate court, if such party claims costs, he shall, within thirty days after the remittitur is filed with the clerk below, serve upon the opposite party a memorandum of his costs, verified as prescribed by law, and deliver the same to the clerk of the court below; *provided,* that if a remittitur be filed by the party against whom the costs are awarded, that party shall serve written notice of the filing thereof on the party to whom the costs are awarded, and the period for filing the cost bill shall begin to run with the service of such notice. The cost to be awarded to a party as provided in this and the preceding sections shall include the reasonable cost of printing transcripts and briefs, and of transcribing the stenographer's notes or minutes of the trial or hearing. The opposite party may, within ten days after service of the memorandum of costs, upon notice given, move the court below to correct the bill of costs as in other cases. Upon the decision of the motion, the clerk shall forthwith attach the memorandum of costs to the remittitur, and annex both to the judgment roll, and enter minutes of his doings in the judgment docket. Thereafter the judgment of the appellate court shall constitute and stand as the judgment of the court below and become a lien upon the real property of the party against whom the costs are awarded, with the right of execution therefor as in other cases.

Am'd '17, p. 389.

Cal. C. Civ. P., § 1034*.

When costs on appeal discretionary, § 7041.

Costs on dismissal, § 7042.

Damages for appeal for delay may be added to costs, § 7012.

Cost of surety bond, § 1215.

A party ordering transcript could not, under § 3099, C. L. 1888, tax expense thereof as costs; nor will more than the usual and reasonable expense of printing proofs and abstracts, not exceeding one dollar per page, be allowed.

Marks v. Culmer, 7 U. 163; 25 P. 743.

When the omissions and inaccuracies of appellant's abstract render the filing of an additional abstract necessary, the cost of such additional abstract may be taxed against appellant.

Munns v. Loveland, 15 U. 250; 49 P. 743.

Where the appeal is on the ground that two instructions are in conflict, and they are in the appellant's abstract, the costs of an additional abstract containing evidence and other instructions will not be taxed.

Gimnich v. Sorenson, 34 U. 109; 96 P. 121.

Costs cannot be awarded for unnecessary repetitions of evidence in the briefs which was in the abstract.

Cobb v. Hartenstein, 47 U. 174; 152 P. 424.

Bastian v. Nebeker, 49 U. 391; 163 P. 1092.

Prior to the amendment of 1917 requiring notice of the filing in order to start time running for filing cost bill, no notice was necessary, and if the cost bill was not filed within the time required, it should be stricken, and the lack of knowledge of the filing of the remittitur does not require the court to grant relief under § 6619.

Hirsh v. Ogden Furniture & Carpet Co., 51 U. —; 172 P. 318.

Where, on appeal, the plaintiff succeeded in modifying a judgment against him on defendant's counterclaim, but practically plaintiff's whole record and brief are devoted to combating a ruling of the court against him which was affirmed, costs should be awarded to neither party.

Jeremy Fuel & Grain Co. v. Mellen, 50 U. —; 165 P. 791.

While the cost bill should state the number of pages in the abstract or brief on appeal, yet the failure so to do affords no grounds for the disallowance thereof.

Big Cottonwood Tanner Ditch Co. v. Shurtliff, et al., 51 U. —; 174 P. 1124.

7049. (3352.) Costs taxed in justice's court. Itemized. In a justice's court no cost bill need be filed, but the justice must tax the same, and make an itemized statement of all the costs incurred by each party, in his docket. In such court the fees paid to jurors must be taxed against the unsuccessful party.

Mont. Civ. P., § 1868.

Costs on appeal from justice's court, § 7040.

Justice to tax and allow costs, § 7512.

7050. (3353.) Interest and costs after verdict or decision to be included in judgment. The clerk must include, in the judgment entered up by him, any interest on the verdict or decision of the court from the time it was rendered or made, and the costs, if the same have been taxed or ascertained, and he must, within two days after the same are taxed or ascertained, if not included in the judgment, insert the same in a blank left in the judgment for that purpose, and must make a similar insertion of the costs in the copies and docket of the judgment.

Cal. C. Civ. P., § 1035.

Interest before and after judgment, § 3330.

Failure of the clerk to insert in judgment the amount of costs within two days after taxation thereof does not defeat recovery of costs, this section being merely as to time, and not prohibiting their entry after expiration of two days.

Smith v. Nelson, 23 U. 512; 65 P. 485.

7051. (3354.) Non-resident plaintiff to furnish security for costs, if required. When the plaintiff in an action resides out of the state, or is a foreign corporation, security for the costs and charges which may be awarded against such plaintiff may be required by the defendant. When required, all proceedings in the action must be stayed until an undertaking executed by two or more persons is filed with the clerk, to the effect that they will pay such costs and charges as may be awarded against the plaintiff by judgment, or in the progress of the action, not exceeding the sum of $300. A new or an additional undertaking may be ordered by the court or judge, upon proof that the original undertaking is insufficient security, and proceedings in the action stayed until such new or additional undertaking is executed and filed.

Cal. C. Civ. P., § 1036.
Qualifications of sureties generally, § 7293.
Expense of bond included in costs, § 1215.
The act of defendant in pleading to the merits and making no mention of security for costs until the case was called for trial was a waiver of its right to demand security.
Sciutti v. U. P. Coal Co., 30 U. 462; 85 P. 1011.

7052. (3355.) Id. If security not given, action dismissed. After the lapse of thirty days from the service of notice that security is required, or of an order for new or additional security, upon proof thereof, and that no undertaking as required has been filed, the court or judge may order the action to be dismissed.

Cal. C. Civ. P., § 1037.

7053. (3356.) Costs awarded against state, how paid. When the state is a party and costs are awarded against it, they must be paid out of the state treasury, and the auditor shall draw his warrant therefor on the general fund.

Cal. C. Civ. P., § 1038*.
Undertaking not to be required of the state, § 7225.
Costs in the absence of a statute cannot be imposed upon the sovereign.
U. S. v. Stevens, 8 U. 3; 28 P. 869.

7054. (3357.) Costs awarded against county, how paid. When a county is a party and costs are awarded against it, they must be paid out of the county treasury.

Cal. C. Civ. P., § 1039.
Undertaking not to be required of a county, § 7225.

CHAPTER 49.

CONTEMPT.

7058. (3358.) Enumeration of contempts. What constitutes contempt. The following acts or omissions, in respect to a court of justice or proceedings therein, are contempts of authority of the court:

1. Disorderly, contemptuous, or insolent behavior toward the judge while holding the court, tending to interrupt the due course of a trial or other judicial proceeding;

2. Breach of the peace, boisterous conduct, or violent disturbance, tending to interrupt the due course of a trial or other judicial proceeding;

3. Misbehavior in office, or other wilful neglect or violation of duty by an attorney, counsel, clerk, sheriff, or other person appointed or elected to perform a judicial or ministerial service;

4. Deceit or abuse of the process or proceedings of the court by a party to an action or special proceeding;

5. Disobedience of any lawful judgment, order, or process of the court;

6. Assuming to be an officer, attorney, or counsel of a court, and acting as such without authority;

7. Rescuing any person or property in the custody of an officer by virtue of an order or process of such court;

8. Unlawfully detaining a witness or party to an action while going to, remaining at, or returning from, the court where the action is on the calendar for trial;

9. Any other unlawful interference with the process or proceedings of a court;

10. Disobedience of a subpœna duly served, or refusing to be sworn or to answer as a witness;

11. When summoned as a juror in a court, neglecting to attend or serve as such, or improperly conversing with a party to an action to be tried at such court, or with any other person, in relation to the merits of such action, or receiving a communication from a party or other person in respect to it, without immediately disclosing the same to the court;

12. Disobedience by an inferior tribunal, magistrate, or officer, of the lawful judgment, order, or process of a superior court, or proceeding in an action or special proceeding contrary to law, after such action or special proceeding is removed from the jurisdiction of such inferior tribunal, magistrate, or officer. Disobedience of the lawful orders or process of a judicial officer is also a contempt of the authority of such officer.

Cal. C. Civ. P., § 1209.

Power of courts generally, §§ 1667, 1802.

Disobedience of order of referee, etc., proceeding, §§ 7072, 7073.

When refused an order by one judge, it is a contempt to apply to another, §§ 1820, 1821.

When appeal lies from judgment in contempt proceeding, note to § 6690.

Contempt of person charged with having property of decedent, § 7734.

Entry after eviction by lawful process, § 7059.

Court may assess damage to indemnify party injured by breach, § 7068.

Contempts before justice of the peace, § 7525, and note.

When act a crime and a contempt, § 8523.

Persons resisting process, § 8592.

Where a witness before a referee refuses to answer a question upon the advice of his counsel, honestly given and accepted in good faith, he will be excused from punishment, which would otherwise be imposed.

U. S. v. The Church, 6 U. 9; 21 P. 503, 524.

Language used in a certain paper submitted to the court quoted and held to be a contempt of court.

Id.

Where an injunction enjoined appellant and its agents from entering upon, digging in, or extracting ores from a certain mining claim; held, that appellant and its agents were not guilty of a contempt.

Bullion-B. & C. M. Co. v. Eureka Hill M. Co., 5 U. 151; 13 P. 174.

A commissioner of the supreme court has no authority to punish for newspaper articles.

People v. Carrington, 5 U. 531; 17 P. 735.

The court has the right to commit for contempt one persuading a witness subpoenaed before the grand jury to leave the territory.

In re Whetstone, 9 U. 156; 36 P. 633.

Wilful refusal of a witness to answer a proper and material question may be punished as contempt.

Ex parte Harris, 4 U. 5; 5 P. 129.

Ex parte Hendrickson, 6 U. 3; 21 P. 396.

When a witness contumaciously refuses to answer a proper question on cross-examination, it is the duty of the court to strike out his entire testimony.

Hadra v. Utah N. Bank, 9 U. 412; 35 P. 508.

When witness a party, pleading stricken, § 7133.

Non-payment of alimony on the order of the court, punishable as contempt.

In re Kelsey, 12 U. 393; 43 P. 106.

Snow v. Snow, 13 U. 15; 43 P. 620.

Lower court may punish violation of injunction notwithstanding appeal.

Ex parte Whitmore, 9 U. 441; 35 P. 524.

A distinction exists between that class of contempt proceedings wherein it is sought to vindicate the authority of the court, or where the contempt consists in the doing of a forbidden act injurious to the opposite party, wherein the process is criminal in its nature and conviction is followed by fine or imprisonment, and that other class of contempts where the proceeding is intended for the benefit or advantage of the opposite party.

Snow v. Snow, 13 U. 15; 43 P. 620.

Ex parte Whitmore, 9 U. 441; 35 P. 524.

See Elliot v. Whitmore, 10 U. 246; 37 P. 461.

In determining whether an actual breach of an injunction has been perpetrated, its terms must be considered, and when the writ does not specifically restrain the parties enjoined from the commission of definite acts, but only in a general way enjoins them from the performance of acts complained of in the complaint, it must satisfactorily appear, in order to constitute a breach of the injunction, that the acts performed were included within its scope.

Coit v. Freed, 15 U. 426; 49 P. 533.

The court has right to rebuke counsel for language and conduct tending to bring it into contempt, and in proper cases to punish by fine or imprisonment.

Lisonbee v. Monroe Irr. Co., 18 U. 343; 54 P. 1009.

Briefs in supreme court may be stricken from the files on account of the use of language disrespectful and insulting to the court below.

Nephi Irr. v. Vickers, 20 U. 310; 58 P. 836.

A court has power to expunge from its records scandalous matter which raises no issue and serves no purpose except to injure the reputation of the parties at whom it is aimed.

Morrison v. Snow, 26 U. 247; 72 P. 924.

See In re Snow, 27 U. 265; 75 P. 741.

Under section 324, requiring an attorney to abstain from all offensive personalities, etc., an attorney who, as a party to an action, knowingly makes defamatory charges against a judge may be disbarred.

Morrison v. Snow, 26 U. 247; 72 P. 924.

In re Snow, 27 U. 265; 75 P. 741.

Where the damage by defendant's act in taking water from an irrigation ditch in violation of an injunction, if any, resulted to all the landowners in common, who were entitled to water from the ditch, a proceeding for contempt for violating such injunction, even if maintainable by a corporation entitled to a portion of the water, was not maintainable in the absence of proof of actual or special damage.

Thompson v. McFarland, 29 U. 455; 82 P. 478.

A judgment of conviction for contempt cannot be entered on pleadings on the theory that intent, motive, and circumstances are immaterial, and then be defended on appeal on the theory that the burden of proof on such matters was on the accused.

Herald-Republican Co. v. Lewis, 42 U. 188; 129 P. 624.

A party to a decree, who for a long time asserted rights thereunder, cannot escape punishment for contempt for violation because it is not alleged in the application that he was served with a copy or notice of the decree.

In re Hoover, 44 U. 476; 141 P. 101.

Where a decree was rendered restraining a bank from disposing of certain funds and appointing a receiver therefor, subsequent discharge of a portion of the funds from receivership was in effect a discharge of the injunction pro tanto.

Commr. Natl. Bank v. Page-Brinton, 45 U. 14; 142 P. 709.

Failure to comply with a void court order is not contempt.

Hammond v. Wall, 50 U. —; 171 P. 148.

Affidavit charging that defendant newspaper, well knowing that certain publications were calculated to greatly prejudice the minds of the summoned jurors and other persons against the defendant then on trial, caused copies containing such publication to be delivered to said veniremen and others, and that such publication did prejudice many of them, making it difficult to obtain qualified jurors, showed contempt.

Herald-Republican Co. v. Lewis, 42 U. 188; 129 P. 624.

The old rule that a constructive criminal contempt was purged by denial under oath is changed, and the matter is regulated by statute.

Id.

Although newspaper may publish anything said or done in court while attempting to empanel a jury in a criminal action, it cannot go beyond this and print facts and conclusions and evidence and a confession by an alleged confederate which would not be admissible upon trial where such matters had been published fully at the time of the crime, such matters not being news.

Id.

The statement of counsel in an altercation over the exclusion of evidence that the court was wishy-washy was contemptuous.

Hogge v. S. L. & Og. Ry. Co., 47 U. 266; 153 P. 585.

Evidence in a contempt proceeding held to show that the construction of a dam did not interfere with water rights of another.

Geddes v. North Ogden Irrigation Co., 33 U. 456; 94 P. 822.

One turning water into a stream and withdrawing it without any order of court fixing the place of diversion and the amount to be withdrawn is not guilty of contempt, even though he should have first secured permission from the court.

Spanish Fork City v. Spanish Fork East Bench Irr. Co., 46 U. 487; 151 P. 46.

7059. (3359.) Entry after eviction by lawful process. Contempt. Restoration. Every person dispossessed of, or ejected from or out of, any real property, by the judgment or process of any court of competent jurisdiction, and who, not having a right so to do, re-enters into or upon, or takes possession of, any such real property, or induces or procures any person not having a right so to do, or aids or abets him therein, is guilty of a contempt of the court by which such judgment was rendered, or from which such process issued. Upon a conviction for such contempt, the court must immediately issue an alias process, directed to the proper officer, and requiring him to restore such possession to the party entitled thereto under the original judgment or process.

Cal. C. Civ. P., § 1210.
Re-entry a misdemeanor, § 8231.
Disobedience of judgment or order of the court, § 7058.

7060. (3360.) Contempt in presence of court summarily punishable. Affidavit in other cases. When a contempt is committed in the immediate view and presence of the court, or judge at chambers, it may be punished summarily, for which an order must be made, reciting the facts as occurring in such immediate view and presence, adjudging that the person proceeded against is thereby guilty of a contempt, and that he be punished as in § 7067 prescribed. When the contempt is not committed in the immediate view and presence of the court, or judge at chambers, an affidavit shall be presented to the court or judge of the facts constituting the contempt, or a statement of the facts by the referees or arbitrators or other judicial officer.

Cal. C. Civ. P., § 1211.
Where contempt committed out of court, affidavit clearly stating particular acts of contempt is necessary to give jurisdiction.
Young v. Cannon, 2 U. 560.
Affidavits in this case held insufficient.
Id.
Person put under bonds for assault in presence of court, § 8579.
One charged with criminal contempt out of the presence of the court must be given a hearing and evidence be taken unless the answer is or amounts to a plea of guilty.
Herald-Republican v. Lewis, 42 U. 188; 129 P. 624.

7061. (3361.) Contempt not committed in presence of court. Warrant. When the contempt is not committed in the immediate view and presence of the court or judge, a warrant of attachment may be issued to bring the person charged to answer, or, without a previous arrest, a warrant of commitment may, upon notice, or upon an order to show cause, be granted; and no warrant of commitment can be issued without such previous attachment to answer, or such notice or order to show cause.

Cal. C. Civ. P., § 1212.

7062. (3362.) Id. Order to specify amount of bail. Whenever a warrant of attachment is issued pursuant to this chapter, the court or judge must direct, by an indorsement on such warrant, that the person charged may be let to bail for his appearance, in an amount to be prescribed in such indorsement.

Cal. C. Civ. P., § 1213.

7063. (3363.) Id. Sheriff to keep prisoner until discharged or bailed. Upon executing the warrant of attachment, the sheriff must keep the person in custody, bring him before the court or judge, and detain him until an order

be made in the premises, unless the person arrested entitle himself to be discharged, as provided in the next section.

Cal. C. Civ. P., § 1214.
A warrant of commitment for contempt for refusing to answer a question before the grand jury is not nullified by reason of the grand jury taking a recess for more than three months.
Ex parte Harris, 4 U. 5; 5 P. 129.

7064. (3364.) Id. Bail bond. Form. When a direction to let the person arrested to bail is contained in the warrant of attachment, or indorsed thereon, he must be discharged from the arrest upon executing and delivering to the officer, at any time before the return day of the warrant, a written undertaking, with two sufficient sureties, to the effect that the person arrested will appear on the return of the warrant, and abide the order of the court or judge thereon, or that the sureties will pay, as may be directed, the sum specified in the warrant.

Cal. C. Civ. P., § 1215.

7065. (3365.) Id. Officer's return of warrant and bond. The officer must return the warrant of arrest and undertaking, if any, received by him from the person arrested, by the return day specified therein.

Cal. C. Civ. P., § 1216.

7066. (3366.) Id. Court must hear defendant. Witnesses. Adjournment. When the person arrested has been brought up or has appeared, the court or judge must proceed to investigate the charge, and must hear any answer which the person arrested may make to the same, and may examine witnesses for or against him; for which an adjournment may be had from time to time, if necessary.

Cal. C. Civ. P., § 1217.
In labor disputes, how tried, §§ 3654, 3658.

7067. (3367.) Id. Judgment. Penalty. Upon the answer and evidence taken, the court or judge must determine whether the person proceeded against is guilty of the contempt charged, and if it be adjudged that he is guilty of the contempt, a fine may be imposed on him not exceeding $200, or he may be imprisoned not exceeding thirty days, or both. Am'd '07, p. 6.

Cal. C. Civ. P., § 1218*.
Decisions on contempt and punishment therefor, note to § 7058.
When conviction for contempt appealable, note to § 6990.
The recital in a judgment that the accused, "having stated that they had no legal reason to give why judgment should not be pronounced against them," etc., does not show that they were given an opportunity to be heard.
Herald-Republican Pub. Co. v. Lewis, 42 U. 188; 129 P. 624.
In a prosecution for criminal contempt for publishing matters which interfered with judicial action, evidence that there was no intent to interfere or that there was no harm done in fact, is admissible in mitigation of punishment.
Id.

7068. (3368.) Court may impose damages to indemnify party injured. Bar. If an actual loss or injury to a party in an action or special proceeding, prejudicial to his right therein, is caused by the contempt, the court, in addition to the fine or imprisonment imposed for the contempt, or in place thereof, may order the person proceeded against to pay the party aggrieved a sum of money sufficient to indemnify him and to satisfy his costs and expenses; which order and the acceptance of money under it is a bar to an action by the aggrieved party for such loss and injury.

Minn. (1894) § 6167.
Measure of damages for breach, § 7070.
Under this section, in proceedings against one for a contempt in violating an injunction restraining him from infringing a trade mark, it was proper to award plaintiff a reasonable attorney's fee.
Davidson v. Munsey, 29 U. 181; 80 P. 743.
Damage must be shown in order to maintain contempt proceeding for taking water.
Thompson v. McFarland, 29 U. 455; 82 P. 478.
Where a decree has been entered in a water case, and one of the parties violated it by taking excess water, the damage to each of those injured must be ascertained in the usual way, and a joint judgment in a lump sum for all injured is erroneous, even though there was no objection for misjoinder.
In re Hoover, 44 U. 476; 141 P. 101.

7069. (3369.) Imprisonment to compel performance. When the contempt consists in the omission to perform an act enjoined by law, which is yet in the power of the person to perform, he may be imprisoned until he has performed it, or until released by the court, and, in that case, the act must be specified in the warrant of commitment.

Cal. C. Civ. P., § 1219*.
Applied to case of violation of an injunction.
Elliot v. Whitmore, 10 U. 246; 37 P. 461.
Imprisonment of witness for refusal to answer proper question.
Ex parte Harris, 4 U. 5; 5 P. 129.

Ex parte Hendrickson, 6 U. 3; 21 P. 396.
In cases of criminal contempt, court may impose costs in addition to fine or fine and imprisonment, and may order contemnor imprisoned until such fine and costs are paid at the rate of one day for each dollar of such fine and costs.
Ex parte Whitmore, 9 U. 441; 35 P. 524.

7070. (3370.) Proceeding upon failure of defendant to appear. Damages. When the warrant of arrest has been returned served, if the person arrested does not appear on the return day, the court or judge may issue another warrant of arrest, or may order the undertaking to be prosecuted, or both. If the undertaking be prosecuted, the measure of damages in the action is the extent of the loss or injury sustained by the aggrieved party by reason of the misconduct for which the warrant was issued, and the costs of the proceeding.

Cal. C. Civ. P., § 1220. Court may assess damages, § 7068.

7071. (3371.) Illness of defendant excuses officer. Unnecessary restraint forbidden. Whenever, by the provisions of this chapter, an officer is required to keep in custody a person arrested on a warrant of attachment, and to bring him before a court or judge, the inability, from illness or otherwise, of the person to attend is a sufficient excuse for not bringing him up; and the officer must not confine a person arrested upon the warrant, in a prison, or otherwise restrain him of personal liberty, except so far as may be necessary to secure his personal attendance.

Cal. C. Civ. P., § 1221.

7072. (3372.) Disobedience of order of referee, board, etc., reported to district judge. Attachment. Whenever authority is given to any person, officer (other than a judicial officer), referee, board, or committee to issue process to compel the attendance of witnesses or the production of books or papers before such person, officer, referee, board, or committee, and any person duly subpœnaed to appear and give evidence, or to produce any books or papers, shall neglect or refuse to appear or to produce such books or papers according to the requirement of such subpœna, or shall refuse to testify, or to answer any question which said person, officer, referee, board, or committee shall decide to be proper and pertinent, he shall be deemed in contempt, and it shall be the duty of the person, officer, referee, board, or committee, as the case may be, to report the fact to the judge of the district court of the county, who shall thereupon issue an attachment in the form usual in the district court, directed to the sheriff of the county, commanding him to attach said person and forthwith bring him before the judge by whose order such attachment was issued.

Wis., S. & B. An. S. (1889) § 4066*. Disobedience of order of referee, etc., § 7058, and note.
Before public utility commission, §§ (2) 4822, 4848. Before industrial commission, § 3079.

7073. (3373.) Id. Hearing before judge. Penalty. On the return of the attachment and the production of the body of the defendant, the said judge shall have jurisdiction of the matter, and the person charged may purge himself of the contempt in the same way, and the same proceeding shall be had, and the same penalty may be imposed, and the same punishment inflicted, as in the case of a witness subpœnaed to appear and give evidence on the trial of a civil case before a district judge.

Wis., S. & B. An. S. (1889) § 4066*.
Witness, subpoenaed, contempt, §§ 7133, 71 34.

CHAPTER 50.

JUDICIAL KNOWLEDGE.

7076. (3374.) Courts take judicial notice of what. Reference to appropriate books, etc. Courts take judicial notice of the following facts:

1. The true signification of all English words and phrases, and of all legal expressions;

2. Whatever is established by law;

3. Public and private official acts of the legislative, executive, and judicial departments of this state and of the United States;

4. The seals of all the courts of this state and of the United States;

5. The accession to office and the official signatures and seals of office of the principal officers of government in the legislative, executive, and judicial departments of this state and of the United States;

6. The existence, title, national flag, and seal of every state or sovereign recognized by the executive power of the United States;

7. The seals of courts of admiralty and maritime jurisdiction, and of notaries public;

8. The laws of nature, the measure of time, and the geographical divisions and political history of the world.

In all these cases the court may resort for its aid to appropriate books or documents of reference.

Cal. C. Civ. P., § 1875.

Judicial notice of newly incorporated city, §§ 524, 527.

Judicial notice of change in organization of cities, § 527, and note.

Court to impart matters of judicial notice to jury, § 7029.

The court takes judicial notice of the following:

Of its officers.

People v. Lyman, 2 U. 30.

Of statutes and authoritative decisions of courts within their jurisdiction.

People v. Hopt, 3 U. 396; 4 P. 250.

Of the population of a city as shown by public census.

People v. Page, 6 U. 353; 23 P. 761.

Of the entries in legislative journals required to be kept by the constitution.

Ritchie v. Richards, 14 U. 345; 47 P. 670.

Stanton v. Hardy, 14 U. 380; 47 P. 1102.

Of the proceedings of the convention which framed the constitution.

State v. Norman, 16 U. 457; 52 P. 986.

Sanipoli v. P. V. Coal Co., 31 U. 114; 86 P. 865.

Of the records of public expenditures in considering the validity of expenditures of public officers.

P. V. Coal Co. v. County Com'rs, 15 U. 97; 48 P. 1032.

Of geographical divisions of counties, cities, etc., and of the fact that Salt Lake City is divided into lots, blocks, and streets.

McMaster v. Morse, 18 U. 21; 55 P. 70.

Of the records and prior proceedings in the same case.

State v. Bates, 22 U. 65; 61 P. 905.

Warren v. Robinson, 21 U. 429; 61 P. 28.

See Garland v. Bear L. & R. Irr. Co., 9 U. 350; 34 P. 368.

Of decisions of supreme court of the United States affecting a law of this state.

State v. Hart, 19 U. 438; 57 P. 415.

State v. Bates, 22 U. 65; 61 P. 905.

Of creeds and doctrine of Mormon church, and of the principles of celestial marriage peculiar to such church.

Hilton v. Roylance, 25 U. 129; 69 P. 660.

That ordinarily the assignment of wages earned or to be earned, or garnishment of wages, imputes no wrong or misconduct to debtor.

Rugg v. Tolman, 39 U. 295; 117 P. 54.

Of an act of congress restoring Indian reserve lands to the public domain.

Sowards v. Meagher, 37 U. 212; 108 P. 1112.

Of the historical fact that the system of time known as standard time has been officially recognized by the national government, and of the system, and that standard instead of solar time was in general use in Salt Lake City.

Salt Lake City v. Robinson, 39 U. 260; 116 P. 442.

That the use of dynamite in blasting is inherently dangerous and no one knows when or where it will explode.

Fazio v. Corey Bros. Constr. Co., 43 U. 120; 134 P. 747.

That there are many miles of small streams that flow in ditches or flumes in the state which may be more or less attractive to children.

Charvoz v. Salt Lake City, 42 U. 455; 131 P. 901.

Of the fact that an election was held in June, 1911, under the mandatory provision of the local option act, as amended.

American Fork City v. Chartier, 43 U. 252; 134 P. 739.

American Fork City v. Briggs, 43 U. 231; 134 P. 747.

Of the general purpose or method of doing business of building and loan associations.

Union Savings & Inv. Co. v. District Court, 44 U. 397; 140 P. 221.

Of the purpose of fenders as applied to street cars.

Spiking v. Consolidated Ry. & P. Co., 33 U. 313; 93 P. 838.

Of the time the sun sets on a given day and that twilight follows immediately, etc.

Preese v. O. S. L. R. R. Co., 48 U. 551; 161 P. 40.

Of the general scope and extent of the territory, named in a contract, in the states of Oregon and Washington, and of the general history and number of inhabitants of the states, and of their general conditions, so far as the same is a matter of common and general knowledge.

Daly v. Olds, 35 U. 74; 99 P. 460.

Of the estimated income from university land sales for the years 1909 and 1910 as contained in last biennial report of the board of regents.

State ex rel. U. of U. v. Candland, 36 U. 406; 104 P. 285.

Of the restoration in a certain year to the public domain of the unalloted lands of an Indian reservation.

Whiterocks Irr. Co. v. Mooseman, 45 U. 79; 141 P. 459.

The court does not take judicial notice of the following.

Laws of another state.

Grow v. O. S. L. R. Co., 44 U. 160; 138 P. 398.

Records of another case prosecuted by the same attorney for another client, and assume that the attorney had a similar champertous contract with such other client.

In re Evans, 42 U. 282; 130 P. 217.

When term of district court adjourned.

Felt v. Cook, 31 U. 299; 87 P. 1092.

Different systems of bookkeeping.

Walker Bros. v. Skliris, 34 U. 353; 97 P. 114.

Of the legal status of any particular Indian, or that Towanta, an Indian in a particular case, is the same Towanta named in a United States case.

Murdock v. Farrell, 49 U. 314; 163 P. 1102.

It is the safer rule to require proof of the laws of another state relative to the validity and effect of judgments in that state, and not to take judicial notice thereof.

Hunt v. Monroe, 32 U. 428. 91 P. 269.

CHAPTER 51.

PUBLIC WRITINGS.

7079. (3375.) Citizens may inspect and copy public writings. Every citizen has a right to inspect and take a copy of any public writing of this state, except as otherwise expressly provided by statute.

Cal. C. Civ. P., § 1892.
Copies of records in county recorders' offices may be taken in pencil only, § 1594.

7080. (3376.) Public officer to furnish copy on payment of fee. Every public officer having the custody of a public writing which a citizen has the right to inspect is bound to give him, on demand, a certified copy of it, on payment of the legal fees therefor.

Cal. C. Civ. P., § 1893.

7081. (3377.) Public and private statutes defined. Statutes are public or private. A private statute is one which concerns only certain designated individuals, and affects only their private rights. All other statutes are public, in which are included statutes creating or affecting corporations.

Cal. C. Civ. P., § 1898.
Pleading private statute, § 6603.
Private statute as evidence, § 7086.
Corporations not to be created by special law, Con. art. 6, sec. 26.
Special laws forbidden, Con. art. 6, sec. 26.

7082. (3378.) Kinds of public writings. Public writings are divided into four classes:

1. Laws;
2. Judicial records;
3. Other official documents;
4. Public records, kept in this state, of private writings.

Cal. C. Civ. P., § 1894.

7083. (3379.) Statutes of other states, etc., admitted in evidence. Books purporting to be printed or published under the authority of another state or a territory, or foreign country, and to contain the statutes, code, or other written law of said state, territory, or country, or proved to be commonly admitted in the tribunals of such state, territory, or country as evidence of the written law thereof, are admissible in this state as evidence of such law.

Cal. C. Civ. P., § 1900*.
Proof of laws of foreign state as to the validity and effect of a judgment.
Hunt v. Monroe, 32 U. 428; 91 P. 269.
A book purporting to be Mills' Code of Colorado, and which contains what purports to be a copy of legislative enactment making it prima facie evidence, is, when a practicing attorney testifies that it was in common use by the attorneys of Colorado and cited by the courts there, admissible on either ground, to prove the laws of Colorado.
Stuart v. Pederson, 41 U. 308; 125 P. 395.

7084. (3380.) Properly certified law, etc., of another state admitted in evidence. A copy of the written law or other public writing of any other state, or of a territory, or a foreign country, attested by the certificate of the officer having charge of the original under the public seal of the state, territory, or country, or attested by the certificate of the keeper thereof and the seal of his office annexed, if there be a seal, together with the certificate of the presiding justice of the county, parish, or district in which such office may be kept, or of the governor, secretary of state, or chancellor, or, if of a foreign country, the certificate of the minister or ambassador, or a consul, vice-consul, or consular agent of the United States in such foreign country, that the attestation of such keeper is in due form and by the proper officer, is admissible as evidence of such law or writing.

Cal. C. Civ. P., § 1901*.

7085. (3381.) Unwritten law of another state, etc., how proved. The oral testimony of witnesses skilled therein is admissible as evidence of the unwritten law of another state, or of a territory, or of a foreign country, as are also printed and published books of reports of decisions of the courts of such state, territory, or country, commonly admitted in such courts.

Cal. C. Civ. P., § 1902*.

7086. (3382.) Effect of recitals in statutes. The recitals in a public statute are conclusive evidence of the fact recited, for the purpose of carrying

it into effect, but no further. The recitals in a private statute are conclusive evidence between parties who claim under its provisions, but no further.

Cal. C. Civ. P., § 1903. Private statute defined, § 7081.

7087. (3383.) Judicial record defined. A judicial record is the record or official entry of the proceedings in a court of justice, or of the official act of a judicial officer, in an action or special proceeding.

Cal. C. Civ. P., § 1904.

7088. (3384.) Id. Of court within the United States, how proved. A judicial record of this state, or of the United States, may be proved by the production of the original, or by a copy thereof certified by the clerk or other person having the legal custody thereof. That of another state or of a territory may be proved by the attestation of the clerk and the seal of the court annexed, if there be a clerk and seal, together with a certificate of the chief judge or presiding magistrate that the attestation is in due form.

Cal. C. Civ. P., § 1905. Judgment of justice of the peace of another state, how proved, §§ 7094, 7095.
Judgment, how pleaded and proved, § 6600. Entries in justice's docket prima facie evidence, § 7531.
Authentication of judgment of another state in clerk's name, by deputy clerk, is sufficient. Steinke v. Graves, 16 U. 293; 52 P. 386.

7089. (3385.) Id. Of foreign country, how proved. A judicial record of a foreign country may be proved by the attestation of the clerk, with the seal of the court annexed, if there be a clerk and seal, or of the keeper of the record, with the seal of his office annexed, if there be a seal, together with a certificate of the chief judge or presiding magistrate, or minister, or ambassador, or a consul, vice-consul, or consular agent of the United States in such foreign country, that the attestation is in due form and by the proper officer.

Cal. C. Civ. P., § 1906*.

7090. (3386.) Id. Other proof. A copy of the judicial record of a foreign country is also admissible in evidence upon proof:

1. That the copy offered has been compared by the witness with the original, and is an exact transcript of the whole of it;

2. That such original was in the custody of the clerk of the court, or other legal keeper of the same; and,

3. That the copy is duly attested by a seal which is proved to be the seal of the court where the record remains, if it be the record of a court; or, if there be no such seal, or if it be not a record of a court, by the signature of the legal keeper of the original.

Cal. C. Civ. P., § 1907.

7091. (3387.) Other official documents, how proved. Other official documents may be proved as follows:

1. Acts of the executive of this state, by the records, and of the United States, by the records of the departments of the United States certified by the heads of those departments respectively. They may also be proved by public documents, printed by the order of the legislature or congress, or either house thereof;

2. The proceedings of the legislature of this state or of congress, by the journals of those bodies respectively, or either house thereof, or by published statutes or resolutions, or by copies certified by the clerk, or printed by their order;

3. The acts of the executive or the proceedings of the legislature of another state or of a territory in the same manner;

4. The acts of the executive, or the proceedings of the legislature of a foreign country, by journals published by their authority, or commonly received in that country as such, or by a copy certified under the seal of the country or sovereign, or by a recognition thereof in some public act of the executive of the United States;

5. Acts of a municipal corporation of this state or of a board or department thereof, by a copy certified by the legal keeper thereof, or by a printed book published by the authority of such corporation;

6. Documents of any other class in this state, by the original, or by a copy, certified by the legal keeper thereof;

7. Documents of any other class in another state or a territory, by the original, or by a copy, certified by the legal keeper thereof, together with the certificate of the secretary of state, judge of the supreme, superior, circuit, district, or county court, or mayor of a city of such state or territory, that the copy is duly certified by the officer having the legal custody of the original;

8. Documents of any other class in a foreign country, by the original, or by a copy, certified by the legal keeper thereof, with a certificate under the seal of the country or sovereign, or with the certificate of the minister or ambassador, or a consul, or vice-consul, or consular agent of the United States in such foreign country, that the document is a valid and subsisting document of such country, and that the copy is duly certified by the officer having the legal custody of the original;

9. Documents in the departments of the United States government, by the certificate of the legal custodian thereof.

Cal. C. Civ. P., § 1918*.

7092. (3388.) Public record of private writing, how proved. A public record of a private writing may be proved by the original record, or by a copy thereof, certified by the legal keeper of the record.

Cal. C. Civ. P., § 1919.

Proof of conveyances, etc., § 7116.

7093. (3389.) Entries in official records prima facie evidence. Entries in public or other official books or records, made in the performance of his duty by a public officer of this state; or by any other person in the performance of a duty specially enjoined by law, are prima facie evidence of the facts stated therein.

Cal. C. Civ. P., § 1920.

Entries in justice's docket prima facie evidence, § 7531.

When courts take judicial notice of the records of public officers, note to § 7076.

Certified copy of industrial commission admissible, § 3067.

Certified copy of files and orders of public utility commission admissible, § (1) 4823.

Reports to public utility commission on accidents not admissible, § 4812.

In order to introduce evidence of the local mining law of a district, it is necessary that it should be made to appear aliunde that the copy offered comes from the proper custodian, and that such person was empowered to give certified copies thereof, so as to become evidence, and that such was a copy of the laws in force in such district.

Roberts v. Wilson, 1 U. 292.

7094. (3390.) Judgment of justice of another state, etc., how proved. A transcript from the record or docket of a justice of the peace of another state, or of a territory, of a judgment rendered by him, of the proceedings in the action before the judgment, of the execution and return, if any, subscribed by the justice and verified in the manner prescribed in the next section, is admissible evidence of the facts stated therein.

Cal. C. Civ. P., § 1921.

Judicial record of this state, how proved, § 7088.

7095. (3391.) Id. Certification. Justice as a witness. There must be attached to the transcript a certificate of the justice that the transcript is in all respects correct, and that he had jurisdiction of the action, and also a further certificate of the clerk or prothonotary of the county in which the justice is a resident at the time of rendering the judgment, under the seal of the county, or the seal of the court of common pleas or county court or court of general jurisdiction thereof, certifying that the person subscribing the transcript was, at the date of the judgment, a justice of the peace in the county, and that the signature is genuine. Such judgment, proceedings, and jurisdiction may also be proved by the justice himself, on the production of his docket, or by a copy of a judgment, and his oral examination as a witness.

Cal. C. Civ. P., § 1922*.

7096. (3392.) Form of certificate to copy. Whenever a copy of a writing is certified for the purpose of evidence, the certificate must state in substance that the copy is a correct copy of the original, or of a specified part thereof, as the case may be.

Cal. C. Civ. P., § 1923.

7097. (3393.) Such certificate to be under seal. Such certificate must be under the official seal of the certifying officer, if there be any, or, if he be the clerk of a court having a seal, under the seal of such court.

Cal. C. Civ. P., § 1923.

7098. (3394.) Effect of certificate of purchase as evidence. A certificate of purchase or of location of any lands in this state, issued or made in pursuance of any law of the United States, is prima facie evidence that the holder or assignee of such certificate is the owner of the land described therein; but this evidence may be overcome by proof that, at the time of the location, or time of filing a pre-emption claim on which the certificate may have been issued, the land was in the adverse possession of the adverse party, or those under whom he claims, or that the adverse party is holding the land for mining purposes.

Cal. C. Civ. P., § 1925*.

7099. (3395.) Id. By officer, or board of officers. An entry made by an officer, or board of officers, or under the direction and in the presence of either, in the course of official duty, is prima facie evidence of the facts stated in such entry.

Cal. C. Civ. P., § 1926.

CHAPTER 52.

PRIVATE WRITINGS.

7103. (3396.) Private writings defined. Private writings are either:

1. Sealed; or,
2. Unsealed.

Cal. C. Civ. P., § 1929.

7104. (3397.) Seal defined. A seal is a particular sign, made to attest in the most formal manner, the execution of an instrument.

Cal. C. Civ. P., § 1930.

7105. (3398.) Public and private seals defined. Foreign seal. A public seal in this state is a stamp or impression made by a public officer with an instrument provided by law, to attest the execution of an official document, upon the paper, or upon any substance attached to the paper which is capable of receiving a visible impression. A private seal may be made in the same manner by any instrument, or it may be made by a scroll of the pen, or by writing the word "seal" against the signature of the writer. A scroll or other sign, made in another state or a territory or a foreign country, and recognized as a seal, must be so regarded in this state.

Cal. C. Civ. P., § 1931*.

7106. (3399.) Private seal not necessary. It shall not be necessary to use private seals on any instrument of writing in this state.

7107. (3400.) Histories, scientific works, maps, etc., prima facie evidence. Historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties, are prima facie evidence of facts of general notoriety and interest.

Cal. C. Civ. P., § 1936.

Historical works relating to the Mormon church, and the records and journals of such church, are admissible to show the meaning of the term "sealing ordinance," as applied by the adherents of the Mormon faith to the ceremony of marriage.

Hilton v. Roylance, 25 U. 129; 69 P. 660.

7108. (3401.) Notice to adverse party to produce writing. Proof. If a writing to be proved be in the custody of the adverse party, he must first have reasonable notice to produce it. If he then fail to do so, the contents of the writing may be proved as in case of its loss. But the notice to produce it is not necessary where the writing is itself a notice, or where it has been wrongfully obtained or withheld by the adverse party.

Cal. C. Civ. P., § 1938.

Demand for copy of writing, etc., order, § 7204.

Demand for inspection of writing, § 6595.

Refusal to admit genuineness of writing, effect, § 7203.

Parol evidence to prove writing, after notice, § 7117.

Secondary evidence admissible, when, § 7117, and note.

Admission of genuineness sufficient, § 7112.

7109. (3402.) Party demanding writing not required to use it. Though a writing called for by one party is produced by the other, and is thereupon

inspected by the party calling for it, he is not obliged to produce it as evidence in the case.

Cal. C. Civ. P., § 1939.

7110. (3403.) Writings, how proved. Any writing may be proved either:

1. By any one who saw the writing executed; or,
2. By evidence of the genuineness of the handwriting of the maker; or,
3. By a subscribing witness.

Cal. C. Civ. P., § 1940.

Proof of instruments sent by telegraph or telephone, §§ 6117-6120, 7032.

A person acquainted with the handwriting of the person whose signature was forged is a competent witness.

People v. Mahon, 1 U. 205.

An expert may testify as to his opinion formed from a comparison with writings admitted to be genuine.

Durnell v. Snowden, 5 U. 216; 14 P. 334.
Tucker v. Kellogg, 8 U. 11; 28 P. 870.
State v. Webb, 18 U. 441; 56 P. 159.

In a prosecution for statutory rape, in which prosecutrix claimed to have received certain letters from defendant, but admitted that she had never seen him write nor seen a specimen of his handwriting admitted to be genuine, and was not an expert at handwriting, she was not competent to testify that the letters were written by defendant, although she claimed that he had admitted having written two of the letters.

State v. McBride, 30 U. 422; 85 P. 440.

On an issue as to whether a certain letter was written by defendant, a witness who had seen defendant write but once was competent to testify.

State v. Freshwater, 30 U. 442; 85 P. 447.
Durnell v. Snowden, 5 U. 216; 14 P. 334.
Tucker v. Kellogg, 8 U. 11; 28 P. 870.

On issue as to whether certain typewritten letters were written by defendant, testimony of an expert that a comparison of the letters with work done by a certain typewriting machine in the town where defendant lived indicated, because of defects in the type and in the alignment thereof, that the letters were written on the machine in question, was competent.

State v. Freshwater, 30 U. 442; 85 P. 447.

7111. (3404.) Id. When subscribing witness denies or forgets. If the subscribing witness denies or does not recollect the execution of the writing, its execution may still be proved by other evidence.

Cal. C. Civ. P., § 1941.

7112. (3405.) Id. Admission of genuineness by adverse party sufficient. When, however, evidence is given that the party against whom the writing is offered has at any time admitted its execution, no other evidence of the execution need be given, when the instrument is one produced from the custody of the adverse party, and has been acted upon by him as genuine.

Cal. C. Civ. P., § 1942*.

7113. (3406.) Entry made by decedents, when prima facie evidence. The entries and other writings of a decedent made at or near the time of the transaction, and when he was in a position to know the facts stated therein, may be read as prima facie evidence of the facts therein stated, in the following cases:

1. When the entry was made against the interest of the person making it;
2. When it was made in a professional capacity, and in the ordinary course of professional conduct;
3. When it was made in the performance of a duty specially enjoined by law.

Cal. C. Civ. P., § 1946.

7114. (3407.) Private writing, acknowledged and certified, prima facie evidence of execution. Every private writing, except last wills and testaments, may be acknowledged or proved and certified in the manner provided for the acknowledgment or proof of conveyances of real property, and the certificate of such acknowledgment of proof is prima facie evidence of the execution of the writing, in the same manner as if it were a conveyance of real property.

Cal. C. Civ. P., § 1948.

7115. (3408.) Will invalid unless formally executed. Proof. A last will and testament, except a nuncupative will, is invalid, unless it be in writing and executed with such formalities as are required by law. When, therefore, such a will is to be shown, the instrument itself must be produced, or secondary evidence of its contents be given.

Cal. C. Civ. P., 1969.
Execution of will, § 6315.
Proof of will, § 7572.

7116. (3409.) Conveyance acknowledged and certified, prima facie evidence. Certified copy. Every instrument conveying or affecting real property, acknowledged, or proved and certified, as provided by law, may, to-

gether with the certificate of acknowledgment or proof, be read in evidence, in an action or proceeding, without further proof; and the record, or a certified copy of the record, of such conveyance or instrument thus acknowledged or proved may be read in evidence, with the like effect as the original, on proof, by affidavit or otherwise, that the original is not in the possession or under the control of the party producing the record or the certified copy.

Cal. C. Civ. P., § 1951*.

Conveyance, etc., sent by telegraph or telephone as evidence, §§ 6117-6120.

Public record of private writing, how proved, § 7092.

Abstract of title as evidence, § 1590.

Exemplification of United States patent for a mining claim, authenticated by the commissioner of the general land office, is evidence equally with the original, and is admissible without the proof hereby required to authorize the admission of certified copies.

Bullion-B. & C. M. Co. v. Eureka Hill M. Co., 5 U. 3; 11 P. 515.

Where it is shown that a party offering a certified copy of a deed has left the original in the city where the trial is being held and no effort made to secure it, the certified copy is not admissible.

Wilson v. Wright, 8 U. 215; 30 P. 754.

The record of a patent is admissible where it shows it was duly executed.

Tate v. Rose, 35 U. 229; 99 P. 1003.

7117. (3410.) When parol evidence of writing admissible. There can be no evidence of the contents of a writing, other than the writing itself, except in the following cases:

1. When the original has been lost or destroyed, in which case proof of the loss or destruction must first be made;

2. When the original is in the possession of the party against whom the evidence is offered, and he fails to produce it after reasonable notice;

3. When the original is a record or other document in the custody of a public officer;

4. When the original has been recorded, and a certified copy of the record is made evidence by this code or other statute;

5. When the original consists of numerous accounts or other documents which cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole.

In the cases mentioned in subs. 3 and 4, a copy of the original, or of the record, must be produced; in those mentioned in subs. 1 and 2, either a copy or oral evidence of the contents.

Cal. C. Civ. P., § 1855.

Abstracts of title admissible in evidence, §§ 1590, 1591.

Notice to produce writing, § 7108.

A party who states that he has left the original deed with a person in the city where the trial is had, and that he has made no attempt to get the same, is not entitled to offer a copy of such deed in evidence.

Wilson v. Wright, 8 U. 215; 30 P. 754.

Where a written instrument is traced into the hands of a party not within the state, secondary evidence is admissible to prove the contents of the instrument, and this without further showing that the original was lost or destroyed. In such case no notice to produce is necessary, and a copy of the instrument is competent. (Approved in McCollum v. S. P. Co., 31 U. 494; 88 P. 663.)

Dwyer v. S. L. C. Copper Co., 14 U. 339; 47 P. 311.

Sufficient reason for failure to produce writing not being given, the copy held by defendant Ryan should have been produced.

McIntyre v. Ajax, 17 U. 213; 53 P. 1124.

Where written contract has been lost its contents may be proved.

Nelson v. S. P. Ry., 18 U. 244; 55 P. 364.

Saunders v. S. P. Ry., 18 U. 243; 55 P. 1102.

Contents of lost deed may be proved.

Scott v. Crouch, 24 U. 377; 67 U. 1068.

Before parol evidence may be given of the contents of a writing, it must be shown that the writing itself can not be produced, or its absence must be satisfactorily accounted for.

Stoll v. Daly M. Co., 19 U. 271; 57 P. 295.

Evidence that a letter was properly addressed, stamped, and mailed to defendant raises the presumption that it was received by him, and is sufficient to admit it in evidence.

Cooney v. McKinney, 25 U. 329; 71 P. 485.

Brown v. Fraternal Acc. Ass'n, 18 U. 265; 55 P. 63.

Where, in a prosecution for adultery, the state claimed that certain letters had been written by defendant's alleged paramour to defendant and notified the defendant to produce these letters, which he did not do, evidence by the woman who wrote them as to their contents was admissible.

State v. Freshwater, 30 U. 442; 85 P. 447.

Plaintiff, in an action against a railway company for injuries caused by its failure to provide him with proper accommodations and protection as a passenger, could introduce oral evidence to show the class of his ticket, where he had surrendered it to the railway and had served proper notice on the same to produce it.

McCollum v. S. P. Co., 31 U. 494; 88 P. 663.

7118. (3411.) Material alterations require explanation. The party producing as genuine a writing which has been altered, or appears to have been altered, after its execution, in a part material to the question in dispute, must account for the appearance or alteration. He may show that the alteration was made by another, without his concurrence, or was made with the consent of the parties affected by it, or otherwise properly or innocently made, or that the alteration did not change the meaning or language of the instrument. If he do that, he may give the writing in evidence, but not otherwise.

Cal. C. Civ. P., § 1982.

Alteration of promissory note, effect, §§ 4160, 4161, and note.

Alteration of contract after signing; held, material and contract void.
Am. Pub. Co. v. Fisher Brew. Co., 10 U. 147; 37 P. 259.

The rule of this section cannot be applied to the alteration of a commercial agency's report by changing the figures so as to correct an incorrect addition.
Belleville Pump & S. W. v. Samuelson, 16 U. 234; 52 P. 282.

CHAPTER 53.

WITNESSES.

COMPETENCY.

7122. (3412.) Who may be witnesses. Jury exclusive judges of credibility. All persons, without exception, otherwise than is specified in the next two sections, who, having organs of sense, can perceive, and, perceiving, can make known their perceptions to others, may be witnesses. Therefore, neither parties nor other persons who have an interest in the event of an action or proceeding are excluded; nor those who have been convicted of crime; nor persons on account of their opinions on matters of religious belief; although, in every case, the credibility of the witness may be drawn in question, by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty, or integrity, or his motives, or by contradictory evidence; and the jury are the exclusive judges of his credibility.

Cal. C. Civ. P., § 1879*.
Jury to decide questions of fact, when, §§ 6444, 6781, 7208.
Witnesses, etc., in criminal cases, §§ 9275-9280.
Defendant in criminal case as a witness in his own behalf, § 9279, and note.
The jury, or the court when a law action is tried without a jury, is the exclusive judge of the credibility of the witnesses and of the weight of the evidence, note to Con. art. 8, sec. 9.
Discretion of court as to examination of witnesses, note to § 6802.
Witnesses to be protected from insult, § 7142.
Defendant and mother competent in bastardy proceedings, § 384.
Witness must answer in corrupt practice prosecution, §§ 2373, 2401.
Witness must answer in liquor prosecution, § 3371.
Accomplices competent in liquor prosecution, § 3369.
Witness in pandering prosecution, § 8101.
Witness in prosecution of delinquent father or husband, § 8113.
Instructions generally, note to § 6802.

Jury's attention called to defendant's interest in the result in a criminal case not error.
People v. Callaghan, 4 U. 49; 6 P. 49.

Court may caution a jury as to testimony of weak-minded witness.
Lowe v. Herald, 6 U. 175; 21 P. 991.

An instruction that the jury were to determine the credibility of the witnesses, etc., that they were not bound to take the testimony of any witness as absolutely true, and should not do so if they were satisfied that the witness was mistaken in the matter testified to by him, or that for any other reason his testimony was untrue or unreliable, though ambiguous, was not error.
Black v. Rocky Mt. Bell Tel. Co., 26 U. 451; 73 P. 514.

An attorney is a competent witness and may be sworn and testify on the hearing of a cause wherein he is sole attorney for one of the parties litigant and actively engaged in the trial. Practice not commended, however.
Jennings v. Pratt, 19 U. 137; 56 P. 680.

A county attorney who was of counsel for the state in a criminal prosecution, after his term of office expired and to whom accused made admissions, is a competent witness.
State v. Green, 38 U. 389; 115 P. 181.

IMPEACHMENT OF WITNESS:

Impeaching questions should go to general reputation of witness in neighborhood in which he resides.
State v. Marks, 16 U. 204; 51 P. 1089.
State v. Hilberg, 22 U. 27; 61 P. 215.

Where questions are proper as laying foundation for impeachment, etc., it is error to refuse to allow them.
Walley v. Des. Natl. Bk., 14 U. 305; 47 P. 147.

The credibility of a witness cannot be impeached by asking her whether she has not had some difficulty with her husband.
People v. Thiede, 11 U. 241; 39 P. 837; affirmed 159 U. S. 510.

A witness in a criminal case cannot be impeached by contradicting an answer made to an immaterial question.
State v. Haworth, 24 U. 398; 68 P. 155.

When propounding impeaching questions to a witness concerning his prior inconsistent statements to another, the time, place, and circumstances should be stated with reasonable certainty, in order to allow a proper foundation for the questions.
Olson v. O. S. L. R. R. Co., 24 U. 460; 68 P. 148.

Plaintiff was entitled to introduce evidence that the witness on former occasions had made statements contradictory to and inconsistent with his testimony with reference to the danger attending bathers at the resort, a proper foundation having been first laid on cross-examination for the introduction of such impeaching evidence.
Larkin v. Saltair B. Co., 30 U. 86; 83 P. 686.

Where a witness for defendant in a criminal case testifies as to an alleged alibi, evidence of contrary statements made by him is admissible in impeachment, though, when he is interrogated as to such statements, he is excused from answering for the reason that his answer would tend to incriminate him.
State v. Haworth, 24 U. 398; 68 P. 155.

CHARACTER OF WITNESS:

Cross-examination of defendant charged with crime, § 9279, and note.

In a prosecution for adultery, it is error for the court not to allow the defense to show the bad character of the woman with whom the offense was alleged to have been committed, she being a witness for the prosecution.
U. S. v. Bredemeyer, 6 U. 143; 22 P. 110.

It is no excuse to the defendant that the person assaulted was a woman of bad reputation for chastity, if she was forced against her will,

but such fact is a proper matter for the consideration of the jury, as affecting her credibility as a witness, and whether she would be more unlikely to resist an assault of that character upon her person.

State v. McCune, 16 U. 170; 51 P. 818.

When a defendant in a criminal case testifies in his own behalf, he places his general character for truth and veracity in issue, but not his character for honesty and integrity, and his character in these respects cannot be inquired into unless he voluntarily places them in issue.

State v. Marks, 16 U. 204; 51 P. 1089.

In all cases where evidence is admitted touching the general character of a party, it ought to bear reference to the nature of the charge against him.

Id.

When the general reputation of a person charged with crime is in question, it should be limited to a period not later than the date of the arrest.

Id.

In criminal prosecutions, whatever degree of the offense with which accused is charged, evidence of his good character may be introduced by him without reference to the apparently conclusive or inconclusive character of the other evidence.

State v. Blue, 17 U. 175; 53 P. 978.

People v. Hancock, 7 U. 170; 25 P. 1093.

State v. Van Kuran, 25 U. 8; 69 P. 60.

Evidence of good character or the contrary must be confined to the general reputation of accused, hence, in a prosecution for homicide, that there was found in accused's room appliances which might be used for crime, although they were susceptible of innocent use, is inadmissible to rebut accused's evidence of good character.

State v. Anselmo, 46 U. 137; 148 P. 1071.

7123. (3413.) Cannot be witnesses; Mentally unsound; children under ten; parties to transactions with deceased, or insane. The following persons cannot be witnesses:

1. Those who are of unsound mind at the time of their production for examination;

2. Children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly;

3. A party to any civil action, suit, or proceeding, and any person directly interested in the event thereof, and any person from, through, or under whom such party or interested person derives his interest or title or any part thereof, when the adverse party in such action, suit, or proceeding claims or opposes, sues or defends as guardian of any insane or incompetent person, or as the executor or administrator, heir, legatee, or devisee of any deceased person, or as guardian, or assignee, or grantee, directly or remotely, of such heir, legatee, or devisee, as to any statement by, or transaction with, such deceased, insane, or incompetent person, or matter of fact whatever, which must have been equally within the knowledge of both the witness and such insane, incompetent, or deceased person, unless such witness be called to testify thereto by such adverse party, so claiming or opposing, suing or defending in such action, suit, or proceeding.

Cal. C. Civ. P., § 1880*.

When a child under ten years of age is offered as a witness, not age, but capacity of receiving just impressions of facts and relating them truly, are the tests of competency.

State v. Blythe, 20 U. 378; 58 P. 1108.

And the discretion of the trial court will not be interfered with unless abused.

State v. Morasco, 42 U. 5; 128 P. 571.

State v. MacMillan, 46 U. 19; 145 P. 833.

That offered witnesses, in an action for injury sustained in attempting to pass between cars obstructing a crossing, were boys 9 and 12 years old, who had been standing between trains and were climbing over the cars, did not authorize the court to conclusively assume that they had no such means or opportunity as to have heard the bell had it rung, or that there was such a want of attention on their part as to prevent their hearing it had it rung.

Geses v. O. S. L. Ry. Co., 33 U. 156; 93 P. 274.

Sub. 3 applies:

To suits brought by as well as against an executor.

Ewing v. White, 8 U. 250; 30 P. 984.

To plaintiff's testifying in a suit against an administrator to enforce a trust against decedent and for an accounting thereunder.

Wood v. Fox, 8 U. 380; 32 P. 48; affirmed 166 U. S. 637.

To the testimony of a party to an action to establish his interest in the estate of decedent.

Henefer v. Hays, 14 U. 324; 47 P. 90.

See Chambers v. Emery, 13 U. 374; 45 P. 192.

The testimony of one through whom plaintiff claims title as to statements of a deceased person in an action by the assignee or heir of such deceased person, but not the testimony of the wife.

Clawson v. Wallace, 16 U. 300; 52 P. 9.

Plaintiff's testimony suing decedent's estate for money loaned decedent on open account.

Kislingberry v. Evans, 40 U. 356; 121 P. 571.

The plaintiff's testimony as to the indorsement or leaving of the stock by the deceased, nor is the possession of the stock prima facie evidence of its having been pledged as security.

Robison v. Gull, 51 U. —; 173 P. 905.

Sub. 3 does not apply:

To the testimony of a secretary of a corporation where it is a party, and the opposing party is a guardian, etc.

Rasmussen v. Sev. Val. Canal Co., 40 U. 371; 121 P. 741.

To the testimony of a grantee of a deceased grantor as to conversation with the latter in a suit by the divorced wife of the grantor, claiming the property conveyed in her own right.

Murphy v. Ganey, 23 U. 633; 66 P. 190.

Testimony of a guardian ad litem contesting the probate of a will on behalf of two minor children of testator.

In re Van Alstine's Estate, 26 U. 193; 42 P. 941.

To the testimony of heirs at law, devises, or legatees under the will or their heirs in a suit to contest a will. (Overruling Atwoods Est., 14 U. 1; 45 P. 1036.)

Miller v. Livingston, 31 U. 415; 88 P. 338.

7124. (3414.) Privileged communications and rights of witnesses. There are particular relations in which it is the policy of the law to encourage

confidence and to preserve it inviolate. Therefore, a person cannot be examined as a witness in the following cases:

1. A husband cannot be examined for or against his wife, without her consent, nor a wife for or against her husband, without his consent; nor can either during the marriage or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceedings for a crime committed by one against the other, nor to crimes referred to in an act making it a misdemeanor to abandon or wilfully neglect to provide for the support and maintenance, by any person, of his wife or his or her minor child or children in destitute or necessitous circumstances (§§ 8112-8115), and also an act in relation to pandering (§§ 8095-8101).

2. An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given therein, in the course of professional employment; nor can an attorney's secretary, stenographer, or clerk be examined, without the consent of his employer, concerning any fact the knowledge of which had been acquired in such capacity;

3. A clergyman or priest cannot, without the consent of the person making the confession, be examined as to any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs;

4. A physician or surgeon cannot, without the consent of his patient, be examined in a civil action, as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient;

5. A public officer cannot be examined as to communications made to him in official confidence, when the public interests would suffer by the disclosure. Am'd '07, p. 195; '09, p. 42; '11, p. 180.

Cal. C. Civ. P., § 1881*.

Husband not compellled to testify against wife or wife against husband, Con. art. 1, sec. 12.

Husband and wife as witnesses in criminal actions, §§ 8555, 9278, and note.

Sub. 1:

When a witness is offered by a party to the suit, with the statement that "she is his plural, or second wife," such witness will be excluded, and the court will not try the question of the validity of the marriage or the relations of the parties.

Friel v. Wood, 1 U. 160.

A witness claiming exemption on the ground that she is the wife of defendant may be examined as to the truth of such claim.

Ex parte Hendrickson, 6 U. 3; 21 P. 396.

Where a husband testified in a suit to quiet title, without the consent of his wife, but the testimony was in the interest of both, and the wife impliedly consented thereto, such testimony was not prohibited by this section.

Murphy v. Janey, 23 U. 633; 66 P. 190.

A divorced wife may testify in a contest involving the probate of her former husband's will, as to his condition when under the influence of liquor, during the time she was his wife.

In re Van Alstine's Estate, 26 U. 193; 72 P. 942.

Sub. 2:

An attorney is a competent witness in an action in which he is the sole attorney for one of the parties.

Jennings v. Pratt, 19 U. 129; 56 P. 951.

Conversations with an attorney in negotiations to employ him are priviledged.

State v. Snowden, 23 U. 318; 65 P. 479.

Burden of proving a communication, is privileged on one claiming it.

Id.

A statement by a party to an attorney that he intends to commit a crime, and asking advice as to the effect of it, is not privileged hereunder.

People v. Mahon, 1 U. 205.

This provision is declaratory of common law, and may be waived by client, and in a will contest on the ground of undue influence and want of capacity, the attorney who prepared the will cannot claim the privilege but must testify at the demand of any of the parties.

In re Young's Estate, 33 U. 382; 94 P. 731.

Where a client testifies as to conversation with his attorney which is privileged, he thereby waives his privilege and cannot thereafter claim it when the attorney is called to impeach him.

State v. Hoben, 36 U. 186; 102 P. 1000.

Sub. 4:

A physician sent by a railroad company to examine an injured passenger was not entitled to testify as to any information acquired.

Munz v. Salt Lake City R. R. Co., 25 U. 220; 70 P. 852.

Physicians who attended testator before his death are disqualified from expressing, in a contest over testator's will, their opinion of his sanity at the time of its execution.

In re Van Alstine's Estate, 26 U. 193; 72 P. 942.

Such information only as may reasonably be necessary to enable the physician to apply his full skill for the patient's benefit, even though it be but the narrative of the facts leading up to the accidental injury, is privileged.

Madsen v. Utah Light & Ry. Co., 36 U. 528; 105 P. 799.

Sub. 4:

Is statutory:

In re Young's Estate, 33 U. 382; 94 P. 731.

A statement made by insured to his physician after he was told that he was afflicted with cancer and that it was incurable, that he had suffered with his stomach and pains in his back for two years, is privileged.

Lombard v. Columbia Nat. Life Ins. Co., 50 U. —; 168 P. 269.

A question as to how long one was under an anaesthetic, or whether he was under the influence of an anaesthetic is not privileged, but where there is no issue on such points, and where the witness in answering another

question answered this question, the error in sustaining the objection is harmless.
Dovick v. Chief Con. M. Co., 51 U. —; 174 P. 627.

Sub. 5:

Where a party testifies as to his condition after an accident and as to the treatment given by a physician, and has one attending physician testify as to his condition and treatment, he thereby waives the privilege, and the other attending physician may testify fully as to his condition and treatment, and also as to whether or not the patient was syphilitic.
Dahlquist v. D. & R. G. R. R. Co., 51 U. —; 174 P. 833.

Where the state in a criminal case invites a disclosure of matters privileged under sub. 5, and acquiesces in such disclosure so long as the matter disclosed is against the accused, the state cannot exclude other disclosures sought to be shown by accused.
State v. Hoben, 36 U. 186; 102 P. 1000.

7125. (3415.) Judge or juror may be a witness. Proceeding. The judge himself or any juror may be called as a witness by either party; but in such case it is in the discretion of the court to order the trial to be postponed or suspended, and to take place before another judge or jury.

Cal. C. Civ. P., § 1883.

7126. (3416.) Interpreter may be summoned. Contempt. When a witness does not understand and speak the English language, an interpreter must be sworn to interpret for him. Any person may be summoned by any court or judge to appear before such court or judge to act as interpreter in any action or proceeding. The summons must be served and returned in like manner as a subpœna. Any person so summoned who fails to attend at the time and place named in the summons is guilty of a contempt.

Cal. C. Civ. P., § 1884*.
Fee of interpreter, § 2558.

Juror may act as interpreter.
People v. Thiede, 11 U. 241; 39 P. 837; affirmed 159 U. S. 510.

PRODUCTION OF WITNESSES.

7127. (3417.) Subpœna defined. May require production of books, etc. The process by which the attendance of a witness is required is a subpœna. It is a writ or order directed to a person and requiring his attendance at a particular time and place to testify as a witness. It may also require him to bring with him any books, documents, or other things under his control which he is bound by law to produce in evidence.

Cal. C. Civ. P., § 1985.

7128. (3418.) Id. To require attendance before court or officer, etc. Contempt. The subpœna is issued as follows:

1. To require attendance before a court, or at the trial of an issue therein, it is issued in the name of the court before which the attendance is required, or in which the issue is pending;

2. To require attendance out of the court, before a judge, justice, or other officer authorized to administer oaths or take testimony in any matter under the laws of this state, it is issued by the judge, justice, or any other officer before whom the attendance is required;

3. To require attendance before a commissioner appointed to take testimony by a court of a foreign country or of the United States, or of any other state or territory in the United States, or of any other district or county within this state, or before any officer or officers empowered by the laws of the United States to take testimony, it may be issued by any judge, or justice of the peace in places within their respective jurisdictions, with like power to enforce attendance; and, upon certificate of contumacy to said court, to punish contempt of such process, as such judge or justice could exercise if the subpœna directed the attendance of the witness before his court in a matter pending therein.

Cal. C. Civ. P., § 1986.

7129. (3419.) Service of subpœna, by whom and how made. The service of a subpœna is made by showing the original and delivering a copy, or a ticket containing its substance, to the witness personally, or by leaving a copy with some suitable person at the place of his abode, giving or offering to him at the same time, if demanded by him, the fees to which he is entitled for travel to and from the place designated, and one day's attendance there. The service must be made so as to allow the witness a reasonable time for preparation and travel to the place of attendance. Such service may be made by any person.

Cal. C. Civ. P., § 1987*.
Witness may demand fee and mileage in advance, § 2549.
Witness fee, $1.50 per day; mileage, 20c per mile, § 2545.
Party may serve his own subpoenas.
Smith v. Nelson, 23 U. 512; 65 P. 485.
A subpoena may be served by any person, and the witness may waive the manner of service, or accept service.
Holt v. Neilson, 37 U. 566; 109 P. 470.

7130. (3420.) Id. When witness concealed, inclosure may be broken. If a witness is concealed in a building or vessel, so as to prevent the service of a subpœna upon him, any court or judge, or any officer issuing the subpœna, may, upon proof by affidavit of the concealment, and of the materiality of the witness, make an order that the sheriff of the county serve the subpœna; and the officer must serve it accordingly, and for that purpose may break into the building or vessel where the witness is concealed.

Cal. C. Civ. P., § 1988.

7131. (3421.) Witness required to attend court. When not out of county. A witness is obliged to attend as a witness before any district court, a judge thereof, or referee, or master appointed by such district court, or a judge thereof, at any place in this state. A witness is not obliged to attend as a witness before any judge of a city court, any judge of a municipal court, any justice of the peace, or other officer out of the county in which he resides, unless the distance be less than thirty miles from his place of residence to the place of trial. Am'd '05, p. 111.

7132. (3422.) Person present in court must testify. A person present in court, or before a judicial officer, may be required to testify in the same manner as if he were in attendance upon a subpœna issued by such court or officer.

Cal. C. Civ. P., § 1990.

7133. (3423.) Disobedience of witness a contempt. Punishment if witness a party. Disobedience to a subpœna, or a refusal to be sworn, or to answer as a witness, or to subscribe an affidavit or deposition when required, may be punished as a contempt of the court or officer issuing the subpœna or requiring the witness to be sworn; and, if the witness be a party, his complaint or answer may be stricken out.

Cal. C. Civ. P., § 1991.
Contempt, punishment, § 7058, and note.
When testimony stricken out.
Hadra v. Utah N. Bank, 9 U. 412; 35 P. 508.

7134. (3424.) Id. Liability to forfeiture and damage. A witness disobeying a subpœna also forfeits to the party aggrieved the sum of $100 and all damages which he may sustain by the failure of the witness to attend, which forfeiture and damages may be recovered in a civil action.

Cal. C. Civ. P., § 1992.

7135. (3425.) Warrant issued for absent witness. In case of a failure of a witness to attend, the court or officer issuing the subpœna, upon proof of the service thereof, and of the failure of the witness, may issue a warrant to the sheriff of the county to arrest the witness and bring him before the court or officer where his attendance was required.

Cal. C. Civ. P., § 1993.

7136. (3426.) Contents of warrant of commitment. To whom directed. Every warrant of commitment issued by a court or officer pursuant to this chapter must specify therein, particularly, the cause of the commitment, and if it be for refusing to answer a question, such question must be stated in the warrant. And every warrant to arrest or commit a witness pursuant to this chapter must be directed to the sheriff of the county where the witness may be, and must be executed by the officer in the same manner as process issued by the district court.

Cal. C. Civ. P., § 1994.

7137. (3427.) When witness a prisoner, order for production. If the witness be a prisoner confined in a jail or prison within this state, an order for his examination in the prison upon deposition, or for his temporary removal and production before a court or officer for the purpose of being orally examined, may be made as follows:

1. By the court itself in which the action or special proceeding is pending, unless it be a justice's court;

2. By a justice of the supreme court or by a judge of the district court of the county where the action or proceeding is pending, if pending before a justice's court or before a judge or other person out of court.

Cal. C. Civ. P., § 1995.

7138. (3428.) Id. Order made upon affidavits. Form. Such order can be made only on the motion of a party, upon affidavit showing the nature of the action or proceeding, the testimony expected from the witness, and its materiality.

Cal. C. Civ. P., § 1996.

7139. (3429.) Id. Witness produced if in county. Deposition, otherwise. If the witness be imprisoned in the county where the action or proceeding is pending, his production may be required. In all other cases his examination, when allowed must be taken upon deposition.

Cal. C. Civ. P., § 1997.

RIGHTS AND DUTIES OF WITNESSES.

7140. (3430.) Witness served must attend and answer legal questions. A witness, served with a subpœna, must attend at the time appointed, with any papers under his control required by the subpœna, and answer all pertinent and legal questions; and unless sooner discharged, must remain until the testimony is closed.

Cal. C. Civ. P., § 2064.

7141. (3431.) Id. Witness' privilege in certain cases. A witness must answer questions legal and pertinent to the matter in issue, though his answer may establish a claim against himself; but he need not give an answer which will have a tendency to subject him to punishment for felony; nor need he give an answer which will have a direct tendency to degrade his character, unless it be to the very fact in issue, or to a fact from which the fact in issue would be presumed. But a witness must answer as to the fact of his previous conviction for felony.

Cal. C. Civ. P., § 2065.

Impeachment of witness, note to § 7122.

Discretion of court as to examination of witness, note to § 6804.

A witness can be compelled to answer where the answer would disgrace him, only where the evidence is material.

Conway v. Clinton, 1 U. 215.

A witness may on cross-examination be questioned concerning his past life, and much latitude of inquiry should be permitted, even if attended with humiliation and disgrace to the witness, to enable the jury to judge of his credibility.

People v. Hite, 8 U. 461; 33 P. 254.

Immunities given hereby are personal privileges of witness which he waives by failing to claim himself.

People v. Larsen, 10 U. 143; 37 P. 258.

In a criminal prosecution, the general rule is that the right to refuse to answer incriminating questions is a personal privilege of the witness, which he can either exercise or waive, and, if the witness chooses to answer, neither defendant nor his counsel can legally object.

State v. Shockley, 29 U. 25; 80 P. 865.

But where the witness is also the defendant, he need not personally make the objection, but may claim such immunity through his counsel. (Distinguishing People v. Larsen, 10 U. 143; 37 P. 258.)

Id.

It is error to compel a witness, a married man, to answer a question whether he had put his arm around prosecutrix's sister, it being immaterial, and tending to degrade him.

State v. Reese, 43 U. 447; 135 P. 270.

While a witness, in order to test his credibility, may be asked if he has not been convicted of a crime, the question whether he has committed a crime is privileged, and he may decline to answer it.

State v. Thorne, 39 U. 208; 117 P. 58.

Though accused, on becoming a witness, may be cross-examined as other witnesses, yet when the question relates to incriminating acts, or calls for evidence of an incriminating character separate and distinct from those on trial testified to by him, he may claim his privilege and decline to answer, and the court must determine whether the evidence called for may tend to incriminate the witness.

Id.

7142. (3432.) Rights of witness, protection from insult, etc. It is the right of a witness to be protected from irrelevant, improper, or insulting questions, and from harsh or insulting demeanor; to be detained only so long as the interests of justice require it; and to be examined only as to matters legal and pertinent to the issue.

Cal. C. Civ. P., § 2066.

Counsel for the state, while entitled to considerable latitude in examining witnesses for defense should not be allowed to propound and repeat improper and unfair questions.

State v. Anselmo, 46 U. 137; 148 P. 1071.

7143. (3433.) Witness exempt from arrest in civil action. Every person who has been, in good faith, served with a subpœna to attend as a witness before a court, judge, commissioner, referee, or other person, in a case where the disobedience of the witness may be punished as a contempt, is exonerated from arrest in a civil action while going to the place of attendance, necessarily remaining there, and returning therefrom.

Cal. C. Civ. P., § 2067.

7144. (3434.) Id. Unlawful arrest void. Witness' damages. The arrest of a witness contrary to the preceding section is void, and when wilfully made, is a contempt of the court, and the person making it is responsible to the witness arrested for double the amount of the damages which may be assessed against him, and is also liable to an action at the suit of the party serving the witness with the subpœna, for the damages sustained by him in consequence of the arrest.

Cal. C. Civ. P., § 2068.

7145. (3435.) Arrest made in good faith. Affidavit claiming exemption. An officer is not liable to the party for making the arrest in ignorance of the facts creating the exoneration, but is liable for any subsequent detention of the party, if such party claim the exemption, and make an affidavit stating:

1. That he has been served with a subpœna to attend as a witness before a court, officer, or other person, specifying the same, the place of attendance, and the action or proceeding in which the subpœna was issued; and,

2. That he has not thus been served by his own procurement, with the intention of avoiding an arrest;

3. That he is at the time going to the place of attendance, or returning therefrom, or remaining there in obedience to the subpœna.

The affidavit may be taken by the officer, and exonerates him from liabil ity for discharging the witness when arrested.

Cal. C. Civ. P., § 2069.

7146. (3436.) Id. Court to discharge witness unlawfully arrested. The court or officer issuing the subpœna, and the court or officer before whom the attendance is required, may discharge the witness from an arrest made in violation of § 7143. If the court have adjourned before the arrest, or before application for the discharge, a judge of the court may grant the discharge.

Cal. C. Civ. P., § 2070.

OATHS AND AFFIRMATIONS.

7147. (3437.) Officers authorized to administer oaths. Every court, every judge or clerk or deputy clerk of any court, every justice, and every notary public, the secretary of state, and every officer or person authorized to take testimony in any action or proceeding, or to decide upon evidence, has power to administer oaths or affirmations.

Cal. C. Civ. P., § 2093*. Affidavit may be taken before whom, § 7157.

7148. (3438.) Form of oath or affirmation. An oath, or affirmation, in an action or proceeding, may be administered as follows, the person who swears or affirms expressing his assent when addressed in the following form:

You do solemnly swear (or affirm, as the case may be) that the evidence you shall give in this issue (or matter) pending between .....and.....shall be the truth, the whole truth, and nothing but the truth, so help you God.

Cal. C. Civ. P., § 2094.

7149. (3439.) Id. Court may vary form. Whenever the court before which a person is offered as a witness is satisfied that he has a peculiar mode of swearing connected with or in addition to the usual form of administration which in his opinion is more solemn or obligatory, the court may in its discretion adopt that mode.

Cal. C. Civ. P., § 2095.

7150. (3440.) Id. Witnesses not Christian. When a person is sworn who believes in any other than the Christian religion, he may be sworn according to the peculiar ceremonies of his religion if there be any such.

Cal. C. Civ. P., § 2096.

7151. (3441.) Affirmation or declaration instead of oath. Any person who desires it may, at his option, instead of taking an oath, make his solemn affirmation or declaration, by assenting, when addressed in the following form: "You do solemnly affirm (or declare) that," etc., as in § 7148.

Cal. C. Civ. P., § 2097.

CHAPTER 54.

AFFIDAVITS.

7154. (3442.) Affidavit may be used for what purposes. An affidavit may be used to verify a pleading or a paper in a special proceeding, to prove the service of a summons, notice, or other paper in an action or special proceeding, to obtain a provisional remedy, the examination of a witness or a stay of proceedings, or upon a motion, and in any other case expressly permitted by some other provision of this code.

Cal. C. Civ. P., § 2009.
Validity of affidavit, etc., defectively entitled, § 7213.
Affidavit without venue not valid.
Smith v. Richardson, 1 U. 194.
Affidavit must have a venue; omission of "ss," however, is an immaterial irregularity.
Smith v. Richardson, 1 U. 194.
McCord & Nave Mercantile Co. v. Glenn, 6 U. 139; 21 P. 500.

7155. (3443.) Proof of publication, how made. Evidence of the publication of a document or notice required by law or an order of a court or judge to be published in a newspaper may be given by the affidavit of the printer of the newspaper, or his foreman, or principal clerk, annexed to a copy of the document or notice, specifying the times when, and the paper in which, the publication was made.

Cal. C. Civ. P., § 2010.
Proof of publication of summons, § 6552.
Proof of publication of probate notices, § 7866.

7156. (3444.) Where filed. Certified copy prima facie evidence. If such affidavit be made in an action or special proceeding pending in a court, it may be filed with the court or clerk thereof. If not so made, it may be filed with the recorder of the county where the newspaper is printed. In either case, the original affidavit, or a copy thereof, certified by the judge of the court or officer having it in custody, is prima facie evidence of the facts stated therein.

Cal. C. Civ. P., § 2011*.

7157. (3445.) Affidavit taken before whom, if in Utah. An affidavit to be used before any court, judge, or officer of this state may be taken before any judge or clerk of any court, or any justice of the peace, or any notary public in this state.

Cal. C. Civ. P., § 2012.
Officers authorized to administer oaths, § 7147.

7158. (3446.) Id. If taken in another state. An affidavit taken in another state or territory of the United States, to be used in this state, may be taken before a commissioner appointed by the governor of this state to take affidavits and depositions in such other state or territory, or before any notary public in another state or territory, or before any judge or clerk of a court of record having a seal.

Cal. C. Civ. P., § 2013.

7159. (3447.) Id. If taken in a foreign country. An affidavit taken in a foreign country, to be used in this state, may be taken before an ambassador, minister, consul, vice-consul, or consular agent of the United States, or before any judge of a court of record having a seal, in such foreign country.

Cal. C. Civ. P., § 2014.

7160. (3448.) Certification of affidavit taken before foreign judge, etc. When an affidavit is taken before a judge or a court in another state or territory, or in a foreign country, the genuineness of the signature of the judge, the existence of the court, and the fact that such judge is a member thereof, must be certified by the clerk of the court, under the seal thereof.

Cal. C. Civ. P., § 2015.

CHAPTER 55.

DEPOSITIONS.

TAKEN OUT OF THE STATE.

7163. (3449.) Deposition out of state, taken when. The testimony of a witness out of the state may be taken by deposition in an action at any time after the service of the summons or the appearance of the defendant; and, in a special proceeding, at any time after a question of fact has arisen therein.

Cal. C. Civ. P., § 2020.
Taken out of state on oral interrogatories, §§ 7169-7167.
This chapter applicable to depositions for industrial commission, § 3081; public utility commission, § (3) 4822.

7164. (3450.) Commission, by and to whom issued. Notice. The deposition of a witness out of this state may be taken upon commission issued from the court, under the seal of the court, upon an order of the judge, or court, or justice of the peace in any case pending before such judge, court, or justice of the peace respectively, on the application of either party, upon five days' previous notice to the other. If issued to any place within the United States, it may be directed to any person agreed upon by the parties, or, if they do not agree, to any judge or notary public, or person named or commissioned by the officers issuing it. If issued to any country out of the United States, it may be directed to a minister, ambassador, consul, vice-consul, or consular agent of the United States in such country, or to any person agreed upon by the parties.

Cal. C. Civ. P., § 2024*.
A person appointed to take a deposition in another state must be one of the local officers specified in the practice act.
Newton v. Brown, 1 U. 287.
A stipulation waiving all objections to the form of taking depositions covers the objection that they were taken before a notary instead of commissioner.
Homberger v. Alexander, 11 U. 363; 40 P 260.

7165. (3451.) Interrogatories, proposed and settled. Oral examination. Such proper interrogatories, direct and cross, as the respective parties may propose, to be settled if the parties disagree as to their form by the judge or officer granting the order for the commission at a day fixed in the order, may be annexed to the commission; or, when the parties agree to that mode, the examination may be without written interrogatories.

Cal. C. Civ. P., § 2025.

7166. (3452.) Commissioners to take, certify, and forward deposition. The commission must authorize the commissioners to administer an oath to the witness, and to take his deposition in answer to the interrogatories, or, when the examination is to be without interrogatories, in respect to the question in dispute, and to certify the deposition to the court in a sealed envelope directed to the clerk or other person designated or agreed upon, and forwarded to him by mail or other usual channel of conveyance.

Cal. C. Civ. P., § 2026.
The certificate that "witnesses appeared in person before me and answered the interrogatories and cross-interrogatories herein, as appears by the duly signed and sworn-to depositions hereunto annexed" is insufficient.
Homberger v. Alexander, 11 U. 363; 40 P. 260.

7167. (3453.) Commission not returned. Continuance, when. A trial or other proceeding must not be postponed by reason of a commission not returned, except upon evidence satisfactory to the court that the testimony of the witness is necessary, and that proper diligence has been used to obtain it.

Cal. C. Civ. P., § 2027.

7168. (3454.) Deposition may be used by either party. The deposition mentioned in this chapter may be used by either party on the trial or other proceeding, against any other party giving or receiving the notice, subject to all just exceptions.

Cal. C. Civ. P., § 2028.

TAKEN OUT OF THE STATE ON ORAL INTERROGATORIES.

7169. (3454x.) Depositions out of the state upon oral interrogatories. The testimony of witnesses out of this state may also be taken, in addition to the method now provided by law, by depositions upon oral interrogatories and answers, in the following manner: The party taking such depositions

shall serve upon the adverse party, or his attorney, a written notice specifying the title of the action in which the depositions are to be taken, the name and official character of the person before whom the depositions are to be taken, the time and place for taking the same, and the names of the witnesses to be examined. Such notice shall be served at least ten days previous to the day of taking such depositions, to which time shall be added one day for every 200 miles, or fraction thereof, intervening between the place of trial and the place of taking such depositions. '05, p. 39.

Taking depositions out of the state on written interrogatories, §§ 7163-7167.

7170. (3454x1.) Id. When defendant has not appeared. When the summons in an action has been served upon the defendant therein in the manner provided by law, and the time allowed such defendant to answer has expired, and he has in no way appeared in such action, the plaintiff may take the deposition of any witness without notice to such defendant, and such deposition may be introduced in evidence in the action, and shall have the same force and effect as a deposition taken upon notice. '05, p. 40.

7171. (3454x2.) Id. Publication for non-resident defendant. When the party against whom the deposition is to be heard is absent from or is not a resident of the state, and he has no agent or attorney therein upon whom service may be made, notice of the taking of a deposition may be served upon him by publishing the same three times, once each week for three successive weeks, in some newspaper printed in the county where the action or proceeding is pending, if one is printed in such county; and if not, in some newspaper printed at the seat of government of this state. Personal service of the notice on the defendant out of the state shall be equivalent to such publication. '05, p. 40.

Publication against a non-resident, etc., § 7184.

7172. (3454x3.) Id. Before whom taken. Such depositions may be taken before a judge, justice, or chancellor of any court of record, a justice of the peace, a notary public, the mayor or chief magistrate of any municipal corporation, a commissioner appointed by the governor of this state to take depositions, or any special commissioner appointed for that purpose by the court in which the action is pending, a consul, a vice-consul, or consular agent, or any other officer or person authorized to administer oaths by the law of the place where such depositions are taken; *provided,* that when a deposition is taken before an officer not having a seal, the jurat or certificate of such officer shall be accompanied by a certificate of a clerk of a court of record, or of an officer having custody of the records of official appointments or tenures, setting forth the fact that the officer so taking such deposition is in fact such officer, and that his signature is genuine. When such depositions are taken before an officer having a seal, such seal shall be sufficient authentication of his office and authority. '05, p. 40.

7173. (3454x4.) Id. How taken. The deposition shall be taken or written in the presence of the officer before whom it is taken, either by the officer, the witness, or some disinterested person, and subscribed by the witness, when completed. Nothing herein shall prevent depositions being written in shorthand and afterwards transcribed in typewriting or writing, or being taken by graphophone, or other mechanism, and transcribed therefrom in typewriting or writing. '05, p. 40.

7174. (3454x5.) Id. Transmission to clerk. The deposition so taken shall be sealed in an envelope indorsed with the title of the cause, and the name of the officer before whom it was taken, and such officer shall address and transmit the same to the clerk of the court where the action or proceeding is pending; and it shall remain under seal until opened by the clerk, by order of the court, or at the request of a party to the proceeding or his attorney. '05, p. 40.

7175. (3454x6.) Id. How certified. The officer before whom the deposition is taken shall annex thereto a certificate showing substantially the following facts:

1. That the witness was first duly sworn or affirmed to testify to the truth, the whole truth, and nothing but the truth;

2. That the deposition was reduced to writing by some person, naming him;

3. That the deposition was written or taken in the presence of the officer certifying thereto, at the time and place specified in the notice;

4. That the deposition was read by or to the witness, and corrected and subscribed by him in the presence of said officer. '05, p. 41.

Where it is stipulated that testimony may be taken in shorthand and transcribed, a certificate by the notary that the deposition was by him carefully read to the witness and corrected by him and then subscribed by him, "in my presence," is sufficient, and when it is stipulated that the deposition so taken might be signed for the witness by the notary; held, this waives provisions of reading, etc., to the witness.
Groot v. O. S. L. Ry. Co., 34 U. 452; 96 P. 1019.

7176. (3454x7.) Id. Objections, how made. Every objection to the competency of the witness, or to the propriety of any question put to him, or the admissibility of any testimony given by him, may be made when the deposition is produced, in the same manner as if the witness were personally examined on the trial; and without being noted upon the deposition, unless the objection is to the form or order of a question, when the objection must be noted in the deposition before the question is answered. '05, p. 41.

7177. (3454x8.) Id. Deposition in evidence. Depositions taken under the provisions of §§ 7169-7177 may be used in evidence in all proceedings where depositions can be heard, as now provided by the laws of this state, and all existing laws relating to depositions, so far as applicable and not inconsistent with said sections, shall apply to depositions taken pursuant to the provisions hereof. '05, p. 41.

TAKEN IN THE STATE.

7178. (3455.) Deposition in the state, taken when. The testimony of a witness in this state may be taken by deposition in an action, at any time after the service of the summons or the appearance of the defendant; and, in a special proceeding, after a question of fact has arisen therein in the following cases:

1. When the witness is a party in the action or proceeding, or a person for whose immediate benefit the action or proceeding is prosecuted or defended;

2. When the witness resides out of the county in which his testimony is to be used;

3. When the witness is about to leave the county where the action is to be tried, and will probably continue absent when the testimony is required;

4. When the witness, otherwise liable to attend the trial, is nevertheless too infirm to attend;

5. When the testimony is required upon a motion, or in any other case where the oral examination of the witness is not required.

Cal. C. Civ. P., § 2021*.
Taking deposition on postponement of trial, § 6787.
Taking depositions out of the state on written interrogatories, §§ 7163-7168.
Taking depositions out of the state on oral interrogatories, §§ 7169-7177.

7179. (3456.) Id. Before whom taken. Notice and affidavit. Either party may have the deposition taken of a witness in this state, in either of the cases mentioned in the next preceding section, before a judge or officer authorized to administer oaths, on serving upon the adverse party previous notice of the time and place of examination, together with a copy of an affidavit, showing that the case is within that section. Such notice must be at least five days, adding also one day for every twenty-five miles of the distance of the place of examination from the residence of the person to whom the notice is given, unless, for a cause shown, a judge, by order, prescribe a shorter time. When the shorter time is prescribed, a copy of the order must be served with the notice.

Cal. C. Civ. P., § 2031.

7180. (3457.) Id. Examination signed by witness. Custodian. Use on

trial. Either party may attend the examination and put such questions, direct and cross, as may be proper. The deposition, when completed, must be carefully read to the witness and corrected by him in any particular, if desired; it must then be subscribed by the witness, certified by the judge or officer taking the deposition, inclosed in an envelope or wrapper, sealed and directed to the clerk of the court in which the action is pending, or to such person as the parties, in writing, may agree upon, and either delivered by the judge or officer to the clerk or such person, or transmitted through the mail or by some safe private means of conveyance; and thereupon such deposition may be used by either party upon the trial or other proceeding against any party giving or receiving the notice, subject to all legal exceptions; but, if the parties attend at the examination, no objection to the form of an interrogatory shall be made at the trial, unless the same was stated at the time of the examination. If the deposition be taken under sub. 2, 3, or 4 of § 7178, proof must be made at the trial that the witness continues absent or infirm, or is dead. The deposition thus taken may be also read in case of the death of the witness.

Cal. C. Civ. P., § 2032.

7181. (3458.) Deposition excluded for irregularity. Notwithstanding the taking of a deposition, it may be excluded from the case upon proof that sufficient notice was not given to the party against whom it is offered to enable him to attend the taking thereof, or that the taking was not in all respects fair.

Cal. C. Civ. P., § 2033.

Deposition is not admissible unless party has had opportunity of cross-examination.

Newton v. Brown, 1 U. 287.

Depositions may be read though amendments to the pleadings have changed the issues, where the subject matter remains the same.

Anthony v. Savage, 3 U. 277; 3 P. 546.

Where a deposition is defective in any respect that can be remedied by retaking it, and no motion to suppress it is made, objection cannot be made thereto when the deposition is offered at the trial.

Am. Pub. Co. v. Mayne Co., 9 U. 318; 34 P. 247.

Where witness whose deposition was being taken refused, without cause, to answer a material question, whole deposition may be excluded.

Hadra v. Utah Nat. Bank, 9 U. 412; 35 P. 508.

Deposition extended on account of insufficiency of notary's certificate.

Homberger v. Alexander, 11 U. 363; 40 P. 260.

The objection to a deposition for insufficiency of authentication must be taken before the trial by motion to suppress.

Groot v. O. S. L. R. R. Co., 34 U. 152; 96 P. 1019.

It was not error to refuse to exclude an entire deposition because a direct interrogatory remained among the other interrogatories after it had been stricken by the court and was answered, the answer being excluded; and where the deposition was being taken on written interrogatories, the court could not permit an oral cross-examination of the witness.

Burnham v. Stout, 35 U. 250; 99 P. 1070.

7182. (3459.) Deposition may be read by either party at any time. When a deposition has been once taken, it may be read by either party in any stage of the same action or proceeding, or in any other action between the same parties, upon the same subject, and is then deemed the evidence of the party reading it.

Cal. C. Civ. P., § 2034.

Generally a party may read only such portions of the deposition as he desires.

Moore v. Utah-Idaho Central R. Co., 51 U. —; 174 P. 873.

7183. (3460.) Deposition taken without notice if defendant in default. When the summons in an action has been served upon the defendant therein in the manner provided by law, and the time allowed such defendant to answer has expired, and he has in no way appeared in such action, the plaintiff may take the deposition of any witness without notice to such defendant, and such deposition may be introduced in evidence in the action, and shall have the same force and effect as a deposition taken upon notice.

Wis., S. & B. An. S. (1889) § 4102*.

Deposition on oral interrogatories when defendant in default, § 7170.

7184. (3461.) Id. Notice of publication against non-resident. Personal service. When the party against whom the deposition is to be read is absent from or is not a resident of the state, and has no agent or attorney therein upon whom service may be made, notice of the taking of a deposition may be served upon him by publishing the same three times, once in each week for three successive weeks, in some newspaper printed in the county where the action or proceeding is pending, if one is printed in such county; and if not, in some newspaper printed at the seat of government of this state. Personal

service of the notice on the defendant out of the state shall be equivalent to such publication.

Kansas (1889) § 4448*.
Publication of notice of taking deposition on oral interrogatories, § 7171.

7185. (3462.) Depositions to be used in other states. Any party to an action or special proceeding in a court or before a judge of another state or a territory may obtain the testimony of a witness residing in this state to be used in such action or proceeding, in the cases mentioned in the next two sections.

Cal. C. Civ. P., § 2035.

7186. (3463.) Id. District judge may subpœna witness before commissioner. If a commission to take such testimony has been issued from the court or a judge before whom such action or proceeding is pending, on producing the commission to a district judge, with an affidavit satisfactory to him of the materiality of the testimony, he may issue a subpœna to the witness, requiring him to appear and testify before the commissioner named in the commission, at a specified time and place.

Cal. C. Civ. P., § 2036.

7187. (3464.) Id. Judge may take testimony without commission in certain cases. If a commission has not been issued, and it appears to a district judge, or justice of the peace, by affidavit satisfactory to him:

1. That the testimony of the witness is material to either party;

2. That a commission to take the testimony of such witness has not been issued;

3. That, according to the law of the state or territory where the action or special proceeding is pending, the deposition of a witness taken under such circumstances, and before such judge or justice, will be received in the action or proceeding;

He must issue his subpœna, requiring the witness to appear and testify before him at a specified time and place.

Cal. C. Civ. P., § 2037.

7188. (3465.) Id. How taken and certified. Upon the appearance of the witness, the judge or justice must cause his testimony to be taken in writing, and must certify and transmit the same to the court or judge before whom the action or proceeding is pending, in such manner as the law of that state or territory requires.

Cal. C. Civ. P., § 2038.

CHAPTER 56.

PERPETUATING TESTIMONY.

7193. (3466.) Testimony perpetuated as herein provided. The testimony of a witness may be taken and perpetuated as provided in this chapter.

Cal. C. Civ. P., § 2083.

7194. (3467.) Verified petition, contents. Order for examination. Notice. The applicant must produce to a district judge a petition verified by his oath stating:

1. That the applicant expects to be a party to an action in a court in this state, and in such case the names of the persons whom he expects will be adverse parties; or

2. That the proof of some fact is necessary to perfect the title to the property in which he is interested, or to establish marriage, descent, heirship, or any other matter which it may hereafter become material to establish, though no suit may at the time be anticipated, or if anticipated, he may not know the parties to such suit; and

3. The name of the witness to be examined, his place of residence, and a general outline of the facts expected to be proved. The judge to whom such

petition is presented must make an order allowing the examination, and designating the officer before whom the same must be taken and prescribing the notice to be given, which notice, if the parties expectant are known and reside in this state, must be formally served, and if unknown, such notice must be served on the recorder of the county where the property to be affected by the evidence is situated, or the judge making the order resides, as may be directed by him, and by publication thereof in some newspaper, to be designated by the judge, for the same period required for the publication of summons. The judge must also designate in his order the clerk of the court to whom the deposition must be returned when taken.

Cal. C. Civ. P., § 2084*.
Publication of summons, § 6550.
The first two subdivisions prescribe separate and distinct classes of cases, in either of which testimony may be perpetuated. Under the first subdivision, the testimony of a person injured and not expected to recover may be taken and perpetuated for use in a contemplated action on behalf of his wife and minor children to recover for his death.
Ohio Copper Mining Co. v. Hutchings, 172 Fed. Rep. 201.

7195. (3468.) Authority of person appointed to take deposition. The person appointed by the judge to take the deposition is authorized, if a resident of this state, on receiving a copy of the order of the judge, and of the notice prescribed in the next preceding section, with proof of its personal service or publication, or, if a resident without the state, on receiving the commission mentioned in the next section, with proof of like service or publication of the notice, to take the deposition of the witness named in the order of the judge, or in the commission, or if more than one witness is thus named, of such of them as appear before him, at the time designated, and to continue the taking of the same from time to time.

Cal. C. Civ. P., § 2085.

7196. (3469.) Examination. Manner of taking deposition. Delivery to clerk. The examination must be by question and answer, and if the testimony is to be taken in another state or territory, it must be taken upon a commission to be issued by the judge allowing the examination, under the seal of the court of which he is judge, and upon interrogatories to be settled in the same manner as in cases of depositions taken under commission in pending actions, unless the parties expectant, if known, otherwise agree. If such parties are unknown, notice of the settlement of the interrogatories shall be published in some newspaper for such time as the judge may designate. The deposition, when completed, must be carefully read to, and subscribed by, the witness, then certified by the officer or person taking the same, and shall then be sealed up and delivered or transmitted to the clerk of the court designated in the order of the judge allowing the examination, who shall file the same when received. The judge allowing the examination shall file with the clerk the order for examination, the petition on which the same was granted, with proof of service of the order and notice.

Cal. C. Civ. P., § 2086.

7197. (3470.) Petition, etc., prima facie evidence. The petition and order and papers filed by the judge, as provided in the next preceding section, or a certified copy thereof, are prima facie evidence of the fact stated therein to show compliance with the provisions of this chapter.

Cal. C. Civ. P., § 2087.

7198. (3471.) When deposition may be used. Objections to interrogatories. If a trial be had between the parties named in the petition as parties expectant, or their successors in interest, or between any parties wherein it may be material to establish the facts which such depositions prove, or tend to prove, upon proof of the death or insanity of the witnesses, or that they cannot be found, or are unable, by reason of age or other infirmity, to give their testimony, the depositions or copies thereof may be used by either party subject to all legal objections; but if the parties attend at the examination, no objection to the form of an interrogatory can be made at the trial, unless the same was stated at the examination.

Cal. C. Civ. P., § 2088.

7199. (3472.) Id. Has same effect as oral testimony. The deposition

so taken and read in evidence has the same effect as the oral testimony of the witness, and no other, and every objection to the witness, or to the relevancy of any question put to him, or of any answer given by him, may be made in the same manner as if he were examined orally at the trial.

Cal. C. Civ. P., § 2089.

CHAPTER 57.

ADMISSION OR INSPECTION OF WRITINGS.

7203. (3473.) Refusal of adverse party to admit genuineness of writing. Costs. Either party may exhibit to the other or to his attorney at any time before the trial any paper, material to the action, and request an admission in writing of its genuineness. If the adverse party or his attorney fails to give the admission within five days after the request, and if the party exhibiting the paper is afterward put to costs in order to prove its genuineness and the same is finally proved or admitted on the trial, such costs must be paid by the party refusing the admission, unless it appears to the satisfaction of the court that there were good reasons for the refusal.

N. Dak. (1895) § 5643; Wis., S. & B. An. S. (1889) § 4184. See notes to § 7204.

7204. (3474.) Court may order party to permit writing to be copied. Refusal. Any court in which an action is pending, or a judge thereof, may, upon notice, order either party to give to the other within a specified time a copy, or permission to take a copy, of entries of account in any book, or of any document or paper in his possession, or under his control, containing evidence relating to the merits of the action, or the defense therein. If compliance with the order be refused, the court may exclude the entries of accounts of the book, or the document, or paper from being given in evidence, or if wanted as evidence by the party applying, may direct the jury to presume them to be such as he alleges them to be; and the court may also punish the party refusing for a contempt. This section is not to be construed to prevent a party from compelling another to produce books, papers, or documents when he is examined as a witness.

Cal. C. Civ. P., § 1000*.
Demand for inspection of writing, § 6595.
Demand for items of an account, § 6598.
Notice to adverse party to produce writing, § 7108.
Admission of genuineness by adverse party, § 7112.

In order to predicate error on the court's refusal to require the state to produce letters written by defendant to prosecutrix, it was not sufficient merely to demand the letters from the state's attorney on the trial.
State v. Hammond, 46 U. 249; 148 P. 420.

CHAPTER 58.

GENERAL PROVISIONS.

7205. (3475.) When testimony officially reported used on subsequent trial. Whenever in any court of record the testimony of any witness in any case shall be stenographically reported by an official court stenographer, and thereafter said witness shall die, or be beyond the jurisdiction of the court in which the cause is pending, either party to the record may read in evidence the testimony of said witness, when duly certified by the stenographer to be correct, in any subsequent trial of, or proceeding had, in the same cause, subject only to the same objection that might be made if said witness were upon the stand and testifying in open court.

When it appears that a witness, sworn on a former trial, was out of the state at a second trial, and could not be reached by subpoena, such testimony, when correctly transcribed, may be read in evidence on a subsequent trial.
Reese v. Morgan S. M. Co., 17 U. 489; 54 P. 759.
State v. King, 24 U. 482; 68 P. 418.

7206. (3476.) When clerk to take down testimony. On the trial of an

action in a court of record, if there is no court stenographer in attendance, the court may require the clerk to take down the testimony in writing.

Cal. C. Civ. P., § 1051*.

7207. (3477.) Exclusion of witnesses during trial. If either party requires it, the judge may exclude from the court room any witness of the adverse party, not at the time under examination, so that he may not hear the testimony of other witnesses.

Cal. C. Civ. P., § 2043.
Exclusion of witnesses, § 1801.

Allowing witness who has inadvertantly disobeyed it to testify is not error.
People v. O'Loughlin, 3 U. 133; 1 P. 653.

7208. (3478.) Jury to decide questions of fact. All questions of fact, where the trial is by jury, other than those mentioned in the next section, are to be decided by the jury, and all evidence thereon is to be addressed to them except when otherwise provided by this code.

Cal. C. Civ. P., § 2101.
Issues of fact to be tried by the jury, § 6781; by the court, § 6781.
Court to charge that the jury are the exclusive judges of all questions of fact, § 6802.
Issues of fact arise, how, § 6779.
Advisory jury in equity case, note to § 6821.
Verdict may be general or special, § 6820.
Special issues may be tried by jury, § 6444.
Court may submit special findings to jury, § 6821.
Directing a verdict, note to § 6802.
Nonsuit, § 6848, and note.

The jury, or the court when a law action is tried without a jury, is the exclusive judge of the credibility of the witnesses and of the weight of the evidence, note to Con. art. 8, sec. 9.

When there is no legal evidence before the jury the court should withdraw the case from the jury, note to § 6802.

As a general rule, the question whether a party has been guilty of negligence or contributory negligence is one of fact for the jury, whether there be any conflict in the evidence of such alleged negligence or not.

Davis v. Utah Sou. Ry. Co., 3 U. 218; 2 P. 521.
Cunningham v. U. P. Ry. Co., 4 U. 206; 7 P. 795.
Trihay v. Brooklyn M. Co., 4 U. 468; 11 P. 612.
Brown v. Sou. Pac. Co., 7 U. 288; 26 P. 579.
Boyce v. U. P. Ry. Co., 8 U. 353; 31 P. 450.
Smith v. R. G. W. Ry. Co., 9 U. 141; 33 P. 626.
Wines v. R. G. W. Ry. Co., 9 U. 228; 33 P. 1042.
Jeffs v. R. G. W. Ry. Co., 9 U. 374; 35 P. 505.
Riley v. S. L. Rapid Transit Co., 10 U. 428; 37 P. 681.
Dederichs v. S. L. C. Ry. Co., 13 U. 34 44 P. 649.
Handley v. Daly M. Co., 15 U. 176; 49 P. 295.
Young v. Clark, 16 U. 42; 50 P. 832.
Anderson v. Daly M. Co., 15 U. 22; 49 P. 126.
Thompson v. S. L. Rapid Transit Co., 16 U. 281; 52 P. 92.
Nelson v. Sou. Pac. Co., 18 U. 244; 55 P. 364.
Miller v. Bullion-B. & C. M. Co., 18 U. 358; 55 P. 58.
Frank v. Bullion-B. & C. M. Co., 19 U. 35; 56 P. 419.
Dwyer v. S. L. City, 19 U. 521; 57 P. 535.
Pool v. Sou. Pac. Co., 20 U. 210; 58 P. 326.
Hill v. Sou. Pac. Co., 23 U. 94; 63 P. 814.
Ewell v. Joe Bowers M. Co., 23 U. 192; 64 P. 367.

Before the question of negligence becomes one of law for the court, the facts shown by the evidence must be such that all reasonable men must draw the same conclusions from them.

Pence v. California M. Co., 27 U. 378; 75 P. 934.
Hone v. Mammoth M. Co., 27 U. 168; 75 P. 381.
Holland v. O. S. L. R. R. Co., 26 U. 209; 72 P. 940.
Copley v. U. P. R. R. Co., 26 U. 361; 73 P. 517.
Peck v. O. S. L. R. R. Co., 25 U. 21; 69 P. 153.
Haun v. R. G. W. Ry. Co., 22 U. 346; 62 P. 908.
Silcock v. R. G. W. Ry. Co., 22 U. 179; 61 P. 565.
Linden v. Anchor M. Co., 20 U. 134; 58 P. 355
Fritz v. S. L. & D. Gas Co., 18 U. 493; 56 P. 90.
Burgess v S. L. City Ry. Co., 17 U. 406; 53 P. 1013.
Fowler v. P. V. Coal Co., 16 U. 348; 52 P. 594.
Reese v. Morgan S. M. Co., 15 U. 453; 49 P. 824.
Lowe v. S. L. City, 13 U. 91; 44 P. 1050.
Saunders v. Sou. Pac. Co., 13 U. 275; 44 P. 932.
Hall v. Ogden C. St. Ry. Co., 13 U. 243; 44 P. 1046.
Mangum v. Bullion-B. & C. M. Co., 15 U. 534; 50 P. 834.

The jury is to determine the degree of care to be exercised in moving a dead motor car along the street.
Musgrove v. Studebaker Bros. Co., 48 U. 410; 160 P. 117.

In an action for damages to crops, where inadmissible evidence as to plaintiff's damages is received, judgment for plaintiff will be reversed; and the case remanded, notwithstanding there is evidence which would support the verdict, since the supreme court will not try the case de novo on the record.
Cleary v. Shand, 48 U. 640; 161 P. 453.

Whether testimony of certain witnesses is more credible or reliable than that of other witnesses is solely for the jury.
Ephraim Milling & Elevator Co. v. City of Ephraim, 49 U. 71; 161 P. 1124.

7209. (3479.) Court to decide questions of law. All questions of law, including the admissibility of testimony, the facts preliminary to such admission, and the construction of statutes and other writings, and other rules of evidence are to be decided by the court and all discussions of law addressed to it. Whenever the knowledge of the court is by law made evidence of a fact, the court is to declare such knowledge to the jury, who are bound to accept it.

Cal. C. Civ. P., § 2102.
Decisions on questions of evidence which do not have reference to any particular section of the statutes are omitted from this volume.
Issues of law to be tried by the court, § 6780.
Whether or not annual labor on mining claim is sufficient, a question for the jury, note to § 3895.
Whether a municipality had notice of defects in streets, etc., usually a question for the jury, note to § 816.
Where there is no evidence to support a verdict, the question becomes one of law within the meaning of the constitution, note to Con art. 8, sec. 9.
Sufficiency of evidence to support judgment, note to Con. art. 8, sec. 9; and note to § 6994.

Decisions on construction of statutes, note to § 5839.
Decisions on interpretation of the constitution, note to Con. art. 6, sec. 1.
Discretion of court in the conduct of trial, admission of evidence, etc., note to § 6802.
Negligence and contributory negligence, when questions of law, note to § 7208.
Sufficiency of evidence as against motion for nonsuit, a question of law, note to § 6848.
The question as to whether the notice given by the guarantee to the guarantor of the failure of the principal debtor is reasonable or not is one to be determined by the court and not by the jury.
Wells Fargo & Co. v. Davis, 2 U. 411.
In a suit for damage for malicious prosecution, the question whether the undisputed facts constitute probable cause is one of law.
Wright v. Ascheim, 5 U. 480; 17 P. 125.
The reasonableness of a regulation of a telegraph company that telegrams after eight o'clock should not be delivered until the next morning is for the jury to determine.
Brown v. W. U. Telegraph Co., 6 U. 219; 21 P. 988.
Where evidence in support of a particular agency is undisputed, the question of whether or not the agency exists is one of law for the court; but where such evidence is disputed, the existence of the agency becomes a mixed question of law and fact, and is one for the jury to determine under proper instructions from the court.
McCornick v. Queen of Sheba M. Co., 23 U. 71; 63 P. 820.
The court should instruct the jury as to what is meant by "domestic family remedies" and not leave to the jury to determine whether herbs were "domestic family remedies," but where the evidence as to defendant's guilt is conclusive, the failure to instruct is favorable to defendant, and therefore defendant cannot complain of the error.
State v. Yee Foo Lun, 45 U. 531; 147 P. 488.
It is the duty of the court to construe pleadings and instruct the jury on the issue, and it is not proper to permit the jurors to take pleadings to the jury box with them.
Pulos v. D. & R. G. Ry. Co., 37 U. 238; 107 P. 241.

7210. (3480.) Rules of evidence applicable to jury trials applicable to others. The provisions contained in this part of the code respecting the evidence on a trial before a jury are equally applicable on the trial of a question of fact before a court, referee, or other officer.

Cal. C. Civ. P., § 2103.
General provisions applicable to trial before referee, § 6840.

7211. (3481.) All referees, etc., must meet, but majority may act. When there are three referees or three arbitrators, all must meet, but two of them may do any act which might be done by all.

Cal. C. Civ. P., § 1053.
Appointment of referee, § 6837.
Authority of arbitrators, §§ 6902, 6904.
Words giving authority to three or more construed as giving authority to a majority, § 5846.

7212. (3482.) Court may authorize substitution of copy for lost original. If an original pleading or paper be lost, the court may authorize a copy thereof to be filed and used instead of the original.

Cal. C. Civ. P., § 1045.

7213. (3483.) Papers with defective titles, when valid. An affidavit, notice, or other paper, without the title of the action or proceeding in which it was made, or with a defective title, is as valid and effectual for any purpose as if duly entitled, if it intelligibly refer to such action or proceeding.

Cal. C. Civ. P., § 1046.
Defective affidavit on attachment, § 6728.
Affidavit without "ss" received.
Smith v. Richardson, 1 U. 194.
McCord & N. Co. v. Glenn, 6 U. 139; 21 P. 500.
Affidavit without venue is invalid, as is an affidavit taken by an officer without his jurisdiction.
Smith v. Richardson, 1 U. 194.

7214. (3484.) Clerk to receive money deposited in court. Whenever moneys are paid into or deposited in court, the same shall be delivered to the clerk in person, or to such of his deputies as shall be specially authorized by his appointment in writing to receive the same.

Cal. C. Civ. P., § 2104*.
Deposit in court, §§ 6770-6772.

7215. (3485.) Offer in writing equivalent to tender, when. An offer in writing to pay a particular sum of money, or to deliver a written instrument or specific personal property, is, if not accepted, equivalent to the actual production and tender of the money, instrument, or property.

Cal. C. Civ. P., § 2074.
Offer to allow judgment to be taken for specified amount, effect, § 6893.
Refusal of tender, costs, § 7044.
Objection to tender must be specified or it is deemed waived, § 7217.
Receipt may be demanded, § 7216.
Deposit in court of sum tendered, § 7043.
Where a tender of purchase money is made on condition that the husband, who has made a contract for the sale of land, will cause his wife to convey her dower interest in the land; held, that such tender being upon a condition that could not be required to be performed was not good.
Kelsey v. Crowther, 7 U. 519; 27 P. 695.
If a vendee elects to enforce a contract of sale, he must tender an instalment of the purchase price when due, even though the vendor may not be able to give such a deed as the contract calls for.
Coughran v. Bigelow, 164 U. S. 301; same case, 9 U. 260; 34 P. 51.
This statute excuses debtor from actually producing the money at the time, but dispenses with no other requirement of a valid tender.
Hyams v. Bamberger, 10 U. 3; 36 P. 202.
Tender in writing must be made in good faith, and the other party must have a reasonable time in which to accept or refuse.
Id.
Tender of deed after action is too late.
Bacon v. McCrystal, 10 U. 290; 35 P. 563.
Under the facts as shown; held, that permitting the tender made by the defendant in

the presence of the jury to stand was error; and further, that under the pleadings the value of the property received by the plaintiff was not in issue.

Hecht v. Metzler, 14 U. 408; 48 P. 37.

A purchaser of land subject to a mortgage payable at a certain place, which fact was not known to and could not be ascertained by the purchaser, in order to release the land from the lien, with costs and interest after maturity, should have made a tender at the place of business or residence of the maker.

McCauley v. Leavitt, 10 U. 91; 37 P. 164.

A tender by a check on a bank in which there was always sufficient funds to meet it, in the absence of objection, is good, and a tender made to an authorized attorney is good.

Hirsh v. Ogden Furniture Co., 48 U. 434; 160 P. 283.

7216. (3486.) Receipt must be given on payment or delivery. Whoever pays money, or delivers an instrument or property, is entitled to a receipt therefor from the person to whom the payment or delivery is made, and may demand a proper signature to such receipt, as a condition of the payment or delivery.

Cal. C. Civ. P., § 2075.

7217. (3487.) Objection to tender must be specified. The person to whom the tender is made must, at the time, specify any objection he may have to the money, instrument, or property, or he must be deemed to have waived it; and, if the objection be to the amount of money, the terms of the instrument, or the amount or kind of property, he must specify the amount, terms, or kind which he requires, or be precluded from objecting afterward.

Mont. Civ. P., § 3412.

Where a tender is made by check, it should be kept good by bringing or depositing the money into court, but where there was money in the bank to make the check good, the plaintiff's failure to object, and his conduct in permitting the defendant to assume that the production of the money into court was waived, waives the objection that the tender was not kept good.

Hirsh v. Ogden Furniture Co., 48 U. 434; 160 P. 283.

7218. (3488.) Successive actions on same contract permitted. Successive actions may be maintained upon the same contract or transaction, whenever, after the former action, a new cause of action arises therefrom.

Cal. C. Civ. P., § 1047.

Successive actions on bond of officer, § 4270.

Successsive actions on bond of executor, etc., § 7620.

7219. (3489.) Consolidation of actions. Whenever two or more actions are pending at one time between the same parties and in the same court upon causes of action which might have been joined, the court may order the actions to be consolidated.

Cal. C. Civ. P., § 1048.

7220. (3490.) Action deemed pending, when. An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied.

Cal. C. Civ. P., § 1049.

Action commenced, how, § 6538.

A statute, effective March 25, authorizing additional findings and conclusions of law after entry of judgment, is applicable to a judgment entered March 16 previous, as the action under the provisions of this section is still pending.

Boucofski v. Jacobson, 36 U. 165; 104 P. 117.

A judgment is not admissible in evidence to prove a material issue in another case before the time of appeal shall have expired.

Vance v. Heath, 42 U. 148; 129 P. 365.

A judgment becomes final so as to start eight-year limitation against an action thereon from the time it was rendered where no appeal was taken.

Sweetser v. Fox, 43 U. 40; 134 P. 599.

7221. (3491.) Action to determine adverse claim. By surety against principal. An action may be brought by one person against another for the purpose of determining an adverse claim, which the latter makes against the former for money or property upon an alleged obligation; and also against two or more persons, for the purpose of compelling one to satisfy a debt due to the other, for which the plaintiff is bound as a surety.

Cal. C. Civ. P., § 1050.

Action to determine adverse claim to real property, § 7247.

Parties in action to determine adverse claim, § 6508.

7222. (3492.) Judgment against sureties on indemnity bond to sheriff. Notice. If an action is brought against a sheriff for an act done by virtue of his office, and he give written notice thereof to the sureties on any bond of indemnity received by him, the judgment recovered therein is conclusive evidence of his right to recover against such sureties; and the court or judge, in vacation, may, on motion, upon notice of five days, order judgment to be entered up against them for the amount so recovered, including costs.

Cal. C. Civ. P., § 1055.

Sheriff may have execution or attaching creditor made a party, § 6515.

7223. (3493.) Qualifications of sureties generally. Affidavits. Three or more. In all cases where an undertaking or bond, with sureties, is required by the provisions of law, the officer taking the same must require the sureties to accompany it with an affidavit that they are each residents and householders or freeholders within the state, and are each worth the sum specified in the undertaking over and above all his just debts and liabilities, exclusive of property exempt from execution; but when the amount specified in the undertaking exceeds $2,000, and there are more than two sureties thereon, they may state in their affidavits that they are severally worth amounts less than that expressed in the undertaking, if the whole amount be equivalent to that of two sufficient sureties.

Cal. C. Civ. P., § 1057*.
Qualifications of bail on civil arrest, § 6645.
Corporations may act as sureties, §§ 1201, 1207-1216.
Attorney may not be surety, when, § 344.

7224. (3494.) Money may be deposited in lieu of undertaking. Withdrawal. In all cases where an undertaking or bond with sureties is required by the provisions of law, the plaintiff or defendant may deposit with the clerk of the court or justice of the peace, as the case may be, a sum equal to the amount required by the undertaking or bond, which shall be taken as security in the place thereof. At any time such deposit may be withdrawn by the party making it, upon giving the undertaking with sufficient sureties as required by law, approved by the clerk or justice, upon notice to the adverse party or his attorney, who may object to the sufficiency of the sureties in the same manner as though the undertaking were filed in the first instance.

Mont. Civ. P., § 1904.

7225. (3495.) Undertaking not required of state or public corporation. In any civil action or proceeding wherein the state is a party plaintiff, or any state officer, in his official capacity, or on behalf of the state, or any county, or city, or other public corporation, is a party plaintiff or defendant, no bond, written undertaking, nor security can be required of the state, or any officer thereof, or of any county, or city, or other public corporation; but on complying with the other provisions of this code, the state, or any state officer acting in his official capacity, or any county, or city, or other public corporation, has the same rights, remedies, and benefits as if the bond, undertaking, or security were given and approved as required by this code.

Cal. C. Civ. P., § 1058*.
Payment of costs by state or county, §§ 7053, 7054.

7226. (3496.) Subrogation of surety to rights of judgment creditor. Whenever any surety on an undertaking on appeal executed to stay proceedings upon a money judgment pays the judgment, either with or without action, after its affirmation by the appellate court, he is substituted to the rights of the judgment creditor, and is entitled to control, enforce, and satisfy such judgment in all respects as if he had recovered the same.

Cal. C. Civ. P., § 1059.
Contribution as between joint debtors, § 6950.
Judgment may direct that property of principal debtor be first exhausted, § 6855.

7227. (3497.) Officer not to charge for copies furnished by party. In all cases where copies of pleadings, affidavits, or other papers are to be served, neither the sheriff, constable, nor clerk shall charge or receive any fee for making such copies when the same are furnished to such officer by the party.

Mont. Civ. C., § 1905*.

CHAPTER 59.

FORECLOSURE OF MORTGAGES.

7230. (3498.) But one action for debt secured by mortgage on real or personal property. Judgment. Docketing. There can be but one action for the recovery of any debt or the enforcement of any right secured by mortgage upon real estate or personal property, which action must be in accordance with the provisions of this chapter. Judgment shall be given adjudging

the amount due, with costs and disbursements, and the sale of the mortgaged property, or some part thereof, to satisfy said amount, and directing the sheriff to proceed and sell the same according to the provisions of law relating to sales on execution. Such judgment may be docketed at any time.

Minn. (1894) § 6059*. Cal. C. Civ. P., § 726*; see Sup. (1893) p. 970; sup. (1895) p 24.

Covenants implied in statutory mortgage, § 4883.

Action brought in county where property situated, § 6525.

When a receiver will be appointed on foreclosure, § 6764.

Foreclosure of chattel mortgage, § 471, and note.

Mortgage not deemed a conveyance, whatever its terms, § 7253.

Execution for deficiency, § 7231.

Sale under trust deed and action for deficiency, note to § 7231.

Judgment for deficiency against grantee who assumes and agrees to pay a mortgage, note to § 7231.

One purchasing with notice of an existing mortgage is estopped from asserting an after-acquired title to defeat the mortgage.

Marrier v. Lee, 2 U. 460.

A conveyance of land as security for a debt may be enforced as a mortgage, even though the conveyance contain no clause authorizing a foreclosure.

Territory v. Golding, 3 U. 39; 5 P. 546.

Mortgagor not having paid certain money into court as agreed was in default, and the mortgage subject to foreclosure.

Wasatch M. Co. v. Crescent M. Co., 7 U. 8; 24 P. 586.

Where a foreclosure sale of a railroad and its franchise is made under a decree, the wrong to the stockholders, if any, is to be found in the decree itself, and not in the sale made pursuant thereto; and a motion to set aside the sale, by a person not a party to the record, is not a proper way to review the errors in the decree, or committed by the court anterior to it. The decree is final until reversed or annulled.

Meyer v. Utah & P. V. Ry. Co., 3 U. 280; 3 P. 393.

Suit pending on note secured by mortgage without asking foreclosure is a bar to a foreclosure suit.

Bacon v. Raybould, 4 U. 357; 10 P. 481; 11 P. 510.

Maker and indorser of note may be joined in foreclosure suit, and deficiency judgment had against both.

Smith v. McEvoy, 8 U. 58; 29 P. 1030.

Potter v. Hussey, 1 U. 249.

Where property is held in trust to secure certain debts, the fact that the trustees are partners with certain creditors does not affect their right to foreclosure.

Gallagher v. Yosemite Mining Co., 10 U. 189; 37 P. 264.

A trust deed is, in effect, a mortgage.

Dupee v. Rose, 10 U. 305; 37 P. 567.

Trustees in deed of trust have no interest in the property, and are not necessary parties on an action of foreclosure.

Stevens Imp. Co. v. So. Ogden Co., 20 U. 267; 58 P. 843.

A person without any previous interest, who pays mortgage debt at the instance of the mortgagor and takes a mortgage on the same property, believing that he is getting security equal to that held by the person whose debt he pays, may, when no innocent person can be injured, be subrogated to his rights.

George v. Butler, 16 U. 111; 50 P. 1032.

Fullerton v. Bailey, 17 U. 85; 53 P. 1020.

Johnson v. Tootle, 14 U. 482; 47 P. 1033.

Where a party holds two mortgages under two separate debts on the same property, the lien of the mortgage foreclosed in the second action is not lost by reason of the first suit, but the plaintiff will be allowed costs in one suit only.

Thompson v. Skeen, 14 U. 209; 46 P. 1103.

A provision in a decree of foreclosure permitting any party to buy at the sale does not authorize a trustee to purchase trust property for his own benefit.

Hamilton v. Dooly, 15 U. 280; 49 P. 769.

Mortgaged premises may be sold under foreclosure to satisfy a portion of a debt due, and if a lis pendens was filed at the commencement of the proceedings, the lien of the entire debt may be continued as against subsequent incumbrancers or redemptioners.

Dupee v. Salt Lake V. L. & T. Co., 20 U. 103; 57 P. 845.

Decree of foreclosure when cross-complaint filed and land ordered sold to satisfy both parties plaintiff.

Stevens Co. v. South Ogden Co., 20 U. 267; 58 P. 843.

Under provisions of this section and § 7253 an action to determine adverse claims cannot be maintained against the holder of the legal title by one who has a mortgage lien; and such an action once commenced cannot be converted into a foreclosure proceedings, so as to allow the entry in effect of a decree of foreclosure.

Fields v. Cobbey, 22 U. 415; 62 P. 1020.

The reason of the rule that an officer who, under execution against one of the co-owners of personal property, sells in severalty the common property, commits a trespass for which he is liable to the co-owner not a party to the action, does not exist under this section and §§ 6916, 6938, 6940.

Spalding v. Allred, 23 U. 354; 64 P. 1100.

Where foreclosure was had by publication of summons, defendants, by leave of court, could come in at any time within a year and answer to the merits; therefore, they were not entitled to maintain a suit in equity to set aside the proceedings.

Baer v. Higson, 26 U. 78; 72 P. 180.

L., having failed to file a cross-complaint demanding affirmative relief, as authorized by § 6581, the court, on determining that he was the owner of the other two notes, had no jurisdiction to render judgment in his favor against the mortgagor, against whom L. held two mortgage notes.

West v. Shurtliff, 28 U. 337; 79 P. 180.

In an action to foreclose a mortgage given to secure a debt or obligation, it must be made to appear by proper averment that there is an existing obligation to pay, since where there is no right to personal judgment in case the mortgage was given as security for money only, there is no right to foreclose.

Chesney v. Chesney, 33 U. 503; 94 P. 989.

Where, in an action to foreclose a mortgage, the pleadings raised the issue of the consideration of a note, and whether the maker had delivered the note made by a third person as collateral, and it was admitted in the pleadings that the note of the third person had been paid, the court properly disregarded the claim that the admission of payment of said note was inadvertently made and that the claim of the maker that he had deposited with such notes as collateral mining stock of great value which had never been accounted for.

Utah Commr. Svg. Bank v. Fox, 40 U. 205; 120 P. 840.

The lien of a mortgagee, advancing money to erect a building, is entitled to priority over subcontractors' lien, only to the amount actually advanced.

Culmer P. & G. Co. v. Gleason, 42 U. 344; 130 P. 66.

Where mortgages, secured note, and bond were made payable to a trust company, it was not a purchaser thereof.

Id.

A conveyance, by a mortgagee holding title under a void foreclosure and sheriff's deed, operates as a transfer of the mortgage and debt.

Lawrence v. Murphy, 45 U. 572; 147 P. 903.

A chattel mortgagee does not waive his right to a lien by selling the property under a power in the mortgage after confession of judgment in his favor by the mortgagor, though the confession was not in all things regular.

Utah Ass'n of Credit Men v. Jones, 49 U. 519; 164 P. 1029.

A judgment by court of this state ordering

the sale of land in Idaho on a foreclosure proceedings is void.
Hammond v. Hall, 51 U. —; 171 P. 148.
A subsequent mortgagee or claimant is a necessary party, he being entitled to set up any legal or equitable defense to protect his interest, and to interpose a plea of the statute of limitations, and an extension of time made by the mortgagor, or arising by the absence of the mortgagor from the state, does not affect the right of the junior mortgagee to interpose the plea of the statute of limitations.
Boucofski v. Jacobson, 36 U. 165; 104 P. 117.
Where one holding a contract for sale of property is made a party defendant in an action to foreclose a mechanic's lien on the property, and the contract-holder sets forth his contract, its breach, and claims a lien prior to the mechanic's lien, and obtains a judgment to the full extent of his claim, there was an adjudication, and he cannot thereafter bring an action to foreclose his contract.
Cain v. Parfitt, 48 U. 81; 158 P. 448.
A delay in the prosecution of foreclosure suit does not prevent the granting of proper relief where either party could have compelled a hearing.
Utah Commercial Svgs. Bank v. Fox, 40 U. 205; 120 P. 840.
The mere fact that a lessee who uses the premises for gambling purposes loaned money to the owner and took a mortgage therefor, does not taint the mortgage with illegality.
Dinkelspiel v. O'Day, 47 U. 18; 151 P. 345.
Evidence in an action on a note and mortgage, of which the ownership was in dispute, held insufficient to overcome the presumption that the payee was the legal owner or the correctness of the trial court's judgment for the payee.
Escamillo v. Pingree et al., 44 U. 421; 141 P. 103.
A note secured by a mortgage of withdrawing partner held discharged.
Commrl. Natl. Bank v. Brinton, 45 U. 265; 145 P. 42.
The foreclosure of a mortgage against mortgagors who were dead at the time is a nullity.
Lawrence v. Murphy, 45 U. 572; 147 P. 903.
Where a part of the property is taken by condemnation, noise and interference from the operation of railroad trains are proper elements of damage to the remaining part.
Twenty-second Ward Corporation v. O. S. L. R. Co., 36 U. 238; 103 P. 243.
The purchaser of an equity of redemption who merely took the premises subject to the mortgage, but did not assume payment thereof, may set up a partial failure of consideration where he does so with the consent of the mortgagors.
Brunswick Realty Co. v. University Inv. Co., 43 U. 75; 134 P. 608.
A tender, by a purchaser of the equity of redemption, of the amount due under the mortgage will not discharge the lien where there was no assumption of the debt, because, as between the mortgagor and the purchaser, the mortgage debt is part of the consideration, and the land becomes a primary fund for payment.
Id.
Where a corporation executed a trust deed to secure bonds to be used, and they were not negotiated, and the corporation delivered the deed and bonds as collateral security for the payment of notes on default in the payment of the note, the payee may foreclose the trust deed.
Kurtz v. Ogden Canyon S. Co., 37 U. 313; 108 P. 14.
Where the mortgagor deposits irrigation stock as security for a debt, it must be foreclosed in accordance with this section.
Coburn v. Bartholomew, 50 U. —; 167 P. 1156.

7231. (3499.) Execution for deficiency issued only after sale. If it appears from the return of the officer making the sale that the proceeds are insufficient, and a balance still remains due, execution may be issued for such balance as in other cases; but no such execution shall issue until after the sale of the mortgaged property and the application of the amount realized as aforesaid.

Minn. (1894) § 6063*; Cal. C. Civ. P., § 726*.
A sale of property under a power of sale in the mortgage, which did not realize the amount of the debt, does not extinguish the debt, and is no bar to an action for the balance remaining unpaid.
Savage v. Stone, 1 U. 35.
Where property is ordered sold to satisfy the lien of the mortgage, the judgment creditor has the right to have the full amount of his lien realized in money, until the property is exhausted.
Kershaw v. Dyer, 6 U. 239; 24 P. 621; reversing same case, 21 P. 1000.
Until sale of mortgaged property has been made and the amount of deficiency ascertained, no judgment can be docketed against the party personally liable, nor any execution issued. (Distinguishing Brereton v. Miller, 7 U. 426; 27 P. 81.)
Russell v. Hank, 9 U. 309; 34 P. 245.
Donaldson v. Grant, 15 U. 231; 49 P. 779.
Savage v. Stone, 1 U. 35.
Prayer for general relief entitles plaintiff to such deficiency judgment in a proper case.
Donaldson v. Grant, 15 U. 231; 49 P. 779.
A grantee who assumes and agrees to pay a mortgage upon the premises, makes the debt his own, is a proper party to the foreclosure proceeding, and judgment for deficiency may be rendered against him.
Clark v. Fisk, 9 U. 94; 33 P. 248.
Thompson v. Cheesman, 15 U. 42; 48 P. 477.
Schroeder v. Kinney, 15 U. 462; 49 P. 894.
Brown v. Markland, 16 U. 360; 52 P. 597.
And this whether the immediate grantor of such purchaser was personally liable or not.
McKay v. Ward, 20 U. 149; 57 P. 1024.
The property mortgaged must be subjected first to the payment of the debt, and the mortgagee or assignee of the note cannot recover a personal judgment unless the proceeds of sale of the property mortgaged prove to be insufficient.
Donaldson v. Grant, 15 U. 231; 49 P. 779.
But see Brereton v. Miller, 7 U. 426; 27 P. 81.
And Russell v. Hank, 9 U. 309; 34 P. 205.
Where property is sold under power in a trust deed and the proceedings are regular the amount realized on the sale may be credited as a payment on the note, and the holder has his action at law for deficiency, § 3460, C. L. U. 1888, being no bar to such action.
Mallory v. Kessler, 18 U. 11; 54 P. 892.
Savage v. Stone, 1 U. 35.
Dupee v. Rose, 10 U. 305; 37 P. 567.
In an action for deficiency upon a note secured by trust deed, the security must first be exhausted as to quantity and value before other property of the debtor can be resorted to for the payment of the debt.
Salt Lake V. L. & T. Co. v. Millspaugh, 18 U. 283; 54 P. 893.
A right of action on a deficiency judgment, entered after foreclosure sale, accrued at the date the amount of the deficiency was ascertained, and not at the time the decree of foreclosure was made.
Howe v. Sears, 30 U. 344; 84 P. 1107.
No personal judgment is authorized until the mortgaged property has been sold and the proceeds derived from the sale applied to the payment of the debt, and only for the deficiency.
Boucofski v. Jacobson, 36 U. 165; 104 P. 117.
Jensen v. Lichtenstein, 45 U. 320; 145 P. 1036.
Hammond v. Wall, 51 U. —; 171 P. 148.
An action to foreclose is essentially in rem, and personal service is not necessary except to support a judgment for deficiency after sale, and in the absence of personal service the amount of deficiency remained a subsisting debt which may be sued on by the mortgagee.
Boucofski v. Jacobson, 36 U. 165; 104 P. 117.

7232. (3500.) Holder of unrecorded conveyance, etc., not made a party.

Judgment. No person holding a conveyance from or under the mortgagor of the property mortgaged, or having a lien thereon, which conveyance or lien does not appear of record in the proper office, at the time of the commencement of the action, need be made a party to such action, and the judgment therein rendered, and the proceedings therein had, are as conclusive against the party holding such unrecorded conveyance or lien as if he had been made a party to the action.

Cal. C. Civ. P., § 726*. Parties defendant generally, § 6507.

7233. (3501.) Surplus paid to person entitled. Deposit in court. If there be surplus money remaining after payment of the amount due on the mortgage, lien, or incumbrance, with costs, the court may cause the same to be paid to the person entitled to it, and in the meantime may direct it to be deposited in court.

Cal. C. Civ. P., § 727.

7234. (3502.) Sale of property when debt due in instalments. If the debt for which the mortgage, lien, or incumbrance is held is not all due, as soon as sufficient of the property has been sold to pay the amount due, with costs, the sale must cease, and afterward, as often as more becomes due for principal or interest, the court may, on motion, order more to be sold. But if the property cannot be sold in portions without injury to the parties, the whole may be ordered to be sold in the first instance, and the entire debt and costs paid, there being a rebate of interest where such rebate is proper.

Cal. C. Civ. P., § 728.

Complaint drawn on the theory that whole indebtedness is due will not support a decree for sale of whole property hereunder.

Hartog v. Tibbitts, 1 U. 328.

Where a party holds two mortgages and forecloses separately.

Thompson v. Skeen, 14 U. 209; 46 P. 1103.

Where only a part of a mortgage debt is due and foreclosure on that part is desired, but the mortgaged premises cannot be sold in parcels without injury, it is the better practice to make a complete showing to the court and have a decree entered accordingly; mortgage sales in equity will be controlled by courts of equity so that no injustice may be done to either party.

Dupee v. Salt Lake V. L. & T. Co., 20 U. 103; 57 P. 845.

7235. (3503.) Real estate and water right stock apportioned for sale. Sales of real estate under judgments of foreclosure of mortgages and liens are subject to redemption as in case of sales under execution. In all cases where the judgment directs the sale of land, together with shares of corporate stock evidencing title to a water right, used or intended to be used, or suitable for use, on the land, the court shall equitably apportion such water stock to the land, or some part thereof, in one or more parcels, as it may deem suitable for the sale thereof, and the land and water stock in each parcel shall be sold together, and for the purpose of such sale shall be regarded as real estate and subject to redemption as above specified. In all cases of real estate under foreclosure, the court may direct the parcels and order in which parcels of property shall be sold. Am'd '17, p. 45.

Cal. C. Civ. P., § 726*. See Sup. (1893) p. 970; Sup. (1895) p. 24.

Limitation on action to redeem against mortgagee in possession, §§ 6476, 6477.

Redemption after execution sale, §§ 6940-6950.

Redemption after sale under trust deed, § 6951.

Parties, purchasers, and redemptioners in foreclosure proceedings are bound by the decree; redemption can be made subject to the conditions therein imposed; and a redemptioner by redeeming becomes the assignee of the purchaser, succeeds only to his rights, and cannot be heard to claim under one portion of a decree and repudiate the balance.

Dupee v. Salt Lake V. L. & T. Co., 20 U. 103; 57 P. 845.

7236. (3504.) No greater attorney's fee allowed than actually charged. In all cases of foreclosure, when an attorney or counsel fee is claimed by the plaintiff, no other or greater amount shall be allowed or decreed than the sum which shall appear by the evidence to be actually charged by and to be paid to the attorney for the plaintiff; and if it shall appear that there is an agreement or understanding to divide such fees between the plaintiff and his attorney, or between the attorney and any other person except an attorney associated with him in the cause, only the amount to be retained by the attorney or attorneys shall be decreed as against the defendant.

Compensation of attorneys generally, § 346, and note.

This statute was enacted in order to prevent a division of fees provided for in the mortgage between the attorney and the mortgagee, and that only those reasonable fees paid or agreed to be paid to attorneys could be taxed against the defendant under the contract in the deed of trust.

McClure v. Little, 15 U. 379; 49 P. 298.

Where an attorney's fee has been allowed and made part of the judgment, the attorney

has a lien thereon to the extent of the amount allowed, and the lien cannot be discharged by payment to any one except the attorney, who is deemed the equitable assignee of the judgment, and the fact that the property was sold to the owner of the debt can make no difference.

Gray v. Denhalter, 17 U. 312; 53 P. 976.

Where a decree provides for the payment of attorney's fees allowed in a foreclosure suit, and judgment is rendered, the fees form part of the judgment, and, where they have not been paid to the attorney, they go to the mortgagee in trust for the attorney.

Loofbourow v. Hicks, 24 U. 49; 66 P. 602.

Where a mortgage provided that in case of foreclosure the mortgagor should be liable for reasonable attorney's fee, the attorney's fee allowed becomes a lien on the property secured by the mortgage.

Jensen v. Lichtenstein, 45 U. 320; 145 P. 1036.

7237. (3505.) Attorney's fee fixed by court in all cases. In all cases of foreclosure by proceeding in court, the attorney's fee shall be fixed by the court in which the proceedings of foreclosure are had, any stipulation in said mortgage to the contrary notwithstanding.

Cal. C. Civ. P., following § 726.

Attorney's fees on foreclosure, § 7236, and note.

Attorney's fees generally, lien, § 346, and note.

In a suit to foreclose a chattel mortgage, where the evidence is not before the supreme court, it must assume that the attorney's fee allowed by the trial court was reasonable and justified by the proof.

Johnson v. Hibbard, 27 U. 342; 75 P. 737.

This section, together with § 7236, is applicable only to foreclosure proceedings, and not to a note not secured by mortgage.

Utah National Bank v. Nelson, 38 U. 169; 111 P. 907.

The court may, whether he has or has not sufficient data, call to his assistance, attorneys engaged in the practice and take their judgement under oath, respecting what is reasonable attorney's fee.

Jensen v. Lichtenstein, 45 U. 320; 145 P. 1036.

Though the mortgage provides for a definite amount therefor.

Kurtz v. Ogden C. S. Co., 37 U. 313; 108 P. 14.

CHAPTER 60.

ACTIONS FOR NUISANCE, WASTE, ETC.

7240. (3506.) Nuisance defined. Who may bring action. Abatement. Damages. Anything which is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance, and the subject of an action. Such action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by the nuisance; and by the judgment the nuisance may be enjoined or abated, as well as damages recovered.

Cal. C. Civ. P., § 731.

Nuisances dangerous to health, §§ 2735, 2736.

Houses of ill fame, etc., nuisance and their abatement, §§ 4275-4282.

Damages for taking private property for public use, Con. art. 1, sec. 32.

Infected orchard a nuisance, § 1899.

Public nuisances, penalty, §§ 8184-8189.

Cited in Salt Lake City v. Young, 45 U. 349; 145 P. 1047.

Fences constructed across a highway by the owner of the land, to prohibit public travel thereon, constitute a nuisance, which the road supervisor has the right to abate.

Whittaker v. Ferguson, 16 U. 240; 51 P. 980.

The mixing of impure water with water used for irrigation and domestic purposes, which renders it unfit for such use, causes a nuisance.

North Point C. I. Co. v. Utah & Salt Lake C. Co., 16 U. 246; 52 P. 168.

Crane v. Winsor, 2 U. 248.

In case of a railroad track about to be laid in a street and across a sidewalk, without lawful authority, in such a way as to become a public and private nuisance, a private citizen specially damaged may have the threatened damage enjoined.

Cereghino v. O. S. L. R. R. Co., 26 U. 467; 73 P. 634.

Operation of engine and cars over switch track by railroad, causing smoke and noise, is a nuisance, entitling owner of property affected to an injunction as well as damages.

Stockdale v. R. G. W. Ry. Co., 28 U. 201; 77 P. 849.

The interference with religious services by the annoyances from noises in the rightful operation of a railroad and trainyards near a church without any physical interference with the church property, is not a private nuisance.

Twenty-second Corporation v. O. S. L. R. R. Co., 36 U. 238; 103 P. 243.

The question whether excessive noises made in the operation of railroad trains is a nuisance to the adjacent property is one of fact, and not of law.

Id.

An action for damages caused by the pollution of fish ponds, the plaintiff not owning the entire interest in the real estate on which the ponds were located, is an action for damages to personal property.

Reese v. Qualtrough, 48 U. 23; 156 P. 955.

Except for the provision of Con. art. 1, sec. 23, forbidding damage to private property for public use, no action would lie against a railroad company for mere consequential injury to real property by the jar of passing trains, and the smoke and cinders, where the road was carefully and properly built and operated.

O'Neill v. S. P., L. A. & S. L. Ry. Co., 38 U. 475; 114 P. 127.

A prescriptive right to maintain a private nuisance must be adverse, under claim of right uninterrupted and continuous for twenty years, with the knowledge and acquiesence of the parties whose right is invaded

North Point Irr. Co. v. Utah-S. L. Canal Co., 16 U. 246; 52 P. 168.

7241. (3507.) Who may sue for waste. Treble damages. If a guardian, tenant for life or years, joint tenant, or tenant in common of real property commit waste thereon, any person aggrieved by the waste may bring an ac-

tion against him therefor, in which action there may be judgment for treble damages.

Cal. C. Civ. P., § 732.
Limitation three years, § 6468.
Duty of guardian, § 7829.
A tenant in common or a joint tenant may sue his co-tenant, § 6512.
Waste pending foreclosure or after execution, § 7254.
Treble damages for wrongful taking of ore, § 3938.

It is waste for a tenant for life to tear down a building, even though it is the intention to erect a better one.
Dooly v. Stringfellows, 4 U. 107; 7 P. 405.
Treble damages for taking of ore.
Bullion-B. & C. M. Co. v. Eureka H. M. Co., 27 U. 417; 76 P. 19.

7242. (3508.) Injuries to trees. Who may sue. Treble damages. Any person who cuts down or carries off any wood or underwood, tree or timber, or girdles or otherwise injures any tree or timber on the land of another person, or on the street or highway in front of any person's house, village or city lot, or cultivated grounds, or on the commons or public grounds of any city or town, or on the street or highway in front thereof, without lawful authority, is liable to the owner of such land, or to such city or town, for treble the amount of damages which may be assessed therefor, in a civil action in any court having jurisdiction.

Cal. C. Civ. P., § 733.
Injuring or destroying trees a misdemeanor, damages, § 2843.

7243. (3509.) Id. Damages limited if timber used for highways, etc. Nothing in the next preceding section authorizes the recovery of more than the just value of the timber taken from uncultivated woodland for the repair of a public highway or bridge upon the land, or adjoining it.

Cal. C. Civ. P., § 734.

7244. (3510.) Treble damages for forcible entry, etc. If a person recover damages for a forcible or unlawful entry in or upon, or detention of, any building or any cultivated real property, judgment may be entered for three times the amount at which the actual damages are assessed.

Cal. C. Civ. P., § 735.
Treble damages in forcible entry, etc., proceedings, § 7324, and note.

CHAPTER 61.

ACTIONS TO QUIET TITLE, ETC.

7247. (3511.) Action to determine adverse claim. An action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim.

Cal. C. Civ. P., § 738; see Sup. (1895) p. 25.
Action to determine adverse claim to real or personal property, § 7221.
Action by party out of possession to determine adverse claim, parties, judgment, § 6508.
Action brought in county where property situated, § 6525.
For purposes of this action the possession of the executor is the possession of the heirs, § 7719.
Adverse possession, generally, §§ 6452-6456.
Possessory rights, § 4867.
Writ for possession after judgment, § 6508.
General powers of court of equity, note to § 1667.
Defective tax titles, note to § 6018.
Boundaries established by acquiescence for a long period of time, note to § 6456.
Easement acquired by twenty years' adverse user, note to § 6456.
U. S. patent subject to equities, and may be avoided for fraud, etc., note to § 3890.
Description of property in pleading, § 6599, and note.
Counterclaim asking for affirmative relief, note to § 6756.
Issues to be tried by the jury, and by the court, § 6781, and note.
Equitable issues must first be disposed of, note to § 6781.
Form of action in support of adverse claim for lode, note to § 3890.
Allowance for improvements made under order of title, §§ 5031, 7250.

GENERAL:

The words "claims an estate or interest" are used in a broad sense, and are not technical in their meaning. They are evidently intended to embrace every species of adverse claim.
Goldberg v. Taylor, 2 U. 486.
Where the facts show a right to specific performance merely, a decree quieting title is erroneous.
Hennefer v. Hays, 14 U. 324; 47 P. 90.
In an action of ejectment, the question is as to who has the better title.
Kahn v. Old Telegraph M. Co., 2 U. 174.
An action to determine adverse claims cannot be maintained against the holder of the legal title by one who has a mortgage lien; and such an action, once commenced, cannot be converted into a foreclosure proceeding, so as to allow the entry in effect of a decree of foreclosure.
Fields v. Cobbey, 22 U. 415; 62 P. 1020.
A cloud on a title is something, such as a mortgage deed, or judgment, etc., which shows prima facie some interest in a third party in or to the property adverse to the person vested with the real title to the same, or to one having an interest therein.
Schenck v. Wicks, 23 U. 576; 65 P. 732.
A suit to modify a decree restraining plaintiff

from entering on defendant's premises on the ground that plaintiff has secured, since rendition of that decree, a right-of-way over defendant's premises, is essentially an original action to quiet title.
Richey v. Beus, 31 U. 262; 87 P. 903.

Where it is found the defendant is the owner in fee, subject to the lien for taxes paid by plaintiff, judgment should provide that on defendant's default to pay the taxes, the property should be sold; and an order made that, if the taxes be not paid before a certain date, the title shall vest in defendant, is erroneous.
S. L. Inv. Co. v. Fox, 37 U. 334; 108 P. 1132.

PLEADINGS:

Where both parties plead title in themselves, evidence to show mistake in deed under which plaintiff claims is admissible, without allegation of mistake or prayer for reformation.
Glasmann v. O'Donnell, 6 U. 446; 24 P. 537.

Defense of possession under alleged contract of purchase; under circumstances, judgment for plaintiff properly directed.
Jones v. Memmott, 8 U. 212; 30 P. 752.

Complaint in ejectment held insufficient.
Id.

In an action to recover real estate from a co-tenant, where the complaint, verdict, and judgment all fail to define the extent of plaintiff's interest, a judgment in his favor will be set aside.
Lillianskyoldt v. Goss, 2 U. 292.

A party who bases his claim in ejectment upon a legal title cannot recover upon an equitable title.
Tarpey v. Deseret Salt Co., 5 U. 205; 14 P. 338.

Equitable estoppel is a good defense in ejectment.
Duke v. Griffith, 9 U. 469; 35 P. 512.

In ejectment, defendant denied plaintiff's right, and in a counterclaim alleged ownership and a right of possession in himself, and afterwards amended by alleging the fee in a third party, but still relied on possession and ownership in himself; held, that the court did not err in overruling plaintiff's motion to require defendant to elect on which right he would rely, as there was, in effect, but one defense presented.
Conner v. Raddon, 16 U. 418; 52 P. 764.

In a conveyance of land by natural monuments, distances and quantity, being the most uncertain, must yield to the description by natural monuments; and in an action to quiet title to land so described, it is proper for the court to read into the deed sufficient language to close the description by natural monuments.
Park v. Wilkinson, 21 U. 279; 60 P. 945.

Under a general prayer, the defendant may be restrained from asserting any claim or doing any act that would tend to impair plaintiff's rights.
Richey v. Beus, 31 U. 262; 87 P. 903.

A plea, in an action to quiet title, alleging that the property had been sold for taxes, that it had not been redeemed, that a tax deed was issued to the purchaser, without referring to the recital of the tax deed, itself was insufficient as a plea of tax title.
Bean v. Fairbanks, 46 U. 513; 151 P. 338.

The manner of describing the property involved is immaterial.
Fitzpatrick v. Brown, 41 U. 139; 124 P. 769.

In an action to quiet title, plaintiff may seek to have a judgment against him, which affects his title, canceled, on the ground of fraud in procuring it, and the attack on such judgment is direct and not collateral.
Doyle v. West Temple Terr. Co., 43 U. 277; 135 P. 103.

A suit to quiet title may include allegations to annul a special assessment on school property exempt from taxation, even though it is claimed the assessment is void on its face.
Wey v. S. L. City, 35 U. 504; 101 P. 381.

If, when decedent died, he owned and was in possession of land, title to which his administrator sues to quiet, in the absence of proof to the contrary, it will be presumed that the title remained in his estate, and hence it is not necessary to allege ownership at the time of suit.
Tate v. Rose, 35 U. 229; 99 P. 1003.

A plaintiff, to quiet title, may include allegations that the deed was obtained by fraud, and void.
Larsen v. Gasberg, 43 U. 203; 134 P. 885.

EVIDENCE AND TRIAL:

It was held error to instruct the jury to return a verdict for the plaintiff who had shown a deed from the Union Pacific railway to land included within its grant, where proof had not been made that the land did not fall within the execptions to the grant.
McGrath v. Tallent, 7 U. 256; 26 P. 574.
Corinne M. C. & S. Co. v. Johnson, 7 U. 327; 26 P. 922; affirmed 156 U. S. 574.

Under a general denial and claim of title in an action of ejectment, it is competent for the defendant to show that the plaintiff had no right to enter when the suit was brought, or to show want of consideration for the deed under which the plaintiff claims title and right of entry.
Eastman v. Gurrey, 14 U. 169; 46 P. 828.
Kahn v. Old Tel. Co., 2 U. 174.

A tax deed, though void on its face, may be good as color of title, and sufficient to support a decree quieting title in the holder thereof.
Lawrence v. Murphy, 45 U. 572; 147 P. 903.

Where a defendant's general demurrer to action quieting title has been overruled, and the defendant is in default, he is not entitled to object to the introduction of evidence.
Doyle v. West Temple Terr. Co., 43 U. 277; 135 P. 103.

Where the record title was in plaintiff, evidence of an offer made by him to purchase interest of defendant's grantor, particularly when denied by plaintiff, is insufficient to divest his record title.
Ives v. Grange, 42 U. 608; 134 P. 619.

POSSESSION:

Actions to quiet title or to determine adverse claims under this section may be legal or equitable depending upon the pleadings.
Park v. Wilkinson, 21 U. 279; 60 P. 945.
See State v. Hart, 26 U. 229; 72 P. 938.

Actual possession under color of tax title is sufficient to maintain action.
Kunkel v. Utah L. Co., 29 U. 13; 81 P. 897.

When a party has title to a lot including alley way, and has a building on same except alley, there being no adverse possession, he has such possession as to entitle him to maintain an action to quiet title under § 1479, C. L. 1876.
Goldberg v. Taylor, 2 U. 486.

Complaint in ejectment alleging plaintiff to be the owner of and seized in fee of certain lands, and that defendant was in possession thereof, wrongfully withholding the same; held, sufficient, since possession and the right thereof is presumed to follow the legal title.
Jones v. Memmott, 7 U. 340; 26 P. 925.

A deed is admissible without evidence showing possession thereunder, and an admission made by persons claiming adverse possession recognizing owner's right is admissible.
English v. Oppenshaw, 28 U. 24; 78 P. 476.

As against one who, for his own benefit, comes into a pending action to quiet title, plaintiff may, by supplemental complaint, avail himself of his title by adverse possession which became complete after he brought the action, but before such other person came into it.
Welner v. Stearns, 40 U. 185; 120 P. 490.

The holder of a patented mining claim in possession may maintain a suit in equity in the federal court to quiet title and restrain defendants from further mining or removing ore from beneath the surface of said claim.
Lawson v. U. S. Mining Co., 207 U. S. 1; 52 L. Ed. 65.

The complaint, in an action to quiet title, need not allege possession of property in plaintiff.
Gibson v. McGurrin, 37 U. 158; 106 P. 669.

Proof that legal title is in plaintiff is sufficient to support a finding that he is entitled to possession.
Id.

IMPROVEMENTS:

Where the record owner of land permitted others to pay taxes, and to enter into possession, and make valuable improvements in good faith, he cannot, having delayed his action for several years after such improvements,

take them without compensation therefor, and reimbursing those who paid the taxes.

Ives v. Grange, 42 U. 608; 134 P. 619.

Where plaintiff held the legal title to land on which defendant, while in possession, made improvements during the period of twenty years or more, so that the value advanced from $300, which plaintiff had paid for it, to $1500, the plaintiff was nevertheless entitled to the entire right and interest.

Sheppick v. Sheppick, 44 U. 131; 138 P. 1169.

In a suit to quiet title under a parol gift from deceased, evidence held to sustain findings that, during plaintiff's occupancy, deceased exercised acts of exclusive ownership over the premises, and that the plaintiff's improvements were not permanent, but only such as were conducive to the comfort of occupancy.

Price v. Lloyd, 43 U. 441; 135 P. 268.

LAW AND EQUITY:

A suit to quiet title, being an equity case, the judgment of the supreme court on the whole evidence may be invoked, and the findings, in its judgment being clearly against the weight of evidence, it will vacate them and substitute others.

Leland v. Bourne, 41 U. 125; 125 P. 652.

Where neither side demands a jury trial, and the case is tried as a suit in equity, it must be considered as such by the court on appeal, so far as consideration of the evidence is concerned.

Fares v. Urban, 46 U. 609; 151 P. 57.

7248. (3512.) If defendant disclaim or default, costs not recoverable. If the defendant in such action disclaim in his answer any interest or estate in the property, or suffer judgment to be taken against him without answer, the plaintiff cannot recover costs.

Cal. C. Civ. P., § 739.

After filing a demurrer, a defendant filed a disclaimer. It thereby waived its right to a ruling on the demurrer, and the judgment was not void, for want of jurisdiction, on the ground that it was entered while the demurrer was still pending; a municipal corporation is bound by the act of its attorney filing such disclaimer.

S. L. City v. S. L. Inv. Co., 43 U. 181; 134 P. 603.

7249. (3513.) Termination of plaintiff's title pending action. Judgment. Damages. In an action for the recovery of real property, where the plaintiff shows a right to recover at the time the action was commenced, but it appears that his right has terminated during the pendency of the action, the verdict and judgment must be according to the fact, and the plaintiff may recover damages for withholding the property.

Cal. C. Civ. P., § 740.

Action not to abate by death or transfer, § 6513, and note.

Substitution of parties, costs, etc., § 6513, and note.

Alienation not to affect recovery, § 7256.

7250. (3514.) Improvement allowed as counterclaim. Exceptions. When damages are claimed for withholding the property recovered, upon which permanent improvements have been made by a defendant, or those under whom he claims, holding under color of title adversely to the claims of the plaintiff, in good faith, the value of such improvements must be allowed as a counterclaim against such damages, except improvements made upon mining property.

Col. Mills' An. C. (1896) § 258*; Cal. C. Civ. P., § 741*.

Improvements by occupying claimants, § 5031.

Color of title for this purpose, § 5034.

Where the rightful owner of real property seeks relief from one in possession under color of title, who has made improvements, such owner must compensate the occupant to the extent of the benefits which accrue to the owner therefrom.

Bacon v. Thornton, 16 U. 138; 51 P. 153.

Wasatch M. Co. v. Jennings, 14 U. 221; 46 P. 1106.

7251. (3515.) Order for survey of lands and mines. Notice. The court in which an action is pending for the recovery of real property, or for damages for an injury thereto, or to quiet title or to determine adverse claims thereto, or a judge of such court may, on motion, upon notice by either party, for good cause shown, grant an order allowing to such party the right to enter upon the property and make survey and measurement thereof, and of any tunnels, shafts, or drifts thereon, for the purpose of the action, even though entry for such purpose has to be made through other lands belonging to parties to the action.

Cal. C. Civ. P., § 742*.

Posponement of trial to further develop mining claim, § 6787.

Limitation on action for waste or trespass upon mining claim by means of underground works begins to run on discovery, § 6468.

Decisions concerning miners, notes to §§ 3890-3895.

7252. (3516.) Id. Order and service thereof. Liability for injury. The order must describe the property, and a copy thereof must be served on the owner or occupant, and thereupon such party may enter upon the property with necessary surveyors and assistants, and may make such survey and measurement; but if any unnecessary injury be done to the property, he is liable therefor.

Cal. C. Civ. P., § 743.

7253. (3517.) Mortgage not a conveyance, whatever its terms. Fore-

closure. A mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale.

Cal. C. Civ. P., § 744.

Decisions on the foreclosure of mortgages on real property, notes to §§ 7230-7231.

Decisions on foreclosure of chattel mortgages, note to § 471.

A mortgage of real property does not vest title in the mortgagee, and the mortgagor may transfer the title to a third party, subject to the lien of the mortgage.

Thompson v. Cheesman, 15 U. 43; 48 P. 477.
Fields v. Cobbey, 22 U. 415; 62 P. 1020.
Azzalia v. St. Claire, 23 U. 401; 64 P. 1106.

A deed absolute in form may be in effect a mortgage.

Peck v. Girard Ins. Co., 16 U. 121; 51 P. 255.
Stevens Imp. Co. v. S. Ogden Imp. Co., 20 U. 267; 58 P. 843.
Fields v. Cobbey, 22 U. 415; 62 P. 1020.

A stranger cannot question whether a conveyance is a mortgage or a conditional sale.

Smith v. North C. Water Co., 16 U. 194; 52 P. 283.

Trustees in deed of trust are not vested with any title, legal or equitable; they have no substantial interest; they cannot be affected by any decree in the case, and they are not necessary or indispensable parties to an action to foreclose a deed of trust.

Stevens Imp. Co. v. S. Ogden L. B. & I. Co., 20 U. 267; 58 P. 843.

Under provisions of this section and § 7230, an action to determine adverse claims cannot be maintained against the holder of the legal title by one who has a mortgage lien; and such an action, once commenced, cannot be converted into a foreclosure proceeding so as to allow the entry in effect of a decree of foreclosure.

Fields v. Cobbey, 22 U. 415; 62 P. 1020.

A bill of sale of a house, given to party furnishing lumber for the erection of the house, without transfer of possession, amounts to nothing but a mortgage securing the debt, and does not pass title.

Azzalia v. St. Claire, 23 U. 401; 64 P. 1106.

Where R. deeds property to F., and by contemporaneous agreement it is provided that, on payment to F. by R. of a certain sum by a certain day, F. will reconvey the property, and time is expressly made of the essence of the contract, and it is declared that, in default of the payment on or before such time, the agreement shall be null and void, and R. does not promise to bind himself to make the payments, there is a conditional sale, not a mortgage.

Smyth v. Reed, 28 U. 262; 78 P. 478.
Conditional sales of personalty, note to § 487.

Where a complaint alleged that a deed, sought to be foreclosed as a mortgage, was given to secure an antecedent indebtedness, the debt was not merged in the mortgage, hence a reference in the complaint to the deed and an option agreement to reconvey attached as an exhibit, was insufficient to obviate the necessity of an allegation in the complaint of an existing indebtedness from defendant to plaintiff.

Chesney v. Chesney, 33 U. 503; 94 P. 989.

Whether a deed absolute in form should be treated as a mortgage depends on the circumstances of the transaction and the purpose for which the deed was given and received, and whether it was given as security or for bargain and sale, and where there is doubt, it will be treated as a mortgage.

Duerden v. Solomon, 33 U. 468; 94 P. 978.

Where, long after a deed was given, the grantee made a written declaration of a naked trust for the benefit of the grantor and his heirs, it will not be presumed that a mortgage was intended.

Welch, Driscoll & Buck v. Buck, 48 U. 653; 161 P. 455.

And the terms of the trust cannot be varied by parol evidence, except upon the production of strong, clear, and convincing proof.

Id.

7254. (3518.) Waste restrained pending foreclosure or after execution sale. The court or judge may, by injunction, on good cause shown, restrain the party in possession from doing any act to the injury of real property during the foreclosure of a mortgage thereon, or after a sale on execution, before a conveyance.

Cal. C. Civ. P., § 745.
Injunction generally, § 6688.
Treble damages for waste, § 7241.
Treble damages for unlawful taking of ore, § 3938.

7255. (3519.) Purchaser may recover from tenant for waste. When real property has been sold on execution, the purchaser thereof, or any person who may have succeeded to his interest, may, after his estate becomes absolute, recover damages for injury to the property by the tenant in possession, after sale and before the possession is delivered under the conveyance.

Cal. C. Civ. P., § 746.
Waste may be restrained during period of redemption, § 6946.

7256. (3520.) Alienation pending action not to prejudice recovery. An action for the recovery of real property against a person in possession cannot be prejudiced by any alienation made by such person, either before or after the commencement of the action.

Cal. C. Civ. P., § 747.
Assignment of thing in action not prejudice defense, §§ 6496, 6578.
Action not to abate by transfer, § 6513.
Assignment for purpose of suit, note to § 6495.
Substitution generally, note to § 6513.

7257. (3521.) Mining customs and rules control, when. In actions respecting mining claims, proof must be admitted of the customs, usages, or regulations established and in force in the district, bar, diggings, or camp embracing such claim; and such customs, usages, or regulations, when not in conflict with the laws of this state, or of the United States, must govern the decision of the action.

Cal. C. Civ. P., § 748*.
Local laws and customs, note to § 3890.

CHAPTER 62.

PARTITION.

7260. (3522.) Who may bring action for partition or sale. When several co-tenants hold and are in possession of real property as joint tenants or tenants in common, in which one or more of them have an estate of inheritance, or for life or lives, or for years, an action may be brought by one or more of such persons for a partition thereof according to the respective rights of the persons interested therein, and for a sale of such property, or a part thereof if it appear that a partition cannot be made without great prejudice to the owners.

Cal. C. Civ. P., § 752.
For the purposes of partition, the possession of the executor, etc., is the possession of the heirs, § 7719.
Waste by tenant in common, etc., § 7241.
Tenants in common, etc., as parties, §§ 6506-6512.
Action brought where property situated, § 6525.
Partition of estates of decedents, §§ 7768-7778.
Guardian may assent to partition of estate of ward, §§ 7303, 7835.
Parol partition followed by possession, etc., specific performance, note to § 5824.
Where the evidence did not show but that the ground within the boundaries of the mining claim was all of equal value, or that a partition by metes and bounds would result in great prejudice to any of the co-owners, under the provisions of this section and § 7271, the property was susceptible of partition by metes and bounds.
Ryan v. Egan, 26 U. 241; 72 P. 933.

7261. (3523.) Interests of all parties must be set forth. Exceptions. The interests of all persons in the property, whether such persons be known or unknown, must be set forth in the complaint, specifically and particularly, as far as known to the plaintiff, and if one or more of the parties, or the share or quantity of interest of any of the parties, be unknown to the plaintiff or be uncertain or contingent, or the ownership of the inheritance depend upon an executory devise, or the remainder be a contingent remainder, so that such parties cannot be named, that fact must be set forth in the complaint.

Cal. C. Civ. P., § 753.
In a suit for partition, new parties may be brought in by defendant by cross-complaint, where it is shown that they are necessary to the determination of the cause.
Chalmers v. Trent, 11 U. 88; 39 P. 488.

7262. (3524.) Id. Only persons having recorded claims made parties. No person having a conveyance of, or claiming a lien on, the property, or some part of it, need be made a party to the action unless such conveyance or lien appear of record.

Cal. C. Civ. P., § 754.

7263. (3525.) Lis pendens to be filed. Notice. Immediately after filing the complaint in the district court, the plaintiff must file with the recorder of the county, or of the several counties in which the property is situated, either a copy of such complaint or a notice of the pendency of the action, containing the names of the parties, so far as known, the object of the action, and a description of the property to be affected thereby. From the time of filing such notice for record, all persons shall be deemed to have notice of the pendency of the action.

Cal. C. Civ. P., § 755*.
Lis pendens generally, § 6553.

7264. (3526.) Summons, to whom directed. The summons must be directed to all the joint tenants, tenants in common, and all persons having any interest in, or liens of record by mortgage, judgment, or otherwise, upon the property, or upon any particular portion thereof, and generally to all persons unknown who have or claim any interest in the property.

Cal. C. Civ. P., § 756.

7265. (3527.) Absent and unknown parties served by publication. If a party having a share or interest is unknown, or any one of the known parties reside out of the state, or cannot be found therein, and such fact is made to appear by affidavit, the summons may be served on such absent or unknown party by publication, as in other cases. When publication is made, the summons, as published, must be accompanied by a brief description of the property which is the subject of the action.

Cal. C. Civ. P., § 757.
Service by publication upon unknown defendants, § 6551.

7266. (3528.) Answers must specifically set forth interests. Waiver.

The defendants who have been personally served with the summons, or who have appeared without such service, must set forth in their answers, fully and particularly, the origin, nature, and extent of their respective interests in the property; and if such defendants claim a lien on the property by mortgage, judgment, or otherwise, they must state the original amount and date of the same, and the sum remaining due thereon, also whether the same has been secured in any other way or not, and if secured, the extent and nature of such security, or they are deemed to have waived their rights to such lien.

Cal. C. Civ. P., § 758*.

7267. (3529.) Rights of all parties determined. Proof. The rights of the several parties, plaintiff as well as defendant, may be put in issue, tried, and determined by such action; and when a sale of the premises is necessary, the title must be ascertained by proof, to the satisfaction of the court, before the judgment of sale can be made; and where service of the summons has been made by publication, like proofs must be required of the right of the absent or unknown parties, before such judgment is rendered; except that where there are several unknown persons having an interest in the property, their rights may be considered together in the action, and not as between themselves.

Cal. C. Civ. P., § 759*.

7268. (3530.) Partial partition, where complete partition impracticable. Whenever from any cause it is, in the opinion of the court, impracticable or highly inconvenient to make a complete partition, in the first instance, among all the parties in interest, the court may first ascertain and determine the shares or interests respectively held by the original co-tenants, and thereupon adjudge and cause a partition to be made, as if such original co-tenants were the parties and sole parties in interest, and the only parties to the action, and thereafter may proceed in like manner to adjudge and make partition separately of each share or portion so ascertained and allotted, as between those claiming under the original tenant to whom the same shall have been so set apart, or may allow them to remain tenants in common thereof, as they may desire.

Cal. C. Civ. P., § 760.

7269. (3531.) Rights of lienholders not summoned to be adjusted. If it appears to the court by the certificate of the county recorder, or clerk, or by the sworn or verified statement of any person who may have examined or searched the records, that there are outstanding liens or incumbrances of record upon such real property, or any part or portion thereof, which existed and were of record at the time of the commencement of the action, and the persons holding such liens are not made parties to the action, the court must either order such persons to be made parties to the action by an amendment or supplemental complaint, or appoint a referee to ascertain whether or not such liens or incumbrances have been paid, or, if not paid, what amount remains due thereon, and their order among the liens or incumbrances severally held by such persons and the parties to said action, and whether the amount remaining due thereon has been secured in any manner, and, if secured, the nature and extent of the security.

Cal. C. Civ. P., § 761.

7270. (3532.) Id. Notice to appear before referee. Publication. Report. The plaintiff must cause a notice to be served a reasonable time previous to the day for appearance before the referee appointed, as provided in the next preceding section, on each person having outstanding liens of record who is not a party to the action, to appear before the referee at a specified time and place, to make proof by his own affidavit or otherwise of the amount due or to become due, contingently or absolutely, thereon. In case such person is absent, or his residence is unknown, service may be made by publication or notice to his agents, under the direction of the court, in such manner as may be proper. The report of the referee thereon must be made to the

court, and must be confirmed, modified, or set aside and a new reference ordered, as the justice of the case may require.

Cal. C. Civ. P., § 762.

7271. (3533.) Land partitioned if possible; otherwise to be sold. Referees. If it is alleged in the complaint and established by evidence, or if it appears by the evidence without such allegation in the complaint, to the satisfaction of the court, that the property or any part of it is so situated that the partition cannot be made without great prejudice to the owners, the court may order a sale thereof; otherwise, upon the requisite proofs being made, it must order a partition according to the respective rights of the parties as ascertained by the court, and appoint three referees therefor, and must designate the portion to remain undivided for the owners whose interests remain unknown or are not ascertained; *provided,* however, that when the action is for partition of a mining claim among the tenants in common, joint tenants, co-partners, or parceners thereof, the court, upon good cause shown by any party or parties in interest, may, instead of ordering partition to be made in manner as hereinbefore provided, or a sale of the premises for cash, direct the referees to divide the claim in the manner hereinafter provided. Am'd '09, p. 202.

Cal. C. Civ. P., § 763*.
Single referee by consent, § 7305.

Mining claim without known ore bodies held susceptible of partition by metes and bounds. Ryan v. Egan, 26 U. 241; 72 P. 933.

7272. (3534.) Manner of making partition. Improvements. In making the partition, the referees must divide the property and allot the several portions thereof to the respective parties, quality and quantity, relatively considered, according to the respective rights of the parties as determined by the court, pursuant to the provisions of this chapter, designating the several portions by proper landmarks, and may employ a surveyor with the necessary assistants to aid them. In all cases the court shall direct the referees, in making partition of land, to allot the share of each of the parties owning an interest in the whole or any part of the premises sought to be partitioned, and to locate the share of each co-tenant, so as to embrace, as far as practicable, the improvements made by such co-tenant upon the property; and the value of the improvements made by the tenants in common must be excluded from the valuation in making allotments, and the land must be valued without regard to such improvements, in case the same can be done without material injury to the rights and interests of the other tenants in common owning such land; *provided, however,* that when the action is for a partition of a mining claim among the tenants in common, joint tenants, co-partners, or parceners thereof, the court shall, by order, fix the time for division of the claim by the referees, which shall not be less than twenty nor more than forty days from the day of the making the order, except by consent of all the parties in interest who have appeared in the action. On the day designated in the order, the referees shall go upon the claim to be divided, and proceed to make division of the same as hereinafter provided, and shall continue from day to day until the whole business is completed. Two or more of the tenants in common, joint tenants, co-partners, or parceners may unite together for the purposes of such division of which they shall give the referees written notice before they commence the business of division; and all who do not unite as aforesaid, or give notice of separate action, shall, for the purposes of division, be deemed and held to have united. The referees, in their action, shall recognize those named in the order of the court, or their agents and attorneys in fact, duly appointed by instrument in writing under seal, and acknowledged as in cases of conveyances of real estate, the guardian of a minor, and the guardian entitled to the custody and the management of the estate of an insane person, or other person adjudged incapable of conducting his own affairs, and as to the interest of each, shall be controlled entirely by the order of the court. At the time and place of division, one of the referees to be elected by them shall, in the manner of public auction, offer to the party or parties who will take the least part or portion of said mining claim in pro-

portion to the interest he or they may have therein, the privilege of first selecting the place at which his portion shall be located, and upon closing the bids the referees shall proceed to measure and mark off, by distinct metes and bounds, to the lowest bidder, his or their portion of said mining claim, at the place designated by them or him, according to the terms of his or their bid. When the referees have marked off and set apart the interest of the lowest bidder, as provided herein, they shall offer to the remaining parties the privilege of selection, as herein mentioned and provided, and shall, upon closing the bids, proceed in the same manner to locate and mark off the portion of the lowest bidder, and shall thereafter continue in the same manner to receive bids and mark off the interest of the bidder or bidders until there shall remain but one party in interest, or parties united, forming one interest, as provided herein. The party or parties remaining shall become the owner or owners, as the case may be, of the entire claim not marked off and set apart to other parties as hereinbefore provided, in proportion to their respective interests in the claim. Am'd '09, p. 202.

Mont. Civ. P., § 1359*; Cal. C. Civ. P., § 764*.

In partitioning property of an intestate, into which a stream ran from the land of a daughter used as a surburban home, and which then ran into a son's land, on which he had fishponds, a decree that the whole stream be allotted to the son should be modified so as to give the daughter her proportionate part thereof.

In re Ferguson's Estate, 44 U. 234; 139 P. 438.

7273. (3535.) Referees to report, describing property and shares. The referees must make a report of their proceedings, specifying therein the manner in which they executed their trust, and describing the property divided and the shares allotted to each party, with a particular description of each share.

Cal. C. Civ. P., § 765.

7274. (3536.) Power of court over referees' report. Decree conclusive. The court may confirm, change, modify, or set aside the report, and, if necessary, appoint new referees. Upon the report being confirmed, judgment must be rendered that such partition be effectual forever, which judgment is binding and conclusive:

1. On all persons named as parties to the action, and their legal representatives who have at the time any interest in the property divided, or any part thereof, as owners in fee, or as tenants for life or for years, or as entitled to the reversion, remainder, or the inheritance of such property, or of any part thereof, after the determination of a particular estate therein, and who by any contingency may be entitled to a beneficial interest in the property, or who have an interest in any undivided share thereof as tenants for years or for life;

2. On all persons interested in the property who may be unknown, to whom notice has been given of the action for partition by publication; and,

3. On all other persons claiming from such parties or persons, or either of them.

And no judgment is invalidated by reason of the death of any party before final judgment or decree; but such judgment or decree is as conclusive against the heirs, legal representatives, or assigns of such decedent, as if it had been entered before his death.

Cal. C. Civ. P., § 766.

7275. (3537.) Tenants for less than ten years not affected. The judgment does not affect tenants for years, less than ten, to the whole of the property which is the subject of the partition.

Cal. C. Civ. P., § 767.

7276. (3538.) Expenses apportioned. The expenses of the referees, including those of the surveyor and his assistants, when employed, must be ascertained and allowed by the court, and the amount thereof, together with the fees allowed by the court in its discretion to the referees, must be apportioned among the different parties to the action equitably.

Cal. C. Civ. P., § 768.

7277. (3539.) Disposal of lien on undivided interest. When a lien is on an undivided interest or estate of any of the parties, such lien, if a partition

be made, shall henceforth be a charge only on the share assigned to such party, but such share must be first charged with its just proportion of the costs of the partition, in preference to such lien.

Cal. C. Civ. P., § 769.

7278. (3540.) Estate for life or years set off. When a part of the property only is ordered to be sold, if there be an estate for life or years in an undivided share of the whole property, such estate may be set off in any part of the property not ordered to be sold.

Cal. C. Civ. P., § 770.

7279. (3541.) Proceeds of sale of incumbered property, how applied. The proceeds of the sale of the incumbered property must be applied under the direction of the court, as follows:

1. To pay its just proportion of the general costs of the action;
2. To pay the costs of the reference;
3. To satisfy and cancel of record the several liens in their order of priority, by payment of the sums due and to become due; the amount due to be verified by affidavit at the time of payment;
4. The residue among the owners of the property sold, according to their respective shares therein.

Cal. C. Civ. P., § 771.

7280. (3542.) Other security of lienholders first exhausted. Whenever any party to an action who holds a lien upon the property, or any part thereof, has other securities for the payment of the amount of such lien, the court may, in its discretion, order such securities to be exhausted before a distribution of the proceeds of sale, or may order a just reduction to be made from the amount of the lien on the property on account thereof.

Cal. C. Civ. P., § 772*.

7281. (3543.) Proceeds distributed by referees, if ordered. Deposit. The proceeds of sale, and the securities taken by the referees, or any part thereof, must be distributed by them to the persons entitled thereto, whenever the court so directs. But in case no direction for distribution is given, all of such proceeds and securities must be paid into court, or deposited therein, or as directed by the court.

Cal. C. Civ. P., § 773*.

7282. (3544.) Proceeds of sale held pending determination of claims. When the proceeds of the sale of any share or parcel belonging to persons who are parties to the action, and who are known, are paid into court, the action may be continued as between such parties, for the determination of their respective claims thereto, which must be ascertained and adjudged by the court. Further testimony may be taken in court, or by a referee at the discretion of the court, and the court may, if necessary, require such parties to present the facts or law in controversy, by pleadings as in an original action.

Cal. C. Civ. P., § 774.

7283. (3545.) Referees' sales to be at public auction. Notice. All sales of real property made by referees under this chapter must be made at public auction to the highest bidder, upon notice published in the manner required for the sale of real property on execution. The notice must state the terms of sale, and if the property, or any part of it, is to be sold subject to a prior estate, charge or lien, that must be stated in the notice.

Cal. C. Civ. P., § 775. Sale of real property on execution, §§ 6928-6940.

7284. (3546.) Court must direct terms of credit sale. The court must in the order of sale direct the terms of credit which may be allowed for the purchase money of any portion of the premises of which it may direct a sale on credit, and for that portion of which the purchase money is required by the provisions hereinafter contained, to be invested for the benefit of unknown owners, minors, or parties out of the state.

Cal. C. Civ. P., § 776.

7285. (3547.) Id. Securities to be in name of owner, guardian, etc. The

referees may take separate mortgages and other securities for the whole or convenient portions of the purchase money, of such parts of the property as are directed by the court to be sold on credit, for the shares of any known owner of full age in the name of such owner, and for the shares of a minor in the name of the guardian of such minor, and for other shares in the name of the clerk of the court and his successors in office.

Cal. C. Civ. P., § 777.

7286. (3548.) Tenant whose estate is sold to be compensated. Consent. The person entitled to a tenancy for life or years, whose estate has been sold, is entitled to receive such sum as may be deemed a reasonable satisfaction for such estate, and which the person so entitled may consent to accept instead thereof, by an instrument in writing, filed with the clerk of the court. Upon the filing of such consent, the clerk must enter the same in the minutes of the court.

Cal. C. Civ. P., § 778.

7287. (3549.) Id. If consent not given, fixed by court. If such consent be not given, filed, and entered, as provided in the next preceding section, at or before a judgment of sale is rendered, the court must ascertain and determine what proportion of the proceeds of the sale, after deducting expenses, will be a just and reasonable sum to be allowed on account of such estate, and must order the same to be paid to such party, or deposited in the court for him, as the case may require.

Cal. C. Civ. P., § 779.

7288. (3550.) Id. Unknown tenant to be protected. If the persons entitled to such estate for life or years be unknown, the court must provide for the protection of their rights in the same manner, as far as may be, as if they were known and had appeared.

Cal. C. Civ. P., § 780.

7289. (3551.) Future or contingent interests to be protected. In all cases of sales when it appears that any person has a vested or contingent or future right or estate in any of the property sold, the court must ascertain and settle the proportional value of such contingent or vested right or estate, and must direct such proportion of the proceeds of the sale to be invested, secured, or paid over, in such manner as to protect the rights and interests of the parties.

Cal. C. Civ. P., § 781.

7290. (3552.) Terms to be announced at sale. Lots sold separately. In all cases of sales of property, the terms must be made known at the time, and if the premises consist of distinct farms or lots, they must be sold separately.

Cal. C. Civ. P., § 782.

7291. (3553.) Referees and guardians not to be interested in purchase. Neither of the referees nor any person for the benefit of either of them can be interested in any purchase; nor can a guardian of a minor party be interested in the purchase of any real property, being the subject of the action, except for the benefit of the minor. All sales contrary to the provisions of this section are void.

Cal. C. Civ. P., § 783.

7292. (3554.) Referees to report sale to court. Filing. After completing a sale of the property, or any part thereof ordered to be sold, the referees must report the same to the court, with a description of the different parcels of land sold to each purchaser, the name of the purchaser, the price paid or secured, the terms and conditions of the sale, and the securities, if any, taken. The report must be filed in the office of the clerk of the court.

Cal. C. Civ. P., § 784*.

7293. (3555.) Order to convey after confirmation. Disposition of proceeds. If the sale be confirmed by the court, an order must be entered, directing the referees to execute conveyances and take such securities pursuant to such sale, which they are hereby authorized to do. Such order may also give direction to them respecting the disposition of the proceeds of the sale.

Cal. C. Civ. P., § 785.

7294. (3556.) When shareholder or lienholder a purchaser. Receipt. When a party entitled to a share of the property, or an incumbrancer entitled to have his lien paid out of the sale, becomes a purchaser, the referees may take his receipt for so much of the proceeds of the sale as belongs to him.

Cal. C. Civ. P., § 786.

7295. (3557.) Conveyances to be recorded. A bar. The conveyances must be recorded in the county where the premises are situated, and shall be a bar against all persons interested in the property in any way, who shall have been named as parties in the action, and against all such parties or persons as were unknown, if the summons was served by publication, and against all persons claiming under them, or either of them, and against all persons having unrecorded deeds or liens at the commencement of the action.

Cal. C. Civ. P., § 787.

7296. (3558.) Investment of proceeds belonging to non-resident, etc. When there are proceeds of a sale belonging to an unknown owner or to a person without the state who has no legal representative within it, the same must be invested in bonds of the United States, of this state, or of any political subdivision thereof, for the benefit of the persons entitled thereto.

Mont. Civ. P., 1383*; Cal. C. Civ. P., § 788*.

7297. (3559.) Securities and investments to be in name of clerk. When the security of the proceeds of the sale is taken, or when an investment of any proceeds is made, it must be done, except as herein otherwise provided, in the name of the clerk of the district court of the county where the papers are filed, and his successors in office, who must hold the same for the use and benefit of the parties interested, subject to the order of the court.

Mont. Civ. P., § 1384*.

7298. (3560.) When interests ascertained, securities taken in names of parties. When security is taken by the referees on a sale, and the parties interested in such security, by an instrument in writing under their hands delivered to the referees, agree upon the shares and proportions to which they are respectively entitled, or when shares and proportions have been previously adjudged by the court, such securities must be taken in the names of, and payable to, the parties respectively entitled thereto, and must be delivered to such parties upon their receipt therefor. Such agreement and receipt must be returned and filed with the clerk of the court.

Cal. C. Civ. P., § 790.

7299. (3561.) Duties of clerk as to investments and securities. The clerk of the court in whose name a security is taken or by whom an investment is made, and his successors in office, must receive the interest and principal as it becomes due, and apply and invest the same as the court may direct, and must deposit with the county treasurer all securities taken, and keep an account in a book provided and kept for that purpose, in the clerk's office, free for inspection by all persons, of investments and moneys received by him thereon, and the disposition thereof.

Cal. C. Civ. P., § 791.

7300. (3562.) Where partition impracticable, compensation ordered. When it appears that a partition cannot be made equally among the parties according to their respective rights, without prejudice to the rights and interest of some of them, and a partition be ordered, the court may adjudge compensation to be made by one party to another, on account of the inequality; but such compensation shall not be required to be made to others by owners unknown, nor by a minor, unless it appears that such minor has personal property sufficient for that purpose, and that his interest will be promoted thereby. And in all cases the court has power to make compensatory adjustment between the respective parties, according to the ordinary principles of equity.

Cal. C. Civ. P., § 792.

7301. (3563.) Infant's share received by guardian. Security. When the share of a minor is sold, the proceeds of sale may be paid by the referee

making the sale to his general guardian or to the special guardian appointed for him in the action, upon giving the security required by law or directed by order of the court.

Cal. C. Civ. P., § 793.

7302. (3564.) Insane person's share received by guardian. Security. The guardian who may be entitled to the custody and management of the estate of an insane person or other person adjudged incapable of conducting his own affairs, whose interest in real property has been sold, may receive from the referees, in behalf of such person, his share of the proceeds of such real property, on executing with sufficient sureties an undertaking, approved by the judge of the court, that he will faithfully discharge the trust reposed in him, and will render a true and just account to the person entitled, or to his legal representative.

Cal. C. Civ. P., § 794.

7303. (3565.) Guardian may consent to partition without action. The general guardian of a minor, and the guardian entitled to the custody and management of the estate of an insane person, or other person adjudged incapable of conducting his own affairs, who is interested in real estate held in joint tenancy, or in common, or in any other manner so as to authorize his being made a party to an action for the partition thereof, may consent to a partition without action, and agree upon the share to be set off to such minor or other person entitled, and may execute a release in his behalf to the owners of the shares of the parts to which they may be respectively entitled, upon an order of the court.

Cal. C. Civ. P., § 795.

Guardian may consent, § 7835.

Though at the time of a parol partition of their father's land two sons were minors, if, after reaching majority and knowing the circumstances, they retain possession of, exercise exclusive dominion over, and sell the parts allotted them, and assert no claim to the lands allotted to the other heirs, they cannot repudiate the partition.

Whittemore v. Cope, 11 U. 344; 40 P. 256.

7304. (3566.) Costs apportioned according to shares. Exception. Lien. The costs of partition, including reasonable counsel fees, expended by the plaintiff or either of the defendants for the common benefit, fees of referees, and other disbursements, must be paid by the parties respectively entitled to share in the lands divided, in proportion to their respective interests therein, and may be included and specified in the judgment. In that case they shall be a lien on the several shares, and the judgment may be enforced by execution against such shares, and against other property held by the respective parties. When, however, litigation arises between some of the parties only, the court may require the expenses of such litigation to be paid by the parties thereto, or any of them.

Cal. C. Civ. P., § 796.

The court may allow counsel fees to plaintiff, provided the fees are reasonable and the services rendered are such as are necessary and for the common benefit of all parties interested, and may tax a proper part thereof against the part of the fund belonging to defendants.

Murray v. Hays et al., 50 U. —; 169 P. 264.

Where the attorney's services resulted in a higher price being obtained for the property, the court should consider such services in determining the attorney's fees to be allowed.

Id.

7305. (3567.) Single referee appointed by consent. Powers and duties. The court, with the consent of the parties, may appoint a single referee, instead of three referees, in the proceedings under the provisions of this chapter, and the single referee, when thus appointed, has all the powers and may perform all the duties required of the three referees.

Cal. C. Civ. P., § 797.

Appointment of referees, § 7271.

7306. (3568.) Co-tenant allowed expenditures for common benefit. Lien. If it appear that other actions or proceedings have been necessarily prosecuted or defended by any one of the tenants in common, for the protection, confirmation, or perfecting of the title, or setting the boundaries, or making a survey or surveys of the estate partitioned, the court shall allow to the parties to the action, who have paid the expenses of such litigation or other proceedings, all the expenses necessarily incurred therein, including counsel fees, which shall have accrued to the common benefit of the other tenants in common, with interest thereon from the date of making the said ex-

penditures, and the same must be pleaded and allowed by the court and included in the final judgment, and shall be a lien upon the share of each tenant, respectively, in proportion to his interest, and shall be enforced in the same manner as taxable costs of partition are taxed and collected.

Cal. C. Civ. P., § 798*.

7307. (3569.) Abstract of title. Cost. Inspection by all. If it appear to the court that it was necessary to have made an abstract of the title to the property to be partitioned, and such abstract shall have been procured by the plaintiff, or if the plaintiff shall have failed to have the same made before the commencement of the action, and any one of the defendants shall have had such abstract afterward made, the cost of the abstract, with interest thereon from the time the same is subject to the inspection of the respective parties to the action, must be allowed and taxed. Whenever such abstract is procured by the plaintiff before the commencement of the action, he must file with his complaint a notice that an abstract of the title has been made, and is subject to the inspection and use of all the parties to the action, designating therein where the abstract will be kept for inspection. But if the plaintiff shall have failed to procure such abstract before commencing the action, and any defendant shall procure the same to be made, he shall, as soon as he has directed it to be made, file a notice thereof in the action with the clerk of the court, stating who is making the same and where it will be kept when finished. The court, or the judge thereof, may direct, from time to time, during the progress of the action, who shall have the custody of the abstract.

Cal. C. Civ. P., § 799.

7308. (3570.) Id. Who may make. The abstract mentioned in the next preceding section may be made by any competent searcher of records, and need not be certified by the recorder or other officer, but instead thereof, it must be verified by the affidavit of the person making it, to the effect that he believes it to be correct; but the same may be corrected, from time to time, if found incorrect, under the direction of the court.

Cal. C. Civ. P., § 800.

7309. (3571.) Interest allowed on disbursements. Whenever, during the progress of the action for partition, any disbursement shall have been made, under the direction of the court, or the judge thereof, by a party thereto, interest must be allowed thereon from the time of making such disbursement.

Cal. C. Civ. P. § 801.

CHAPTER 63.

TERMINATION OF LIFE ESTATE.

7312. (3572.) Proceedings to determine. Notice. Order. If any person has died, or shall hereafter die, who at the time of his death was the owner of a life estate which terminates by reason of his death, any person interested in the property, or in the title thereto, in which such life estate was held, may file in the district court of the county in which the property is situated his verified petition, setting forth such facts, and thereupon, and after such notice by publication or otherwise, as the court or judge may order, the court or judge shall hear such petition and the evidence offered in support thereof, and if, upon such hearing, it shall appear that such life estate of such deceased person absolutely terminated by reason of his death, the court or judge shall make an order to that effect, and thereupon a certified copy of such order may be recorded in the office of the county recorder.

Cal. C. Civ. P., § 1723*. Specific legacies for life, § 6392.

CHAPTER 64.

FORCIBLE ENTRY AND DETAINER.

7313. (3573.) Forcible entry defined. Every person is guilty of a forcible entry who either:

1. By breaking open doors, windows, or other parts of a house, or by fraud, intimidation, or stealth, or by any kind of violence or circumstance of terror, enters upon or into any real property; or,

2. Who, after entering peaceably upon real property, turns out by force, threats, or menacing conduct, the party in actual possession.

Cal. C. Civ. P., § 1159*.
Concurrent jurisdiction of city court, § 1712; of justice's court, § 1792; of municipal court, § 1758.
If the entry upon real estate was forcible and disseizee peaceably in the actual possession at the time of the forcible entry, the right to recover is complete.
Brooks v. Warren, 5 U. 118; 13 P. 175.
Holladay Coal Co. v. Kirker, 20 U. 192; 57 P. 882.
A mere scrambling possession is insufficient to predicate an action under this chapter.
Wellington v. Abbott, 51 U. —; 173; P. 245.

7314. (3574.) Forcible detainer defined. Every person is guilty of a forcible detainer who either:

1. By force, or by menaces and threats of violence, unlawfully holds and keeps the possession of any real property, whether the same was acquired peaceably or otherwise; or,

2. Who in the night time, or during the absence of the occupant of any real property, unlawfully enters thereon, and who, after demand made for the surrender thereof, refuses for the period of three days to surrender the same to such former occupant. The occupant of real property within the meaning of this subdivision is one who, within five days preceding such unlawful entry, was in the peaceable and undisturbed possession of such lands.

Cal. C. Civ. P., § 1160*.
Form of complaint; time to answer, § 7370.
Forcible entry or detainer a misdemeanor, § 8231.

7315. (3575.) Unlawful detainer. A tenant of real property, for a term less than life, is guilty of an unlawful detainer:

1. Where he continues in possession, in person or by sub-tenant, of the property or any part thereof, after the expiration of the term for which it is let to him. In all cases where real property is leased for a specified term or period, or by express or implied contract, whether written or parol, the tenancy shall be terminated without notice at the expiration of such specified term or period; or,

2. When, having leased real property for an indefinite time with monthly or other periodic rent reserved, he continues in possession thereof in person or by sub-tenant, after the end of any such month or period, in cases where the landlord or the successor in estate of his landlord, if any there be, fifteen days or more prior to the end of such month or period, shall have served notice requiring him to quit the premises at the expiration of such month or period; or in cases of tenancies at will, where he remains in possession of such premises after the expiration of a notice of not less than five days;

3. When he continues in possession, in person or by sub-tenant, after default in the payment of any rent and after a notice in writing requiring in the alternative the payment of the rent or the surrender of the detained premises, shall have remained uncomplied with for the period of three days after service thereof. Such notice may be served at any time after the rent becomes due;

4. When he assigns or sub-lets the leased premises contrary to the covenants of the lease, or commits or permits waste thereon, or when he sets up or carries on therein or thereon any unlawful business, or when he suffers, permits, or maintains on or about said premises any nuisance, and remains in possession after service upon him of three days' notice to quit;

5. When he continues in possession, in person or by sub-tenant, after a neglect or failure to perform any condition or covenant of the lease or agreement under which the property is held, other than those hereinbefore mentioned, and after notice, in writing, requiring in the alternative the perform-

ance of such condition or covenant or the surrender of the property, served upon him, and, if there be a sub-tenant in actual occupation of the premises, also upon such sub-tenant, shall remain uncomplied with for five days after service thereof. Within three days after the service of the notice, the tenant, or any sub-tenant in actual occupation of the premises, or any mortgagee of the term, or other person interested in its continuance, may perform such condition or covenant and thereby save the lease from forfeiture; *provided,* that if the covenants and conditions of the lease, violated by the lessee, cannot afterwards be performed, then no notice as last prescribed herein need be given. Am'd '13, p. 12.

Cal. C. Civ. P., § 1161*. Wash. (1896) § 4776*.

One month's notice to quit is sufficient in case of a tenancy from month to month.

Utah Loan and Trust Co. v. Garbutt, 6 U. 342; 23 P. 758.

The acceptance of rent on a void lease under the statute of frauds creates a tenancy from month to month.

Id.

Unlawful attempt to forfeit lease of mine. Damages.

Ruffatti v. Societe des Mines, 10 U. 386; 37 P. 591.

Wherever there is an ownership of land on the one hand, and an occupation by permission on the other, a tenancy at will arises by implication.

Utah Optical Co. v. Keith, 18 U. 464; 56 P. 155.

In an action of forcible entry and detainer, the exact date at which a notice to surrender the premises was given is immaterial, plaintiff only being required to aver and prove that, subsequent to the unlawful entry, while defendants were in possession and prior to the commencement of the action, a notice to surrender was given and refused for three days thereafter.

Holladay Coal Co. v. Kirker, 20 U. 192; 57 P. 882.

7316. (3576.) Right of tenant of agricultural lands to hold over. In all cases of tenancy upon agricultural lands, where the tenant has held over and retained possession for more than sixty days after the expiration of his term without any demand of possession or notice to quit by the landlord, or the successor in estate of his landlord, if any there be, he shall be deemed to be holding by permission of the landlord, or the successor in estate of his landlord, if any there be, and shall be entitled to hold under the terms of the lease for another full year, and shall not be guilty of an unlawful detainer during said year, and such holding over for the period aforesaid shall be taken and construed as a consent on the part of the tenant to hold for another year.

Cal. C. Civ. P., § 1161*.

7317. (3577.) Tenant has similar remedies against sub-tenant. A tenant may take proceedings similar to those prescribed in this chapter, to obtain possession of the premises let to an under-tenant, in case of his unlawful detention of the premises underlet to him.

Cal. C. Civ. P., § 1161*.

7318. (3578.) Notice to quit, how served. The notices required by the preceding sections may be served, either:

1. By delivering a copy to the tenant personally; or,

2. If he is absent from his place of residence, or from his usual place of business, by leaving a copy with some person of suitable age and discretion at either place, and sending a copy through the mail addressed to the tenant at his place of residence or place of business; or,

3. If such place of residence or business cannot be ascertained, or a person of suitable age or discretion cannot be found there, then by fixing a copy in a conspicuous place on the leased property, and also delivering a copy to a person there residing, if such person can be found, and also sending a copy through the mail addressed to the tenant at the place where the leased property is situated. Service upon a sub-tenant may be made in the same manner.

Cal. C. Civ. P., § 1162*.

7319. (3579.) Only tenant and sub-tenant need be made defendants. Exception. No person other than the tenant of the premises, and sub-tenant if there be one in the actual occupation of the premises when the action is commenced, need be made parties defendant in the proceeding, nor shall any proceeding abate, nor the plaintiff be nonsuited for the non-joinder of any person who might have been made a party defendant; but when it appears that any of the parties served with process or appearing in the proceeding are guilty of the offense charged, judgment must be rendered against him. In case a person has become sub-tenant of the premises in controversy after the service of any notice in this chapter provided for, the fact that such notice was

not served on such sub-tenant shall constitute no defense to the action. All persons who enter under the tenant, after the commencement of the action hereunder, shall be bound by the judgment the same as if they had been made parties to the action.

Wash. (1896) § 4780. Cal. C. Civ. P., § 1164*. In an action for possession, landlord may be made a party defendant, § 6507.

Possession of tenant deemed possession of landlord, § 6458.

7320. (3580.) Complaint and summons, what to obtain. Service. The plaintiff in his complaint, which shall be in writing, must set forth the facts on which he seeks to recover, and describe the premises with reasonable certainty, and may set forth therein any circumstances of fraud, force, or violence which may have accompanied the alleged forcible entry, or forcible or unlawful detainer, and claim damages therefor, or compensation for the occupation of the premises, or both. In case the unlawful detainer charged be after default in the payment of rent, the complaint must state the amount of such rent. The judge or justice of the peace shall indorse on the summons the number of days within which the defendant shall be required to appear and defend the action, which shall be not less than three nor more than twelve days from the date of service, except when publication is necessary, in which case the court shall direct publication for a period of not less than one week. The officer or person serving the summons shall change the prescribed form thereof to conform to the time of service as ordered. The summons shall be served as in other cases. The complaint shall be filed within one day after service of summons if not served therewith.

Wash. (1896) § 4781*. Cal. C. Civ. P., § 1166*. Complaint and answer must be verified, § 7325.

Service of summons from district court, §§ 6548-6552; from justice's court, §§ 7442-7444; from city court, § 1714.

Description of land in pleadings, § 6599.

Allegation and proof of possession, § 7322, and note.

Complaint in unlawful detainer should allege that plaintiff has right of and is entitled to possession, and that property is being unlawfully detained from him after legal notice to quit served.

Barnes v. Cox, 12 U. 47; 41 P. 577.

In an action of forcible entry and detainer of a part of the unsurveyed public domain, the complaint must contain an actual description of the land claimed; and if such description contains a greater area than that allowed by law, no presumption of lawful possession would exist, and the complaint should be dismissed.

Holladay Coal Co. v. Kirker, 20 U. 192; 57 P. 882.

7321. (3581.) Issue of fact tried by jury unless waived. Whenever an issue of fact is presented by the pleadings, it must be tried by a jury, unless such jury be waived as in other cases.

Cal. C. Civ. P., § 1171*.

Jury waived unless demanded, Con. art. 1, sec. 10; §§ 6782, 6827; in justice's courts, § 7485.

7322. (3582.) Proof required of plaintiff. What possession a bar. On the trial of any proceeding for any forcible entry or forcible detainer, the plaintiff shall only be required to show, in addition to the forcible entry or forcible detainer complained of, that he was peaceably in the actual possession at the time of the forcible entry, or was entitled to the possession at the time of the forcible detainer. The defendant may show in his defense that he or his ancestors, or those whose interest in such premises he claims, have been in the quiet possession thereof for the space of one whole year together next before the commencement of the proceedings, and that his interest therein is not then ended or determined; and such showing is a bar to the proceedings.

Cal. C. Civ. P., § 1172.

Presumption of possession on proof of legal title, § 6451.

Possession of tenant possession of landlord, § 6458.

A mere scrambling possession is not sufficient.

Brooks v. Warren, 5 U. 118; 12 P. 659.

Actual occupancy necessary to possessory title. But it may be evidenced by an enclosure, etc.

Hyndman v. Stowe, 9 U. 23; 33 P. 227.

Under this section, plaintiff need never allege his estate or title to premises, nor, with few exceptions, is he required to allege his right of possession; an allegation of the ultimate fact that, at the time of the forcible detainer, he was entitled to the possession of the premises is sufficient.

Holladay Coal Co. v. Kirker, 20 U. 192; 57 P. 882.

As against a mere intruder or trespasser, possession of public land is prima facie evidence of right of possession.

Wilson v. Triumph M. Co., 19 U. 66; 56 P. 300.

Holladay Coal Co. v. Kirker, 20 U. 192; 57 P. 882.

Brooks v. Warren, 5 U. 118; 13 P. 175.

Johnston v. Meaghr, 14 U. 426; 47 P. 861.

7323. (3583.) Amendments to conform to proof. Effect. When, upon the trial of any proceeding under this chapter, it appears from the evidence that the defendant has been guilty of either a forcible entry or a forcible detainer, and other than the offense charged in the complaint, the judge must

order that such complaint be forthwith amended to conform to such proofs. Such amendment must be without any imposition of terms. No continuance must be permitted upon account of such amendment, unless the defendant, by affidavit filed, shows to the satisfaction of the court, good cause therefor.

Cal. C. Civ. P., § 1173*.

7324. (3584.) Judgment. Restitution. Rent. Treble damages. If, upon the trial, the verdict of the jury, or, if the case be tried without a jury, the finding of the court, be in favor of the plaintiff and against the defendant, judgment shall be entered for the restitution of the premises; and, if the proceeding be for unlawful detainer after neglect or faliure to perform any condition or covenant of the lease or agreement under which the property is held, or after default in the payment of rent, the judgment shall also declare the forfeiture of such lease or agreement. The jury, or the court if the proceeding be tried without a jury, shall also assess the damages occasioned to the plaintiff by any forcible entry, or by any forcible or unlawful detainer, and any amount found due the plaintiff by reason of waste of the premises by the defendant during the tenancy, alleged in the complaint and proved on the trial, and find the amount of any rent due, if the alleged unlawful detainer be after default in the payment of rent; and the judgment shall be rendered against the defendant guilty of the forcible entry, or forcible or unlawful detainer, for the rent and for three times the amount of the damages thus assessed. When the proceeding is for an unlawful detainer after default in the payment of the rent, and the lease or agreement under which the rent is payable has not by its terms expired, execution upon the judgment shall not be issued until the expiration of five days after the entry of the judgment, within which time the tenant, or any sub-tenant, or any mortgagee of the term, or other party interested in its continuance, may pay into court for the landlord the amount of the judgment and costs, and thereupon the judgment shall be satisfied, and the tenant be restored to his estate; but if payment, as herein provided, be not made within the five days, the judgment may be enforced for its full amount, and for the possession of the premises. In all other cases the judgment may be enforced immediately.

Cal. C. Civ. P., § 1174*.

Treble damages for forcible entry, etc., § 7244.

A plaintiff in a case for damages for forcible entry or unlawful detainer is entitled to recover treble damages.

Eccles v. U. P. Coal Co., 15 U. 14; 48 P. 148.

In an action for forcible entry, a judgment cannot be entered quieting title.

Welling v. Abbott, 51 U. —; 173 P. 245.

Thomson v. Reynolds, 51 U. —; 174 P. 164.

7325. (3585.) Pleadings verified. The complaint and answer must be verified.

Cal. C. Civ. P., § 1175.

Complaint in justice's court to be verified, §§ 7447, 7491.

7326. (3586.) Appeal within ten days. Undertaking. Stay. Either party may, within ten days, appeal from the judgment rendered. But an appeal by the defendant shall not stay the execution of the judgment, unless, within said ten days, he shall execute and file with the court or justice his undertaking to the plaintiff, with two or more sureties, in an amount to be fixed by the court or justice, but which shall be not less than twice the amount of the judgment and costs, to the effect that, if the judgment appealed from be affirmed or the appeal be dismissed, the appellant will pay the judgment and the costs of appeal, the value of the use and occupation of the property, and damages justly accruing to the plaintiff during the pendency of the appeal. Upon taking the appeal and filing the undertaking, all further proceedings in the case shall be stayed.

Cal. C. Civ. P., § 978*.

Provisions of §§ 7517, 7518, made applicable to appeals in forcible entry, etc., proceedings

Hoffman v. Lewis, 31 U. 179; 87 P. 167.

There is no distinction between an appeal from a judgment rendered by a justice's court in forcible entry and detainer and an appeal from a justice's court in other cases.

Id.

The provision prescribing a special time for appeal is valid, and the general provision for time of appeal not applicable.

Hunsaker v. Harris, 37 U. 226; 109 P. 1.

Murphy v. Paumie, 37 U. 228; 109 P. 2.

7327. (3587.) Civil procedure applicable. The provisions of this code, relative to civil actions, appeals, and new trials, so far as they are not incon-

sistent with the provisions of this chapter, apply to the proceedings mentioned in this chapter.

Cal. C. Civ. P., § 1177* .

CHAPTER 65.

EMINENT DOMAIN.

7330. (3588.) Exercised in behalf of what uses. Subject to the provisions of this chapter, the right of eminent domain may be exercised in behalf of the following public uses:

1. All public uses authorized by the government of the United States;

2. Public buildings and grounds for the use of the state, and all other public uses authorized by the legislature;

3. Public buildings and grounds for the use of any county, incorporated city or town, or school district; reservoirs, canals, aqueducts, flumes, ditches, or pipes for conducting water for the use of the inhabitants of any county, or incorporated city or town, or for draining any county, or incorporated city or town; for raising the banks of streams, removing obstructions therefrom, and widening, deepening, or straightening their channels; for roads, streets, and alleys, and all other public uses for the benefit of any county, incorporated city or town, or the inhabitants thereof;

4. Wharves, docks, piers, chutes, booms, ferries, bridges, toll roads, by-roads, plank and turnpike roads, roads for transportation by traction engines or road locomotives, roads for logging or lumbering purposes, and railroads and street railways for public transportation;

5. Reservoirs, dams, water-gates, canals, ditches, flumes, tunnels, aqueducts, and pipes for the supplying persons, mines, mills, smelters, or other works for the reduction of ores with water for domestic or other uses, or for irrigation purposes, or for draining and reclaiming lands, or for floating logs and lumber on streams not navigable;

6. Roads, railroads, tramways, tunnels, ditches, flumes, pipes, and dumping places to facilitate the milling, smelting, or other reduction of ores, or the working of mines, quarries, coal mines, or mineral deposits; outlets, natural or otherwise, for the deposit or conduct of tailings, refuse, or water from mills, smelters, or other works for the reduction of ores; or from mines, quarries, coal mines, or mineral deposits; mill dams; natural gas or oil pipe lines, tanks, or reservoirs; also any occupancy in common by the owners or possessors of different mines, quarries, coal mines, mineral deposits, mills, smelters, or other places for the reduction of ores, or any place for the flow, deposit, or conduct of tailings or refuse matter;

7. By-roads leading from highways to residences and farms;

8. Telegraph, telephone, electric light, and electric power lines, and sites for electric light and power plants;

9. Sewerage of any city or town, or of any settlement of not less than ten families, or of any public building belonging to the state, or of any college or university;

10. Canals, reservoirs, dams, ditches, flumes, aqueducts, and pipes for supplying and storing water for the operation of machinery for the purpose of generating and transmitting electricity for power, light, or heat;

11. Cemeteries or public parks;

12. Pipe lines for the purpose of conducting any and all liquids connected with the manufacture of beet sugar;

13. For sites for mills, smelters, or other works for the reduction of ores and necessary to the successful operation thereof, including the right to take lands for the discharge and natural distribution of smoke, fumes, and dust therefrom, produced by the operation of such works; *provided,* that the powers granted by this subdivision shall not be exercised in any county where

the population exceeds twenty thousand, or within one mile of the limits of any incorporated city or town; nor unless the proposed condemnor has the right to operate by purchase, option to purchase, or easement, as to at least seventy-five per cent of the value of land acreage owned by persons or corporations situated within a radius of four miles from the mill, smelter, or other works for the reduction of ores; nor beyond the limits of said four miles radius; nor as to lands covered by contracts, easements, or agreements existing between the condemnor and the owner of land within said limit and providing for the operation of such mill, smelter, or other works for the reduction of ores; nor until an action shall have been commenced to restrain the operation of such mill, smelter, or other works for the reduction of ores.

Am' d '01, p. 19; '07, p. 143; '09, p. 50.

Cal. C. Civ. P., § 1238*. See Sup. (1893) p. 995, and Sup. (1895) p. 33, § 1233*.

Eminent domain for pipes, tanks, etc., for natural gas, § 4024; for right of way for canals, ditches, etc., § 3466; for railroads, for right of way and for water, § 1228, sub. 3; for drainage district, § 2046; for city, for water, § 570x2; irrigation districts, § 3526; county hospital site, § 2781.

Property and franchises of private corporations subject to eminent domain, Con. art. 12, sec. 11.

Private property shall not be taken or damaged for public use without just compensation, Con. art. 1, sec. 22, and note.

No person shall be deprived of property without due process of law, Con. art. 1 sec 7, and note.

Condemnation by foreign corporation, § 946.

Condemnation by state armory, § 2884.

Con. art. 1, sec. 22, providing that private property shall not be taken or damaged for public use without just compensation, is a limitation on exercise of power of eminent domain.

Kimball v. Grantsville City, 19 U. 368; 57 P. 1.

If the land on which shade trees adjacent to sidewalk stood was owned by the abutting property owner, the city could only cut the trees by condemning the land and upon paying just compensation.

Giauque v. S. L. City, 42 U. 89; 129 P. 429.

Where an owner of land on both sides of the highway acquired title to the highway by failure of the public to use and work it, she could not be compelled thereafter to allow it to be opened as a highway, without compensation being made.

Tuttle v. Sowadzki, 41 U. 501; 126 P. 959.

RAILROADS:

Under § 3841, C. L. 1888, providing that the right of eminent domain may be exercised in behalf of steam and horse railroads; held, that by implication this right may be exercised in behalf of electrical railways.

Ogden City Railway Company v. Ogden City, 7 U. 207; 26 P. 288.

Land which is a part of a railroad's right of way, but not used for any purpose and not essential to the enjoyment of such railroad's franchise and property, may be appropriated to the use of a duly incorporated telegraph company for the purpose of constructing and maintaining its lines, since such appropriation is for a more necessary public use. Measure of damages.

Postal Tel. & C. Co. v. O. S. L. R. R. Co., 23 U. 474; 65 P. 735

A city council cannot authorize a permanent switch track, for a private business only, along a street and across a sidewalk, from a steam railroad in the street, to the detriment of people residing on the street and to the damage of their abutting property; the streets being dedicated to public use.

Cereghino v. O. S. L. R. R. Co., 26 U. 467; 73 P. 634.

A party whose property is about to be damaged in a substantial degree for public use is given same remedies as would be accorded him if his property were actually appropriated for public use.

Stockdale v. R. G. W. Ry. Co., 28 U. 201; 77 P. 849.

Railroad cannot subject private property in a city to burdens to which it will be subjected by running of cars and engines over a switch laid over adjoining property, without proceeding under law of eminent domain.

Id.

CANALS, MINES, ETC.:

The provision of this section and §§ 7332, 7338, render, under ordinary circumstances, property appropriated for a public use liable to condemnation for another public use.

Salt Lake City v. Water & El. P. Co., 24 U. 249; 67 P. 672.

A proceeding by a power company under the eminent domain statute to obtain the right to connect a flume with a city's canal for purpose of discharging water into it, under the provisions of this section and § 7332, is not a suit to condemn land belonging to the city, and it is not necessary to show, as provided in § 7333, that the use to which it is to be applied by power company is a more necessary public use than that to which the city devotes it. (On rehearing, 25 U. 456; 71 P. 1069.)

Salt Lake City v. Water & El. P. Co., 24 U. 249; 67 P. 672.

Property is taken for a public use, within the provision of the constitution declaring that private property shall not be taken for public use without just compensation, when the taking is for use that will promote the public interest, and will tend to develop the resources of the state. In this case a right of way for an irrigation ditch.

Nash v. Clark, 27 U. 158; 75 P. 371; affirmed 198 U. S. 361.

The construction and operation of roads and tramways for the development and working of mines is a public use.

Highland B. G. M. Co. v. Strickley, 28 U. 215; 78 P. 296; affirmed 200 U. S. 525.

Where a street grade was established but not carried into effect, and thereafter buildings were erected, the city was liable for damages resulting from the change of grade. The fact that the improvements were made before the adoption of Con. art. 1, sec. 22, does not relieve liability.

Kimball v. S. L. City, 32 U. 253; 90 P. 395.

Hempstead v. S. L. City, 32 U. 261; 90 P. 397.

Felt v. S. L. City, 32 U. 275; 90 P. 402.

Webber v. Salt Lake City, 40 U. 221; 120 P. 503.

Lannan v. Waltenspiel, 45 U. 564; 147 P. 908.

A proceeding under § 3467 to obtain the right to enlarge an irrigation canal of another is controlled by the principles involved in the exercise of the right of eminent domain.

S. L. City v. East Jordan Irr. Co., 40 U. 126; 121 P. 593.

The right to use a reservoir in common may be condemned.

Gunnison Irr. Co. v. Gunnison High. Canal Co., 51 U. —; 174 P. 852.

The right to run water through defendant's irrigation canal may be condemned, though the defendant has only an easement and the owners of the land were not parties.

Whiterocks Irr. Co. v. Mooseman, 45 U. 79; 141 P. 459.

A purchaser of property on a city street does so with the implied consent that the street must be made reasonably safe and convenient for travel, and cannot complain if it is lowered or filled to make it safe for travel so long as the city has established the grade so as to

inform him of the extent to which it would be lowered or raised.

Gray v. Salt Lake City, 44 U. 204; 138 P. 1177.

Coal companies may condemn ground for a tipple site, etc., but cannot condemn any portion of a right-of-way used for railroad purposes; even though a track departs from a right-of-way, it cannot be approached so close as to interfere with traffic, and five feet is not an unreasonable minimum distance.

Ketchum Coal Co. v. Pleasant Valley Coal Co., 50 U. —; 168 P. 86.

Under the provisions of §§ 7330, 7332, mining generally and development of the mines and mineral deposits is a public use, and where a mining company has driven a tunnel going through a claim owned by another company, and does not, in its own operation, use the tunnel to its full capacity, the company owning the claim may condemn a right to use the tunnel jointly to work its claim.

Monataire M. Co. v. Columbus Rexall Con., 50 U. —; 174 P. 172.

7331. (3589.) Estates and rights subject to condemnation. The following is a classification of the estates and rights in lands subject to be taken for public use:

1. A fee simple, when taken for public buildings or grounds, or for permanent buildings, for reservoirs and dams, and permanent flooding occasioned thereby, or for an outlet for a flow, or a place for the deposit of debris or tailings of a mine, mill, smelter, or other place for the reduction of ores;

2. An easement, when taken for any other use;

3. The right of entry upon, and occupation of, lands, and the right to take therefrom such earth, gravel, stones, trees, and timber as may be necessary for some public use.

Cal. C. Civ. P., § 1239*.

7332. (3590.) Property subject to condemnation. The private property which may be taken under this chapter includes:

1. All real property belonging to any person;

2. Lands belonging to the state, or to any county, or incorporated city or town, not appropriated to some public use;

3. Property appropriated to public use; *provided,* that such property shall not be taken unless for a more necessary public use than that to which it has been already appropriated;

4. Franchises for toll roads, toll bridges, ferries, and all other franchises; *provided,* that such franchises shall not be taken unless for free highways, railroads, or other more necessary public use;

5. All rights of way for any and all purposes mentioned in § 7330, and any and all structures and improvements thereon, and the lands held or used in connection therewith, shall be subject to be connected with, crossed, or intersected by any other right of way or improvement or structure thereon; they shall also be subject to a limited use in common with the owners thereof, when necessary; but such uses of crossings, intersections, and connections shall be made in the manner most compatible with the greatest public benefit and the least private injury;

6. All classes of private property not enumerated may be taken for public use when such taking is authorized by law.

Cal. C. Civ. P., § 1240*.

Property and franchises of private corporations subject to eminent domain, Con. art. 12, sec. 11.

Decisions on property subject to condemnation, note to § 7330.

Under the provisions of §§ 7330, 7332, mining generally and development of the mines and mineral deposits is a public use, and where a mining company has driven a tunnel going through a claim owned by another company, and does not, in its own operation, use the tunnel to its full capacity, the company owning the claim may condemn a right to use the tunnel jointly to work its claim.

Monataire M. Co. v. Columbus Rexall Con. M. Co., 50 U. —; 174 P. 172.

7333. (3591.) Conditions precedent to condemnation. Before property can be taken it must appear;

1. That the use to which it is to be applied is a use authorized by law;

2. That the taking is necessary to such use;

3. If already appropriated to some public use, that the public use to which it is to be applied is a more necessary public use.

Cal. C. Civ. P., § 1241.

7334. (3592.) Right to enter to make survey, etc. Damage. In all cases where land is required for public use, the person or corporation, or his or its agents, in charge of such use may survey and locate the same; but it must be located in the manner which will be most compatible with the greatest public good and the least private injury, and subject to the provisions of

this chapter. The person or corporation, or his or its agents, in charge of such public use may enter upon the land and make examinations, surveys, and maps thereof, and such entry shall constitute no cause of action in favor of the owners of the lands, except for injuries resulting from negligence, wantonness, or malice.

Cal. C. Civ. P., § 1242*.

7335. (3593.) Jurisdiction in district court. Complaint verified. All proceedings under this chapter must be brought in the district court for the county in which the property or some part thereof is situated. The complaint in such cases must be verified.

Cal. C. Civ. P., § 1243*.

The provisions of this section are not in conflict with Con. art. 8. sec. 5, providing that all civil and criminal business arising in any county must be tried in such county, etc., so as to preclude a telegraph company from bringing an action to condemn a railroad's right of way, which extends through several counties, for construction of its lines in one of such counties.

Postal Tel. & C. Co. v. O. S. L. R. R. Co., 23 U. 474; 65 P. 735.

7336. (3594.) Contents of complaint. The complaint must contain:

1. The name of the corporation, association, commission, or person in charge of the public use for which the property is sought, who must be styled plaintiff;

2. The names of all owners and claimants of the property, if known, or a statement that they are unknown, who must be styled defendants;

3. A statement of the right of the plaintiff;

4. If a right of way be sought, the complaint must show the location, general route, and termini, and must be accompanied with a map thereof, so far as the same is involved in the action or proceeding;

5. A description of each piece of land sought to be taken, and whether the same includes the whole or only part of an entire parcel or tract. All parcels lying in the county and required for the same public use may be included in the same or separate proceedings, at the option of the plaintiff, but the court may consolidate or separate them to suit the convenience of parties.

Cal. C. Civ. P., § 1244*.

Parties, note to § 7337.

Grantors in trust deed to secure indebtedness are "owners" hereunder.

O. S. L. Ry. Co. v. Mitchell, 7 U. 505; 27 P. 693.

Description of property held sufficient.

Postal Tel. & C. Co. v. O. S. L. R. Co., 23 U. 474; 65 P. 735.

Where a complaint fails to state the attempted condemnation proceedings were authorized, as required by statute, the defect, being jurisdictional, was not waived by a failure to demur or object during the trial.

Town of Tremonton v. Johnston, 49 U. 307; 164 P. 190.

7337. (3595.) All parties in interest may appear. All persons in occupation of or having or claiming an interest in, any of the property described in the complaint, or in the damages for the taking thereof, though not named, may appear, plead, and defend, each in respect to his own property or interest, or that claimed by him, in like manner as if named in the complaint.

Cal. C. Civ. P., § 1246.

The giving of a trust deed merely creates a lien upon the premises, and a decree against the trustee would give no right of entry as against the equitable owner.

O. S. L. Ry. Co. v. Mitchell, 7 U. 505; 27 P. 693.

The fact that a telegraph company of another state is interested in a corporation organized under the laws of Utah to construct a telegraph line does not affect the latter's right to maintain proceedings to condemn a right of way for construction of its lines.

Postal Tel. & C. Co. v. O. S. L. R. R. Co., 23 U. 474; 65 P. 735.

It is not necessary that the complaint in condemnation proceedings make all the owners or alleged owners parties; but one in possession and claiming ownership must be joined.

Brigham City v. Chase, 30 U. 410; 85 P. 436.

A holder of a certificate tax sale may be made a party.

O. S. L. R. R. Co. v. Hallock, 41 U. 378; 126 P. 394.

Where condemnation proceedings are instituted against the person in possession of land under contract to purchase from the state the title to which is in the United States Government, subsequently, pending the proceedings, the defendant in possession assigned his right in the land to a corporation, of which he was president, which received a patent therefor from the state and was afterwards made a party to the proceedings, held the original defendant had an interest in the land when the proceedings were commenced which was subject to condemnation and was the same interest which passed to the defendant corporation and ripened into a title relating back to the contract sale by the state.

Brigham City v. Rich, 34 U. 130; 97 P. 220.

7338. (3596.) Power of the court. The court or judge thereof shall have power:

1. To determine the conditions specified in § 7333; to determine the places of making connections and crossings, and to regulate the manner thereof and of enjoying the common use mentioned in sub. 5, § 7332;

2. To hear and determine all adverse or conflicting claims to the property sought to be condemned, and to the damages therefor;

3. To determine the respective rights of different parties seeking condemnation of the same property.

Cal. C. Civ. P., § 1247*.

Where it is alleged that the defendant company claimed to own part of the property sought to be condemned, and such company, in its answer, claimed title to such land, and the plaintiff, in its reply, alleged that, since the commencement of the action, it had acquired title to the land in question and denied the defendant's tax title, held the district court was authorized to determine these issues in the same action.

Ketchum Coal Co. v. District Court, 48 U. 342; 159 P. 737.

7339. (3597.) Occupancy of premises pending action. Notice. Hearing. Bond. Restraining order. The plaintiff may move the court or a judge thereof, at any time after the commencement of suit, on notice to the defendant, if he is a resident of the county, or has appeared in the action, otherwise by serving a notice directed to him on the clerk of the court, for an order permitting the plaintiff to occupy the premises sought to be condemned, pending the action, and to do such work thereon as may be required for the easement sought, according to its nature. The court or a judge thereof shall take proof by affidavit or otherwise, of the value of the premises sought to be condemned and of the damages which will accrue from the condemnation, and of the reasons for requiring a speedy occupation, and shall grant or refuse the motion according to the equity of the case and the relative damages which may accrue to the parties. If the motion is granted, the court or judge shall require the plaintiff to execute and file in court a bond to the defendant, with sureties to be approved by the court or judge, in a penal sum to be fixed by the court or judge, not less than double the value of the premises sought to be condemned and the damages which will ensue from condemnation, as the same may appear to the court or judge on the hearing, and conditioned to pay the adjudged value of the premises and all damages in case the property is condemned, and to pay all damages arising from occupation before judgment in case the premises are not condemned, and all costs adjudged to the defendant in the action. The sureties shall justify before the court or judge after a reasonable notice to the defendant of the time and place of justification. The amounts fixed shall be for the purposes of the motion only, and shall not be admissible in evidence on final hearing. The court or judge may also, pending the action, restrain the defendant from hindering or interfering with the occupation of the premises and the doing thereon of the work required for the easement.

Right of plaintiff to enter into possession of property in condemnation proceedings, upon filing sufficient bond, upheld, and provisions of this section declared not in conflict with Con. art. 1, sec. 22.

S. L. C. Water Co. v. S. L. C. et al., 24 U. 282; 67 P. 791.

The mere fact that a person contemplates having certain land condemned for public use gives him no right of entry prior to condemnation, and condemnation cannot be had by way of counterclaim in action brought to restrain a trespass and for damages.

Peterson v. Bean, 22 U. 43; 61 P. 213.

That condemnation was for a public use is settled by the lower court's order of condemnation authorizing plaintiff to take possession of and improve the land.

Ketchum Coal Co. v. District Court, 48 U. 342; 159 P. 737.

A stipulation by a landowner's counsel that the court might enter an order for occupancy, agreeing to the amount of the bond, and stipulating that the road's counsel have time to answer, constitutes a general appearance.

Ogden L. & I. Ry. Co., v. Jones, 50 U .—; 168 P. 548.

7340. (3598.) Damages, how assessed. The court, jury, commissioners, or referee must hear such legal testimony as may be offered by any of the parties to the proceedings, and thereupon must ascertain and assess:

1. The value of the property sought to be condemned and all improvements thereon pertaining to the realty, and of each and every separate estate or interest therein; if it consist of different parcels, the value of each parcel and of each estate or interest therein shall be separately assessed;

2. If the property sought to be condemned constitutes only a part of a large parcel, the damages which will accrue to the portion not sought to be condemned, by reason of its severance from the portion sought to be condemned, and the construction of the improvement in the manner proposed by the plaintiff;

3. If the property, though no part thereof is taken, will be damaged by the construction of the proposed improvement, the amount of such damages;

4. Separately, how much the portion not sought to be condemned, and each estate or interest therein, will be benefited, if at all, by the construction of the improvement proposed by the plaintiff; and if the benefit shall be equal to the damages assessed, under sub. 2 of this section, the owner of the parcel shall be allowed no compensation except the value of the portion taken; but if the benefit shall be less than the damages so assessed, the former shall be deducted from the latter, and the remainder shall be the only damages allowed in addition to the value of the portion taken;

5. If the property sought to be condemned be for a railroad, the cost of good and sufficient fences along the line of such railroad between such railroad and other adjoining lands of the defendant; and the cost of cattle guards where fences may cross the line of such railroad;

6. As far as practicable, compensation must be assessed for each source of damages separately.

Cal. C. Civ. P., § 1248*.

Private property shall not be taken or damaged for public use without just compensation, Con. art. 1, sec. 22.

MEASURE OF DAMAGES FOR CONDEMNATION FOR USE FOR RAILROAD PURPOSES:

Of land used for school purposes, is the diminution of the value of the property when used for school purposes determined as of the date of the operation of the railroad, and interest should be allowed from such date.

S. P., L. A. & S. L. R. Co. v. Board of Education, 35 U. 13; 99 P. 263.

Evidence insufficient to show that the property had been wholly destroyed for school purposes.

S. P., L. A. & S. L. R. Co. v. Board of Education, 32 U. 305; 90 P. 565.

A railroad in the street in front of property —the depreciation in the market value of the property.

Morris v. O. S. L. R. Co., 36 U. 14; 102 P. 629.

Where a railroad was built over unoccupied public land to which a party afterwards acquires title, the value of the railroad's improvements are not an element of damages.

D. & R. G. W. Ry. Co. v. Stancliff, 4 U. 117; 7 P. 530.

The casting of cinders on and the emission of engine smoke over land abutting a railroad cannot be considered by the jury in a suit by the owner as a separate and distinct element of damage.

Jordan v. Utah R. R. Co., 47 U. 519; 156 P. 939.

Where interference with ingress and egress to abutting land, railroad is liable for grading the street in front of the premises.

Id.

The rental value of the land to be condemned for the year preceding the one in which the action is commenced is some evidence of value.

Ogden L. & I. Ry. Co. v. Jones, 50 U. —; 168 P. 548.

Increased insurance rate for property in proximity of the railroad.

O'Neill v. S. P., L. A. & S. L. R. Co., 38 U. 475; 114 P. 127.

Damages to plaintiff's property by jar of passing trains, and from smoke and cinders, where the construction and operation of the railroad is careful and proper, but cannot include damages for negligent operation.

Id.

General benefits by the establishment of the railroad cannot be deducted from damages to owner whose land was taken for right of way.

S. L. & U. R. Co. v. Butterfield, 46 U. 431; 150 P. 931.

To compensation in money and may not be required to accept any mitigation of damages or condemnee's offer of a joint possession or occupancy subordinate to the condemnor's use.

B. & G. Ry. Co. v. North Utah M. Co., 49 U. 125; 162 P. 65.

Where a railroad company, on constructing a line across a land owner's premises, abandoned an old line across the same premises a mile distant, the company was not entitled to have any benefit from the abandonment of the old line set off against the damage done the land adjoining the new line.

O. S. L. R. Co. v. Fox, 28 U. 311; 78 P. 800.

After defendant, in a former and present trial, had submitted all its evidence on the theory that condemnor would exclude it from the tracks, the condemnor had no right to amend, as a matter of course, so as to permit defendant to have joint possession of the part of the track, and an order imposing as a condition of the amendment that condemnor pay the defendant $1750 was proper.

Bingham & Garfield Ry. Co. v. North Utah Mining Co., 162 P. 65.

COMPENSATION FOR PROPERTY TAKEN FOR OTHER PUBLIC PURPOSES:

Where land taken in good faith for the erection of a schoolhouse, the owner not being known, but with intention to acquire title by proceedings in eminent domain, if he should not consent to such use of it, he cannot recover as damages the value of such schoolhouse.

Chase v. Jemmett, 8 U. 231; 30 P. 757.

Where a telegraph company condemns a right of way along the right of way for a railroad, the damages are nominal, since the telegraph company does not materially interfere with the use of the land for railroad purposes.

Postal Tel. Co. v. O. S. L. R. Co., 23 U. 474; 65 P. 735.

In an action for damages to real estate by reason of the construction of a viaduct, where witness testified as to the depreciation of the property, evidence that the viaduct tended to improve the property generally on the street, and made more business thereon. is not admissible, where it is not shown that the particular property is benefited.

Cook v. Salt Lake City, 48 U. 58; 157 P. 643.

In proceedings to condemn a strip of land on which to erect poles bearing wires heavily charged with electricity, if the presence of the wires would expose persons and livestock on the land of defendant to danger, and thus depreciate the market value of such land, defendant was entitled to show such fact.

Telluride Power Co. v. Bruneau, 41 U. 501; 125 P. 399.

In an action to condemn land for canal purposes, the damages recoverable by land owner may include damages by seepage to adjoining land and for the land within the highway to which the plaintiff owned the fee.

Utah Lake Irr. Co. v. Jensen, 49 U. 19; 161 P. 677.

Eliciting from the owner on cross-examination that fifteen years prior he had stated the value much less than he testified their value to be at the trial was improper, as being too remote, but harmless as to substantial rights.

Town of Tremonton v. Johnston, 49 U. 307; 164 P. 190.

Where property such as a mining tunnel is condemned for the purpose of a joint use, the whole matter of determining what is a reasonable compensation as well as the regulations respecting the use of the property is determined and regulated according to the rules of equity.

Monataire M. Co. v. Columbus Rexall Con. M. Co., 50 U. —; 174 P. 172.

7341. (3599.) Damages deemed accrued at date of service. For the purpose of assessing compensation and damages, the right thereto shall be deemed to have accrued at the date of the service of summons, and its actual value at that date shall be the measure of compensation for all property to be actually taken, and the basis of damages to property not actually taken, but injuriously affected, in all cases where such damages are allowed, as provided in the next preceding section. No improvements put upon the property subsequent to the date of service of summons shall be included in the assessment of compensation or damages.

Cal. C. Civ. P., § 1249*.

Where condemnation suit is brought against trustee under a trust deed, and summons served upon him, and the equitable owner thereafter voluntarily enters his appearance, damages are to be assessed as of the date of such entry of appearance, not the date of service of summons upon trustee.

O. S. L. Ry. Co. v. Mitchell, 7 U. 505; 27 P. 693.

Under provisions of this section and §§ 7343-7346, defendants in a condemnation proceeding were not entitled to interest upon the assessment of compensation from the date of the service of summons; defendants remaining in possession.

O. S. L. R. R. Co. v. Jones, 29 U. 147; 80 P. 732.

S. L. City Water Co. v. S. L. City, 24 U. 282; 67 P. 791.

7342. (3600.) Action begun anew where defendant's title defective. If the title attempted to be acquired is found to be defective from any cause, the plaintiff may again institute proceedings to acquire the same as in this chapter prescribed.

Cal. C. Civ. P., § 1250.

7343. (3601.) Damages to be paid within thirty days. Bond for railroad fence. The plaintiff must, within thirty days after final judgment, pay the sum of money assessed; and, if the plaintiff is a railroad company, it shall also execute to the defendant a bond, with sureties, to be determined and approved by the court or judge, conditioned that the plaintiff shall build proper fences within six months from the time the railroad is built on or over the land taken. In an action on the bond, all damages sustained and the cost of the construction of such fences may be recovered.

Cal. C. Civ. P., § 1251*.

7344. (3602.) Id. To whom paid. Execution if not paid. Annulling proceedings. Payment may be made to the defendants entitled thereto, or the money may be deposited in court for the defendants and be distributed to those entitled thereto. If the money be not so paid or deposited, the defendants may have execution as in civil cases; and if the money cannot be made on execution, the court, upon a showing to that effect, must set aside and annul the entire proceedings, and restore possession of the property to the defendants if possession has been taken by the plaintiff.

Cal. C. Civ. P., § 1252.

7345. (3603.) Final order made upon payment. Recording same. When payments have been made (and the bond given, if the plaintiff elects to give one), as required by the next two preceding sections, the court must make a final order of condemnation, which must describe the property condemned and the purpose of such condemnation. A copy of the order must be filed in the office of the recorder of the county, and thereupon the property described therein shall vest in the plaintiff for the purpose therein specified.

Cal. C. Civ. P., § 1253.

7346. (3604.) Authorizing occupancy by plaintiff. Deposit. Payment. Effect. At any time after the entry of judgment, or pending an appeal from the judgment to the supreme court, whenever the plaintiff shall have paid into court for the defendant the full amount of the judgment, and such further sum as may be required by the court as a fund to pay any further damages and costs that may be recovered in said proceedings, as well as all damages that may be sustained by the defendant, if for any cause the property shall not be finally taken for public use, the district court in which the proceeding was tried may, upon notice of not less than ten days, authorize the plaintiff, if already in possession, to continue therein, and if not, then to take possession of and use the property during the pendency of and until the final conclusion of the litigation, and may, if necessary, stay all actions and proceedings against the plaintiff on account thereof. The defendant, who is entitled

to the money paid into court for him upon any judgment, shall be entitled to demand and receive the same at any time thereafter upon obtaining an order therefor from the court. It shall be the duty of the court or a judge thereof, upon application being made by such defendant, to order and direct that the money so paid into court for him be delivered to him upon his filing a satisfaction of the judgment, or upon his filing a receipt therefor, and an abandonment of all defenses to the action or proceeding, except as to the amount of damages that he may be entitled to in the event that a new trial shall be granted. A payment to a defendant, as aforesaid, shall be held to be an abandonment by such defendant of all defenses interposed by him, excepting his claim for greater compensation.

Cal. C. Civ. P., § 1254*.

7347. (3605.) Apportionment of costs. Costs may be allowed or not, and if allowed, may be apportioned between the parties on the same or adverse sides, in the discretion of the court.

Cal. C. Civ. P., § 1255.
Costs Generally, §§ 7035-7054.

This section includes only such costs as are taxable under the statute.
McCready v. R. G. W. Ry. Co., 30 U. 1; 83 P. 331.

7348. (3606.) Procedure applicable. Except as otherwise provided in this chapter, the provisions of this code relative to civil actions, new trials, and appeals shall be applicable to and constitute the rules of practice in the proceedings in this chapter.

Cal. C. Civ. P., § 1256*.

7349. (3607.) Rights of cities and towns not affected. Nothing in this code must be construed to abrogate or repeal any statute providing for the taking of property in any city or town for street purposes.

Cal. C. Civ. P., § 1263.

7350. (3608.) Crossings to be made and kept in repair. A party obtaining a right of way shall, without delay, construct such crossings as may be required by the court or judge, and shall keep them and the way itself in good repair.

CHAPTER 66.

QUO WARRANTO.

7354. (3609.) Action in name of state, against whom. A civil action may be brought in the name of the state:

1. Against a person who usurps, intrudes into, or unlawfully holds or exercises a public office, civil or military, or a franchise, within this state, or an office in a corporation created by the authority of this state;

2. Against a public officer, civil or military, who does or suffers an act which, by the provisions of law, works a forfeiture of his office;

3. Against an association of persons who act as a corporation within this state without being legally incorporated.

Mont. Civ. P., § 1410.
Cal. C. Civ. P., § 803*.
Original jurisdiction in supreme and in district courts, Con. art. 8, secs. 4, 7.
The writ of quo warranto will not issue and cannot be invoked for purpose of determining merely a private right in which the public is not interested.
Cupit v. Park City Bank, 20 U. 292; 58 P. 839.
The attorney-general must bring the action in the name of the state on his own relation or on leave of court on relation of another, except that one claiming to be entitled to public office unlawfully exercised by another may bring action in the name of the state; under such circumstances he alone may control the action.
Murdoch v. Ryan, 41 U. 327; 125 P. 666.
A citizen and resident taxpayer cannot sue in the name of the state to test validity of the organization of a high school district; the state alone may do so.
Id.

7355. (3610.) Id. Against a corporation. A like action may be brought against a corporation:

1. When it has offended against a provision of an act by or under which it was created, altered, or renewed, or any act altering or amending such acts;

2. When it has forfeited its privileges and franchises by nonuser;

3. When it has committed or omitted an act which amounts to a surrender or a forfeiture of its corporate rights, privileges, and franchises;

4. When it has misused a franchise or privilege conferred upon it by law, or exercised a franchise or privilege not so conferred.

Mont. Civ. P., 1411.
No corporation shall engage in any business except that authorized, Con. art. 12, sec. 10.
Nonuse of franchise for two years deemed a forfeiture, § 868.

7356. (3611.) Attorney general to begin action, when. The attorney general, when directed by the governor, shall commence any such action; and when, upon complaint or otherwise, he has good reason to believe that any case specified in the preceding section can be established by proof, he shall commence an action.

Mont. Civ. P., § 1412.
Where there is a union of public and private interests an individual in whom the private interest is vested may request the attorney-general to proceed, and if he refuses the individual may present the matters to the court to require the atttorney-general to proceed, and the court may order the bringing of the action on the relation of the individual.
Murdoch v. Ryan, 41 U. 327; 125 P. 666.

7357. (3612.) Id. Upon whose relation. Security for costs. Such officer may, upon his own relation, bring any such action, or he may, on leave of the court, or a judge thereof in vacation, bring the action upon the relation of another person; and if the action be brought under sub. 1, § 7354, he may require security for costs to be given as in other cases.

Mont. Civ. P., § 1413.
The government officer has the right, ex officio, where proceedings are instituted without any relator, to file an information as of course, without leave of court, but cannot prevent the court from assuming jurisdiction by refusing the use of his name when a private citizen is the relator.
Lloyd v. Elliott, 13 U. 200; 44 P. 248.
In an action by a private person, it is the better practice to petition the court for an order on the defendant to show cause why information should not be filed.
Id.

7358. (3613.) Action for usurpation by claimant in name of state. Bond. A person claiming to be entitled to a public office unlawfully held and exercised by another may, by himself or by an attorney and counselor at law, bring an action therefor in the name of the state, as provided in this chapter. On filing the complaint, such person shall enter into an undertaking with two sufficient sureties, to be approved by the judge or any judge of the court in which the action is brought, conditioned that such person will pay any judgment for costs or damages recovered against him, and all costs and expenses incurred in the prosecution of the action, which undertaking shall be filed with the clerk of the court.

Mont. Civ. P., § 1414.
Election contest, §§ 2410-2424.
Quo warranto will lie to test title of alleged intruder in office.
People v. McAllister, 10 U. 357; 37 P. 578.
See Williams v. Clayton, 6 U. 86; 21 P. 398.
When the right of a person exercising an office is challenged in direct proceedings in the nature of quo warranto, the burden of proof is on him to show good title to the office.
Dickson v. Clayton, 4 U. 421; 11 P. 206; affirmed 132 U. S. 632.

7359. (3614.) Id. Contents of complaint. When the action is against a person for usurping, intruding into, or unlawfully holding or exercising an office, the complaint shall set forth the name of the person who claims to be entitled thereto, with an averment of his right thereto, and judgment may be rendered upon the right of the defendant, and also upon the right of the person so averred to be entitled, or only upon the right of the defendant, as justice requires.

Mont. Civ. P., § 1415.
Complaint alleging that defendant holds and exercises the functions of the office without authority of law is sufficient.
Dickson v. Clayton, 4 U. 421; 11 P. 206; affirmed 132 U. S. 632.

7360. (3615.) Id. All claimants to same office made defendants. All persons who claim to be entitled to the same office or franchise may be made defendants in the same action to try their respective rights to such office or franchise.

Mont. Civ. P., § 1416.
Title to seats as councilmen from a city ward entitled to three councilmen may be determined between two sets of claimants in one action.
Young v. Cohn, 7 U. 352; 26 P. 928.
One action will not lie against several defendants claiming separate offices under distinct appointments and commissions, though all within the territory over which plaintiff claims to be an officer.
Preshaw v. Dee, 6 U. 360; 23 P. 763.

7361. (3616.) Jurisdiction in supreme or district court. An action under this chapter can be brought in the supreme court of the state, or in the district court of the proper county.

Mont. Civ. P., § 1417*.

Jurisdiction in supreme and in district courts, Con. art. 8, secs. 4, 7.

The supreme court has jurisdiction to issue writs of quo warranto, which may be exercised on the relation of a private person, but leave must first be granted by the court to file the information.

Lloyd v. Elliott, 13 U. 200; 44 P. 248.

The supreme court, being primarily an appellate tribunal, will not assume jurisdiction in quo warranto, except in cases which present some peculiar reason why the concurrent jurisdiction of the district court is not adequate to afford relief, or when interests of the state require it.

Id.

7362. (3617.) Application to file complaint. Notice to defendant. Upon application for leave to file a complaint, the court or judge may, in its discretion, direct notice thereof to be given to the defendant previous to granting such leave, and may hear the defendant in opposition thereto; and if leave be granted, an entry thereof shall be made on the minutes of the court, or the fact shall be indorsed by the judge on the complaint, which shall then be filed.

Mont. Civ. P., § 1418.

7363. (3618.) Summons, when issued. When unnecessary. When the complaint is filed without leave and notice, or upon leave and notice in case all the defendants do not appear, a summons shall issue and be served as in other cases. When all the defendants appear to oppose the filing of the complaint, no summons need issue.

Mont. Civ. P., § 1419.

7364. (3619.) Pleadings. The pleadings shall be as in other cases.

Mont. Civ. P., § 1421.

7365. (3620.) Judgment of ouster. Costs. Fine where state is party. When a defendant is found guilty of usurping, intruding into, or unlawfully holding or exercising an office, franchise, or privilege, judgment shall be rendered that such defendant be ousted and altogether excluded therefrom, and that the relator recover his costs. The court may also, in its discretion, in actions to which the state is a party, impose upon the defendant a fine not exceeding $5,000, which fine when collected must be paid into the state treasury.

Mont. Civ. P., § 1422*. Cal. C. Civ. P., § 809*. Costs in special proceedings, § 7036, and note.

7366. (3621.) Judgment ousting director of corporation. When the action is against a director of a corporation, and the court finds that, at his election, either illegal votes were received, or legal votes were rejected, or both, sufficient to change the result, judgment may be rendered that the defendant be ousted, and judgment of induction entered in favor of the person who was entitled to be declared elected at such election.

Mont. Civ. P., § 1423.

7367. (3622.) Action for damages within one year. Such person may, at any time within one year after the date of such judgment, bring an action against the party ousted, and recover the damages he sustained by reason of such usurpation.

Mont. Civ. P., § 1426.

7368. (3623.) Judgment against corporation. Dissolution or restraint. When, in any such action, it is found and adjudged that a corporation has, by an act done or omitted, surrendered or forfeited its corporate rights, privileges, or franchises, or has not used the same during a term of two years, judgment shall be entered that it be ousted and excluded therefrom, and that it be dissolved; and when it is found and adjudged that a corporation has offended in any matter or manner which does not work such surrender or forfeiture, or has misused a franchise, or exercised a power not conferred by law, judgment shall be entered that it be enjoined from the continuance of such offense or the exercise of such power.

Mont. Civ. P., § 1428.

7369. (3624.) Quo warranto actions take precedence. Actions under this chapter in any court shall have precedence of any civil business pending therein; and the court, if the matter is of public concern, shall, on motion of the attorney general, or of the attorney of the party, require as speedy a trial of the merits of the case as may be consistent with the rights of the parties.

Mont. Civ. P., § 1433.

7370. (3625.) Procedure in supreme as in district court. Jury. Ac-

tions under this chapter commenced in the supreme court shall be conducted in the same manner as if commenced in the district court, and the clerk of the supreme court shall have the same authority to issue process and to enter orders and judgments as the clerk of the district court has in like cases. All pleadings and the conduct of the trial shall be the same as in the district court. If a jury is required to determine an issue of fact, the court shall order the question to be tried before a jury in the district court of any county designated in such order, and that the verdict be certified to the supreme court.

Mont. Civ. P., § 1434*.

7371. (3626.) Appeal does not stay judgment of ouster. If the action is commenced in the district court, an appeal may be taken from the final judgment by either party to the supreme court as in other cases; but if there is judgment of ouster against the defendant, there shall be no stay of execution or proceedings pending such appeal.

Mont. Civ. P., § 1435.
Judgment in case of usurpation of office not stayed on appeal, § 7007.

CHAPTER 67.

SPECIAL PROCEEDINGS—IN GENERAL.

7374. (3627.) Parties, how designated. The party prosecuting a special proceeding may be known as the plaintiff, and the adverse party as the defendant.

Cal. C. Civ. P., § 1063.
General provisions as to special proceedings, §§ 7413-7416.
Word "action" in limitations applies to special proceedings, § 6492.
A proceeding in habeas corpus, being civil, the applicant is the plaintiff and the party who restrains is the defendant, and therefore an appeal by defendant is not an attempted appeal by the state.
Winnovich v. Emery, 33 U. 345; 93 P. 988.

7375. (3628.) Effect of judgment. Motion and order defined. A judgment in a special proceeding is the final determination of the rights of the parties therein. The definitions of a motion and of an order in a civil action are applicable to similar acts in a special proceeding.

Cal. C. Civ. P., § 1064.
Costs on appeal in special proceedings, §§ 7036, 7037.
Definitions of motion and order, § 7017.
New trials and appeals, § 7415.

CHAPTER 68.

CERTIORARI.

7376. (3629.) A writ of review. The writ of certiorari may be denominated the writ of review.

Cal. C. Civ. P., § 1067.
The writ here designated is the common law writ of certiorari, hence the power of the court under it is the same as at common law, except as modified by statute.
Gilbert v. Bd. of P. and F. Comm'rs, 11 U. 378; 40 P. 264.
Clark v. Bd. of P. and F. Comm'rs, 11 U. 399; 40 P. 269.

7377. (3630.) When and by whom granted. A writ of review may be granted by the supreme court, or by a district court, or a judge thereof, when an inferior tribunal, board, or officer exercising judicial functions has exceeded the jurisdiction of such tribunal, board, or officer, and there is no appeal, nor, in the judgment of the court or judge, any plain, speedy, and adequate remedy; *provided,* that the district courts shall issue writs of certiorari to the justices' courts in the counties within their several jurisdictions in all cases where judgment has been taken in said justices' courts upon an ex parte hearing or by default. Said writ shall issue at any time after judgment, and the district court shall, pursuant to said writ, inspect and review the proceedings had in the justice's court, and shall determine whether said justice's court had jurisdiction of the cause of action or the person of the defendant, and had regularly pursued its authority as prescribed by law.

Am'd '07, p. 64.

Cal. C. Civ. P., § 1068*.
Original jurisdiction in supreme and in district court, Con. art. 8, secs. 4, 7.
Extent of review, §§ 7383, 7384, and note.
Supreme court may review decision of public utility com., §§ 4834, 4835.

Supreme court may grant the writ.
Young v. Cannon, 2 U. 566.

But under the provisions of Con. art. 8, sec. 4, the supreme court, and not a justice, may issue writs.
Robinson v. District Court, 38 U. 379; 113 P. 1026.

Is not a writ of right; issuing or quashing it is discretionary.
Crosby v. Probate Court, 3 U. 51; 5 P. 552.

Will not generally be issued after time within which appeal would lie.
Id.

Writ does not lie until judgment or final determination by the inferior tribunal.
In re Bates, 1 U. 213.

Where a court refuses to proceed when it has jurisdiction and authority to do so, the remedy is not by certiorari, but by writ of mandate.
Hoffman v. Lewis, 31 U. 179; 87 P. 167.

The justice's record cannot be contradicted by a statement in the return or other evidence de hors the record.
Griffith v. Justice Court, 35 U. 443; 100 P. 1064.
Beck v. Lewis, 49 U. 368; 164 P. 480.
McMillan v. Durand, 38 U. 274; 112 P. 807.

On certiorari to review the overruling by a district court of defendant's motion to dismiss on the ground that the city justice below was ousted of jurisdiction of the prosecution for sale of liquor by the filing of an affidavit of prejudice, so the district court itself was without jurisdiction on appeal, proceedings in a similar case against relator and his conviction and satisfaction of judgment against him could not be considered when in the instant case such proceedings were not pleaded as former jeopardy.
Brooks v. 1st Jud. Court, 43 U. 499; 136 P. 785.

WRIT WILL BE ISSUED TO REVIEW:

Acts of a special board when exercising judicial functions.
Gilbert v. Bd. of P. and F. Com'rs, 11 U. 378; 40 P. 264.
Clark v. Bd. of P. and F. Com'rs, 11 U. 399; 40 P. 269.

Where a court in attachment proceedings makes a formal order of sale in pursuance of which a special execution is issued, a subsequent order of the court recalling the execution though void.
Newell v. District Court, 37 U. 418; 108 P. 1121.

Where a defendant answered in the justice's court and the justice proceeded to trial without first fixing a date and notifying the parties thereof, judgment so entered will be reviewed.
Griffiths v. Justice's Court, 35 U. 443; 100 P. 1064.

An order of the district court striking an abstract of the justice's judgment docket from the records because justice's court had no jurisdiction of the defendant, will be annulled.
Lund v. Booth, 33 U. 341; 93 P. 987.

IT WILL NOT BE ISSUED TO REVIEW:

A judgment that has been performed and satisfied.
Madsen v. Kenner, 4 U. 3; 4 P. 992.

Interlocutory orders or rulings as to whether a service confers jurisdiction, or whether certain conduct or statements of the person served, or his counsel in open court, constitute a general appearance.
Page v. Commer. Natl. Bank, 38 U. 440; 112 P. 816.

Void or default judgments from which there is an appeal.
Saunders v. Sioux City Nursery Co., 6 U. 431; 24 P. 532.
Cereghino v. Third District Court, 8 U. 455; 32 P. 697.
But see Golding v. Jennings, 1 U. 135.
Ducheneau v. House, 4 U. 363; 10 P. 427.

Though the court may in its discretion issue the writ even though there is still opportunity for appeal.
Rohwer v. Dist. Court, 41 U. 279; 125 P. 671.
Herald-Republican Co. v. Lewis, 12 U. 188; 129 P. 624.

But on such review the court cannot inquire into irregularities of the proceedings or errors.
Rohwer v. Dist. Court, 41 U. 279; 125 P. 671.

The action of the state board of equalization in apportioning to a county for taxation railroad property claimed to be located in another county where application was not applied for until after the second Monday in August, the date on which apportionments were required to be made, and the board did not clearly exceed its powers of jurisdiction.
Rich County v. Bailey, 47 U. 378; 154 P. 773.

7378. (3631.) Application on affidavit by party interested. Notice. The application must be made on affidavit by the party beneficially interested, and the court or judge may require a notice of the application to be given to the adverse party, or may grant an order to show cause why it should not be allowed, or may grant the writ without notice.

Cal. C. Civ. P., § 1069.
An affidavit merely stating that the justice in rendering judgment exceeded his jurisdiction without specifying in what particular, states a mere conclusion, and the proceedings will be dismissed.
Griffiths v. Justice's Court, 35 U. 443; 100 P. 1064.

7379. (3632.) Writ, to whom directed. Return. The writ may be directed to the inferior tribunal, board, or officer, or to any other person having the custody of the record or proceedings to be certified. When directed to a tribunal, the clerk, if there be one, must return the writ with the transcript required.

Cal. C. Civ. P., § 1070.

7380. (3633.) Id. Contents of writ. The writ of review must command the party to whom it is directed to certify fully to the court issuing the writ, at a specified time and place, a transcript of the record and proceedings, describing or referring to them with convenient certainty, that the same may be reviewed by the court, and requiring the party in the meantime to desist from further proceedings in the matter to be reviewed.

Cal. C. Civ. P., § 1071.
Extent of review, §§ 7383, 7384, and note.
The only office of the writ of certiorari is to cause the record of the proceedings to be certified from inferior to a superior court. Nothing outside of the record should be certified.
Hamilton v. Spiers, 2 U. 225.

7381. (3634.) Order may stay proceedings. If a stay of proceedings be not intended, the words requiring the stay must be omitted from the writ;

these words may be inserted or omitted, in the sound discretion of the court or judge, but if omitted, the power of the inferior court or officer is not suspended or the proceedings stayed.

Cal. C. Civ. P., § 1072.

7382. (3635.) Writ served as a summons. The writ must be served in the same manner as a summons in a civil action, except when otherwise expressly directed by the court or judge.

Cal. C. Civ. P., § 1073. Return may be ordered at any time, § 7413.

7383. (3636.) Extent of review under writ. The review upon this writ cannot be extended further than to determine whether the inferior tribunal, board, or officer has regularly pursued the authority of such tribunal, board, or officer.

Cal. C. Civ. P., § 1074.

7384. (3637.) Amendment of defective return. Hearing. Judgment. If the return of the writ be defective, the court or judge may order a further return to be made. When a full return has been made, the court must hear the parties, or such of them as may attend for that purpose, and may thereupon give judgment, either affirming, annulling, or modifying the proceedings below.

Cal. C. Civ. P., § 1075.

Under this and the next preceding section, court may examine evidence and decide whether proceedings of inferior tribunal were in accordance therewith and with the law. (Overruling Golding v. Jennings, 1 U. 135.)

Gilbert v. Bd. of P. and F. Com'rs, 11 U. 378; 40 P. 264.

Supreme court, on certiorari, not limited to mere question whether trial court exceeded jurisdiction, but may review errors of law.

Salt Lake City Water Co. v. Salt Lake City, 24 U. 282; 67 P. 791.

While, on certiorari to review a judgment, the question of the judge's right to hold the office, whether by reason of the invalidity of the law under which he was chosen or appointed, or because of his want of the proper qualifications, cannot be considered, the question whether the law under which he acts, and on which the validity of his acts depends, is unconstitutional may be considered.

Mill v. Brown, 31 U. 473; 88 P. 609.

The supreme court will, by certiorari, review the action of the district court in cases appealed from justices' courts only where the district court has acted without or has exceeded its jurisdiction. (Distinguishing Crooks v. Dist. Court, 21 U. 98; 59 P. 529, and Smith v. Dist. Court, 24 U. 164; 66 P. 1065.)

O. S. L. R. R. Co. v. Dist. Court, 30 U. 371; 85 P. 360.

Hansen v. Anderson, 21 U. 286; 61 P. 219.

Since the action of the district court in dismissing an appeal from a justice's court is final, and cannot be reviewed on appeal, nor on certiorari, the remedy is by mandamus where the court erroneously dismisses the appeal, for its act is a refusal to proceed further, so that if contrary to law the court may be required to proceed in accordance therewith.

Hoffman v. Lewis, 31 U. 179; 87 P. 167.

The record as returned by the justice imports verity, and is conclusive as to all matters required to be recorded, and as to such matters may not be aided or varied by anything de hors the record or by statements in the return; but where jurisdictional facts do not appear of record and are required to be made of record, evidence necessary to determine jurisdictional questions involved should be stated in the return and certified to the reviewing court, and the return as to such facts is conclusive when made by the person before whom the proceedings took place, but where such facts set forth in return made by a person before whom the proceedings did not take place the return is not conclusive, and evidence aliunde the return may be introduced, and when the return is made by a person before whom the proceedings did not take place, and he is unable to return as to certain matters, then the court may receive evidence.

Griffiths v. Justice's Court, 35 U. 443; 100 P. 1064.

7385. (3638.) Copy of judgment transmitted. A copy of the judgment, signed by the clerk, must be transmitted to the inferior tribunal, board, or officer having the custody of the record or proceedings certified up.

Cal. C. Civ. P., § 1076.

When attorney's fee taxed as costs, § 7416.

Costs in special proceedings, § 7036, and note.

Costs not taxed against the justice.

Hamilton v. Spiers, 2 U. 225.

7386. (3639.) Judgment roll. A copy of the judgment, signed by the clerk, entered upon or attached to the writ and return, constitute the judgment roll.

Cal. C. Civ. P., § 1077. Judgment roll, § 6867.

CHAPTER 69.

MANDAMUS.

7390. (3640.) Mandamus or writ of mandate. The writ of mandamus may be denominated a writ of mandate.

Cal. C. Civ. P., § 1084.

7391. (3641.) Jurisdiction. When writ granted. It may be issued by

the supreme court, or by a district court or a judge thereof, to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled and from which he is unlawfully precluded by such inferior tribunal, corporation, board, or person.

Cal. C. Civ. P., § 1085*.

Original jurisdiction in supreme and in district courts, Con. art. 8, secs. 4, 7.

Against county commissioners to compel action on irrigation district organization, § 3503.

By public utility commission, § 4842.

Supreme court may issue against public utility commission, § 4834.

Supreme court may issue this writ.

Maxwell v. Burton, 2 U. 595.

Kendall v. Raybould, 13 U. 226; 44 P. 1034.

But under the provisions of Con. art. 8, sec. 4, the supreme court, and not a justice, may issue writs.

Robinson v. District Court, 38 U. 379; 113 P. 1026.

There is a wide difference in the office of the two writs, mandamus and certiorari; the former is one of mandate, while the latter is one of review.

Maxwell v. Burton, 2 U. 595.

Where mandamus proceedings are pending to compel issuance of certificate of election, prohibition will not lie to prevent issuance of certificate to another.

Page v. Utah Com., 11 U. 119; 39 P. 499.

Where plaintiff obtained a judgment in a justice's court and the defendant had it set aside by district court without a hearing, on the ground that the justice's court had no jurisdiction, plaintiff is entitled to costs in proceedings to supreme court to obtain a writ of mandate to compel reinstatement against all defendants, except the district judge.

Burt v. District Court, 39 U. 1; 114 P. 143.

When the question presented to the supreme court turned upon the facts admitted by demurrer in the district court, and the only question is whether upon such facts the judgment of the district court should not have been in favor of the applicant, the defendant may not for the first time deny the truth of the facts in the supreme court.

Ketchum Coal Co. v. Christensen, 48 U. 214;

MANDAMUS LIES:

To compel proper board to canvass election returns.

Lyman v. Martin, 2 U. 136.

To compel a canvassing board to issue a certificate of election.

Page v. Utah Com., 11 U. 119; 39 P. 499.

To compel county officer to pay over fees.

Richards v. Stanton, 14 U. 180; 46 P. 1109.

To compel city auditor to draw warrant on treasurer to pay salary of a city officer.

Kendall v. Raybould, 13 U. 226; 44 P. 1034.
Pratt v. Swan, 16 U. 483; 52 P. 1092.
Everill v. Swan, 17 U. 514; 55 P. 68.
Everill v. Swan, 20 U. 56; 57 P. 716.
Moreton v. Swan, 20 U. 79; 57 P. 718.

Each occupant of the office of territorial statistician was entitled to writ to compel the issuance of a warrant for the amount due him for services.

Bache v. Richards, 15 U. 477; 49 P. 532.

To compel executor to pay inheritance tax.

Dixon v. Ricketts, 26 U. 215; 72 P. 947.

To compel approval of an official bond by county treasurer.

Brown v. Atkin, 1 U. 277.

To compel a county court to pass upon and allow proper bills against the county where there was no statute allowing a county to be sued.

Taylor v. County Court of S. L. Co., 2 U. 405.

To control the performance of a ministerial but not of a judicial act.

Id.

To compel officer, having levied execution upon more property than sufficient, to release excess.

Metz v. Schweitzer, 8 U. 184; 30 P. 683.

Mandamus, not execution, is proper when a county refuses to make payment of a judgment.

Emery Co. v. Burreson, 14 U. 328; 47 P. 91.

To compel a city to levy a tax for the purpose of paying a judgment.

Shepard v. Kaysville City, 16 U. 340; 52 P. 592.

To compel board to audit a claim admitted to be just and to belong to class mentioned in § 2501.

Thoreson v. State Bd. Ex., 19 U. 18; 57 P. 175.

To a mayor to compel him to sign a warrant for an officer's salary.

Henriod v. Church, 51 U. —; 172 P. 701.

On the petition of the industrial commission to force an employer to comply with the industrial commission act.

The Industrial Com. of Utah v. Daly Mining Co., 51 U. —; 172 P. 301.

To compel the school board to issue certificate of election to the candidate who, the returns show, received the plurality of votes, though the tally sheets show a smaller number of votes cast than was shown by the certified returns.

Rich v. Henderson, 49 U. 258; 162 P. 621.

To compel a carrier not to discriminate against a person and to receive him at a place where it receives others.

Skeen v. Ogden R. T. Co., 38 U. 242; 112 P. 120.

To compel the enforcement of official action by the state board of examiners.

Davis v. Cutler et al., 34 U. 99; 95 P. 1071.
Davis v. Edwards, 33 U. 243; 93 P. 720.

To enforce a stockholder's right to inspect corporate books and records.

Kimball v. Dern, 39 U. 181; 116 P. 28.

But where stockholder demands inspection of the corporate books from a bad motive or at a time or in a manner which unnecessarily interferes with the corporate offices, the exercise of the right will not be enforced by the court.

Clawson v. Clayton, 33 U. 266; 93 P. 729.

To compel the court to enter final judgment as of the date of final submission, when six months have elapsed and the court held neither party was entitled to a divorce.

Benson v. Ritchie, 44 U. 59; 138 P. 136.

To compel trustees of an irrigation district to assume management of the whole district.

Harris v. Tarbet, 19 U. 328; 57 P. 33.

It was not a good objection to mandamus that the salary had already been paid to a person now out of office, who had claimed such salary as an officer de facto, and that, the title to the office being involved, quo warranto was the proper remedy.

Williams v. Clayton, 6 U. 86; 21 P. 398.

An alleged de facto officer out of office when the mandamus was instituted is not a necessary party, since payment to him is no defense.

Id.

Mandamus is the appropriate remedy to restore a de jure officer to his office; and it is not necessary to resort to quo warranto even though the office be in possession of another.

Pratt v. B. of P. & F. Com'rs, 15 U. 1; 49 P. 747.

Officer not allowed to plead unconstitutionality of statute. Where statute requires an officer to perform a ministerial act, he will not be permitted in mandamus proceeding to plead in justification of non-performance that the act would violate the constitution. (On rehearing, 21 U. 187; 60 P. 982.)

Thoreson v. State Bd. Ex., 19 U. 18; 57 P. 175.

Where the ordinance provided that on any instalment, or the interest, not being paid on date due, the whole amount of the special tax unpaid at the time the instalment and interest are due, shall become due and payable, and providing for sale of all the property upon which the special tax is delinquent, mandamus lies to compel city treasurer to enforce such provision.

Stinson v. Godbe, 48 U. 444; 160 P. 280.

MANDAMUS DOES NOT LIE:

To compel outgoing sheriff to deliver to his successor property held under writ of attachment.

Lynch v. Lee, 1 U. 271.

To undo an act already done.

Maxwell v. Burton, 2 U. 595.

To direct, how the discretionary power vested in the state board of land commissioners shall be exercised.

Miles v. Wells, 22 U. 55; 61 P. 534.

To review the dissolution of an attachment.

H. L. Griffin Co. v. Howell, 38 U. 357; 113 P. 326.

Where salary of a public officer has been fixed at a definite sum, no other appropriation is required, and application for writ of mandamus to compel special appropriation for a fixed salary must be denied.

Silvey v. Boyle, 20 U. 205; 57 P. 880.

To compel a city to connect school property with the public sewer, it being exempt from the payment of sewer tax.

State v. McGonigal, 38 U. 277; 112 P. 401.

To compel county commissioners to issue a liquor license where it is shown that the applicant has constantly disobeyed the law.

Smythe v. Butters, 38 U. 151; 112 P. 804.

To compel the state engineer to grant the right to perfect an irrigation ditch so as to avoid waste of water by seepage, and to permit the applicant to use the water saved.

Tanner v. Beers, 49 U. 536; 165 P. 465.

To compel reinstatement of an expelled member of a trade association where, owing to nonresidence of defendants, the decree could not be enforced.

Pratt v. Amalgamated Ass'n, 50 U. —; 167 P. 830.

The action of public officer which requires the exercise of discretion will not be reviewed by mandamus unless he is guilty of clear and wilful disregard of duty, or acts capriciously, or with partiality, and unless it is clearly his duty to act as requested.

Bishop v. Morehouse, 38 U. 234; 112 P. 169.

The statutes and ordinance do not impose upon the city treasurer the power and duty to sell assessed property upon delinquency of an instalment before the whole tax is due and delinquent, with sufficient certainty to justify the direction of such action by the treasurer by mandamus.

Stinson v. Godbe, 46 U. 468; 150 P. 967.

Mandamus will lie only where a board or officer has refused to act, and not after action to reverse or review the judgment or discretion of the board or officer.

Civic Fed. v. S. L. County, 22 U. 6; 61 P. 222.

Where board of county commissioners has rejected a claim against the county, suit on the claim and not mandamus is the proper remedy.

Civic Fed. v. S. L. Co., 22 U. 6; 61 P. 222.

Toronto v. S. L. Co., 10 U. 410; 37 P. 587.

To authorize mandamus against a public officer, relator must show a clear right to the performance of the act demanded with a corresponding duty upon the officer to perform it and the act of a public officer which requires the exercise of discretion will not be reviewed by mandamus unless he is guilty of a clear and wilful disregard of duty or acts capriciously or with partiality.

Bishop v. Morehouse, 38 U. 234; 112 P. 169.

But an officer, though acting ministerially, may attack a statute directing him to act as unconstitutional and justify his refusal in a mandamus proceedings on that ground, and where he has performed an act in accordance with the particular law, mandamus is not maintainable to compel him to undo what he has done because the law is unconstitutional.

State v. Candland, 36 U. 406; 104 P. 285.

Where a mining company incorrectly reported to state board of equalization the gross yield of certain mines as located in Utah county, when they were largely located in plaintiff county, and under such reports the assessed valuation apportioned Utah county the plaintiff after such apportionment and rate of taxation had been fixed in accordance therewith and all levies had been computed, could not maintain mandamus to compel the state board of equalization to grant a hearing and reapportion the assessed value of such mining property to plaintiff county.

Juab County v. Bailey, 44 U. 377; 140 P. 764.

Where it was instituted to compel county officers to correct an assessment where it was not instituted until the 25th of August after the assessment had been completed and the taxes equalized, the rate established, the funds apportioned and the assessment roll passed entirely beyond the control of each party defendant to the proceedings.

Kirie v. Randolph, 51 U. —; 169 P. 941.

LIES TO LOWER COURT:

To compel referee to settle statement on motion for new trial in a proper case.

Whitmore v. Harris, 10 U. 259; 37 P. 464.

To grant a jury trial in an action at law, on demand duly made.

State v. Hart, 26 U. 229; 72 P. 938.

State v. Cherry, 22 U. 1; 60 P. 1103.

To order a justice of the peace to try a case where plaintiff refuses to deposit the fees of jurors summoned at instance of defendant, though he may have entered a judgment of dismissal.

People v. Van Tassel, 13 U. 9; 43 P. 625.

To compel obedience to remittitur.

State v. Norrell, 17 U. 8; 53 P. 610.

To compel an inferior court to act on matters within the jurisdiction of which it has erroneously refused to assume jurisdiction.

State v. Hart, 19 U. 438; 57 P. 415.

Hoffman v. Lewis, 31 U. 179; 87 P. 167.

Since the action of the district court in dismissing an appeal from a justice's court is final, and cannot be reviewed on appeal, nor on certiorari, the remedy is by mandamus where the court erroneously dismisses the appeal.

Hoffman v. Lewis, 31 U. 179; 87 P. 167.

Christensen v. Christensen, 51 U. —; 173 P. 383.

To require the clerk of city court to enter a default judgment, where proper, notwithstanding that the judge of the court directed him to enter no such judgment.

Utah Ass'n Credit Men v. Bowman, 38 U. 326; 113 P. 63.

To reinstate a case where the court erroneously dismissed appeal because non-resident bond for costs had not been filed.

Douglas v. District Court S. L. County, 45 U. 486; 146 P. 562.

To compel the court to try the case, where it has jurisdiction of the subject matter and the person.

Neilson v. 3rd Dist. Court, 36 U. 223; 102 P. 868.

To proceed in a case of which it has acquired jurisdiction by appeal from the municipal court.

Griffin Co. v. Howell, 38 U. 357; 113 P. 326.

To enforce its judgment in condemnation proceedings granting the plaintiff possession of certain strip of ground.

Ketchum Coal Co. v. Christensen, 48 U. 214; 159 P. 541.

To compel a court to proceed when, through mere mistake of law, it declined to take jurisdiction, and for that reason refused to proceed to try the case or hear and determine the issues therein, or where it has made findings, to enter final judgment.

Ketchum Coal Co. v. District Court, 48 U. 342; 159 P. 737.

Where the court wrongfully elects for a party which action he must prosecute, to compel it to proceed with the action which the applicant elects to prosecute.

Dorsett v. Morse, 36 U. 362; 103 P. 969.

Where a judge imposes an unwarranted condition upon the mortgagor of his giving a bond, before according him the remedy granted by § 153, he may be compelled by mandamus to proceed with the case.

Watts v. Greenwood, 49 U. 118; 162 P. 72.

Where a district court sets aside a justice court judgment on the ground it had no jurisdiction, mandamus lies to reinstate the justice's judgment, if it had jurisdiction.

Burt v. Dist. Court, 39 U. 1; 114 P. 143.

Where district court wrongfully refuses to take jurisdiction of an appeal of a case because the complaint in the justice's court did not comply with provisions of § 7447.

Coffee & Spice Co. v. District Court, 44 U. 411; 140 P. 666.

DOES NOT LIE TO LOWER COURT:

Where right of appeal exists, unless the interest of justice requires the interposition of the power.
State v. Booth, 21 U. 88; 59 P. 553.

To reinstate an appeal from the city court for failure of bondsmen to justify where the right of such reinstatement is not entirely clear, since there is adequate remedy by appeal.
Kyrimes v. Kyrimes, 45 U. 168; 143 P. 232.

To reinstate an appeal where notice of the judgment was given informally by letter and appeal was not taken within thirty days from that time.
Tooele Meat & Stor. Co. v. Morse, 43 U. 515; 136 P. 965.

To correct its record which recites the granting of a motion by the district attorney to dismiss a criminal action and discharging accused from custody so as to recite that merely the information, not the action, was dismissed.
Barnes v. Second District Court, 36 U. 396; 104 P. 282.

Where defendant had been convicted of manslaughter, and upon his motion the trial court had indefinitely suspended sentence; held, in an action in mandamus against the successor of the trial judge to compel him to sentence defendant, that it would be presumed that the trial judge intended to impose only a nominal punishment, and that mandamus would not issue to compel his successor to sentence defendant.
People v. Blackburn, 6 U. 347; 23 P. 759.

Where the court dismisses an appeal because failure of sureties on appeal bond to justify in time specified, or refuses to reinstate the appeal on motion, unless the court acted capriciously or arbitrarily.
Kyrimes v. Kyrimes, 45 U. 168; 143 P. 232.

7392. (3642.) Issued when ordinary remedy inadequate. Affidavit. This writ must be issued in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law. It must be issued upon affidavit, on the application of the party beneficially interested.

Cal. C. Civ. P., § 1086.
Mandamus is a civil remedy having all the qualities and attributes of a civil action, and sufficiency of the pleadings therein must be determined by the same rules as in civil actions.
Lyman v. Martin, 2 U. 136.

Chamberlain v. Warburton, 1 U. 267.
It is no objection to an action in mandamus that the plaintiff had a plain, speedy, and adequate remedy against a third party. The remedy must be against the defendant in mandamus, and not against a third person.
Williams v. Clayton, 6 U. 86; 21 P. 398.

7393. (3643.) Alternative or peremptory. Forms. The writ may be either alternative or peremptory. The alternative writ must state generally the allegation against the party to whom it is directed, and command such party, immediately after the receipt of the writ, or at some other specified time, to do the act required to be performed, or to show cause before the court, at a specified time and place, why he has not done so. The peremptory writ must be in a similar form, except that the words requiring the party to show cause why he has not done as commanded must be omitted and a return day inserted.

Cal. C. Civ. P., § 1087.

Return may be ordered at any time, § 7413.

7394. (3644.) Alternative issued without notice. Peremptory. Notice. Default. When the application to the court or judge is made without notice to the adverse party, and the writ be allowed, the alternative must be first issued; but if the application be upon due notice and the writ be allowed, the peremptory may be issued in the first instance. The notice of the application, when given, must be at least ten days unless the court or judge shall order a shorter notice. The writ cannot be granted by default. The case must be heard by the court whether the adverse party appear or not.

Cal. C. Civ. P., § 1088*.

7395. (3645.) Answer. Verification. On the return day of the alternative, or the day on which the application for the writ is noticed (or such further day as the court may allow), the party on whom the writ or notice has been served may show cause by answer under oath, made in the same manner as an answer to a complaint in a civil action.

Cal. C. Civ. P., § 1089*.

An answer may be filed with a demurrer without waiving the demurrer.
Davis v. Edwards, 33 U. 243; 93 P. 720.

7396. (3646.) Issue of fact may be tried by jury. Damages. If an answer be made which raises a question as to a matter of fact essential to the determination of the motion, and affecting the substantial rights of the parties, and upon the supposed truth of the allegation of which the application for the writ is based, the court may, in its discretion, order the question to be tried before a jury, and postpone the argument until such trial can be had, and, if the proceedings are pending in the supreme court, the verdict certified to that court. The order for trial may also direct the jury to assess any damages which the applicant may have sustained, in case they find for him. If the order for trial is issued from the supreme court, it must designate the county in which the same shall be had.

Cal. C. Civ. P., § 1090*.
Special issues may be tried by jury, § 6444.
What issues triable by a jury, § 6781.

This section does not abrogate party's constitutional right to a jury trial in a proper case.
Chamberlain v. Warburton, 1 U. 267.

7397. (3647.) Sufficiency of answer. Denial. Avoidance. On the trial the applicant is not precluded by the answer from any valid objection to its sufficiency, and may countervail it by proof, either in direct denial or by way of avoidance.

Cal. C. Civ. P., § 1091.

7398. (3648.) Motion for new trial, where made. The motion for a new trial must be made in the court in which the issue of fact is tried.

Cal. C. Civ. P., § 1092.

7399. (3649.) When application pending in supreme court, verdict transmitted. Argument. If no notice of a motion for a new trial be given, or, if given, the motion be denied, if the application for the writ is pending in the supreme court, the clerk of the district court must within five days transmit to the supreme court a certified copy of the verdict attached to the order of trial; after which either party may bring on the argument of the application in the court in which it is pending upon reasonable notice to the adverse party.

Cal. C. Civ. P., § 1093*.

7400. (3650.) Proceedings upon default, demurrer, or immaterial answer. If no answer be made, the case must be heard on the papers of the applicant. If the answer raises only questions of law, or puts in issue immaterial statements not affecting the substantial rights of the parties, the court must proceed to hear or fix a day for hearing the argument of the case.

Cal. C. Civ. P., § 1094.

7401. (3651.) Applicant may recover damages and costs. Execution. Peremptory writ. If judgment be given for the applicant, he may recover the damages which he has sustained, as found by the jury, or as may be determined by the court or referees, upon a reference to be ordered, together with costs; and for such damages and costs an execution may issue, and a peremptory mandate must also be awarded without delay.

Cal. C. Civ. P., § 1095.
Costs in special proceeding allowed as of course, § 7036.
Where issuance of mandamus to compel referee to settle statement on motion for a new trial was resisted by the successful party, costs will be awarded against him instead of the referee.
Whitmore v. Harris, 10 U. 259; 37 P. 464.

Where court commissioner refuses in good faith to pay fees of a witness, costs will not be awarded against him.
People v. Pyper, 6 U. 160; 21 P. 722.
Mandamus to compel the canvassing board to issue a certificate of election is a special proceeding hereunder, so as to entitle plaintiff on a judgment in his favor to an allowance for costs, as of course.
Page v. Utah Com., 11 U. 119; 39 P. 499.

7402. (3652.) Writ served as a summons. The writ must be served in the same manner as a summons in a civil action, except when otherwise expressly directed by order of the court. Service upon a majority of the members of any board or body is service upon the board or body, whether at the time of the service the board or body was in session or not.

Cal. C. Civ. P., § 1096.
Service on person not less than fourteen years of age at defendant's usual residence is equivalent to personal service.
People, ex rel. Jones v. House, 4 U. 382; 10 P. 843.

7403. (3653.) Refusal to obey writ. Fine. Imprisonment. When a peremptory mandate has been issued and directed to any inferior tribunal, corporation, board, or person, if it appear to the court that any member of such tribunal, corporation, board, or person upon whom the writ has been personally served has, without just excuse, refused or neglected to obey the same, the court may, upon motion, impose a fine not exceeding $500. In case of persistence in a refusal of obedience, the court may order the party to be imprisoned until the writ is obeyed, and may make any orders necessary and proper for the complete enforcement of the writ.

Cal. C. Civ. P., § 1097*.

CHAPTER 70.

PROHIBITION.

7407. (3654.) Prohibition counterpart of mandamus. Defined. The writ of prohibition is the counterpart of the writ of mandate. It arrests the proceedings of any tribunal, corporation, board, or person, whether exercising functions judicial or ministerial, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board, or person.

Cal. C. Civ. P., § 1102*.

Does not lie to public utility commission, § 4834.

A writ of prohibition could not issue at common law to arrest the doing of a ministerial act, but sec. 6 of the Organic Act, and, in pursuance of that authority, this section, have provided for the issuance of such writs to arrest the doing of ministerial acts.

People, ex rel. Ducheneau v. House, 4 U. 369; 10 P. 838.

The issuance of a writ of prohibition by the supreme court of the territory of Utah, arresting proceedings already commenced in an inferior court, is in aid of the appellate jurisdiction of the supreme court, and within its authority.

People, ex rel. Yearian v. Spiers, 4 U. 385; 10 P. 609; 11 P. 509.

See People v. Douglas, 5 U. 283; 14 P. 801.

The power conferred on the court by Con. art. 8, secs, 4 and 7, to issue writs of prohibition, etc., cannot be enlarged or abridged by the legislature, and the district court in revewing on prohibition the ruling of the justice's court cannot try a matter de novo, but the inquiry must be confined to a review of the proceedings before the justice.

Robinson v. Durand, 36 U. 95; 104 P. 760.

7408. (3655.) By whom and when issued. Affidavit. It may be issued by the supreme court, or by a district court or a judge thereof, to an inferior tribunal, or to a corporation, board, or person, in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law. It is issued upon affidavit, on the application of the person beneficially interested.

Cal. C. Civ. P., § 1103*.

Original jurisdiction in supreme and in district courts, Con. art. 8, secs, 4, 7.

PROHIBITION LIES:

Where a justice of the peace has tried a case of which he has no jurisdiction, although there would be an appeal.

Ducheneau v. House, 4 U. 363; 10 P. 838.

To arrest the proceedings of an inferior tribunal when it is acting without or in excess of its jurisdiction, and there is no plain, speedy, and adequate remedy in the ordinary course of law.

Yearian v. Spiers, 4 U. 482; 10 P. 609; 11 P. 509.

See People v. Douglass, 5 U. 283; 14 P. 801.

To arrest proceedings of the United States commissioners to punish for contempt acts which are not such.

People v. Carrington, 5 U. 531; 17 P. 735.

To arrest further proceedings, subject to the right of the court to permit appellant to supply the defect of proof of service, where the transcript on an appeal from the justice's court does not show service of notice of appeal.

State v. Third District Court, 36 U. 267; 103 P. 261.

Where a defendant moves to set aside a justice court judgment and then more than thirty days thereafter attempts to give notice of appeal, the district court is without jurisdiction.

Grant v. Dist. Court, 38 U. 138; 110 P. 981.

Before the amendment to § 7514, where notice of appeal was not filed before served, or on the same date, against the district court hearing the appeal.

Walton v. Dist. Court, 36 U. 502; 105 P. 105.

Where the district court is about to proceed with the trial on an accusation against the county attorney for his removal under § 8639 which alleges acts not prohibited, the court being without jurisdiction, it may be prohibited from proceeding.

Parker v. Morgan, 48 U. 405; 160 P. 764.

Where the transcript on an appeal from the justice's court is defective in not showing service of notice of appeal, the remedy of the successful party in the justice court, is by prohibition to arrest further proceedings, subject to the right of the court to permit appellant to supply the defect of proof of service.

State v. Dist. Court, 36 U. 267; 103 P. 261.

PROHIBITION DOES NOT LIE:

When there is a plain, speedy, and adequate remedy at law.

Ducheneau v. Ireland, 5 U. 108; 13 P. 87.

People v. Hills, 5 U. 410; 16 P. 405.

To restrain officer from enforcing an execution regular on its face, based on judgment regular on its face, though really void. Remedy is motion to quash execution.

Ducheneau v. Ireland, 5 U. 108; 13 P. 87.

Where mandamus by plaintiff is pending to compel the issuance of a certificate of election to prevent the issuance of a certificate to another person.

Page v. Letcher, 11 U. 134; 39 P. 502.

When the thing sought to be prevented is already done.

Brooks v. Warren, 5 U. 89; 12 P. 659.

See Maxwell v. Burton, 2 U. 595.

Where defendant had right of appeal and the time in which garnishee could appeal had not expired at the time for application for writ of prohibition, the applicants had an adequate remedy at law

Overland M. Co. v. McMaster, 19 U. 177; 56 P. 977.

Where §§ 8682, 8688 have not been complied with, defendant's remedy, on being refused relief by the trial court, is by appeal.

Brown v. Dist. Court, 27 U. 336; 75 P. 739.

As a general rule where there is available to the applicant another plain, speedy, or adequate remedy in the ordinary course of law, either by appeal, writ of error, writ of review, certiorari, injunction, or other proceeding appropriate to the relief.

Campbell v. Durand, 39 U. 118; 115 P. 986.

Where a justice's court retained jurisdiction of the action, notwithstanding the uncontradicted affidavit of the defendant, averring his nonresidence and that he had not contracted to pay the obligation sued on in the precinct, and rendered judgment for plaintiff, the defendant's remedy was by appeal, certiorari, or injunction.

Id.

In advance of trial in city court, where validity of a statute or ordinance is involved.

Carrigan v. Bowman, 40 U. 91; 119 P. 1037.

To restrain county commissioners from appointing a justice of the peace under a law claimed to be invalid after the commissioners have made the appointment.

Martineau v. Crabbe, 46 U. 327; 150 P. 301.

To restrain the court from hearing garnishment proceedings claimed to have been maliciously instituted.

Board of Home Missions v. Maughan, 35 U. 516; 101 P. 581.

7409. (3656.) Alternative or peremptory. Forms of. The writ must be either alternative or peremptory. The alternative writ must state generally the allegation against the party to whom it is directed, and command such party to desist or refrain from further proceedings in the action or matter specified therein, until the further order of the court or judge from which it is issued, and to show cause before such court, at a specified time and place, why such party should not be absolutely restrained from any further proceedings in such action or matter. The peremptory writ must be in a similar form, except that the words requiring the party to show cause why he should not be absolutely restrained, etc., must be omitted, and a return day inserted.

Cal. C. Civ. P., § 1104.
Return ordered at any time, § 7413.
When attorney's fees as costs, § 7416.
Where costs were taxed against the justice.
Ducheneau v. House, 4 U. 369; 10 P. 838.
Length of time between service and hearing is discretionary with the court.
People, ex rel. Jones v. House, 4 U. 382; 10 P. 843.

7410. (3657.) Certain provisions of previous chapter applicable. The provisions of §§ 7394-7403, both inclusive, of the next preceding chapter, apply to the proceedings for writ of prohibition.

Cal. C. Civ. P., § 1105*.

CHAPTER 71.

GENERAL PROVISIONS AS TO CERTIORARI, MANDAMUS, AND PROHIBITION.

7413. (3658.) Court may order return and hearing at any time. Writs of certiorari, mandamus, and prohibition may, in the discretion of the court or judge issuing the writ, be made returnable and a hearing thereon be had at any time.

Cal. C. Civ. P., § 1108*.
Applied in Brown v. Atkin, 1 U. 277.

7414. (3659.) Civil procedure applicable. Exception. Except as otherwise provided in the three chapters next preceding, the provisions of this code relative to civil actions in the district court are applicable to and constitute the rules of practice in the proceedings mentioned in those chapters.

Cal. C. Civ. P., § 1109.

7415. (3660.) Id. New trials and appeals. The provisions of this code relative to new trials in, and appeals from, the district court, except so far as they are inconsistent with the provisions of the three chapters next preceding, apply to the proceedings mentioned in those chapters.

Cal. C. Civ. P., § 1110*.
Motions and judgments, § 7375.
This section authorizes motion for new trial of proceeding originally commenced in supreme court.
Yearian v. Spiers, 4 U. 385; 11 P. 509; 10 P. 609.

7416. (3660x.) Attorney's fees to be taxed as costs. In any action brought to review, by certiorari or prohibition, any judgment, order, or proceeding of any justice of the peace in this state, the successful party shall be entitled to recover a reasonable attorney's fee, to be fixed by the court, not to exceed $25, to be taxed as costs in such action. '07, p. 87.

Costs in special proceedings allowed as of course, § 7036, and note.

CHAPTER 72.

VOLUNTARY DISSOLUTION OF CORPORATIONS.

7418. (3661.) Corporation may be dissolved upon its application. A corporation may be dissolved by the district court of the county where its office or principal place of business is situated, upon its voluntary application for that purpose.

Cal. C. Civ. P., § 1227*.
Voluntary dissolution of irrigation company, § 3487.
Receiver may be appointed, §§ 6764, 6765.
Dissolution by act of directors, note to § 868.
The mere transfer, by deed of assignment, of the corporate property of a corporation to a trustee, for the purpose of paying its debts, does not, per se, work a dissolution of the corporation.
Weyeth H. & M. Co. v. James-Spencer-B. Co., 15 U. 110; 47 P. 604.

7419. (3662.) Application, contents of. The application must be in writing, and must set forth:

1. That, at a meeting of the stockholders or members called for that purpose, the dissolution of the corporation was resolved upon by a two-thirds vote of all the stockholders or members;

2. That all claims and demands against the corporation have been satisfied and discharged.

Cal. C. Civ. P., § 1228.
The minority of the shareholders cannot prevent dissolution in accord with the will of the majority.
Geddes v. Anaconda Mine, 245 Fed. 226.

7420. (3663.) Id. By whom made. Verification. The application must be made by or in behalf of the board of directors, or, should the board decline to make the same, by any stockholder, and must be verified in the same manner as a complaint in a civil action.

Cal. C. Civ. P., § 1229*.

7421. (3664.) Order to file application. Notice by publication. If the judge is satisfied that the application is in conformity with this chapter, he must order it to be filed with the clerk, and that the clerk give not less than thirty nor more than fifty days' notice of the application, by publication in some newspaper having general circulation in the county.

Cal. C. Civ. P., § 1230*.

7422. (3665.) Objections to application. At any time before the expiration of the time of publication, any person may file his objections to the application.

Cal. C. Civ. P., § 1231.

7423. (3666.) Hearing and notice to objectors. Decree. After the time of publication has expired, the court may, upon five days' notice to the persons who have filed objections, or without further notice, if no objections have been filed, proceed to hear and determine the application; and, if all the statements therein made are shown to be true, must declare the corporation dissolved.

Cal. C. Civ. P., § 1232.

7424. (3667.) Judgment roll. Appeal. The application, notices, proof of publication, objections, if any, and declaration of dissolution constitute the judgment roll; and from the judgment an appeal may be taken as from judgments in other civil actions.

Cal. C. Civ. P., § 1233.
Involuntary dissolution, time to wind up affairs, §§ 868, 870.

CHAPTER 73.

JUSTICES' COURTS—PLACE OF TRIAL.

7426. (3668.) Where actions commenced, and tried. Actions in justices' courts must be commenced, and, subject to the right to change the place of trial as in this chapter provided, must be tried:

1. If there is no justice's court for the precinct or city in which the defendant resides,—in any city or precinct of the county in which he resides;

2. When two or more persons are jointly or jointly and severally bound in any debt or contract, or otherwise jointly liable in the same action, and reside in different precincts or different cities of the same county, or in different counties,—in the precinct or city in which any of the persons liable may reside;

3. In cases of injury to the person or property,—in the precinct or city where the injury was committed or where the defendant resides;

4. If for forcible entry, forcible detainer, unlawful detainer, or for the foreclosure or enforcement of a lien upon personal property,—in the precinct or city in which the property or some part thereof is situated, or, if there is no justice's court for such precinct or city, in any other precinct or city in the county;

5. If for the recovery of personal property, or the value thereof, or damages for taking or retaining the same,—in the precinct or city in which the property may be found, or in which the property was taken, or in which the defendant resides;

6. When the defendant is a non-resident of the county,—in any precinct or city wherein he may be found;

7. When the defendant is a non-resident of the state,—in any precinct or city in the state;

8. When a person has contracted to perform an obligation at a particular place and resides in another county, precinct, or city,—in the precinct or city in which such obligation is to be performed, or in which he resides;

9. When the parties voluntarily appear and plead without summons,—in any precinct or city in the state;

10. In all other cases,—in the precinct or city in which the defendant resides.

Cal. C. Civ. P., § 832*.

Jurisdiction of justices of the peace, Con. art. 8, sec. 8; §§ 1790-1794.

Place of holding court, § 1790, and note.

Action commenced by filing complaint, § 7435.

Commencing action in wrong precinct a misdemeanor, § 8510.

Dismissal of action brought in wrong precinct, § 7491, and note.

Where complaint not verified or does not truthfully recite jurisdictional facts, judgment void and subject to attack on appeal, prohibition, or certiorari, § 7448.

Due bills payable generally issued in a certain precinct for work done there are not thereby made payable therein so as to permit an action upon them to be brought in the precinct where executed; suit must be brought where debtor resides.

Klopenstein v. Woolf, 3 U. 426; 4 P. 227.

Under § 3595, C. L. 1888, providing for the dismissal of an actioin without prejudice when it is objected to at the trial and appears by the evidence that the action is brought in the wrong county, precinct, or city, a defendant need not specially appear to move for such dismissal, but may object by answer and prove the facts on the trial.

Kansas City H. Co. v. Neilson, 10 U. 27; 36 P. 131.

A general appearance and answer waives all objection, though the action was brought in wrong precinct.

Neilson v. Third Jud. Dist. Court, 36 U. 223; 102 P. 868.

Quealy v. Sullivan, 42 U. 565; 132 P. 4.

A complaint alleging that a horse entered on the track in western part of Box Elder precinct, and strayed thence eastward where it was killed by defendant's locomotive, sufficiently states the place of killing as in Box Elder precinct to admit evidence on the point in the absence of a special demurrer for uncertainty, and was sufficient to give the court jurisdiction against the motion to dismiss the appeal.

Burt v. District Court, 39 U. 1; 114 P. 143.

Heninger v. O. S. L. R. Co., 48 U. 368; 159 P. 964.

In an action before a justice of the peace, an officer's return upon a summons, of service in a certain precinct, does not sustain a finding that defendant was not a resident of another precinct, as alleged in the complaint.

Beck v. Lewis, 49 U. 368; 164 P. 480.

7427. (3669.) Change of venue, when allowed. Affidavit. Loss of jurisdiction. Penalty. The court must at any time before the trial, on motion, change the place of trial in the following cases:

1. When it appears to the satisfaction of the justice before whom the action is pending, by affidavit of either party, that such justice is a material witness for either party;

2. When either party makes and files an affidavit that he believes that he cannot have a fair and impartial trial before such justice, by reason of the interest, prejudice, or bias of the justice;

3. When a jury is demanded and either party makes and files an affidavit that he cannot have a fair and impartial trial, on account of the bias or prejudice of the citizens of the precinct or city against him;

4. When from any cause the justice is disqualified from acting;

5. When the justice is sick or unable to act;

6. When none of the parties defendant resided in the precinct in which said action is brought at the time it was commenced, and when any party defendant makes and files an affidavit to the effect that, at the time of the bringing of the action, none of the parties defendant were residents of the precinct wherein said action is brought, and that the party making the affidavit did not contract to perform the obligation in said precinct, and setting forth the place of his residence at the time of the bringing of the action and the particular place, if any, where he contracted to perform the obligation.

Said affidavit shall be conclusive upon the parties to the action and upon the justice as to the particular place, if any, where the defendant contracted to perform the obligation, and also as to the residence of defendants at the time of the bringing of the action, unless some other party defendant shall, within two days thereafter, file with said justice his affidavit stating his place of residence at the time of the bringing of said action was within the precinct where said action was brought. Where the affidavits filed under this provision show that at the time of the bringing of said action all the defendants resided elsewhere than within the precinct wherein said action was brought, the court must change the place of trial without motion being made therefor, and his jurisdiction over said action shall cease, upon filing of such affidavit, for all purposes excepting that his jurisdiction shall continue for the sole purpose of transferring such case to the justice of the peace to whom such action is transferred. Any justice of the peace failing to comply with the provisions of this section shall be deemed guilty of a misdemeanor and shall, as additional punishment, forfeit his office.

Am'd '05, p. 108; '07, p. 75.

Cal. C. Civ. P., § 833*.

Disqualification of judge, Con. art. 8, sec. 13; § 1795.

Process to any part of the county, § 1793.

Commencing action in wrong precinct a misdemeanor, § 8510.

In cases of sickness, etc., another justice may act in his stead, § 7541.

Summons served only in the county, exceptions, § 7442.

Where the defendant files an affidavit that he was not a resident of and did not promise to pay in the precinct in which the suit is started and it is not contradicted, the justice is ousted of jurisdiction.

Campbell v. Durand, 39 U. 118; 115 P. 987.

The amendment of 1905 adding a new subdivision does not affect the old subdivisions; the filing of the affidavit provided by sub. 6 deprives the court of jurisdiction to proceed except for transfer of cases.

Gallegher v. Third Dist. Court, 36 U. 68; 104 P. 750.

Where, upon filing the affidavit provided for by sub. 6, the justice court dismissed the action and the plaintiff appeals, the defendant by answering on the merits waives the non-jurisdiction of the justice's court.

Neilsen v. Third Dist. Court, 36 U. 223; 102 P. 868.

A justice does not lose jurisdiction over a suit brought before him in the wrong precinct until the affidavit herein provided is filed.

Beck v. Lewis, 49 U. 368; 164 P. 480.

The defendant waives the objection to the precinct by suffering a default judgment, especially where the complaint stated the necessary jurisdictional facts and no application for changing the place of trial was made.

Id.

7428. (3670.) Id. But one change allowed. The place of trial cannot be changed on motion of the same party more than once, upon any or all the grounds specified in subs. 1 and 2 of the preceding section.

Cal. C. Civ. P., § 834*.

7429. (3671.) Id. To what court transferred in cases under first five subdivisions. When the court orders the place of trial to be changed, upon any of the grounds specified in the 1st, 2nd, 3rd, 4th, and 5th subs. of § 7427, the action must be transferred for trial to a court the parties may agree upon, and if they do not agree, then to another justice's court in the same county.

Am'd '05, p. 109.

Cal. C. Civ. P., § 835*.

Costs on change of venue, one dollar, § 2527.

7430. (3671x.) Action brought in wrong precinct. Change of venue. When one defendant; when two or more. When the place of trial is changed upon the filing of an affidavit of any party defendant to an action as provided for in sub. 6, § 7427, the action must be transferred for trial as follows:

1. Where there is only one party defendant,—to the justice of the precinct wherein said defendant, as shown by his said affidavit, resided at the time of the bringing of the action;

2. When there are two or more parties defendant to the action who are jointly or jointly and severally bound in any debt or contract, or otherwise jointly liable in the same action, and they resided at the time of the bringing of said action in different precincts of the same county where such action was brought, but neither of whom resided in the precinct where said action is brought at the time of the bringing of the action, as shown by the affidavit provided for in sub. 6, § 7427,—to the justice of the precinct where either one of the defendants resided at the time of the bringing of the action;

3. When there are two or more parties defendant to the action who are jointly or jointly and severally bound in any debt or contract, or are jointly liable in the same action, and who resided in different counties and neither one of whom resided in the precinct where said action was brought at the

time it was commenced, as shown by the affidavit provided for in sub. 6, § 7427,—to a justice of the precinct in the same county where said action was brought and within which one of the defendants may have resided at the bringing thereof;

4. When there are two or more parties defendant to the action who are jointly or jointly and severally bound in any debt or contract, or are jointly liable in the same action, and who resided in different counties and neither of whom resided in the county where said action was brought at the time of the bringing thereof, as shown by the affidavit provided for in sub. 6, § 7427,—to a justice of the peace of the precinct and county where either of said defendants resided at the time of the bringing of said action. '05, p. 109.

Joinder, etc., of parties jointly and severally liable, § 6511, and notes.

Assuming joint liability to confer jurisdiction a misdemeanor, § 8511, and judgment void, § 7448.

7431. (3672.) Id. Proceedings after order of transfer. After an order has been made transferring the action for trial to another court, the following proceedings must be had:

1. The justice ordering the transfer must immediately transmit to the justice of the court to which it is transferred, on payment by the party applying of all costs that have accrued, all the papers in the action, together with a certified transcript from his docket of the proceedings therein;

2. Upon the receipt by him of such papers, the justice of the court to which the case is transferred must issue a notice, stating when and where the trial will take place, which notice must be served upon the parties at least one day before the time fixed for trial.

Cal. C. Civ. P., § 836.

7432. (3673.) Id. Jurisdiction of court to which transferred. From the time the order changing the place of trial is made, the court to which the action is thereby transferred has the same jurisdiction over it as though it had been commenced in such court.

Cal. C. Civ. P., § 837.

7433. (3674.) Case involving title to real property, etc., certified to district court. The parties to an action in a justice's court cannot give evidence upon any questions which involve the title or possession of real property, or which involve the legality of any tax, impost, toll, or municipal fine, nor can any issue presenting such question be tried by such court; and if it appear from the answer of the defendant, verified by his oath, or that of his agent or attorney, that the determination of the action will necessarily involve the question of title or possession to real property, or involve the legality of any tax, impost, toll, or municipal fine, the justice must suspend all further proceedings in the action, and certify the pleadings, and if any of the pleadings are oral, a transcript of the same, from his docket to the clerk of the district court of the county in which said justice's precinct is situated; and from the time of filing such pleadings or transcript with the clerk, the district court has over the action the same jurisdiction as if it had been commenced therein; *provided,* that in cases of forcible entry and detainer, of which justices' courts have jurisdiction, any evidence otherwise competent may be given and any question properly involved therein may be determined.

Cal. C. Civ. P., § 838*.

Forcible entry and detainer, jurisdiction, § 1792, and note.

Forcible entry and detainer generally, §§ 7313-7327.

Similar limitation on city courts, § 1711.

Justice cannot certify causes of which he has no jurisdiction; his only power is to dismiss.

Crismon v. Tufts, 3 U. 251; 2 P. 705.

Requirement hereof, that to oust jurisdiction in the cases mentioned the answer must be under oath, is void as in conflict with acts of congress, especially the Organic Act.

People v. House, 4 U. 369; 10 P. 838.

But if justice render judgment in action of which he has no jurisdiction hereunder, appeal is proper remedy. (Overruling Ducheneau v. House, 4 U. 363; 10 P. 427.)

Cereghino v. Third Dist. Court, 8 U. 455; 32 P. 697.

Facts must be specifically pleaded to oust justice's jurisdiction hereunder.

Willard City v. Woodland, 7 U. 192; 26 P. 284.

Justices of the peace can hear evidence as to possession of real property where action is for forcible entry and detainer, and jurisdiction of such actions is conferred by the statute.

Hyndman v. Stowe, 9 U. 23; 33 P. 227.

Jurisdiction limited to questions of possession only.

Id.

An unverified answer raising the question of the legality of a tax does not oust the justice of jurisdiction; and where a justice of the peace has jurisdiction to hear and determine a case and improperly certifies it to the district court, in attempting to comply with the provisions of this section, the district court acquires no ju-

risdiction and should remand the case to the justice's court on motion.
Pleasant Grove City v. Holman, 18 U. 338; 54 P. 1013.
Where complaint before a justice of the peace against a railroad for killing plaintiff's horse at a point where the road was not fenced alleged that the railroad "passed through lands owned and improved by private owners," the denial of such allegation did not raise a material issue of freehold, ousting the justice of jurisdiction, as provided by this section.
O. S. L. R. R. Co. v. Dist. Court, 30 U. 371; 85 P. 360.

CHAPTER 74.

JUSTICES' COURTS—COMMENCING THE ACTION.

7435. (3675.) Action commenced by filing complaint. Summons within three months. An action in a justice's court is commenced by filing a complaint. The court must indorse on the complaint the date upon which it was filed, and make an entry of such filing in his docket with the date thereof, and at any time within three months thereafter the plaintiff may have summons issued. '99, p. 60.

Cal. C. Civ. P., § 839*.
Commencing action in district court, §§ 6538-6559.
Alias summons within a year, § 7441.
Summons to be served within ninety days of issuance, § 7444.
Chap. 42, laws 1899 (hear appearing as §§ 7435, 7436), in its title purported to repeal §§ 3675, 3676, R. S. 1898, but the act itself contained no repealing clause. Query, whether provisions of § 7435 relating to "manner of service and return of summons" are not still in force, at least as to service by publication.
The action does not terminate from mere failure to have the summons "issued" then and not "served" within that time, though failure to serve within a reasonable time might be ground for motion to dismiss.
Luke v. Bennion, 36 U. 61; 106 P. 712.

7436. (3676.) Summons, form of. The summons must be issued and signed by the justice, and shall be substantially in the following form:

In the Justice's Court, in and for the ..... precinct, city of ....., county of ....., state of Utah.

Before ....., Justice of the Peace.

....., Plaintiff, vs. ....., Defendant. Summons.

The state of Utah to the defendant:

You are hereby summoned to appear before the above entitled court within ten days after the service of this summons upon you, if served within the county in which this action is brought, otherwise within twenty days after this service, and defend the above entitled action, brought against you to recover (stating in general terms the nature of the cause of action), and in case of your failure to do so, judgment will be rendered against you according to the demand of the complaint.

.....
Justice of the Peace.
'99, p. 60.

Summons served only in the county, exception, § 7442.
Form of summons, district court, § 6539; city court, § 1714; municipal court, § 1769.
Process to any part of the county, § 1793.
Summons not in compliance herewith, and all subsequent proceedings are void.
Ex parte Dixon, 1 U. 192.
Judgment by default before time to answer has expired is error, and appeal lies.
Ducheneau v. House, 4 U. 363; 10 P. 427.

7437. (3677.) Appearance or written acknowledgment deemed service. The voluntary appearance of a defendant, or a written acknowledgment of service, by indorsement on the back of a summons or otherwise, shall be deemed valid and sufficient service.

Similar section, § 6545.
Appearance defined, § 7029.

7438. (3678.) Party may appear in person or by attorney. Who may act as attorney. Parties in justices' courts, in cities other than the first class, may appear and act in person, or by attorney, and any person, except the officer by whom the summons or jury process was served, may act as attorney; *provided,* that in cities of the first class, no person other than the parties to the action shall conduct or prosecute a suit in a justice, city, or municipal court except attorneys at law who shall have been regularly admitted to practice in the courts of this state. Am'd '01, p. 116.

Cal. C. Civ. P., § 842*.
Judges prohibited from practicing law, § 1796.
Justice not to purchase judgment, § 7960.
Justice may not practice before any other justice, § 8015.

7439. (3679.) Minor, etc., must appear by guardian. Appointment. When a minor, insane, or incompetent person is a party, he must appear either by his general guardian, if he have one, or by a guardian ad litem appointed by the justice. When a guardian ad litem is appointed by the justice, he must be appointed as follows:

1. If the minor, insane, or incompetent person be plaintiff, the appointment must be made before the summons is served, upon the application of the infant, if he be of the age of fourteen years; if under that age, or if insane, or incompetent, upon the application of a relative or friend;

2. If the minor, insane, or incompetent person be defendant, the appointment must be made at the time the summons is returned, or before the answer, upon the application of the minor if he be of the age of fourteen years, and apply at the time or before the summons is returned. If he be under the age of fourteen, or be insane or incompetent, or neglect so to apply, then upon the application of a relative or friend or any other party to the action, or by the justice on his own motion.

Cal. C. Civ. P., § 843.
Guardian to appear for ward, §§ 7832, 7877.
Appointment of guardian ad litem in district court, §§ 6500, 6501.
Guardian for insane, §§ 5408, 7816.

7440. (3680.) Proceeding when name of defendant unknown. Where the plaintiff is ignorant of the name or part of the name of a defendant, such defendant may be designated in the summons and in any other process or proceeding in the action by a fictitious name, or by so much of his name as is known, adding a description identifying the person intended. The person so designated must thereupon be regarded as a defendant in the action. When his name, or the remainder of his name, becomes known, the justice must amend the proceedings already taken by the insertion of the true or full name, and all subsequent proceedings must be taken under the name so inserted.

Mont. Civ. P., § 1692. Cal. C. Civ. P., § 474*.

7441. (3681.) Alias summons issued within one year. At any time within a year from the date of the filing of the complaint, the plaintiff may issue as many alias summons as he may deem necessary.

Cal. C. Civ. P., § 847*.
Summons to issue within three months, § 7435.

7442. (3682.) Summons can be served only in the county. Exceptions. The summons cannot be served out of the county in which the action is commenced, except when the action is brought upon a joint contract or obligation of two or more persons who reside in different counties, and the summons has been served upon the defendant resident of the county, in which case the summons may be served upon the other defendant out of the county; and except, when an action is brought against a party who has contracted to perform an obligation at a particular place and resides in a different county, in which case summons may be served in the county where he resides; and except also where an action is brought for injury to person or property and the defendant resides in a different county, in which case summons may be served in the county where the defendant resides.

Cal. C. Civ. P., § 848.
Mesne and final process issued to any part of the county, § 1793.
Parties jointly and severally liable, venue, § 7426.
Places of trial where parties jointly and severally liable reside in different counties, § 7430.
Where the courts of Salt Lake county have jurisdiction to enforce the collection of a promissory note, under this section, summons was properly served in another county.
Overland M. Co. v. McMaster, 19 U. 177; 56 P. 977.

7443. (3683.) Summons, how and by whom served. Return. Penalty. A summons issued out of any justice's court may be served by the sheriff of the county, by any constable of the precinct in which such summons is issued when the defendant is within such precinct, by any constable of the precinct in which the defendant resides, or where the defendant upon whom service of summons is to be made is within the precinct for which the constable is elected at the time of the service of the summons, or by a city marshal of the city in which service is to be made, and not otherwise; *provided,* that where there is no acting constable or city marshal in any precinct or city where the

summons is to be served, and the sheriff is absent from such precinct, and such fact appears by the affidavit of the plaintiff or his attorney duly filed, the justice may, in writing, depute any citizen over the age of twenty-one years to serve such summons. The return of service made by a sheriff, constable, or city marshal, within the county in which the action is pending, may be by certificate, and need not be sworn to; in all other instances the return of service must be by affidavit of the person making the service. It shall be unlawful for any person to make service of summons issued out of any justice's court except as in this section provided, and any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor. Am'd '99, p. 110; '05, p. 110; '07, p. 53.

7444. (3683x.) Time for service of summons. Summons out of justices' courts in this state shall be served within ninety days after the same is issued. '07, p. 49.

Summons may issue at any time within three months, § 7435.

Alias summons may issue within a year, § 7441.

7445. (3684.) Time of trial. Notice. Must appear within the hour. When all the parties served with process or some of them have appeared, and the remaining defendants have made default, the justice must fix a day for the trial of said cause, and notify the plaintiff and the defendants who have appeared thereof. The parties are entitled to one hour in which to appear after the time fixed by the justice, but are not bound to remain longer than that time, unless both parties have appeared, and the justice being present is engaged in the trial of another cause.

Cal. C. Civ. P., § 850.

Must appear within one hour, §§ 7474, 7476.

After defendant had filed an answer, the justice could not proceed to trial until he had first set the case and notified the parties in writing of the time and place.

Griffiths v. Justice's Court, 35 U. 443; 100 P. 1064.

Where a defendant appears by filing a demurrer, counsel may assume that the justice's court would give notice of the time of trial, and default judgment entered without such notice is improper.

McMillan v. Forsythe, 47 U. 571; 154 P. 959.

CHAPTER 75.

JUSTICES' COURTS—PLEADINGS.

7447. (3685.) No particular form of pleadings. Verification. Venue.

1. Pleadings are not required to be in any particular form, but must be such as to enable a person of common understanding to know what is intended.

2. Pleadings, except the complaint, may be oral or in writing; if in writing, must be filed with the justice; and, if oral, an entry of the substance must be made in the docket.

3. The complaint must be in writing, and must be verified, and must fully allege and set forth at least one of the grounds mentioned in § 7426, showing that the action is commenced in the city or precinct as required by said section. Am'd '05, p. 103; '07, p. 123.

Cal. C. Civ. P., § 851*.

Pleadings in justice's court, § 7449.

Statutes, etc., to be liberally construed, § 5809.

Pleadings liberally construed, § 6596.

Errors and defects not affecting substantial rights to be disregarded, §§ 6622, 6968.

Complaint and answer in forcible entry, etc., must be verified, § 7325.

Judgment void if complaint unverified or untrue as to venue, § 7448.

Dismissal when complaint not verified, § 7491.

Certain allegations taken as true unless denial verified, §§ 6611, 7489.

A failure to verify a complaint is not jurisdictional, and is waived unless timely objection is made.

S. L. Coffee & Spice Co. v. District Court, 44 U. 411; 140 P. 666.

Though nothing was done in an action from April 25, 1907, when defendant's default was entered, until April 22, 1913, when judgment was entered, an action was pending from the time the complaint was filed.

Id.

7448. (3685x.) Judgment void, when. Review by appeal, certiorari, etc. Every judgment made or given on a complaint not legally verified, or that contains no allegation or an allegation that was untrue of the jurisdictional fact required by this section, or that is founded on a debt or contract in which any person has bound himself, or become liable jointly or jointly and severally

with any other defendant for the purpose of conferring jurisdiction, shall be void; and shall be so declared, on review, at the instance of the party aggrieved, either on appeal or by means of a writ of prohibition, or certiorari, and on such review no recital in the docket, files, or records of the justice of any fact on which jurisdiction is predicated shall be conclusive, but the truth of the allegation as to jurisdictional facts, and also the purpose for which any person has bound himself, or become liable, shall always be open to inquiry. The facts that any person who does not reside in the same precinct or city with another defendant, or in the precinct or city in which such other defendant has contracted to perform the obligations, has bound himself or become obligated or liable thereon jointly or jointly and severally with such other defendant, and that suit is commenced on such contract in the precinct or city where such obligated person resides, shall be considered prima facie evidence that such person has bound himself and become liable solely for the purpose of conferring jurisdiction in the precinct or city in which he resides.

'07, p. 123.

Attorney's fee to successful party on certiorari or prohibition, § 7416.

The provision making a judgment void does not apply to the complaint filed prior to the date this provision becomes effective.

S. L. Coffee & Spice Co. v. District Court, 44 U. 411; 140 P. 666.

A general appearance by defendant, and a plea to the merits without asking for a change of venue, confers jurisdiction of the person and waives the defect of the complaint where it sets forth none of the grounds mentioned in § 7426.

Quealy v. Sullivan, 42 U. 565; 132 P. 4.

The provision of §§ 7426-7447 and this section are technical, and a substantial compliance is sufficient.

Burt v. District Court, 39 U. 1; 114 P. 143.

The district court in certiorari proceedings to review a judgment of the justice's court cannot receive parol evidence.

Beck v. Lewis, 49 U. 368; 164 P. 480.

A complaint in M precinct alleging the killing of cows one mile north of M station grounds at a crossing known as M lane, sufficiently alleges the injury to be within M precinct to permit amendment on appeal to the district court by insertion of the words "within M precinct", and judgment was not void.

Heninger v. O. S. L. R. Co., 48 U. 368; 159 P. 964.

Burt v. District Court, 39 U. 1; 114 P. 143.

7449. (3686.) What pleadings allowed. The pleadings are:

1. The complaint of the plaintiff;
2. The demurrer to the complaint;
3. The answer by the defendant;
4. The demurrer to the answer.

Cal. C. Civ. P., § 852.

Pleadings in district court, §§ 6562-6623.

No particular form of pleadings required; complaint must be verified, § 7447.

When answer must be verified, §§ 6611, 7325, 7489.

7450. (3687.) Complaint defined. The complaint in justices' courts is a concise statement in writing of the facts constituting the plaintiff's cause of action; or the original account, note, bill, bond, or instrument, or a copy thereof, upon which the action is based, which shall be deemed a complaint.

Cal. C. Civ. P., § 753*.

7451. (3688.) Demurrer to complaint. The defendant may, at any time before answering, demur to the complaint.

Cal. C. Civ. P., § 854.

Where a justice did not receive a filing fee for a demurrer sent him by defendant's attorney, but received and retained such demurrer without notifying the attorney, such demurrer was filed in his office for the purpose of an appearance by defendant.

McMillan v. Forsythe, 47 U. 571; 154 P. 959.

7452. (3689.) Answer may contain what. The answer may contain a denial of any or all of the material facts stated in the complaint, which the defendant believes to be untrue, and also a statement, in a plain and direct manner, of any other facts constituting a defense or counterclaim, upon which an action might be brought by the defendant against the plaintiff in a justice's court.

Cal. C. Civ. P., § 855.

Judgment on counterclaim, § 7494.

Denial must be verified in certain cases, § 7489.

Denial of corporate existence, § 6611.

7453. (3690.) New matter in answer deemed controverted. The statement of any new matter in the answer, in avoidance or constituting a defense or counterclaim, must on the trial be deemed controverted by the opposite party.

Cal. C. Civ. P., § 462*.

7454. (3691.) Failure to set up counterclaim. If the defendant omit

to set up a counterclaim in the cases mentioned in § 7452, neither he nor his assignee can afterward maintain an action against the plaintiff therefor.

Cal. C. Civ. P., § 856.

7455. (3692.) Demurrer to answer for insufficiency. Grounds specified. When the answer contains new matter in avoidance or constituting a defense or a counterclaim, the plaintiff may, at any time before trial, demur to the same for insufficiency, stating therein the grounds of such demurrer.

Cal. C. Civ. P., § 857.

7456. (3693.) Proceedings on demurrer. The proceedings on demurrer are as follows:

1. If the demurrer to the complaint is sustained, the plaintiff may, within such time, not exceeding two days, as the court allows, amend his complaint;

2. If the demurrer to a complaint is overruled, the defendant may answer forthwith;

3. If the demurrer to an answer is sustained, the defendant may amend his answer within such time, not exceeding two days, as the court may allow;

4. If the demurrer to an answer is overruled, the action must proceed as if no demurrer had been interposed.

Cal. C. Civ. P., § 858.

7457. (3694.) Amendments, when on terms. Setting aside default. Conditions. Either party may, at any time before the conclusion of the trial, amend any pleading, but if the amendment is made after the issue, and it appear to the satisfaction of the court, by oath, that an adjournment is necessary to the adverse party in consequence of such amendment, an adjournment may be granted. The court may also, in its discretion, when an adjournment will by the amendment be rendered necessary, require, as a condition to the allowance of such amendment, made after issue joined, the payment of costs to the adverse party, to be fixed by the court, not exceeding $10. The court may also, on such terms as may be just, and on payment of costs, relieve a party from a judgment by default taken against him by his mistake, inadvertence, surprise, or excusable neglect, but the application for such relief must be made within ten days after the entry of the judgment and upon an affidavit showing good cause therefor.

Cal. C. Civ. P., § 859*.
Amendments, relief from default, etc., district court, §§ 6618, 6619.

7458. (3695.) Answer or demurrer to amended pleading. When the pleading is amended, the adverse party may answer or demur to it within such time, not exceeding two days, as the court may allow.

CHAPTER 76.

JUSTICES' COURTS—PROVISIONAL REMEDIES.

ARREST OF ABSCONDING DEBTOR.

7462. (3696.) Order to arrest absconding debtor. An order to arrest an absconding debtor may be issued by a justice at any time after the commencement of a civil action, and the defendant may be arrested thereon by the sheriff, constable, or city marshal, and brought before the justice, and detained until duly discharged.

Cal. C. Civ. P., § 861*.
Arrest of debtor, district court, §§ 6630-6655.
No imprisonment for debt, except in case of absconding debtor, Con. art. 1, sec. 16.

7463. (3697.) Id. Executed in any county. The order of arrest may be executed, and the defendant arrested in any county in the state.

7464. (3698.) Affidavit and undertaking required. Before an order for an arrest can be made, the party applying must prove to the satisfaction of the justice, by the affidavit of himself or some other person, the facts upon which the application is founded. The plaintiff must also execute and deliver to the justice a written undertaking in the sum of $300, with sufficient sureties, to the effect that the plaintiff will pay all costs that may be adjudged to

the defendant, and all damages which he may sustain by reason of the arrest, if the same be wrongful, or without sufficient cause, not exceeding the sum specified in the undertaking.

Cal. C. Civ. P., § 862. Qualifications of sureties, generally, § 7223.

7465. (3699.) Defendant taken immediately before magistrate. The defendant, immediately upon being arrested, must be taken to the office of the justice who made the order, and if he be absent or unable to try the action, or if it be made to appear to him, by the affidavit of the defendant, that he is a material witness in the action, the officer must immediately take the defendant before a justice of that or an adjoining precinct of the county, who must take jurisdiction of the action, and proceed thereon as if the summons had been issued and the order of arrest made by him.

Cal. C. Civ. P., § 863*.

7466. (3700.) Officer to notify plaintiff of arrest. The officer making the arrest must immediately give notice thereof to the plaintiff, or his attorney or agent, and indorse on the summons, and subscribe a certificate, stating the time of serving the same, the time of the arrest and of his giving notice to the plaintiff.

Cal. C. Civ. P., § 864.

7467. (3701.) Defendant detained until discharged. The officer making the arrest must keep the defendant in custody until duly discharged by order of the justice.

Cal. C. Civ. P., § 865.
Discharge from arrest, §§ 6656-6664.

ATTACHMENT AND GARNISHMENT.

7468. (3702.) When attachment shall issue. Affidavit. A writ to attach the property of the defendant must be issued by the justice at the time of the commencement of the action, or at any time afterward, on receiving an affidavit by or in behalf of the plaintiff, showing the same facts as are required to be shown by the affidavit for attachment out of the district court.

Cal. C. Civ. P., § 866*.
Decisions on attachment, district court, notes to §§ 6704-6729.
Decisions on garnishment, district court notes to §§ 6730-6755.
Liability for issuing attachment without sufficient affidavit, § 8512.

7469. (3703.) Undertaking required. Before issuing the writ, the justice must require a written undertaking on the part of the plaintiff, with two or more sufficient sureties, in a sum not less than $50 nor less than the amount claimed by the plaintiff, to the effect that if the defendant recover judgment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking.

Cal. C. Civ. P., § 867*.

7470. (3704.) Writ, to whom directed. Requirements. The writ may be directed to the sheriff or to any constable of the county, or the sheriff of any other county, and must require him to attach and safely keep all the property of the defendant within his county, not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, the amount of which must be stated in conformity with the complaint, unless the defendant give him security, by the undertaking of two sufficient sureties, in an amount sufficient to satisfy such demand, besides costs; in which case to take such undertaking.

Cal. C. Civ. P., § 868.
Mesne and final process to any part of the county, § 1793.

7471. (3705.) District court practice applicable. The sections of this code providing for garnishments and attachments out of the district courts, except as in this chapter otherwise expressly provided, are applicable to attachments issued out of justices' courts, the necessary changes and substitutions being made therein.

Cal. C. Civ. P., § 869*.
Attachment and garnishment, §§ 6704-6755, and notes.

CLAIM AND DELIVERY.

7472. (3706.) Procedure as in district court. In an action to recover possession of personal property, the plaintiff may, at the time of issuing summons, or at any time thereafter before answer, claim the delivery of such property to him; and the sections of this code prescribing the practice in proceedings for claim and delivery of personal property in the district court are applicable to like proceedings in justices' courts, the necessary changes and substitutions being made therein.

Cal. C. Civ. P., § 870*. Claim and delivery, §§ 6670-6681, and notes.

CHAPTER 77.

JUSTICES' COURTS—TRIALS AND JUDGMENTS.

7474. (3707.) Judgment upon default. When the defendant fails to appear and answer or demur within the time specified in the summons, or when he fails to appear within one hour after the time specified in the notice, the justice must, upon application of the plaintiff, enter the default of the defendant and hear the evidence offered by the plaintiff, and render judgment in his favor for such sum, not exceeding the amount specified in the complaint, as appears by such evidence to be just.

Cal. C. Civ. P., § 871*.

Trial to begin within one hour, §§ 7445, 7476.

In an action to vacate a judgment entered on default, the recital that "from the evidence I find the defendant is indebted," etc., is not conclusive that the justice heard evidence, but only controvertible prima facie evidence thereof.

McMillan v. Forsythe, 47 U. 571; 154 P. 959.

No conclusive presumption should prevail in favor of a judgment of the justice of the peace. In an action to vacate a default judgment all the facts respecting the conduct of the justice as well as the attorney for the then plaintiff may be shown, and where the plaintiff had no cause of action, and the justice acted corruptly in entering a default judgment, it should be set aside.

Id.

Where judgment is wrongfully entered by default and the defendant, when notified thereof, brings an action in certiorari, and is defeated; laches does not bar him from then bringing an action in equity to set it aside.

Id.

7475. (3708.) Omissions of defendant equivalent to default. In the following cases the same proceedings must be had, and judgment must be rendered, in like manner as if the defendant had failed to appear and answer or demur:

1. If the complaint has been amended, and the defendant fails to answer it as amended within the time allowed by the court;

2. If the demurrer to the complaint is overruled, and the defendant fails to answer at once;

3. If the demurrer to the answer is sustained, and the defendant fails to amend the answer within the time allowed by the court.

Cal. C. Civ. P., § 872.

7476. (3709.) Trial to begin within one hour from time set. Unless postponed as provided in this chapter, or unless transferred to another court, the trial of the action must commence within one hour after the time fixed by the justice for the trial.

Cal. C. Civ. P., § 873*. Failure to appear within one hour, default, § 7474.

7477. (3710.) Postponement on motion of court. Time. The court may, of its own motion, postpone the trial:

1. For not exceeding one day, if, at the time fixed by law or by an order the court for the trial, the court is engaged in the trial of another action;

2. For not exceeding two days, if, by an amendment of the pleadings, or the allowance of time to make such amendment or to plead, a postponement is rendered necessary;

3. For not exceeding three days, if the trial is upon issues of fact, and a jury has been demanded.

Cal. C. Civ. P., § 874. Costs on adjournment by reason of amendment, § 7457.

7478. (3711.) Postponement by consent to time agreed. The court

may, by consent of the parties, given in writing or in open court, postpone the trial to a time agreed upon by the parties.

Cal. C. Civ. P., § 875.

7479. (3712.) Postponement upon application of either party. Grounds. Time. The trial may be postponed upon the application of either party, for a period not exceeding four months:

1. The party making the application must prove, by his own oath or otherwise, that he cannot, for want of material testimony, which he expects to procure, safely proceed to trial, and must show in what respect the testimony expected is material, and that he has used due diligence to procure it, and has been unable to do so;

2. If the application is on the part of the plaintiff, and the defendant is under arrest, a postponement for more than three hours discharges the defendant from custody; but the action may proceed notwithstanding, and the defendant is subject to arrest on execution, in the same manner as if he had not been discharged;

3. If the application is on the part of a defendant under arrest, before it can be granted he must execute an undertaking, with two or more sufficient sureties, to be approved by and in a sum to be fixed by the justice, to the effect that he will render himself amenable to the process of the court during the pendency of the action, and to such as may be issued to enforce the judgment therein; or that the sureties will pay to the plaintiff the amount of any judgment which he may recover in the action, not exceeding the amount specified in the undertaking. On filing the undertaking specified in this subdivision, the justice must order the defendant to be discharged from custody;

4. The party making the application must, if required by the adverse party, consent that the testimony of any witness of such adverse party, who is in attendance, may be then taken by deposition before the justice, and that the testimony so taken may be read on the trial with the same effect and subject to the same objections as if the witness was produced; but the court may require the party making the application to state, upon affidavit, the evidence which he expects to obtain, and if the adverse party thereupon admits that such evidence would be given, and that it be considered as actually given on the trial, or offered and overruled as improper, the trial must not be postponed.

Cal. C. Civ. P., § 876.
Depositions generally, §§ 7163-7188.
Adjournment rendered necessary by amendment, § 7457.

7480. (3713.) Id. Undertaking required if more than thirty days. No adjournment must be granted, unless by consent, for a period longer than thirty days, upon the application of either party, except upon condition that such party file an undertaking in an amount fixed by the court, with two sureties, to be approved by the justice, to the effect that they will pay to the opposite party the amount of any judgment which may be recovered against the party applying, not exceeding the sum specified in the undertaking.

Cal. C. Civ. P., § 877*.
Qualifications of sureties generally, § 7223.

7481. (3714.) Issues arise, when. Of two kinds. Issues arise upon the pleadings, when a fact or conclusion of law is maintained by one party and is controverted by the other. They are of two kinds: (1) of law; and (2) of fact.

Cal. C. Civ. P., § 878.
How issues arise, and how tried, district court, §§ 6777, 6781.

7482. (3715.) Id. Of law. An issue of law arises upon a demurrer to the complaint or answer, or to some part thereof.

Cal. C. Civ. P., § 879.

7483. (3716.) Id. Of fact. An issue of fact arises:

1. Upon a material allegation in the complaint controverted by the answer; and,

2. Upon new matter in the answer, unless an issue of law is joined thereon.

Cal. C. Civ. P., § 880.

7484. (3717.) Issue of law tried by court. An issue of law must be tried by the court.

Cal. C. Civ. P., § 881.

7485. (3718.) Issue of fact tried by court, unless jury demanded. An issue of fact shall be tried by the court unless a jury is demanded before the trial commences.

Cal. C. Civ. P., § 882*. Demand for jury, deposit, § 2554.
Summoning and drawing jurors, §§ 3620-3623.

7486. (3719.) Trial to proceed on failure of party to appear. If either party fails to appear at the time fixed for trial, the trial may proceed at the request of the adverse party.

Cal. C. Civ. P., § 884. Must appear within an hour, §§ 7445, 7474, 7476.
Order of trial, district court, § 6802.

7487. (3720.) Challenges to jurors. Number. The challenges are either peremptory or for cause. Each party is entitled to three peremptory challenges. Either party may challenge for cause on any ground set forth as grounds for such challenge in the district court. Challenges for cause must be tried by the court.

Cal. C. Civ. P., § 885*. Challenge, district court, §§ 6191-6800.

7488. (3721.) Exhibition of account may be required. Refusal. When the cause of action or counterclaim arises upon an account or instrument for the payment of money only, the court, at any time before the trial, may, by an order, require the original to be exhibited to the inspection of and a copy to be furnished to the adverse party, at such time as may be fixed in the order; or if such order is not obeyed, the account or instrument cannot be given in evidence.

Cal. C. Civ. P., § 886. Demand for inspection, etc., district court, §§ 6595, 6598, 7108, 7203, 7204.

7489. (3722.) Certain allegations taken as true, unless denial verified. In all actions, allegations of the execution of written instruments and indorsements thereon, of the existence of a corporation or partnership, or of any appointment or authority, or the correctness of any account duly verified by the affidavit of the party, his agent or attorney, shall be taken as true unless the denial of the same be verified by the affidavit of the party, his agent or attorney.

Kan. (1889) § 4191. Sufficient denial of corporate existence, § 6611.
Complaint must be verified, § 7447. Complaint and answer verified in forcible entry proceedings, § 7325.

7490. (3723.) Judgment by confession. Judgments upon the confession may be entered in any justice's court specified in the confession in any amount of which the justice has jurisdiction.

Cal. C. Civ. P., § 889*. Fee, one dollar, § 2527.
Judgment by confession, transcript, § 6890.

7491. (3724.) When action dismissed without prejudice. Judgment that the action be dismissed without prejudice to a new action may be entered, at plaintiff's cost, in the following cases:

1. When the plaintiff voluntarily dismisses the action before it is finally submitted;

2. When he fails to appear at the time fixed by the justice for the trial, or within one hour thereafter;

3. When the complaint of the plaintiff is not verified;

4. When, after a demurrer to the complaint has been sustained, the plaintiff fails to amend it within the time allowed by the court;

5. When, upon the special appearance of the defendant, it is found from affidavits filed by either party that the action is brought in the wrong county, precinct, or city; and if such objection is made by a party specially appearing for the purpose, and is overruled, then the ruling of the court upon such objection may be reviewed in the district court at the instance of the party aggrieved, either on appeal [or by means of a writ of prohibition.]

The clause in brackets is unconstitutional because it enlarges the office of the writ as defined in constitution.
State ex rel. Robinson v. Durand, 36 U. 93; 104 P. 760.

Cal. C. Civ. P., § 890*.
Judgment of dismissal in district court, § 6848, and note.
Dismissal, costs, district court, §§ 6860, 7042.
Place of trial, §§ 1790, 7426, and notes.

Complaint must be verified, § 7447.

Under § 3595, C. L. 1888, defendant need not appear specially and move for a dismissal, but may object by answer and prove facts on the trial.

Kansas City H. Co. v. Neilson, 10 U. 27; 36 P. 131.

Dismissal on appeal for want of jurisdiction in justice's court.

Id.

Defendant may waive objection by voluntarily appearing and consenting to trial.

Kuhn v. Mount, 13 U. 108; 44 P. 1036.

In an action, before a justice of the peace, against a tenant at will for unlawful detainer, in which the defendant claims specific performance of a verbal lease for more than one year, and asks that the action be certified to the district court, such answer does not state an affirmative defense, and hence the dismissal of the case by the justice, on motion of the plaintiff, and the order of the district court dismissing the case, on appeal, and entering judgment, are not erroneous.

Flygare v. Maloney, 12 U. 497; 23 P. 879.

A defendant who especially appears and moves for dismissal cannot also move to change the place of trial as provided by § 7427, the remedy being alternative.

Robinson v. Durand, 36 U. 93; 104 P. 760.

The plaintiff may file affidavit in opposition to those of defendant, and the court has jurisdiction to determine the facts and the decision of the court, though erroneous, is not in excess of jurisdiction.

Id.

7492. (3725.) Judgment entered at once after verdict. When a trial by jury has been had, judgment must be entered by the justice at once in conformity with the verdict.

Cal. C. Civ. P., § 891.

7493. (3726.) Judgment entered within two days after trial by court. When the trial is by the court, judgment must be entered at the close of the trial, or within two days thereafter.

Cal. C. Civ. P., § 892*.

Trial is not closed hereunder till case submitted for decision.

Kaysen v. Steele, 13 U. 260; 44 P. 1042.

7494. (3727.) Judgment when counterclaim established. Where a counterclaim is established which equals the plaintiff's demand, the judgment must be in favor of the defendant. Where it is less than the plaintiff's demand, plaintiff must have judgment for the residue only. Where it exceeds the plaintiff's demand, the defendant must have judgment for the excess.

Mont. Civ. P., § 1627. Cal. C. Civ. P., § 666*. Counterclaim, §§ 7452-7454.

7495. (3728.) Judgment where defendants not all served. Joint property. If the action be on a contract against two or more defendants, and the summons be served on two or more but not on all, the judgment shall be entered only against those who were served, if the contract be a several or a joint and several contract; but if the contract be a joint contract only, the judgment shall be entered against all the defendants, but shall only be enforced against the joint property of all and the separate property of the defendants served.

Mont. Civ. P., § 1625.

Actions against persons severally or jointly and severally liable, §§ 6511, 6520, 6558.

7496. (3729.) Form of judgments. Judgments in justices' courts must be entered substantially in the form in which they are required to be entered in district courts. When the judgment is rendered in a case where the defendant is subject to arrest and imprisonment thereon, the fact that the defendant is so subject must be stated in the judgment.

Cal. C. Civ. P., § 893*.
Judgments, district court, §§ 6844-6871.

Certain courtmartial judgments may be docketed and enforced, § 3858.

7497. (3730.) If amount found due exceeds jurisdiction, excess remitted. When the amount found due to either party exceeds the sum for which the justice is authorized to enter judgment, such party may remit the excess, and the judgment may be rendered for the residue.

Cal. C. Civ. P., § 894.

Less than $300, §§ 1791, 1792.

7498. (3731.) Defendant may offer to compromise. Effect. If the defendant, at any time before the trial, offer in writing to allow judgment to be taken against him for a specified sum, the plaintiff may immediately have judgment therefor, with the costs then accrued; but if he does not accept such offer before the trial, and fails to recover in the action a sum in excess of the offer, he cannot recover costs, but costs must be adjudged against him from the time of the offer, and if he recovers, be deducted from his recovery. But the offer and failure to accept it cannot be given in evidence to affect the recovery otherwise than as to costs.

Cal. C. Civ. P., § 895*.
Similar provision in district court, § 6893.
Tender, §§ 7215, 7217.
Tender and deposit, costs, § 7044.

Where defendant offered $75 hereunder, and plaintiff refused, asking more, which defendant declined to give, plaintiff could not afterward, before trial, take judgment for $75.

Orth v. Z. C. M. I., 5 U. 419; 16 P. 590.

7499. (3732.) Costs of prevailing party included in judgment. The justice must tax and include in the judgment the costs allowed by law to the prevailing party.

Cal. C. Civ. P., § 896.
No cost bill need be filed, § 7049.
Costs to be itemized on docket, § 7530.
Fees of justice of the peace, § 2527.

7500. (3733.) Abstract of judgment. Form. The justice, on the demand of a party in whose favor judgment is rendered, must give him an abstract of the judgment in substantially the following form (filling blanks according to the fact):

State of Utah, county of ....., ..., plaintiff, v. ....., defendant, in justice's court, before ....., justice of the peace, ... precinct (or city), ..., 19....., (insert date of abstract) judgment entered for plaintiff (or defendant) for $....., on the ..... day of ....., 19..... I certify that the foregoing is a correct abstract of a judgment rendered in said action in my court (or, as the case may be, in the court of ....., justice of the peace, as appears by his docket now in my possession, as his successor in office).

Date.

.....
Justice of the Peace.

Cal. C. Civ. P., § 897.

7501. (3734.) Abstract filed in district court. Docketed. The abstract may be filed in the office of the clerk of the district court of any county in the state, and must be docketed in the judgment docket of the district court thereof. The time of the receipt of the abstract by the clerk must be noted by him thereon and entered in the docket.

Cal. C. Civ. P., § 898*.
Transcript of judgment by confession, statement to accompany, § 6890.
Judgments of city courts may be docketed in any county, § 1719.
Lien of docketed judgment, § 7503.
Judgment so docketed does not become, technically, the judgment of the district court.
Ducheneau v. Ireland, 5 U. 108; 13 P. 87.
An abstract will not be stricken from the record on the ground justice's court had not acquired jurisdiction of the defendant.
Lund v. Booth, 33 U. 341; 93 P. 987.

7502. (3735.) Id. Execution issued from district court. From the time of the docketing in the office of the clerk of any district court, execution may be issued thereon within the same time, in the same manner and with like effect as if issued on a judgment of the district court. Am'd '01, p. 17.

Cal. C. Civ. P., § 899*.
Execution on judgment of city court docketed in district court, § 1719.

7503. (3736.) Judgment a lien only when docketed in district court. A judgment rendered in a justice's court creates no lien upon any lands of the judgment debtor, unless such an abstract is filed and docketed in the office of the clerk of the district court of the county in which the lands are situated, and when so filed and docketed, such judgment is a lien upon the real property of the judgment debtor, not exempt from execution, situated in that county, for the period of eight years from the date of the judgment, unless the judgment be previously satisfied. Am'd '01, p. 16.

Cal. C. Civ. P., § 900*.
Limitation of action on judgment, eight years, § 6465.
Lien of judgments of district courts, §§ 6868, 6869; of U. S. courts, § 3589.
Satisfaction of judgments in district courts, §§ 6881-7003; in U. S. courts, § 3590.
Lien lost by renewal of judgment as against an intervening mortgage.
Smith v. Schwartz, 21 U. 126; 60 P. 305.

CHAPTER 78.

JUSTICES' COURTS—EXECUTIONS.

7505. (3737.) Execution issued within eight years. Execution for the enforcement of a judgment of a justice's court may be issued on the application of the party entitled thereto at any time within eight years from the entry of the judgment. Am'd '01, p. 16.

Cal. C. Civ. P., § 901*.
Execution on judgment docketed in district court, § 7502.
Certain court-martial judgments may be docketed and enforced, § 3858.

7506. (3738.) Id. To whom directed. Contents. The execution when issued by a justice shall be directed to the sheriff, or to a constable of the county, and subscribed by the justice by whom the judgment was rendered or by his successor in office. It shall intelligently refer to the judgment by stating the names of the parties, and the name of the justice before whom, and of the county and precinct where, and the time when, it was rendered, the amount of the judgment, if it be for money, and if less than the whole is due, the true amount due thereon. It must contain, in like cases, similar directions to the sheriff or constable as are required in executions issued from the district court.

Cal. C. Civ. P., § 902*. Execution, district court, §§ 6912-6951.

7507. (3739.) Justice may renew by indorsement. Reissue. An execution may, at the request of the judgment creditor, be renewed before the expiration of the time fixed for its return, by the word "renewed" written thereon, with the date thereof and subscribed by the justice. Such renewal has the effect of an original issue, and may be repeated as often as necessary. If an execution is returned unsatisfied, another may be afterwards issued.

Cal. C. Civ. P., § 903.

7508. (3740.) How executed. Powers of constable. The sheriff or constable to whom the execution is directed must execute the same in the same manner as the sheriff is required to proceed upon the executions directed to him, and the constable, when the execution is directed to him, is vested for that purpose with all the power of the sheriff.

Cal. C. Civ. P., § 904*.

7509. (3741.) Proceedings supplementary; provisions applicable. The provisions of this code as to proceedings supplementary to execution in the district court are applicable to justices' courts, the necessary changes and substitutions being made therein.

Cal. C. Civ. P., § 905*. Proceedings supplementary, §§ 6955-6964.

CHAPTER 79.

JUSTICES' COURTS—NEW TRIALS AND APPEALS.

7512. (3742.) New trial, for what causes granted. A new trial may be granted by the justice on motion made within ten days after the entry of judgment, for any of the following causes:

1. Accident or surprise, which ordinary prudence could not have guarded against;

2. Excessive damages, appearing to have been given under the influence of passion;

3. Insufficiency of the evidence to justify the verdict or other decision;

4. Newly discovered evidence material for the party making the application, which he could not with reasonable diligence have discovered and produced at the time.

A motion for a new trial may be filed after verdict and before entry of judgment.
Bellion v. Durand, 39 U. 532; 117 P. 798.
A motion for a new trial must be based on insufficiency of evidence to justify the verdict and not the judgment.
Id.
The same principles govern the extent and exercise of the granting of a new trial as govern courts of record.
Porter v. Ritchie, 32 U. 381; 91 P. 24.
An appeal cannot be taken until overruling of the motion for new trial.
Id.

7513. (3743.) Id. Application on affidavit and notice. Counter affidavits. The application shall be made upon affidavit and notice. The affidavit shall be filed with the justice, with a statement of the grounds upon which the party intends to rely. The adverse party may use counter affidavits on the motion provided they are filed one day previous to the hearing of the motion.

Cal. C. Civ. P., § 974*.
Notices, and filing and service of papers, district court, §§ 7024-7032.
Decisions on application for new trial, district court, notes to § 6978.

7514. (3744.) Appeal within thirty days of notice of entry of judgment. Notice of appeal. Any person dissatisfied with a judgment rendered in a jus-

tice's court, whether the same was rendered on default or after trial, may appeal therefrom to the district court of the county at any time within thirty days after the rendition of any final judgment. Notice of the entry of judgment must be given to the losing party by the successful party either personally or by publication, and the time of appeal shall date from the service of said notice. If personal service cannot be had and the fact is made to appear by affidavit, the justice shall order that notice of the judgment be given by publication in some newspaper published in the county. Said notice shall be published once a week for two successive weeks and a copy thereof sent by mail addressed to the party at his last known place of residence, and the party shall be deemed to have notice of said judgment on the date of the last publication. If no newspaper be published in the county, then notice of the judgment shall be given by mail addressed to the party at his last known place of residence, and the party shall be deemed to have notice of said judgment on the tenth day after the depositing of said notice so addressed in the United States postoffice. The appeal shall be taken by filing a notice thereof with the justice, or in the clerk's office of the district court to which said appeal is taken, and serving a copy on the adverse party. The notice shall show on its face the title of the court in which it is so filed. In case the appeal is taken by filing a notice in the district court, and upon the perfection of such appeal, the clerk of said court shall notify the justice thereof. Order of service is immaterial. Am'd '07, p. 257.

Appeal to district court final, when, Con. art. 8, sec. 9, and note.

Decisions on appeal to supreme court of cases brought up from justice's courts, note to Con. art. 8, sec. 9.

Action of district court when subject to review by supreme court by certiorari or mandamus, notes to §§ 7384, 7391.

There is no distinction between an appeal from a judgment rendered by a justice's court in forcible entry and detainer and an appeal from a justice's court in other cases.

Hoffman v. Lewis, 31 U. 179; 87 P. 167.

Attacking a default judgment by certiorari is a waiver of notice of judgment.

Forsythe v. Third Judicial Dist. Court, 41 U. 16; 123 P. 621.

A motion to set aside a judgment is a waiver of notice of time for appeal, and it commences to run from date of the motion.

State ex rel. Grant v. First Dist. Court, 38 U. 138; 110 P. 981.

Before amendment of 1907 notice of appeal had to be filed before service, or on same date.

State ex rel. Walton v. Third Dist Court, 36 U. 502; 105 P. 105.

State ex rel. Peart v. Third Dist Court, 32 U. 418; 91 P. 133.

Where a transcript on appeal fails to show service of notice of appeal, appellant should ask for leave to amend the transcript and supply the defects; it cannot be supplied by affidavit showing service.

State ex rel. Snell v. Third Dist. Court, 36 U. 267; 103 P. 261.

A letter of one attorney in the case to opposing attorney, stating the facts of the judgment, in justice court, is sufficient notice.

Tooele Meat & Storage Co. v. Morse, 43 U. 515; 136 P. 965.

When a judgment, pending appeal, has been satisfied by execution, the successful party cannot have further judgment.

Moon v. Bollwinkel, 47 U. 389; 154 P. 939.

A judgment is final for the purpose of an appeal when it terminates the action or proceedings in which it is rendered.

Neilsen v. Third Dist. Court, 36 U. 223; 102 P. 868.

An appeal cannot be taken until the motion for new trial has been overruled.

State ex rel. Porter v. Ritchie, 32 U. 381; 91 P. 24.

Where notice of appeal is filed with the clerk and entitled in the justice's court, the defect is not jurisdictional and may be corrected.

Christensen v. Christensen, 51 U. —; 173 P. 383.

Where the notice of appeal was filed with the clerk of the district court, but it does not show proof of service, the defect may be remedied by making proof of service and filing it with the clerk of the district court.

Id.

Where a notice of appeal is served within time, but filed after thirty days, the appeal must be dismissed.

Greenwood v. Bramel, Judge, 51 U. —; 174 P. 637.

7515. (3745.) Trial anew in district court. Practice. Amendments. All causes appealed to the district court shall be heard anew in said court, and said court may regulate by rule the practice in such cases, in all respects not provided for by statute; *provided,* that pleadings in the district court in said cases may be amended in all respects in the same manner and upon the same terms as are now or hereafter may be provided for the amendment of pleadings in cases originally commenced in the district court.

Amendments, district court, §§ 6618, 6619.

An appeal from the justice's court to the district court entitles the appellant to a trial anew upon the same cause of action and pleadings as in the justice's court, and he is liable to be confronted with the same testimony that could have been introduced on the trial before the justice, and no other.

Skews v. Dunn, 3 U. 186; 2 P. 64.

This section, giving either party on appeal the benefit of all legal objections made below, obliges district court to reverse on finding objections to the venue well taken.

K. C. Hwd. Co. v. Neilson, 10 U. 27; 36 P. 131.

On appeal, the case must be tried de novo, just as if it had been commenced in the district court.

Griffin v. Howell, 38 U. 357; 113 P. 327.

Where the defendant in the justice's court appeared specially and objected that the action was brought in the wrong precinct, but on appeal from dismissal, he answered, on the merits, his objection was waived.

Neilsen v. Third Dist. Court, 36 U. 223; 102 P. 868.

7516. (3746.) Papers to be transmitted within five days; remedy for failure. Upon receiving the notice of appeal and the filing of the undertaking, as required in the next succeeding section, or upon receiving notice from the clerk of the district court that the appeal has been filed and perfected in the clerk's office, and the payment of the fees of the justice for making the transcript, the justice shall, within five days, transmit to the clerk of the district court a certified copy of his docket, the original pleadings, all notices, motions, and other papers filed in the case, and the notice and undertaking on appeal, in case the same has been filed with said justice; and the said justice may be compelled by the district court, by an order entered upon motion, to transmit such papers, and may be fined for neglect or refusal to transmit the same. A certified copy of such order may be served on the justice by the party, his attorney or agent. In the district court either party may have the benefit of all legal objections made in the justice's court. Am'd '07, p. 257.

Cal. C. Civ. P., § 977*.
Fee for preparing and certifying transcript, § 2527.
The transcript of the justice's record on appeal, as to all matters and things required to be and which are recorded therein, is conclusive.
Douglass v. District Court, 45 U. 486; 146 P. 562.

7517. (3747.) Undertaking filed within five days; contents; approval when stay desired. Within five days after filing the notice of appeal, an undertaking shall be filed with the justice, with two or more sureties, in the sum of $100, for the payment of the costs on the appeal; and, if a stay of proceedings be claimed, in a sum equal to twice the amount of the judgment, including costs, when the judgment is for the payment of money, or twice the value of the property, including costs, when the judgment is for the recovery of specific personal property; and shall be to the effect, when the action is for the recovery of money, that the appellant will pay the amount of the judgment appealed from and all costs if the appeal be withdrawn or dismissed, or the amount of any judgment and all costs that may be recovered against him in said action in the district court; and that, if the appellant does not make such payment within thirty days after the entry of judgment in the district court or of the date of withdrawal or dismissal of the appeal, judgment may be entered on motion of the respondent in his favor against the sureties for such amount with interest and costs; and judgment may be entered against the sureties by the court having jurisdiction of the case pursuant to the stipulations herein designated. When the action is for the recovery of or to foreclose a lien on specific personal property, the undertaking shall be to the effect that the appellant will pay the judgment and costs appealed from, and obey the order of the court made therein, if the appeal be withdrawn or dismissed, or will pay the amount of any judgment and costs which may be recovered against him in said action in the district court, and will obey any order of the court therein. When the judgment appealed from directs the delivery of the possession of such property by the appellant, he will not commit or suffer to be committed any waste thereon, and if the appeal be dismissed or withdrawn, or the judgment affirmed, or judgment be recovered against him in the action in the district court, he will pay the value of the use and occupation of the property from the time of the appeal until the delivery of possession thereof; or that he will pay any judgment and costs that may be recovered against him in said action in the district court, not exceeding a sum to be fixed by the justice of the court from which the appeal is taken, or by the clerk or judge of the district court in which the notice of appeal may have been filed (in case said appeal is taken by filing in said district court), and which sum must be specified in the undertaking on appeal, may be waived in writing by the adverse party. When a bond is given to stay execution, it must be approved by the justice or by the clerk or judge of the district court to which said appeal is taken. Am'd '05, p. 21; '07, p. 258.

Cal. C. Civ. P., § 978*; Mont. Civ. P., § 1764*.
Dismissal of appeal, § 7520.
When undertaking is or becomes insufficient, § 7004.
Execution stayed on filing of undertaking, § 7519.
An appeal is complete so far as the justice's court losing jurisdiction is concerned, whether an appeal bond is filed within five days or not.
Pratt v. Gilbert, 8 U. 54; 29 P. 965.

Principal need not sign with sureties; he is already bound.
Butterfield v. Cold S. Co., 11 U. 194; 39 P. 824.
Secs. 7517, 7518, refer to one undertaking, and it is optional with appellant in taking his appeal to either file an undertaking, as provided in this section, or make a deposit, as provided in § 7518.
Hansen v. Anderson, 21 U. 286; 61 P. 219.
The bond on appeal and stay bond may be in one instrument.
Christensen v. Christensen, 51 U. —; 173 P. 383.
The undertaking on appeal may be filed with the clerk and approved by either the clerk or the judge of the district court.
Id.
Where it is admitted in the pleadings that the undertaking was filed with the clerk, it is immaterial whether the instrument shows it was so filed, because the lodging of it with the clerk for filing is sufficient.
Id.
This bond does not stay an attachment.
Wells v. Loofbourow, 49 U. 200; 162 P. 375.

7518. (3748.) Affidavits of sureties. Deposit. The undertaking shall be accompanied by the affidavits of the sureties that they are residents of the county and are each worth the amount specified in the undertaking, over and above their just debts and liabilities, exclusive of property exempt from execution. A deposit of the amount of the judgment appealed from, including all costs, or the value of the property and all costs, in actions for the recovery of specific personal property, with the justice or with the clerk of the district court to which the appeal is taken shall be equivalent to the filing of the undertaking in this section mentioned; and in such case the justice shall transmit the money to the clerk of the district court, if not already deposited with him, to be paid out on the order of the district court. Am'd '07, p. 258.

Cal. C. Civ. P., § 978*.
Qualifications of sureties generally, § 7223.
Surety company need not justify, § 1210.
When undertaking insufficient, § 7004.
Deposit in lieu of undertaking, § 7545.
May file undertaking or make a deposit.
Hansen v. Anedrson, 21 U. 286; 61 P. 219.
Appeal dismissed for failure of sureties to justify.
Hoffman v. Lewis, 31 U. 179; 87 P. 167.
Pratt v. Jarvis, 8 U. 5; 28 P. 869.

7519. (3749.) Undertaking stays execution. Order. Relinquishment. Costs. If an execution be issued, on the filing of the undertaking staying all proceedings, the justice shall by order direct the officer to stay all proceedings on the same. Such officer must, upon payment of his fees for services rendered on the execution, thereupon relinquish all property levied upon and deliver the same to the judgment debtor, together with all moneys collected from sales or otherwise. If his fees be not paid, the officer may retain so much of the property or proceeds thereof as may be necessary to pay the same.

Cal. C. Civ. P., § 979.
Approval of undertaking when stay desired, § 7517.

7520. (3750.) When appeal may be dismissed. Damages for appeal for delay. No failure to comply with any provisions of law relating to appeals from justice's court to the district court, except a failure to serve and file a notice of appeal, shall defeat the jurisdiction of the district court over the case attempted to be appealed.

On notice, an appeal shall be dismissed for the following cause: That notice of appeal was not served and filed within thirty days after notice of rendition of judgment; *provided,* that the pendency of motion for new trial shall not enlarge the time for appeal.

An appeal may be dismissed, on notice, in the discretion of the court, for either of the following causes:

1. That the papers were not filed in the district court, and the advance fee required therefor was not paid, within thirty days after the transcript was received by the clerk;

2. That the undertaking was not filed within five days after the filing of notice of appeal;

3. That appellant failed to file a new and sufficient undertaking when so ordered by the court.

On the trial of the case on appeal to the district court, if it appears to the court that the appeal was made solely for delay, it may add to the costs such damages as may be just, not exceeding twenty-five per cent of the judgment appealed from; *provided,* such issue is raised by the pleadings, which may be informally amended for the purpose. Am'd '99, p. 74; '07, p. 259.

When undertaking insufficient, new one may be required by court, § 7004.
Costs on dismissal, § 7042.
When prevailing party entitled to costs on appeal, § 7040.
Action of district court in dismissing or refusing to dismiss appeal from justice's court may be reviewed on certiorari or mandamus, notes to §§ 7384, 7391.

Decisions on appeals from justice's courts to supreme court, note to Con. art. 8, sec. 9.

The district court cannot dismiss an appeal from a justice's court except where the informalities are such as to render the appeal ineffectual.

Wescott v. Eccles, 3 U. 258; 2 P. 525.

District courts have no original jurisdiction of an offense under a city ordinance, and where the record does not show how the case came into the district court, plaintiff's appeal will be dismissed.

Spanish Fork City v. Thomas, 4 U. 485; 11 P. 667.

When it appears that a cause over which a justice's court has no jurisdiction, owing to the fact that the cause involves the trial of title to land, and the cause has been brought into the district court by appeal, it is the duty of the district court to dismiss the appeal because the justice had no jurisdiction.

Cereghino v. Third District Court of Utah Territory, 8 U. 455; 32 P. 697.

Bond filed one day too late; effect.

Pratt v. Gilbert, 8 U. 54; 29 P. 965.

Where the district court refused to dismiss an appeal from a justice's court on account of delay in filing, and the record was silent as to whether the rules governing appeals had been complied with, such action of the district court would not be disturbed.

Hyndman v. Stowe, 9 U. 23; 33 P. 227.

Appeals dismissed on account of failure to pay fees and docket appeal within thirty days.

Van Wagonen v. Barben, 9 U. 481; 35 P. 497.

Henderson v. Higgins, 9 U. 290; 34 P. 61.

Legg v. Larson, 7 U. 110; 25 P. 731.

Salt Lake City v. Redwine, 6 U. 335; 23 P. 756.

Where an appeal has been taken from justice's court to the district court and new parties are added, the latter court does not lose jurisdiction of the case by dismissing as to the only party in the justice's court.

Hamner v. Ballantyne, 16 U. 436; 52 P. 770.

See Skews v. Dunn, 3 U. 186; 2 P. 64.

Where a district court clerk was prohibited from filing papers on appeal from a justice of the peace until the advance filing fee was paid, and the defendant who appealed failed to pay the fee within the time required, payment of the fee by plaintiff in order to move to dismiss the appeal was not a voluntary payment which waived his right to have the appeal dismissed.

Little v. Blank, 31 U. 222; 87 P. 708.

When sureties failed to justify on demand, appeal dismissed.

Hoffman v. Lewis, 31 U. 179; 87 P. 167.

Pratt v. Jarvis, 8 U. 5; 28 P. 869.

An appeal from a justice's court to the district court is statutory, and the statutes granting it must be substantially complied with.

Hoffman v. Lewis, 31 U. 179; 87 P. 867.

Dismissal for failure to serve and file notice of appeal on same day. (This case arose prior to amendment of 1907.)

State v. Third District Court, 32 U. 418; 91 P. 133.

Jurisdictional defects on an appeal are not waived by consenting that the case be set for trial after motion to dismiss the appeal has been overruled.

Steele v. Third Dist. Court, 41 U. 402; 126 P. 321.

Unless the record discloses that the district court acted capriciously or arbitrarily, its ruling in dismissing an appeal or refusing to reinstate it will not be disturbed.

Kyrimes v. Kyrimes, 45 U. 168; 143 P. 232.

Where pleadings admit that notice of appeal was served by mail, but there is no acknowledgment or proof of service of the notice, the service is sufficient, and the court should permit the record to be amended by showing proof of service.

Christensen v. Christensen, 51 U. —; 173 P. 383.

A notice of judgment entitled in the wrong court is not effectual, but may be amended.

Greenwood v. Bramel, Judge, 51 U. —; 174 P. 637.

7521. (3751.) Proceedings after appeal dismissed. When an appeal is dismissed, and a certified copy of the order of dismissal is filed in the justice's court in which the judgment is rendered, the judgment appealed from shall have the same force and validity, and may be enforced in the same manner as if no appeal had been taken. In case an appeal is taken to the supreme court after a certified copy of the order aforesaid is filed in the justice's court, and execution is stayed, the judgment therein shall be suspended until further order of the district court.

N. Dak. (1895) § 6780*.

Judgment against sureties after dismissal, § 7517.

The dismissal of the appeal does not adjudicate the judgment appealed from.

Campbell v. Durand, 39 U. 18; 115 P. 986.

CHAPTER 80.

JUSTICES' COURTS—GENERAL PROVISIONS.

7525. (3752.) Contempt for which justice may punish. A justice may punish, as for contempt, persons guilty of the following acts, and no other:

1. Disorderly, contemptuous, or insolent behavior toward the justice while holding court, tending to interrupt the due course of a trial or other judicial proceeding;

2. Breach of the peace, boisterous conduct, or violent disturbance in the presence of the justice, or in the immediate vicinity of the court held by him, tending to interrupt the due course of a trial or other judicial proceeding;

3. Disobedience or resistance to the execution of a lawful order or process made or issued by him;

4. Disobedience to a subpœna duly served, or refusing to be sworn or to answer as a witness;

5. Rescuing any person or property in the custody of an officer by virtue of an order or process of the court held by him.

Cal. C. Civ. P., § 906.
Contempts generally, § 7058, and note.
General power of courts respecting conduct of proceedings, §§ 1802, 1818.
Assault in presence of court, bond, § 8579.
Newspaper publications concerning courts are not contempts hereunder.
People v. Carrington, 5 U. 531; 17 P. 735.

7526. (3753.) Id. Procedure when committed in presence of court. When a contempt is committed in the immediate view and presence of the justice, it may be punished summarily; to that end an order must be made reciting the facts as they occured, and adjudging that the person proceeded against is thereby guilty of contempt, and that he be punished as therein prescribed.

Cal. C. Civ. P., § 907.

7527. (3754.) Id. When not committed in presence of court. When the contempt is not committed in the immediate view and presence of the justice, a warrant of arrest may be issued by such justice, on which the person so guilty may be arrested and brought before the justice immediately, when an opportunity to be heard in his defense or excuse must be given. The justice may thereupon discharge him, or may convict him of the offense.

Cal. C. Civ. P., § 908.

7528. (3755.) Id. Penalty. A justice may punish for contempts by fine or imprisonment, or both; such fine not to exceed in any case $100, and such imprisonment one day.

Cal. C. Civ. P., § 909.

7529. (3756.) Id. Entry in docket. The conviction, specifying particularly the offense and the judgment thereon, must be entered by the justice in his docket.

Cal. C. Civ. P., § 910.
Record of justice, how proved, § 7088.

DOCKET OF JUSTICE.

7530. (3757.) Justice to keep docket. Entries. Every justice must keep a book, denominated a "docket," in which must be entered:

1. The title to every action or proceeding;

2. The object of the action or proceeding, and, if a sum of money be claimed, the amount thereof;

3. The date of the service of the summons and the time of its return; and if an order to arrest the defendant be made, or a writ of attachment be issued, a statement of the fact;

4. The time when the parties, or either of them, appear, or their non-appearance, if default be made; a minute of the pleadings and motions, if in writing, referring to them; if not in writing, a concise statement of the material parts of the pleadings;

5. Every adjournment, stating on whose application and to what time;

6. The demand for a trial by jury, when the same is made, and by whom made, the order for the jury and the time appointed for the return of the jury, and for the trial;

7. The names of the jurors who appear and are sworn, and the names of all witnesses sworn, and at whose request;

8. The verdict of the jury, and when received; if the jury disagree and are discharged, the fact of such disagreement and discharge;

9. The judgment of the court, specifying the costs included, and the time when rendered;

10. An itemized statement of the costs;

11. The issuing of the execution, when issued, and to whom; the renewals thereof, if any, and when made; and a statement of any money paid to the justice, and when and by whom;

12. The receipt of a notice of appeal, if any be given, and of the appeal bond, if any filed.

Cal. C. Civ. P., § 911*.
Certain court-martial judgments may be docketed, § 3858.
Where an order requiring security for costs was not recorded it was competent for the

parties to stipulate that the order was made on a certain date.
Douglas v. District Court, 45 U. 486; 146 P. 562.
The transcript of the justice's record on appeal, as to all matters and things required to be and which are recorded therein, is conclusive.
Id.
Also on certiorari.
McMillan v. Durand, 38 U. 274; 112 P. 807.
Griffiths v. Justice Court, 35 U. 443; 100 P. 1064.
In an action to set aside a judgment because of fraud, the recital "from the evidence I find" is only prima facie proof that evidence was introduced.
McMillan v. Forsythe, 47 U. 571; 154 P. 959.

7531. (3758.) Id. Entries, when and where made. Prima facie evidence. The several particulars of the next preceding section specified must be entered under the title of the action to which they relate, and, unless otherwise in this code provided, at the time when they occur. Such entries in a justice's docket, or a transcript thereof, certified by the justice, or his successor in office, are prima facie evidence of the facts so stated.

Cal. C. Civ. P., § 912.

7532. (3759.) Index to docket. A justice must keep an alphabetical index to his docket, in which must be entered the names of the parties to each judgment, with a reference to the page of entry. The names of the plaintiffs must be entered in the index in the alphabetical order of the first letter of the family name.

Cal. C. Civ. P., § 913.

7533. (3760.) Dockets and files delivered to successor. Every justice of the peace, upon the expiration of his term of office, must deposit with his successor his official dockets and all papers filed in his office, as well his own as those of his predecessors or any other which may be in his custody, to be kept as public records.

Cal. C. Civ. P., § 914.
The provisions of §§ 7533-7536 do not render invalid § 1724, which provides for transfer of records and files to clerk of city court where several precincts have been abolished and merged into one.
Nystrom v. Clark, 27 U. 186; 75 P. 378.

7534. (3761.) Id. Where deposited when vacancy occurs. If the office of a justice becomes vacant by his death or removal from the precinct or city, or otherwise, before his successor is elected and qualified, the docket and papers in possession of such justice must be deposited in the office of some other justice in the precinct or city, to be by him delivered to the successor of such justice. If there is no other justice in the precinct or city, then the docket and papers of such justice must be deposited in the office of the county clerk of the county, to be by him delivered to the successor in office of such justice.

Cal. C. Civ. P., § 915*.

7535. (3762.) Id. Jurisdiction of successor. Who is successor. Any justice with whom the docket of his predecessor or of another justice is deposited has and may exercise over all actions and proceedings entered in such docket the same jurisdiction as if originally commenced before him. In case of the creation of a new county, or of the change of the boundary between two counties, any justice into whose hands the docket of a justice formerly acting as such within the same territory may come is for the purpose of this section considered the successor of such former justice.

Cal. C. Civ. P., § 916.

7536. (3763.) In case of vacancy, etc. The justice elected or appointed to fill a vacancy is the successor of the justice whose office became vacant before the expiration of a full term. When a full term expires, the same or another person elected to take the office in the same precinct or city from that time is the successor.

Cal. C. Civ. P., § 917*.

7537. (3764.) Id. When two or more equally entitled. When two or more justices are equally entitled, under the next preceding section, to be deemed the successors in office of the justice, the board of county commissioners for that county must, by resolution, spread upon its minutes, designate which justice is the successor of a justice going out of office, or whose office has become vacant.

Cal. C. Civ. P., § 918*.

7538. (3765.) Subpœnas, etc., issued to any part of county. Justices of the peace may issue subpœnas in any action or proceeding in the courts held by them, and final process on any judgment recovered therein, to any part of the county.

Cal. C. Civ. P., § 919.
Witness not required to attend out of the county, unless within thirty miles, § 7131.
Mesne and final process to any part of county, § 1793.
Witnesses, etc., in district court, §§ 7122-7151.

7539. (3766.) Papers, except subpœnas, must be filled out by justice. Every paper made or issued by a justice, except a subpœna, must be issued without a blank to be filled by another, otherwise it is void.

Cal. C. Civ. P., § 920*.
Party may serve his own subpoenas.
Smith v. Nelson, 23 U. 512; 65 P. 485.

7540. (3767.) Justice to receive and disburse money. Justices of the peace must receive from the sheriff or constables of their county all money collected on any process or order issued from their courts respectively, and must pay the same, and all money paid to them in their official capacity, over to the parties entitled or authorized to receive it, without delay.

Cal. C. Civ. P., § 921.

7541. (3768.) Another justice to attend in case of disability. In case of the sickness or other disability, or necessary absence of a justice on a return day of a summons, or at the time appointed for a trial, another justice of the same precinct or city, or an adjoining precinct of the county, may, at his request, attend in his behalf, and thereupon is vested with the power for the time being of the justice before whom the summons was returnable. In that case, the proper entry of the proceedings before the attending justice, subscribed by him, must be made in the docket of the justice before whom the summons was returnable. If the case is adjourned, the justice before whom the summons was returnable may resume jurisdiction.

Cal. C. Civ. P., § 922*.
Change of venue in case of sickness of justice, § 7427.

7542. (3769.) Security for costs may be required. Justices of the peace may in all cases require a deposit of money or an undertaking as security for costs of court, before filing the complaint. If the plaintiff is a non-resident, however, the defendant may demand that the plaintiff make a deposit of money or give an undertaking with two good sureties in any sum not exceeding $100, as the court may determine, for payment of costs adjudged against the plaintiff; and all proceedings shall stop unless such undertaking is given, and if not given within twenty days the suit shall be dismissed without prejudice.

Cal. C. Civ. P., § 923*.
Qualifications of sureties generally, § 7223.
Non-resident required to furnish security for costs, district court, § 7051.
Security for costs must be furnished within twenty days after the order requiring it, not twenty days after demand.
Douglas v. District Court, 45 U. 481; 146 P. 562.

7543. (3770.) Prevailing party entitled to costs. The prevailing party in justices' courts is entitled to costs of the action, and also of any proceedings taken by him in aid of an execution issued upon any judgment recovered therein.

Cal. C. Civ. P., § 924.
Costs on appeal from justice's court, § 7040.
No cost bill need be filed in justices' courts, § 7049.

7544. (3771.) Justices' courts of limited jurisdiction, etc. Provisions of code applicable. Justices' courts being courts of peculiar and limited jurisdiction, only those provisions of this code which are, in their nature, applicable to the organization, powers, and course of proceedings in justices' courts, or which have been made applicable by special provisions in this code, are applicable to justices' courts and the proceedings therein.

Cal. C. Civ. P., § 925.
Cited in: McMillan v. Forsythe, 47 U. 571; 154 P. 959.
Provisions of code, etc., applicable to city courts, § 1729, to municipal courts, § 1763.

7545. (3772.) Deposit in lieu of undertaking. In all civil cases arising in justices' courts, wherein an undertaking is required as prescribed in this code, the plaintiff or defendant may deposit with said justice a sum of money

equal to the amount of the required undertaking, which may be received and held by the justice in place of said undertaking.

Cal. C. Civ. P., § 926*. Deposit in lieu of undertaking on appeal, § 7518.

TITLE 118.

PROBATE CODE.

7553. (3773.) Title known as Probate Code. This title shall be known as the Probate Code.

CHAPTER 1.

JURISDICTION.

7554. (3774.) Where will proved and letters granted. Wills must be proved and letters testamentary or of administration granted:

1. If the decedent be a resident of the state, in the county in which he had his residence at the time of his death;

2. If the decedent be a non-resident of the state: First, in the county in which he may have died leaving estate therein; second, in any county in which any part of the estate may be, the decedent not having left estate in the county in which he died, or having died without the state;

3. In all other cases, in the county where application for letters is first made.

Cal. C. Civ. P., § 1294*.
Civil business arising in county must be tried there, Con. art. 8, sec. 5, and note.
An administrator may be appointed for a non-resident decedent, though he left no property in this state, and the only property is a claim for damages for wrongful death.
In re Lowham's Estate, 30 U. 436; 85 P. 445.
In re Tasanen's Estate, 25 U. 396; 71 P. 984.

7555. (3775.) Id. Concurrent jurisdiction. When a case is originally within the jurisdiction of the courts of two or more counties, the district court of that county in which application is first made for letters testamentary or of administration has exclusive jurisdiction of the settlement of the estate.

Cal. C. Civ. P., § 1295*.

7556. (3776.) Disqualification of judge. Procedure. Where a judge is next of kin to the decedent, or is a legatee or devisee under the will, or is a witness thereto, or is otherwise interested or disqualified in any probate matter, he shall order the same transferred to the district court of another district, or to be heard before another judge of the same district, or procure a judge of another district to hold court for the hearing of such matter. Any proceeding so removed may be returned upon petition of any person interested, upon the election or appointment of another judge not disqualified. The clerk making such transfer must transmit to the clerk of the court to which the proceeding is transferred a certified copy of the order of transfer and all the papers on file in his office relating to the matter.

Cal. C. Civ. P., §§ 1430*-1433*. See Sup. (1893) p. 1007. Disqualification of judges, Con. art. 8, sec. 13; §§ 1795, 1796.

7557. (3777.) Orders at chambers. Hearing at any place in district, when. The judge of the district court in which any probate or guardianship matter is pending may make any order relating to such proceeding in chambers at any place in his district, and such order shall have the same force and effect as if made by the court sitting in the proper county. The hearing of any matter requiring notice shall be had at the time and place appointed or at the time to which the same may be postponed, except that where there is no contest, or where all the parties consent, such hearing may be had at any place within the judicial district in which the matter is pending.

Iowa, McClain's An. C. (1888) § 3510*.
Powers at chambers, §§ 1679, 1817.
Stipulation to try or hear matter at any place, § 1680.

7558. (3778.) Judges, powers of. Code of Civil Procedure applicable. The district and supreme courts and the judges thereof sitting in probate and guardianship matters shall exercise all such powers, consistent with the provisions of this title, as are or may be conferred upon those courts or judges, respectively, in other proceedings; and, except as otherwise provided in this title, the provisions of the Code of Civil Procedure shall be applicable to and constitute the rules of practice in probate and guardianship proceedings.

Cal. C. Civ. P., § 1713*.

Jurisdiction of district court, Con. art. 8, sec. 7; § 1667.

Trials in conformity with civil procedure, § 7872.

Appeals lie from final orders and decrees of probate court, Con. art. 8, sec. 9.

Conclusiveness of decrees, § 7559, and note.

Trial by the court; jury trial, § 7873.

Execute townsite conveyances, § 6141.

Under provisions of this section, a failure to demur below to a petition to set aside the appointment of an administrator is a waiver of the objection, and under § 6993, providing that any party to a judgment may appeal therefrom, the petitioner cannot appeal from a denial of his petition, because not a party to the probate proceedings.

In re Tasanen's Estate, 25 U. 396; 71 P. 984.

Where an assignment of an interest in the estate or compromise agreement is made by the heir while the estate is in administration, a court of equity has jurisdiction to determine the controversy which, if determined, permits the probate court to apportion the estate to those entitled thereto, and the probate court, if having concurrent jurisdiction, possesses it only because it possessed the power to adjudicate questions in equity.

Dunn v. Wallingford, 47 U. 491; 155 P. 347.

7559. (3779.) Validity of probate and guardianship orders and decrees. No order or decree affecting the title to real property, heretofore or hereafter made in any probate or guardianship matter, shall be held to be void at the suit or instance of any person claiming adversely to the title of the decedent or ward, or under a title not derived from or through the decedent or ward, on account of any want of notice, defect, or irregularity in the proceedings, or of any defect or irregularity in such order or decree, if it appears that, before the order or decree was entered, the executor, administrator, or guardian, as the case may be, was appointed by a court of competent jurisdiction, upon such notice as was or may be prescribed by law; and, in an estate in which a competent court shall have appointed an executor, administrator, or guardian upon due notice, no objection to any subsequent order or decree therein can be taken by any person claiming under the deceased or under the ward, on account of any such want of notice, defect, or irregularity, in any other manner than on direct application to the same court, made at any time before distribution, or on appeal.

Appeal from final judgments in probate matters, Con. art. 8, sec. 9, and note.

Validity of clerk's orders, etc., § 7564.

Conclusiveness of probate orders and decrees, §§ 7560, 7564, 7752, 7766, 7796, 7867, 7870.

Conclusiveness of judgments in general, note to § 6853.

Orders and decrees need not recite jurisdictional facts, § 7870.

Decree showing that due notice was given is conclusive evidence of that fact, § 7866.

Decree affecting real property to be recorded, § 7871.

Presumption in favor of judgment, on appeal, note to § 6994.

Nothing to the contrary appearing, it will be presumed that the probate court proceeded regularly in the appointment of an administrator.

Uebel v. Maltese, 2 U. 430.

Order for sale of realty is void and subject to collateral attack, where petition for order fails to recite jurisdictional facts, and the order of sale also fails to recite such facts.

Needham v. S. L. City, 7 U. 319; 26 P. 920.

The appointment of an administrator cannot be collaterally attacked in an action for the wrongful death of the decedent.

Chilton v. U. P. Ry. Co., 8 U. 47; 29 P. 963.

Everything consistent with the record, which would have warranted the appointment and issue of letters of administration, will be presumed to have been found and acted upon by the probate court. Acts done by the court which presuppose the existence of other acts to make them legally operative are presumptive proof of the latter.

Harris v. Chipman, 9 U. 101; 33 P. 242.

An adjudication in the probate court has the effect of a judgment, and cannot be collaterally attacked.

Rogers v. Thompson, 9 U. 46; 33 P. 234.

West v. Utah National Bank, 8 U. 374; 31 P. 987.

Letters of administration cannot be collaterally attacked for want of a seal or bond given by administrator.

Harris v. Chipman, 9 U. 101; 33 P. 242.

A court of chancery has power to review a decree of the probate court where the same has been obtained by fraud or mistake, though plaintiff had notice of all the proceedings in the probate court, and the time for appeal from the decree of distribution had expired.

Benson v. Anderson, 10 U. 135; 37 P. 256.

Probate courts were courts of record and their judgments imported absolute verity until reversed or modified, and, as to all matters within their cognizance, were courts of general jurisdiction.

Amy v. Amy, 12 U. 279; 42 P. 1121.

A decree of a territorial probate court, until reversed or modified, is as final and conclusive, between the parties, as a judgment of the district court.

Ehrngren v. Gronlund, 19 U. 411; 57 P. 268.

A decree of the probate court, by which the interest of certain heirs in the estate of their father was distributed to one of the judgment creditors of the heirs, was conclusive, where no appeal was taken, on the assignee for creditors of the heirs.

Snyder v. Murdock, 26 U. 233; 73 P. 22.

Where relatives failed to apply for letters, decree appointing creditor was not void.

In re Owen's Estate, 32 U. 469; 91 P. 283.

Probate proceedings are in rem, and the court acquires jurisdiction of the property of the estate and of the person claiming any interest therein by the statutory notice of a hearing of the petition for letters, and other notices provided for are not jurisdictional, and a disregard thereof is a mere irregularity and assailable, in the absence of fraud, in a direct proceeding only.

Barrette v. Whitney, 36 U. 574; 106 P. 522.

7560. (3780.) Objection to decree, when available. An objection to any paper, petition, decree, or order in any probate or guardianship matter, for an erroneous or defective statement or determination of any fact necessary to jurisdiction which actually existed, or for an omission to find or state any such fact in such paper, petition, decree, or order, is available only on direct application to the same court, or on appeal.

N. Dak. (1895) § 6185.
Any interested person has right to be heard at any hearing, § 7869.
Correction of mistakes in settlements, §§ 7752, 7877.
Validity and conclusiveness of probate orders and decrees, collateral attack, § 3559, and note.

CHAPTER 2.

POWERS OF CLERK.

7561. (3781.) Clerk, powers of. The clerk of the district court shall have and exercise within his county all the powers and jurisdiction of the court, and of the judge thereof, in the following matters:

1. He may consider petitions for the appointment of administrators, executors, and guardians; and for the probate of wills, and any other petition or written motion filed in any probate or guardianship matter, and may set the time for the hearing of the same, and prescribe the notice to be given;

2. He may fix the amount of the bond of the executor, administrator, or guardian, and for that purpose may hear testimony as to the property, rents, issues, and profits;

3. He may in all cases examine sureties, and approve bonds and undertakings;

4. He may appoint a special administrator, and fix the amount of his bond;

5. He may appoint appraisers;

6. He may designate the terms of and enter the order for publication of notice to creditors;

7. He may grant an order of sale of perishable property.

Iowa, McClain's An. C. (1888) § 245*.
Notice, how given, time, §§ 7856-7868.
Clerk to give notice where not otherwise provided, § 7856.
Notice may be dispensed with by consent in writing, § 7868.
Posting in three public places, § 7864.
Published in paper selected by applicant, § 7028.

7562. (3782.) Minutes of court. Record of clerk's orders. All orders made and proceedings had by the clerk under the provisions of the next preceding section shall be by him spread at large upon the minutes of the court.

7563. (3783.) Review of clerk's order. Any person aggrieved by any order made or entered by the clerk under the powers conferred in this chapter may have the same reviewed in court at the same or at the next term, and not afterwards, upon motion filed, and upon such notice as the court may prescribe. Upon the filing of such notice, the clerk shall place the cause or proceeding on the docket, and the matter shall stand for hearing or trial de novo in open court.

Iowa, McClain's An. C. (1888) § 246*.

7564. (3784.) Validity of clerk's order. The records, orders, and judgments made and entered by the clerk as hereinbefore provided, and not reversed, set aside, or modified by the court, shall stand and be of the same force, validity, and effect, and shall be entitled to the same faith and credit, as if made by the court.

Iowa, McClain's An. C. (1888) § 247.
Decisions on conclusiveness of probate orders, etc., note to § 7559.
Validity and conclusiveness of orders and decrees generally, §§ 7559, 7560, 7752, 7766, 7867, 7870.

CHAPTER 3.

PROBATE OF WILLS.

PETITION AND PROOF.

7565. (3785.) Duty of custodian of will to deliver same. Damages. Every custodian of a will, within thirty days after receipt of information that the maker thereof is dead, must deliver the same to the district court having jurisdiction of the estate or to the executor named therein. Any person who fails to produce the same after receiving reasonable notice so to do may be committed to jail until he does, and shall be liable for all damages occasioned by his failure.

Cal. C. Civ. P., § 1298*.
Execution and revocation of wills, §§ 6311-6346.
Interpretation of wills, §§ 6347-6381.
Legacies, etc., §§ 6382-6403.
Succession, §§ 6404-6430.

7566. (3786.) Who may petition for probate. Any person interested may, at any time after the death of the testator, petition the court to have the will proved.

Cal. C. Civ. P., § 1299*.

7567. (3787.) Petition, contents of. A petition for the probate of a will should show:

1. The jurisdictional facts;
2. Whether the person named as executor consents to act or renounces his right to letters testamentary;
3. The names, ages, and residences of the heirs and devisees of the decedent, so far as known to the petitioner;
4. The probable value and character of the property of the estate;
5. The name of the person for whom letters testamentary are prayed.

Cal. C. Civ. P., § 1300*.

7568. (3788.) Executor forfeits rights, when. If the person named in a will as executor, for thirty days after he has knowledge of the death of the testator and that he is named as executor, fails to petition for the probate of the will, and for letters testamentary, he may be held to have renounced his right to letters, and the court may appoint any other competent person administrator, unless good cause for delay is shown.

Cal. C. Civ. P., § 1301*.
Person indicated by will, though not named, entitled to letters, § 6398.

7569. (3789.) Hearing and notice. When the petition is filed, it must be set for hearing, notice of which shall be given by publication, or by posting, as the court may direct, and by the mailing of notices to the heirs, and to the executor, if he be not the petitioner. Am'd '99, p. 33.

Cal. C. Civ. P., §§ 1303*, 1304*.
Notice generally, time, form, etc., §§ 7856-7868.
Personal service equivalent to mailing, § 7863.
Notice waived in writing by parties interested, § 7868.
Posting in three public places, § 7864.

7570. (3790.) Nuncupative wills. Petition. Nuncupative wills may be admitted to probate at any time after the decedent has been dead ten days and within six months after the testamentary words have been spoken, on petition and notice as provided for the probate wills. The petition, in addition to the jurisdictional facts, should allege that the testamentary words or the substance thereof were reduced to writing within thirty days after they were spoken, which writing must accompany the petition.

Cal. C. Civ. P., § 1344*.
Execution and proof of nuncupative will, §§ 6326-6328.
Olographic will may be proved as are other private writings, § 6316.

CONTESTS.

7571. (3791.) Contesting will. Written grounds. Notice. Pleadings. If any one appears to contest the will, he must file written grounds of opposition to probate thereof, and serve a copy on the petitioner, and on the proposed executor or executors, if he or they be not the petitioner, and shall mail notices of such contest to the heirs. Any one or more such persons may demur thereto upon any of the grounds of demurrer provided in the Code of

Civil Procedure. If the demurrer is sustained, the court must allow the contestant a reasonable time, not exceeding ten days, within which to amend his written opposition. If the demurrer is overruled, the petitioner and others interested may jointly or separately answer the contesant's grounds, traversing or otherwise obviating or avoiding the objections.

Cal. C. Civ. P., § 1312*.
Any interested person may be heard on any proceeding, § 7869.
Subsequent contest by infant, etc., § 7576.
Provisions of Code of Civil Procedure applicable, § 7558.
Issues of fact tried in conformity with Code of Civil Procedure, §§ 7872, 7873.

Where the answer of the petitioner traverses the grounds relied on by contestants, they have the burden of sustaining the issues thus formed, and are entitled to the opening and closing arguments.
In re Van Alstine's Estate, 26 U. 193; 72 P. 942.

7572. (3792.) Proof by subscribing witnesses. If the will is not contested, it may be admitted to probate on the testimony of one subscribing witness. If the will is contested, all the subscribing witnesses who are present in the county, and who are of sound mind, must be produced and examined, and the death, absence, or insanity of any of them must be satisfactorily shown. If none of the subscribing witnesses reside in the county at the time appointed for proving the will, the court may admit the testimony of other witnesses to prove the sanity of the testator and the execution of the will; and as evidence of the execution it may admit proof of the handwriting of the testator, and of the subscribing witnesses, or any of them.

Cal. C. Civ. P., § 1315*.
Subscribing witnesses, §§ 6315, 6317, 6319.
Court may appoint attorney to represent absent parties, etc., § 7881.

7573. (3793.) Id. Testimony reduced to writing. The testimony of each witness shall be reduced to writing and signed by him, and the same shall be evidence in any subsequent contests concerning the validity of the will, or the sufficiency of the proof thereof, if the witness is dead, or has permanently removed from the state.

Cal. C. Civ. P., § 1316.
Secondary evidence to prove will, § 7115.

7574. (3794.) Certificate of proof. If the court is satisfied, upon the proof taken, or from the facts found by the jury, that the will was duly executed, and that the testator at the time of its execution was of sound and disposing mind, and not acting under duress, menace, fraud, or undue influence, a certificate of the proof and of the facts found, signed by the judge and attested by the seal of the court, must be attached to the will.

Cal. C. Civ. P., § 1317.
Issues to be tried as in civil procedure, §§ 7872, 7873.

7575. (3795.) Will to be recorded. Written testimony filed. The will and a certificate of the proof thereof must be filed and recorded by the clerk, and the same, when so filed and recorded, shall constitute part of the record in the cause or proceeding. All testimony reduced to writing shall be filed by the clerk.

Cal. C. Civ. P., § 1318*.

7576. (3796.) Subsequent contests by infants and others. Any person who has not contested a will, or who has contested by attorney appointed by the court without his knowledge, may contest the same or the probate thereof at any time within one year after the admission to probate, and not afterward, except that infants and persons of unsound mind shall be entitled to the period of one year after their respective disabilities are removed in which to contest; *provided,* that this section shall not be construed to permit any heir, devisee, or legatee, in the event of the annulment of a will or the annulment of the probate thereof, to pursue the property of the decedent or any part of the same into the hands of any person who purchased such property prior to such revocation in good faith and for value at executor's or administrator's sale, or from any heir, devisee, or distributee after distribution.

Cal. C. Civ. P., §§ 1307*, 1327*, 1333*.
Cited in: Anderson v. Anderson, 43 U. 26; 134 P. 553.

7577. (3797.) Petition for revocation. Notice. Upon filing a petition for revocation, citation must be issued to the executors of the will, or to the administrators with the will annexed, and to all the legatees and devisees mentioned in the will, and heirs residing in the state so far as known to the

petitioner; or to their guardians, if any of them are minors; or to their personal representatives, if any of them are dead; requiring them to appear before the court on some day therein specified, to show cause why the probate of the will should not be revoked.

Cal. C. Civ. P., § 1328*.
Revocation of letters, §§ 7627-7630.
Citation generally, § 7865.

A suit to revoke the probate of a will on the ground of undue influence is an action at law. Miller v. Livingston, 31 U. 415; 88 P. 338.

LETTERS TESTAMENTARY.

7578. (3798.) Letters testamentary, issue of. The court admitting a will to probate, after the same is proved and allowed, must issue letters thereon to the persons named therein as executors, who are competent to discharge the trust, who must appear and qualify, unless objection is made as provided in this chapter.

Cal. C. Civ. P., § 1349.

When person indicated, but not named in will, entitled to letters testamentary, § 6398.

7579. (3799.) Who incompetent as executors. No person is competent to serve as an executor who, at the time the will is admitted to probate, is:

1. Under the age of majority;
2. Convicted of an infamous crime;
3. Adjudged by the court incompetent to execute the duties of the trust by reason of drunkenness, improvidence, or want of understanding or integrity.

If the sole executor or all the executors are incompetent, or renounce, or fail to apply for letters, or to appear and qualify within thirty days after his or their appointment, letters of administration with the will annexed must be issued as designated and provided for the granting of letters in cases of intestacy.

Cal. C. Civ. P., § 1350*.

7580. (3800.) Objection to executor named. Any person interested in a will may file objections in writing to granting letters testamentary to the persons named as executors, or any of them, and the objections must be heard and determined by the court. A petition may at the same time be filed for letters of administration with the will annexed.

Cal. C. Civ. P., § 1351.

7581. (3801.) Married woman as executrix. When an unmarried woman, appointed executrix, marries, the court or judge thereof may, upon the motion of any person interested in the estate, revoke her authority and appoint another person in her place. When a married woman is named in a last will as executrix, she may be appointed and serve in every respect as a femme sole.

Cal. C. Civ. P., § 1352*. See Cal. Sup. (1893) p. 1005.

Married woman as administratrix, § 7600.

7582. (3802.) Executor cannot act for executor. No executor of an executor shall as such be authorized to administer on the estate of the first testator, but on the death of the sole or surviving executor of any last will, letters of administration, with the will annexed, of the estate of the first testator left unadministered, must be issued.

Cal. C. Civ. P., § 1353.
Administrator with will annexed has same authority as executor, § 7717.

Authority to executor to appoint executor is void, § 6399.

7583. (3803.) Where executor named is non-resident or minor. Where a person absent from the state or a minor is named executor, if there is another executor who accepts the trust and qualifies, the latter may have letters testamentary and administer the estate until the return of the absentee or the majority of the minor, who may then be admitted as joint executor. If there is no other executor, letters of administration with the will annexed must be granted; but the court may in its discretion revoke them on the return of the absent executor or the arrival of the minor at the age of majority. This section shall not be construed to prevent the court from appointing as executor any person appointed as such by a court of any other state, territory, or foreign country.

Cal. C. Civ. P., § 1354*.

Authority of one or more executors, § 7716.

7584. (3804.) Letters testamentary, form of. Letters testamentary must be substantially in the following form:

State of Utah, county of .....

The last will of A B, deceased, a copy of which is hereto annexed, having been proved and recorded in the district court in and for the county of ....., C D, who is named therein as such, is hereby appointed executor.

Witness, G H, clerk of the district court in and for
[SEAL] the county of ..... Dated the ..... day of .....,
A. D. 19.....

By order of the court. G H, Clerk.

Cal. C. Civ. P., § 1360*.

7585. (3805.) Letters of administration with will annexed, form of. Letters of administration with the will annexed must be substantially in the following form:

State of Utah, county of .....

The last will of A B, deceased, a copy of which is hereto annexed, having been proved and recorded in the district court in and for the county of ....., and there being no executor named in the will (or as the case may be), C D is hereby appointed administrator with the will annexed.

Witness, G H, clerk of the district court in and for
[SEAL] the county of ..... Dated the ..... day of .....,
A. D. 19.....

By order of the court. G H, Clerk.

Cal. C. Civ. P., § 1361*.

FOREIGN WILLS.

7586. (3806.) Foreign wills, where proved. Wills duly proved and allowed in any other state or any territory of the United States, or in any foreign country or state, may be allowed and recorded in any county in which the testator shall have left any estate.

Cal. C. Civ. P., § 1322*. Interpretation, etc., governed by what law, § 6402.
Validity of foreign wills, § 6324.

7587. (3807.) Id. Proceedings on production. When a copy of the will and the probate thereof, duly authenticated, shall be produced by any person interested in the will, with a petition for letters, the same must be filed, and the court or clerk must appoint a time for the hearing, of which notice must be given as hereinbefore provided for an original petition for the probate of a will.

Cal. C. Civ. P., § 1323*. Notice, § 7569.

7588. (3808.) Id. Hearing and proof. If, on the hearing, it appears upon the face of the record that the will has been proved, allowed, and admitted to probate in any other state, or any territory of the United States, or in any foreign country, and that it was executed according to the law of the place in which the same was made, or in which the testator was at the time domiciled, or in conformity with the laws of this state, it must be admitted to probate and have the same force and effect as a will first admitted to probate in this state, and letters testamentary or of administration issued thereon.

Cal. C. Civ. P., § 1324* Delivery of property to foreign executor or administrator, §§ 7779, 7780.

LOST OR DESTROYED WILLS.

7589. (3809.) Lost or destroyed will. How established. Notice. Whenever any will is lost or destroyed, the court must take proof of the execution and validity thereof, and establish the same; notice to all persons interested being first given as prescribed in regard to proof of wills in other cases.

Cal. C. Civ. P., § 1338.

7590. (3810.) Id. How proved. No will shall be proved as a lost or destroyed will, unless the same is proved to have been in existence at the time of the death of the testator, or is shown to have been fraudulently de-

stroyed in the lifetime of the testator, nor unless its provisions are clearly and distinctly proved by at least two credible witnesses.

Cal. C. Civ. P., § 1339.
Proof that testatrix in 1900, while she was sane, made the lost will, and that it was in existence eight months after she became insane, was sufficient for admission of the will to probate.
In re Frandsen's Will, 50 U. —; 167 P. 362.

7591. (3811.) Id. Certification and record of proof. When a lost will is established, the provisions thereof must be distinctly stated and certified by the judge under his hand and the seal of the court, and the certificate must be filed and recorded as other wills are filed and recorded, and letters testamentary, or of administration with the will annexed, must be issued thereon in the same manner as upon wills produced and duly proved. The testimony must be reduced to writing, signed, certified, and filed as in other cases, and shall have the same effect as evidence as hereinbefore provided.

Cal. C. Civ. P., § 1340.

CHAPTER 4.

LETTERS OF ADMINISTRATION.

WHO ENTITLED.

7596. (3812.) Administration, to whom granted. Administration of the estate of a person dying intestate must be granted to some one or more of the persons hereinafter mentioned, the relatives of the deceased being entitled to administer only when they are entitled to succeed to his personal estate or some portion thereof; and they are, respectively, entitled thereto in the following order:

1. The surviving husband or wife;
2. The children;
3. The father or mother;
4. The brothers or sisters;
5. The grandchildren;
6. The next of kin.

Administration may be granted to one or more competent persons, although not otherwise entitled to the same, at the written request of the person entitled, filed in the court.

Cal. C. Civ. P., §§ 1365*, 1379*.
Determination of heirship when letters not applied for, §§ 7795-7797.
Special administrator appointed in certain cases, §§ 7606, 7786.
Clerk may appoint special administrator, § 7561.
On joint estates, § 7601.

7597. (3813.) Id. Relatives of whole blood preferred. Creditors. When there are several persons equally entitled to administration, the court may grant letters to one or more of them. Of several persons claiming and equally entitled to administer, relatives of the whole blood must be preferred to those of the half blood. If none of said relatives or their guardians will accept, then the creditors shall be entitled to letters, but when a creditor is applying, the court may, in its discretion, at the request of another creditor, grant letters to any other person legally competent. If a dispute arises as to relationship between applicants, or if there is any other good and sufficient reason, the court may appoint any competent person.

Cal. C. Civ. P., §§ 1366*, 1367*.
An officer of a corporation, which is a creditor of decedent, is not himself a creditor, within provisions of this section, declaring that, if none of the relatives of a deceased person apply for letters of administration, a creditor will be entitled to letters.
In re Owen's Estate, 30 U. 351; 85 P. 277.
Where an alien relative of decedent requests the appointment of a certain person and no nearer relative makes such application, it is the duty of the court to appoint the nominee of the alien relative, instead of appointing a creditor of deceased.
Id.

7598. (3814.) Id. Failure of persons entitled. Letters of administration must be granted to any applicant, though it appears that there are other persons having better rights to the administration, when such persons fail to appear within three months after the death of the decedent and claim the issuance of letters to themselves.

Cal. C. Civ. P., § 1377*.
Though, under the statute, a relative applying within three months would be entitled to preference over a creditor, yet the expiration of that period, or waiver of the right to administration by the relative, was not essential to jurisdiction to appoint a creditor, hence the appointment of the secretary of a creditor corporation, a relative applying within three months, on a hearing of both petitions, though erroneous, was not void.
In re Owen's Estate, 32 U. 469; 91 P. 283.

7599. (3815.) Who are incompetent. Administrators. No person is competent or entitled to serve as administrator or administratrix who is:

1. Under the age of majority or an incompetent person; but in such cases letters must be granted to his or her guardian, or, in the discretion of the court, to any person entitled to administration;

2. Not a bona fide resident of the state; but if the person entitled to serve is not a resident of the state, he may request the court or judge to appoint a resident of the state to serve as administrator, and such person may be appointed;

3. Convicted of an infamous crime;

4. Adjudged by the court incompetent to execute the duties of the trust by reason of drunkenness, improvidence, or want of understanding or integrity;

5. The surviving partner of a firm of which the decedent was a member.

Cal. C. Civ. P., §§ 1365*, 1368*, 1369*. See Cal. Sup. (1893) p. 1005.
Removal for incompetency, etc., § 7627.
Rights of surviving partner, § 7603, and note.

7600. (3816.) Married woman as administratrix. When objection is made by any person interested in an estate, a married woman must not be appointed administratrix. When an unmarried woman appointed administratrix marries, the court may, upon the motion of any such interested person, revoke her authority and appoint another person in her place.

Cal. C. Civ. P., § 1317*. See Cal. Sup. (1893) p. 1006.
Married woman as executrix, § 7581.

LETTERS OF ADMINISTRATION.

7601. Court may grant letters of administration upon certain estates jointly, when. In all cases where the estate left by a deceased person has descended from another deceased person whose estate has never been probated, or where two or more deceased persons held property during their life time as tenants in common, and neither estate has been probated, and where the heirs are the same, the court may grant letters of administration upon such estates jointly, and they may be administered the same as if they were but one estate. '15, p. 89.

7602. (3817.) Petition. Petitions for letters of administration must be in writing, signed by the applicant or his counsel, and filed with the clerk of the court, stating the facts essential to give the court jurisdiction of the case, and when known to the applicant, he must state the names, ages, and residence of the heirs of the decedent, and the value and character of the property.

Cal. C. Civ. P., § 1371*.

7603. (3818.) Notice of petition for letters; publication or posting; mailing. When a petition praying for letters of administration is filed, the clerk must set the petition for hearing and give notice thereof by publication or by posting, and by mailing of notices to the heirs. Am'd '99, p. 76; '01, p. 95.

Cal. C. Civ. P., § 1373*. See Cal. Sup. (1893) p 1006.
Posting in three public places, § 7864.
Personal service equivalent to mailing, § 7863.
Proof of publication or posting, § 7866.
Notice waived in writing by parties interested, § 7868.
Notice generally, time, form, etc., §§ 7856, 7869.
An order for notice of an application for the appointment of an administrator required that the notice be published in two issues of a newspaper for a period of at least a week prior to Sept. 28th, and by mailing a copy of the notice to the heirs, as required by this section. The notice was first published on Sept. 20th, and the second and last insertion was on Sept. 27th, the day prior to the time set for hearing, and no notice was mailed; held, that the court acquired no jurisdiction under such notice to appoint an administrator.
In re Bunting's Estate, 30 U. 251; 84 P. 109. See Wells v. Kelly, 11 U. 421; 40 P. 705.
It will be presumed that the minor children and heirs of a decedent were residents of the place of decedent's residence at the time of his death.
In re Bunting's Estate, 30 U. 251; 84 P. 109.
Probate proceedings are in rem, and if the statutory notice of hearing on the petition for letters is given, the court acquires jurisdiction, and failure to give subsequent notices is an irregularity assailable, in the absence of fraud, in a direct proceeding only.
Barrett v. Whitney, 36 U. 574; 106 P. 522.

7604. (3819.) Id. Contest. Any person interested may contest the pe-

tition by filing an answer thereto on the ground of the incompetency of the applicant, or may assert his own rights to the administration, and pray that letters be issued to himself. In the latter case the contestant must file a cross petition, of which notice shall be given, and the court must hear the two petitions together.

Cal. C. Civ. P., § 1374*.
Any person interested may be heard, § 7869.
Court may appoint attorney to represent absent parties, etc., § 7881.
Provisions of Code of Civil Procedure applicable, § 7558.
Trials in conformity with civil procedure, §§ 7872, 7873.

7605. (3820.) Form of letters of administration. Letters of administration must be substantially in the following form:

State of Utah, county of .....

C D is hereby appointed administrator of the estate of A B, deceased.

Witness, G H, clerk of the district court, in and for the [SEAL] county of ....., with the seal thereof affixed, the ..... day of ....., A. D. 19.....

By order of the court. G. H, Clerk.

Cal. C. Civ. P., § 1362*.

SPECIAL ADMINISTRATORS.

7606. (3821.) Special administrator, when appointed. When there is delay in granting letters testamentary or of administration from any cause, or when such letters are granted irregularly, or no sufficient bond is filed as required, or when no application is made for such letters, or when an executor or administrator dies, or is suspended or removed, the court must appoint a special administrator to collect and take charge of the estate of the decedent in whatever county or counties the same may be found, and to exercise such other powers as may be necessary for the preservation of the estate.

Cal. C. Civ. P., § 1411*.
Clerk may appoint special administrator, § 7561.
For estate of decedent without heirs, §§ 7786, 7787.

7607. (3822.) Id. Proceedings. The appointment may be made at any time and without notice, and must be made by entry upon the minutes of the court specifying the powers to be exercised by the administrator.

Cal. C. Civ. P., § 1412*.

7608. (3823.) Id. Preference to person entitled to letters. In making the appointment of a special administrator, the court or judge, must give preference to the person entitled to letters testamentary or of administration.

Cal. C. Civ. P., § 1413*.

7609. (3824.) Id. Bond and oath. Before letters issue to any special administrator, he must give bond in such sum as the court may direct, with sureties to the satisfaction of the court, conditioned for the faithful performance of his duties; and he must take the usual oath and have the same indorsed on his letters.

Cal. C. Civ. P., § 1414*.
Bonds generally, §§ 7223, 7621.
Clerk may fix and approve bond, § 7561.

7610. (3825.) Id. Duties and powers. The special administrator must collect and preserve for the executor, or administrator, all the goods, chattels, debts, and effects of the decedent, all incomes, rents, issues, and profits, claims, and demands of the estate; must take the charge and management of, enter upon and preserve from damage, waste, and injury, the real estate, and for such and all necessary purposes may commence and maintain or defend suits and other legal proceedings, as an administrator; and exercise such other powers as are conferred upon him by his appointment, but in no case is he liable to an action by any creditor on a claim against the decedent.

Cal. C. Civ. P., § 1415*.
Powers of administrators generally, §§ 7716-7753.
Actions by executors, etc., §§ 6495, 7718-7721.
Final settlements by special administrators, § 7790

CHAPTER 5.

OATHS AND BONDS.

7616. (3826.) Oath. Record of letters, bonds and oath. Before letters testamentary or of administration are issued, the executor or administrator must take and subscribe an oath that he will perform, according to law, the duties of executor or administrator, which oath must be attached to the letters. All letters testamentary and of administration issued to, and all bonds executed by, executors or administrators, with the affidavits and certificates thereon, must be forthwith recorded by the clerk of the court having jurisdiction of the estate, in books to be kept by him in his office for that purpose.

Cal. C. Civ. P., § 1387*. Power of executor before qualifying, § 6400.

7617. (3827.) Bonds, form of. Every person to whom letters testamentary or of administration are directed to issue must, before receiving them, execute a bond to the state of Utah, with two or more sufficient sureties, to be approved by the court or the clerk. In form the bond must be joint and several, and the penalty must not be less than twice the value of the personal property, and twice the probable value of the annual rents, profits, and issues of the real property belonging to the estate, which values must be ascertained by the court, by examining on oath the party applying, or any other person. A separate bond shall be required of each executor or administrator appointed.

Cal. C. Civ. P., §§ 1388*, 1391*. Bonds generally, §§ 7223, 7621.
Clerk may fix bond and ascertain value of estate, § 7561. Cost of bond allowed as an expense, § 1214.

7618. (3828.) Bond on sale of real estate. The court may require an additional bond from each executor or administrator whenever the sale of any real estate belonging to an estate is ordered; but no such additional bond must be required when it satisfactorily appears to the court that the penalty of the bond given before receiving letters, or of any bond given in place thereof, is equal to twice the value of the personal property remaining in or that will come into possession of the executor or administrator, including the annual rents, profits, and issues of real estate, and twice the probable amount to be realized on the sale of the real estate ordered to be sold.

Cal. C. Civ. P., § 1389*.

7619. (3829.) Bond, condition of. Bonds must be conditioned that the executor or administrator shall faithfully execute the duties of the trust according to law.

Cal. C. Civ. P., § 1390.

7620. (3830.) Bond not void on first recovery. A bond shall not be void upon the first recovery, but may be sued and recovered upon from time to time by any person aggrieved, in his own name, until the whole penalty is exhausted.

Cal. C. Civ. P., § 1392. Successive actions generally, § 7218.

7621. (3831.) Justification of sureties. In all cases where bonds or undertakings are required to be given under this title, the sureties must justify thereon in the same manner and in like amount as required in the general provisions of the Code of Civil Procedure, and the certificate thereof must be attached to and filed and recorded with the bond or undertaking.

Cal. C. Civ. P., § 1393*. Qualifications of sureties generally, § 7223.
Sureties may justify before clerk, § 7561.

7622. (3832.) Examination of sureties. Either before or after the approval of any bond, the court, of its own motion or upon motion of any person interested, may examine the sureties and such witnesses as may be produced touching the property qualifications of the sureties; and if upon such examination the court is satisfied that the bond is insufficient, it must require sufficient additional security, and if the same be not given within the time fixed by the court, the authority of such executor or administrator shall cease.

Cal. C. Civ. P., §§ 1394, 1395*. Clerk may examine sureties, § 7561.

7623. (3833.) When bond dispensed with. When it is expressly pro-

vided in the will that no bond shall be required of the executor, letters testamentary may issue and sales of real estate be made and confirmed without any bond, unless the court at any time, for good cause, require one to be executed.

Cal. C. Civ. P., § 1396*.

7624. (3834.) Release of surety, application for. When a surety of an executor or administrator desires to be released from responsibility on account of future acts, he may make application to the court for relief. The court must cause a citation to the executor or administrator to be issued, requiring him to appear at a time and place to be therein specified, and to give other security.

Cal. C. Civ. P., § 1403*.

7625. (3835.) Id. New sureties. If new sureties be given to the satisfaction of the judge, he may thereupon make an order that the sureties who applied for relief shall not be liable on their bond for any subsequent act, default, or misconduct of the executor or administrator.

Cal. C. Civ. P., § 1404.

7626. (3836.) Id. Revocation for failure to give. If the executor or administrator neglects or refuses to give new sureties to the satisfaction of the judge, on the return of the citation, or within such reasonable time as the judge shall allow, the court or judge must revoke his letters unless the surety making the application shall consent to a longer extension of time.

Cal. C. Civ. P., § 1405.

CHAPTER 6.

REVOCATION OF LETTERS.

7627. (3837.) Revocation generally. The court may at any time suspend any administrator or executor; and may, upon citation, revoke the letters of any administrator upon petition of a competent person having a prior right thereto who had no opportunity to apply, or of any administrator of the estate of a supposed intestate whose will was subsequently found and admitted to probate, or of any executor or administrator for neglect, mismanagement, waste, embezzlement, incompetency, incapacity, or because of conviction of an infamous crime, or for any other reason deemed sufficient by the court.

Cal. C. Civ. P., §§ 1383*-1386*, 1436*-1440*.

Damages for fraudulently selling real property, § 7707; for embezzlement, etc., § 7732.

Who incompetent to serve as administrator, § 7599.

Revocation for failure to give new bond, § 7626.

Petition for revocation, § 7577.

Where an executor's want of integrity in accounting an estate's property has been established by a judgment, he should be removed, and in such proceedings the parties are not entitled to a jury trial, as the power of removal is vested in the court.

Farnsworth v. Hatch, 47 U. 62; 151 P. 537.

A person holding a claim against an estate is not thereby disqualified to act as executor, but when the claim is resisted and litigation follows, the conflict of interests may become so serious as to call for the removal.

Id.

7628. (3838.) Resignation. An executor or administrator may resign upon such terms as may be fixed by the will or by the court.

7629. (3839.) Vacancies. In case of the removal, resignation, or death of one of several executors or administrators, the court, if it deems it necessary, may appoint a successor, or may permit the remaining executor or executors, administrator or administrators, to complete the execution of the trust. In case of the death, resignation, or removal of all, the court shall, upon notice, issue letters to the person having the prior right thereto, or to any competent person named by the person having such prior right. But the will may provide for the filling of vacancies among the executors.

Cal. C. Civ. P., § 1721.

Upon the removal of an executor, the appointment of an impartial successor is proper.
Farnsworth v. Hatch, 47 U. 62; 151 P. 537.

7630. (3840.) Removal for contempt. Whenever an executor, administrator, or guardian is committed for contempt in disobeying any lawful order of the court, and has remained in custody for thirty days without obeying

such order, or purging himself otherwise of the contempt, the court may, by order reciting the facts and without further showing or notice, revoke his letters and appoint some other person entitled thereto executor, administrator, or guardian in his stead.

Cal. C. Civ. P., § 1721.

CHAPTER 7.

THE INVENTORY.

7635. (3841.) Inventory, when returned. Every executor or administrator must make and return to the court, within three months after his appointment, a true inventory and appraisement of all the estate of the decedent which has come to his possession or knowledge; and, within two months after any other property shall be subsequently acquired, or after other property shall have been discovered, a true inventory and appraisement of the same shall be made and returned to the court.

Cal. C. Civ. P., §§ 1443*, 1451*.

Appraisement within thirty days, under inheritance tax law, § 3193.

7636. (3842.) Appraisers. Compensation. To make the appraisement, the court must appoint three disinterested persons (any two of whom may act), who are entitled to receive a reasonable compensation for their services, not to exceed $5 per day, to be allowed by the court. The appraisers must, with the inventory, file a verified account of their services and disbursements. If any part of the estate is in any other county than that in which letters issued, appraisers thereof may be appointed, either by the court having jurisdiction of the estate, or by the court of such other county on request of the court having jurisdiction. Appraisers need not be appointed if the whole estate consists of money.

Cal. C. Civ. P., §§ 1444*, 1446*. See Sup. (1893) p. 1008.

Clerk may appoint appraisers, § 7561.

Appointment under inheritance tax law, § 3187.

Where authority joint, majority may act, § 5846.

7637. (3843.) Duties of appraisers. The appraisers must take and subscribe an oath, to be attached to the inventory, that they will truly, honestly, and impartially appraise the property exhibited to them according to the best of their knowledge and ability. They must then proceed to estimate and appraise the property; each article must be set down separately, with the value thereof in figures, opposite the articles, respectively; the inventory must contain all the estate of the decedent, real and personal, a statement of all debts, partnerships, and other interests, bonds, mortgages, notes, and other securities for the payment of money belonging to the decedent, specifying the name of the debtor in each security, the date, the sum originally payable, the indorsements thereon, if any, with their dates, and the sum which, in the judgment of the appraisers, may be collected on each.

Cal. C. Civ. P., § 1445*.

7638. (3844.) Oaths of appraisers and executors. The inventory must be signed by the appraisers; and the executor or administrator must take and subscribe an oath, indorsed upon the inventory, that the inventory contains a true statement of all the estate of the decedent which has came to his knowledge and possession, and particularly of all money belonging to the decedent and of all just claims of the decedent against the affiant.

Cal. C. Civ. P., § 1449*.

7639. (3845.) Debt of executor not discharged by appointment. The naming of a person as executor does not thereby discharge him from any just claim which the testator has against him, but the claim must be included in the inventory, and the executor is liable for the same, as for so much money in his hands, when the debt or demand becomes due.

Cal. C. Civ. P., § 1447.

CHAPTER 8.

FAMILY SUPPORT.

7643. (3846.) Family entitled to support. Exception. Possession of homestead. When a person dies leaving a surviving wife, husband, or minor children, they shall be entitled to remain in possession of the homestead and to the use of the property exempt from execution until otherwise directed by the court; and during administration shall receive such allowance out of the estate as the court may deem necessary and reasonable for their support Such allowance may date from the death of the decedent, but in case of insolvent estates shall not continue for longer than one year, and must be paid in preference to all other charges except expenses of last sickness and funeral expenses of the decedent, and costs and charges of administration. The court may, in its discretion, exclude from such family allowance, except homestead rights, any person who may have a separate property or income.

Am'd '15, p. 58.

Cal. C. Civ. P., §§ 1464*, 1466*, 1467*.

Homestead exemption to be provided for, Con. art. 22, sec. 1.

Homestead exempt from execution, § 6925.

Homestead, etc., exempt from payment of debts; use and distribution of, §§ 6409-6411.

Homestead generally, §§ 2862-2882.

Appointment of attorney for absent party, etc., § 7881.

Payment of incumbrances on homestead, § 7668.

Where amount of allowance is made discretionary with the executor by the terms of the will.

Allen v. Barnes, 5 U. 100; 12 P. 912.

HOMESTEAD:

Real estate set apart under § 850, C. L. 1876, for use of widow and minor children, does not vest in the widow so that she could convey it absolutely to the exclusion of the family of the deceased.

Rand v. Brain, 5 U. 197; 14 P. 129.

Sec. 4114, C. L. 1888, is intended to continue the benefits given by § 7139, sub. 11, to a deceased debtor's family. The homestead right does not attach in favor of the widow or children unless the estate is insolvent and in debt, or is below the homestead allowance in value.

Knudsen v. Hanberg, 8 U. 203; 30 P. 749.

The right to dispose of homestead property by will is limited to such estates as exceeded the homestead limit in value.

Knudsen v. Hanberg, 8 U. 203; 30 P. 749.

In re Little's Estate, 22 U. 204; 61 P. 899.

The provisions of § 6409, that homesteads and all exempt property shall be set apart for the surviving wives, husbands, and minor children, is not in conflict with, and was not repealed by, § 7644 as amended, which deals exclusively with question of "family support" and the summary administration and settlment of estates not exceeding $1500 in value.

In re Syndergaard's Estate, 31 U. 490; 88 P. 616.

Homestead not subject to mechanic's lien.

Volker L. Co. v. Vance, 32 U. 74; 88 P. 896.

FAMILY ALLOWANCE:

Where intestate died while §§ 4113-4119, C. L. 1888, relative to distribution of estates, were in force, but the orders settling the estate were made after this section and § 7644, relating to the same subject, took effect, the orders were properly made in accordance with the statutes in force at the time the orders were made.

In re Thorn's Estate, 24 U. 209; 67 P. 22.

Where husband and wife had for many years before his death lived apart, under an agreement, and she was not dependent on him for support, she was not entitled to a family allowance on his death, as the statute granting the allowance was intended to make immediate provision, on a husband's death, for his family, to continue during the administration of the estate.

Hilton v. Stewart, 25 U. 161; 69 P. 671.

Though a portion of the real estate of a decedent is set aside to the widow as her share of the estate, she has an absolute right to the family allowance during the administration; the amount being a matter in the court's discretion.

In re Pugsley, 27 U. 489; 76 P. 560.

In fixing the amount of the allowance for support during administration of the estate of a decedent, the age of the survivor or survivors, their health, social position and standing, the education of the children, the value of the estate and its solvency or insolvency should be taken into consideration.

Id.

A wife who did not voluntarily leave and live apart from her husband is entitled to allowance.

In re Beason's Estate, 49 U. 24; 161 P. 678.

7644. (3847.) Summary administration and distribution of small estates. Right of devise not affected. After the return of the inventory, the court may, on petition and after notice, set apart and distribute all the property of the decedent, if the whole value of the same does not exceed $1500, in fee and absolutely, as follows, to wit: One-half to the surviving wife or husband, and one-half in equal shares to the minor children; or, if there be no surviving wife or husband, in equal shares to the minor children; or, if there be no minor child, to the surviving wife or husband. The expenses of the last illness, funeral charges, and expenses of administration shall be paid before such distribution is ordered. In case the whole estate of the decedent be thus distributed, there must be no further proceedings in the administration, unless other property is discovered. The court may, at its discretion, exclude from the distribution of the property so set apart and distributed, other than the homestead, any surviving wife, husband, or minor child having separate property or income, and in all other cases wherein the estate is valued at more than $1500 the court may, on petition and notice, set apart and dis-

tribute property, not to exceed $1500 in value, to the surviving wife, or husband, and minor children, according to the foregoing provisions. This section shall not be construed to affect the right of the decedent to dispose of his estate by will, as provided by law. Am'd '03, p. 51.

Cal. C. Civ. P., §§ 1465*, 1468*, 1469*.
See note to § 7643 on homestead.
Where estate amounted to $567.30, it was error for the court to decree that a lessor's claim and lien for rent of $270 was superior to all other claims, and the estate, being less than $1500, should have been set aside for use and support of widow and minor children.
In re Stone's Estate, 14 U. 205; 46 P. 1101.
A person who sells goods to one since deceased has no lien against the estate, which amounts to less than $1500, for the amount for which such goods were sold by the administrator. The lien, if any, was against the goods themselves.
In re Farmer's Estate, 17 U. 80; 53 P. 972.
The provisions of this section and §§ 6409, 7643, should be construed together, and where the estate is less than $1500 in value, the expenses of the last sickness, funeral charges, etc., should be paid before any distribution.
In re Thorn's Estate, 24 U. 209; 67 P. 22.

CHAPTER 9.

CLAIMS AND PAYMENT.

7645. (3848.) Notice to creditors. Every executor or administrator must, immediately after his appointment, cause to be published a notice to the creditors of the decedent; such notice must be published not less than once a week for four successive weeks, but such publication shall not be necessary in cases where summary distribution of estates shall apply, as provided in § 7644; *provided, however,* that where an estate exceeds $1500 in amount the publication of such notice shall be necessary. Am'd '03, p. 57.

Cal. C. Civ. P., § 1490*.
Clerk may designate terms and enter order, § 7561.
Failure to give notice, recovery on bond, § 7673.
Form of notice, § 7859.

7646. (3849.) Time expressed to creditors. The time expressed in the notice, unless otherwise ordered by the court, must be four months after its first publication when the estate exceeds in value the sum of $10,000, and two months when it does not. In case such executor or administrator resigns, is removed, or dies before the time for presentation of claims has expired, his successor must give notice for the unexpired time allowed for such presentation. Am'd '17, p. 38.

Cal. C. Civ. P., § 1491*.

7647. (3850.) Id. Affidavit of publication and decree. Within thirty days after the notice is completed, a copy thereof, with the affidavit of due publication, must be filed, and the court must enter an order or decree, showing that due notice to creditors has been given.

Cal. C. Civ. P., § 1492*.
Proof of publication, §§ 7866, 7867.

7648. (3851.) Claims to be presented within time limited. Exceptions. All claims arising upon contracts, whether the same be due, not due, or contingent, must be presented within the time limited in the notice, and any claim not presented is barred forever; *provided,* that when it is made to appear by the affidavit of the claimant, to the satisfaction of the court or judge thereof, that the claimant had no notice as provided in this chapter, by reason of being out of the state, it may be presented at any time before a decree of distribution is entered; *provided further,* that nothing in this title contained shall be so construed as to prohibit the foreclosure of liens or mortgages as hereinafter provided.

Cal. C. Civ. P., § 1493*.
Action pending, presentment of claims, § 7657.
Limitation of action against representatives of deceased, §§ 6481, 6482, 7653.
Action on mortgage, claim need not be presented, when, § 7655.
Under § 7654 a claim against an estate is barred by statute of limitations if not presented within ten months from time notice is given to creditors, and, in an action to recover amount of claim, failure of executor or administrator to plead the bar cannot avail claimant, since duty to set up bar of the statute rests upon executor or administrator.
Fullerton v. Bailey, 17 U. 85; 53 P. 1020.
Where deceased conveyed property by warranty deed, and there was delinquent taxes, a claim therefor arises under contract.
Clayton v. Dinwoodey, 33 U. 251; 93 P. 723.
Where a complaint contains all the allegations required in a claim, and the service of the complaint on the executor is within the time, it operates as a presentation of claim.
Id.
Knowledge on the part of an executor of the debt does not dispense with presentation of the claim.
Id.

7649. (3852.) Claims. Form of verification. Every claim which is due, when presented to the executor or administrator, must be supported by the affidavit of the claimant or some one in his behalf that the amount is justly due, that no payments have been made thereon which are not credited, and that there are no offsets to the same, to the knowledge of the affiant. If the claim be not due when presented, or be contingent, the particulars of such claim must be stated. When the affidavit is made by a person other than the claimant, he must set forth in the affidavit the reason why it is not made by the claimant. The executor or administrator may also require satisfactory vouchers or proofs to be produced in support of the claim. If the claim be founded on a bond, bill, note, or any other instrument, a copy of such instrument must accompany the claim, and the original instrument must be exhibited, if demanded, unless it be lost or destroyed, in which case the claimant must accompany his claim by his affidavit, containing a copy or particular description of such instrument, and stating its loss or destruction. If the claim, or any part thereof, be secured by a mortgage or other lien which has been recorded, it shall be sufficient to describe the mortgage or lien, and refer to the date, volume, and page of its record. If, in any case, the claimant has left any original voucher in the hands of the executor or administrator, or suffered the same to be filed in court, he may withdraw the same when a copy thereof has been already, or is then, attached to his claim. A brief description of every claim filed must be entered by the clerk in the register, showing the name of the claimant, the amount and character of the claim, rate of interest, and date of allowance.

Cal. C. Civ. P., §§ 1494*, 1497*. Debts secured by liens, order of payment, §§ Payment of contingent claims, § 7671. 7667, 7668.

7650. (3853.) Allowance or rejection of claim. When a claim, accompanied by the affidavit required in this chapter, is presented to the executor or administrator, he must indorse thereon his allowance or rejection, with the date thereof. If he allows the claim, it must be presented to the judge, who must indorse upon it his allowance or rejection. If the executor or administrator, or the judge, refuses or neglects to indorse such allowance or rejection for ten days after the claim has been presented to him, such refusal or neglect may, at the option of the claimant, be deemed equivalent to a rejection on the tenth day; and if the presentation be made by a notary, the certificate of such notary under seal shall be prima facie evidence of such presentation and the date thereof. If the claim be presented to the executor or administrator before the expiration of the time limited for the presentation of claims, the same is presented in time, though acted upon by the executor or administrator and by the judge after the expiration of such time. If the claim be payable in a particular kind of money or currency, it shall, if allowed, be payable only in such money or currency.

Cal. C. Civ. P., § 1496*. Allowance in part, § 7658.

7651. (3854.) Filing of claims. Claim by judge. Every claim allowed by the executor or administrator and approved by the judge, or a copy thereof as hereinafter provided, must, within thirty days thereafter, be filed in the court, and be ranked among the acknowledged debts of the estate to be paid in due course of administration. If the judge have a claim against an estate in process of settlement before him, the same must be allowed or rejected by another judge of the district court of the same or of an adjoining county, and a right of action shall lie as in the case of other creditors.

Cal. C. Civ. P., §§ 1495*, 1497*.

7652. (3855.) Interest on claim where estate insolvent. If the estate be insolvent, no greater rate of interest shall be allowed upon any claim after the first publication of notice to creditors than is allowed on judgments obtained in the courts of this state.

Cal. C. Civ. P., § 1494*.

7653. (3856.) Suit on rejected claim must be brought within three

months; exception. When a claim is rejected, either by the executor or administrator, or the judge, the holder must bring suit in the proper court against the executor or administrator within three months after the date of its rejection, if it be then due, or within two months after it becomes due; otherwise the claim shall be forever barred.

Cal. C. Civ. P., § 1498.

Limitation of action against representatives of deceased, §§ 6481, 6482, 6647.

7654. (3857.) Claims barred by statute. Judge may hear evidence. No claim must be allowed by the executor or administrator, or the judge, which is barred by the statute of limitations. When a claim is presented to the judge for his allowance, he may, in his discretion, examine the claimant and others on oath, and hear any legal evidence touching the validity of the claim.

Cal. C. Civ. P., § 1499.
Limitations generally, §§ 6445-6492.

The statute raises the bar of limitations even if the representative fails to plead it.
Fullerton v. Bailey, 17 U. 85; 53 P. 1020.
Clayton v. Dinwoodey, 33 U. 251; 93 P. 723.

7655. (3858.) Presentation before suit. Mortgages. No holder of any claim against an estate shall maintain any action thereon unless the claim is first presented to the executor or administrator, except that an action may be brought without notice by any holder of a mortgage or lien to enforce the same against the property of the estate subject thereto, where all recourse against any other property of the estate is expressly waived in the complaint; but no counsel fees shall be recovered in such action unless such claim be so presented.

Cal. C. Civ. P., § 1500*.
Reservation as to foreclosure, § 7648.
Action pending at death, presentation, § 7657.

A person having an equitable claim or interest in the decedent's property could bring suit against the trustee without first presenting his claim to the executor for allowance.
Hamilton v. Dooly 15 U. 280; 49 P. 769.

One claiming subrogation under a mortgage might bring his action by virtue of his equitable lien and claim, without presenting same to the administrator for allowance.
Fullerton v. Bailey, 17 U. 85; 53 P. 1020.

A warehouseman, by presenting and suing on a claim for storage charges without mentioning his lien, did not make an election of remedies so as to bar the assertion of his warehouseman's lien, by way of counterclaim, in a subsequent action for the property.
Howard v. J. P. Paulson Co., 41 U. 490; 127 P. 284.

This section applies to claims arising out of contracts or transactions with deceased, and not with executor.
Martin v. Saxton, 48 U. 488; 160 P. 441.

Suit by the administrator of a wife against the executors of her husband to recover her separate estate does not require the presentment of the claim, and laches does not bar it, when the delay did not work to the disadvantage of the executors.
Hatch v. Hatch, 46 U. 116; 148 P. 1096.

A claim for taxes need not be presented within the exception—the lien therefor being against the land bought and not against any property of the estate.
Clayton v. Dinwoody, 33 U. 251; 93 P. 723.

Claims must be presented in the probate court, and cannot be established in a court of equity.
Welch, Driscoll & Buck, v. Buck, 48 U. 653; 161 P. 455.

7656. (3859.) Statute of limitations does not run, when. The time during which there shall be a vacancy in the administration must not be included in any limitation herein prescribed. No claim against any estate, which has been presented and allowed, is affected by the statute of limitations, pending the proceedings for the settlment of the estate.

Cal. C. Civ. P., §§ 1501*, 1569*.

Statute of limitations, §§ 6445-6492.

7657. (3860.) Actions pending at death. Presentation. If an action is pending against the decedent at the time of his death, the plaintiff must in like manner present his claim to the executor or administrator for allowance or rejection, authenticated as required in other cases; and no recovery shall be had in the action unless proof be made of the presentation required.

Cal. C. Civ. P., § 1502.
Where party dies after verdict or decision and before judgment, the judgment is not a lien, § 6866.
Action not to abate by death, when; substitution, §§ 6481, 6513.
Presentation before suit, § 7655.

Where the complaint seeks to charge defendants as executors de son tort, an allegation therein of the presentation of the claim will be regarded as surplusage.
First Nat. Bank of Hailey v. Lewis, 12 U. 84; 41 P. 712.

7658. (3861.) Claim allowed in part. Whenever any claim is presented to an executor or administrator, or the judge, and he is willing to allow the same in part, he must state in his indorsement the amount he is willing to allow. If the creditor refuses to accept the amount allowed in satisfaction of his claim, he shall recover no costs in any action therefor brought against the executor or administrator, unless he recover a greater amount than that offered to be allowed.

Cal. C. Civ. P., § 1503.

Tender and deposit, costs, § 7044.

7659. (3862.) Judgment against executor or administrator. Effect. A judgment rendered against an executor or administrator, upon any claim for money against the estate of his testator or intestate, only establishes the claim in the same manner as if it had been allowed by the executor or administrator and the judge; and the judgment must be that the executor or administrator pay, in due course of administration, the amount ascertained to be due. A certified transcript of the original docket of the judgment must be filed among the papers of the estate in court. No execution must issue upon such judgment, nor shall it create any lien upon the property of the estate, or give to the judgment creditor any priority of payment.

Cal. C. Civ. P., § 1504.
After decree made for the payment of creditors, execution, § 7672.
A judgment against an administrator on a claim against the estate is improperly entered against him personally.
Clayton v. Dinwoodey, 33 U. 251; 93 P. 723.
Smith v. Hanson, 34 U. 171; 96 P. 1087.

7660. (3863.) Judgment against decedent. Effect. When any judgment has been rendered for or against the testator or intestate, in his lifetime, no execution shall issue thereon after his death, except as provided in the Code of Civil Procedure relative to executions. Judgment against the decedent for the recovery of money must be presented to the executor or administrator like any other claim. If execution is actually levied upon any property of the decedent before his death, the same may be sold for the satisfaction thereof, and the officer making the sale must account to the executor or administrator for any surplus in his hands. A judgment creditor having a judgment which was rendered against the testator or intestate in his lifetime may redeem any real estate of the decedent from any sale under foreclosure or execution, in like manner and with like effect as if the judgment debtor were still living.

Cal. C. Civ. P., § 1505.
Judgment on verdict or decision before death, § 6866.
Execution on judgment against deceased, § 6918.

7661. (3864.) Reference of doubtful claim. If the executor or administrator doubts the correctness of any claim presented to him, he may enter into an agreement, in writing, with the claimant to refer the matter in controversy to some disinterested person to be approved by the court. The report of the referee, if confirmed, shall be as valid and effectual in all respects as if the same had been rendered in a suit commenced by ordinary process.

Cal. C. Civ. P., § 1507*.
Reference generally, §§ 6835-6841.
Arbitration generally, §§ 6899-6909.

7662. (3865.) Liability of executor on judgment for costs. When a judgment is recovered, with costs, against any executor or administrator, he shall be individually liable for such costs, but they must be allowed him in his administration accounts, unless it appears that the suit or proceeding in which the costs were taxed was prosecuted or defended without just cause.

Cal. C. Civ. P., § 1509.
Liability of executor, etc., for costs, §§ 7045, 7876.

7663. (3866.) Claims of executors. Presentment. If the executor or administrator is a creditor of the decedent, his claim, duly authenticated by affidavit, must be presented for allowance or rejection to the court, and on its allowance by the court must be paid as other claims. If, however, the judge reject the claim, action thereon may be had against the estate by the claimant, and summons must be served upon the judge, who may appoint an attorney at the expense of the estate, to defend the action. If the claimant recover no judgment, he must pay all costs, including defendant's reasonable attorney's fees, to be fixed by the court.

Cal. C. Civ. P., § 1510*.
Debt of executor not discharged by his appointment, § 7639.

7664. (3867.) Statement of claims. The executor or administrator must return a statement of all claims against the estate which have been presented to him, when required by the court. In all such statements he must designate the names of the creditors, the nature of each claim, when it became due, or will become due, and whether it was allowed or rejected by him.

Cal. C. Civ. P., § 1512*.
Statement of claims presented at accounting, § 7747.

7665. (3868.) Presentment of interest-bearing debts. If there is any debt of the decedent bearing interest, whether presented or not, the executor or administrator may, by order of the court, pay the amount then accumulated and unpaid, or any part thereof, at any time when there are sufficient funds properly applicable thereto, whether said claim be then due or not; and interest shall thereupon cease to accrue upon the amount so paid. This section shall not apply to existing debts, unless the creditor consents to accept the amount.

Cal. C. Civ. P., § 1513.

Deduction of interest, § 7671.

PAYMENT OF DEBTS.

7666. (3869.) Payment of funeral and family expenses. Other debts. The executor or administrator, as soon as he has sufficient funds in his hands, must pay the funeral expenses and expenses of the last sickness and the allowance made to the family of the decedent. He may retain in his hands the necessary expenses of administration, but he is not obliged to pay any other debt or any legacy until the payment has been ordered by the court.

Cal. C. Civ. P., § 1646.

Property subject to payment of debts, §§ 6311, 6383, 6408, 7667-7670, 7761.

Homestead exemption, §§ 6409, 7643, and notes.

When devisees and legatees must contribute, §§ 6384, 6385, 6389.

Executor may pay funeral expenses before qualifying, § 6400.

Legacy, when due, §§ 6395, 6396.

On summary distribution of small estate, § 7644.

Where payment of an allowance was made discretionary with executor.

Allen v. Barnes, 5 U. 100; 12 P. 912.

The heirs are not bound to pay the debts of the ancestor, unless they received property from the estate, in which case they are responsible for such debts only to the extent of their inheritance.

Bacon v. Thornton, 16 U. 138; 51 P. 153.

The provisions of this section and §§ 7643, 7644, should be construed together, and where the estate is less than $1500 in value, the expenses of the last sickness, funeral charges, etc., should be paid before any distribution.

In re Thorn's Estate, 24 U. 209; 67 P. 22.

7667. (3870.) Other debts. Order of payment. Other debts of the estate must be paid in the following order:

1. The wages of each employe of the decedent for services rendered within sixty days next preceding his death, not exceeding $100;

2. Debts having preference by the laws of the United States or of the state;

3. All debts which were liens upon the real property occupied, selected, or set apart as a homestead;

4. All other debts which were liens on the property of the decedent at the time of his death;

5. All other demands against the estate.

Cal. C. Civ. P., §§ 1205*, 1643*.

Vouchers must be taken, when, §§ 7749, 7750.

Payment of local creditors of non-resident decedent before transmission of property to foreign representatives, § 7780.

7668. (3871.) Debts secured by liens. Debts secured by liens or incumbrances on the property occupied, selected, or set apart as a homestead must be paid out of the funds of the estate; and such liens or incumbrances shall only be enforced for any deficiency remaining after such payment. The preference given in the preceding section to debts secured by liens on other property shall extend only to the proceeds of the property affected by such liens, and to the extent thereof, and if such proceeds are insufficient to pay the liens, the part remaining unsatisfied must be classed with other demands against the estate.

Cal. C. Civ. P., § 1644*.

Homestead, distribution of, etc., §§ 6409-6411, 7644.

Presentment of claim, § 7649.

Presentation of contingent claim, § 7649.

No mechanic's lien against homestead, note to § 7643.

7669. (3872.) Dividends to creditors. If the estate is insufficient to pay all the debts of any one class, each creditor must be paid a dividend in proportion to his claim; and no creditor of any one class shall receive any payment until all those of the preceding class are fully paid.

Cal. C. Civ. P., § 1645.

7670. (3873.) Payment in part. Discharge of executor. Upon the settlement of the accounts of the executor or administrator, the court must make an order for the payment of the debts, as circumstances of the estate require.

If there are not sufficient funds in the hands of the executor or administrator, the court must specify in the decree the sum to be paid to each creditor. If the whole property of the estate be exhausted by such payment or distribution, such account must be considered as a final account, and the executor or administrator is entitled to his discharge on producing and filing the necessary vouchers and proofs showing that such payments have been made and that he has fully complied with the decree of the court.

Cal. C. Civ. P., § 1647. Final account and settlement, §§ 7751, 7763-7776.

7671. (3874.) Claims contingent or not due. If there is any claim not due, or any contingent or disputed claim against the estate, the amount thereof or such part of the same as the holder would be entitled to if the claim were due, established, or absolute, must be paid into the court and there remain to be paid over to the party when he becomes entitled thereto, or if he fails to establish his claim, to be paid over or distributed as the circumstances of the case require. If any creditor whose claim has been allowed, but is not yet due, appears and assents to a deduction therefrom of the legal interest for the time the claim has yet to run, he is entitled to be paid accordingly. The payments provided for in this section are not to be made when the estate is insolvent, unless a pro rata distribution is ordered.

Cal. C. Civ. P., § 1648. Payment of interest bearing debts, § 7665.

7672. (3875.) Executor or administrator liable to creditors, when. Execution. When a decree is made by the court for the payment of creditors, the executor or administrator is personally liable to each creditor for his allowed claim, or the dividend thereon, and execution may be issued on such decree, as upon a judgment in the court, in favor of each creditor, and the same proceedings may be had under such execution as in other cases. The executor or administrator is liable therefor on his bond to each creditor.

Cal. C. Civ. P., § 1649. Judgment against executor or administrator upon claim, payment, § 7659.

7673. (3876.) Claims not included in order for payment. When the accounts of the administrator or executor have been settled, and an order made for the payment of debts and distribution of the estate, no creditor whose claim was not included in the order for payment has any right to call upon the creditors who have been paid, or upon the heirs, devisees, or legatees to contribute to the payment of his claim; but if the executor or administrator has failed to give due notice to the creditors, any such creditor may recover on the bond of the executor or administrator.

Cal. C. Civ. P., § 1650*. Failure to present claim, bar, § 7648.

CHAPTER 10.

SALES, MORTGAGES, AND LEASES.

SALES IN GENERAL.

7677. (3877.) When sale allowed. When a sale of property of the estate is necessary to pay the allowance of the family, or the debts outstanding against the decedent, or the debts, expenses, or charges of administration, or legacies, or when it appears to the satisfaction of the court that it is for the advantage, benefit, and best interests of the estate and those interested therein that the real or personal estate or some part thereof, be sold, the executor or administrator may sell any real as well as personal property of the estate upon the order of the court; and an application for the sale of property may embrace both real and personal property.

Cal. C. Civ. P., § 1536. Cal. Sup. (1893) p. 1010.
Mortgage or lease of real property, §§ 7708, 7709.
Limitation on action to recover land sold by executor, etc., § 6461.
Lease and bond of mining claim, §§ 7712.
Sale of property of absent heirs, § 7784.
Property liable for debts, §§ 6311, 6385, 6389, 6408, 7666, 7670, 7761.
Order of probate court for sale of property to pay for improvements made years after death of decedent, and while there was no

properly authorized administrator of the estate, is void; no title passes by sale thereunder.
Cain Heirs v. Young, 1 U. 361.
Possessory rights are treated as real estate in the manner of descent and distributions, and cannot be sold by administrators except to pay debts incurred by the ancestor; but if they be treated merely as personal property, they cannot be sold to pay debts not incurred by the ancestor and not allowed by the probate court.
Id.

7678. (3878.) Order for and report of sale. Confirmation. No sale of any property of an estate of a decedent is valid unless made under order of the court, except as otherwise provided in this chapter. All sales must be reported under oath to and confirmed by the court before the title to the property sold passes.

Cal. C. Civ. P., § 1517. Confirmation of private sale, § 7695.

7679. (3879.) But one sale when estate insolvent. When it appears to the court that the estate is insolvent, or that it will require a sale of all the property of the estate of every character to pay the family allowance, expenses of administration, and debts, there need be but one order of sale made, and but one sale had.

Cal. C. Civ. P., § 1519*.

7680. (3880.) All may be sold when sale of part injurious. If at any hearing it appears necessary or advantageous to sell a part of the real or personal estate, and that by a sale thereof the residue of the estate, real or personal, or any part thereof, would thereby be injured, or would be so small in quantity or value, or would be of such a character with reference to its future disposition among the heirs or devisees, as clearly to render it for the best interest of all concerned that the same should be sold, the court may authorize the sale of the whole estate, or of any part thereof, as may be necessary for the best interest of all concerned.

Cal. C. Civ. P., § 1542*. See Cal. Sup. (1893) p. 1012.

7681. (3881.) Sales without order and notice. When property is directed by the will to be sold, or authority is given by the will to sell property, the executor may sell any property of the estate without order of the court, and at either public or private sale, and with or without notice, as the executor may determine, but the executor must make return of such sales as in other cases; and if directions are given in the will as to the mode of selling, or the particular property to be sold, such direction must be observed. In either case, no title passes unless the sale be confirmed by the court.

Cal. C. Civ. P., § 1561.
Notice generally, §§ 7856-7868.
Under § 4181, C. L. 1888, where will gives executors simply "power to sell either at public or private sale in their discretion," without directions as to notice, sales without statutory notice are invalid.
In re Walker Estate, 6 U. 369; 23 P. 930.

7682. (3882.) Executor liable for neglect at sale. If there is any neglect or misconduct in the proceedings of the executor or administrator in relation to any sale by which any person interested in the estate suffers damage, the party aggrieved may recover the same in an action upon the bond of the executor or administrator, or otherwise.

Cal. C. Civ. P., § 1571. Executor liable for double damages for fraud in sale, § 7707.

7683. (3883.) Return of sale within thirty days. Penalty. When a sale has been made by an executor or administrator of any property of the estate, real or personal, he must return to the court within thirty days thereafter an account of sales verified by his affidavit. If he neglects to make such return, he may be punished by attachment, or his letters may be revoked, one day's notice having been first given him to appear and show cause why such attachment should not issue or such revocation should not be made.

Cal. C. Civ. P., § 1575. Revocation generally, §§ 7627-7630.

7684. (3884.) Executor cannot be purchaser. No executor or administrator must, directly or indirectly, purchase any property of the estate he represents, nor be interested in any sale.

Cal. C. Civ. P., § 1576.
Not to purchase claim against estate, § 7737.
Not to profit or lose by estate, § 7736.
Executor may, however, purchase an heir's or devisee's interest in the estate.
Haight v. Pearson, 11 U. 51; 39 P. 479.

SALES OF PERSONAL PROPERTY.

7685. (3885.) Sale may be ordered on petition. Notice. Proviso. A sale of personal property may be ordered on petition setting forth the facts

showing the sale to be necessary or advantageous. Orders authorizing sales of personal property shall be granted, and such sales be made, only after notice, except in the case of perishable and other property likely to depreciate in value, and for the purpose of paying the family allowance, in which cases orders and sales may be made without notice if directed by the court; but it is provided that, when any estate consists in whole or in part of stocks, bonds, or other choses in action likely to fluctuate in value, which have a publicly quoted market value and are regularly sold and purchased on any publicly recognized stock exchange, chamber of commerce, or other like institution, any or all such stocks, bonds, or other choses in action may be, by the personal representative of such estate, sold upon any such stock exchange, chamber of commerce, or other like institution, without either notice or confirmation of such sale, but only upon a verified petition, duly filed, and upon an order of the judge of the court made without notice, both showing that such sale is necessary to pay the legacies or outstanding debts of the estate, or both showing it to be for the best interests or better security of the estate and the persons interested therein that such sale be made; and the title to the property thus sold shall pass upon and by virtue of the sale, and the personal representative of the estate shall pay the costs and expenses of and commissions upon such sale out of the proceeds received thereupon. Am'd '15, p. 102.

Cal. C. Civ. P., §§ 1522-1525*.
Clerk may order sale of perishable property, § 7561.
Notice generally, time, form, etc., §§ 7856-7868.
Under § 7724, providing that, on the death of one partner, the surviving partner shall have the right to continue in possession of the partnership property and to settle its business, the court has no authority or jurisdiction to order a sale of the personal property of a deceased partner, and, although a sale was ordered and made, it was not error to refuse to confirm it.
Wilson v. Meyer, 23 U. 529; 65 P. 488.

7686. (3886.) Id. How and where sold. Personal property must be sold at public auction, unless the court orders a private sale. The court may direct the terms of sale. Public sales of personal property must be made at the courthouse door, or at some other public place, or at the residence of the decedent; but no sale shall be made of personal property not present at the time of sale, unless the court otherwise orders.

Cal. C. Civ. P., § 1526*.

7687. (3887.) Personalty sold before realty, when. Whenever it appears to the court on any hearing of an application for the sale of real property that it would be for the interest of the estate that personal property of the estate, or some part of such property, should be first sold, the court may decree the sale of the personal property, or any part of it, and the sale thereof shall be conducted in the same manner as if the application had been made for the sale of such personal property in the first instance.

Cal. C. Civ. P., § 1639.

SALES OF REAL PROPERTY.

7688. (3888.) Petition, form of. To obtain an order for the sale of real property, the executor or administrator must present a verified petition to the court, setting forth the amount of personal estate that has come to his hands, and how much thereof, if any, remains undisposed of; the debts outstanding against the decedent, as far as can be ascertained or estimated; the amount due upon the family allowance, or that will be due after the same has been in force for one year; the debts, expenses, and charges of administration already accrued, and an estimate of what will or may accrue during the administration; a general description of all the real property of which the decedent died seized, or in which he had any interest, or in which the estate has acquired any interest, and the condition and value thereof; and if said order for sale of real estate is petitioned for on the ground that it is for the advantage, benefit, and best interests of the estate and those interested therein that the sale be made, the petition, in addition to the foregoing facts, must set forth in what way an advantage or benefit would accrue to the estate and those interested therein by such sale. If the executor or administrator neglects to apply for an order of sale where it is necessary, any person interested may make application therefor.

Cal. C. Civ. P., §§ 1537, 1545*. See Cal. Sup. (1893) p. 1010.
Additional bond of executor or administrator on making sale, § 7618.
Lease of mining claim, with option, § 7711.
Sale of property of absent heir, § 7784.

But if neither petition nor decree shows facts under § 4159, C. L. 1888, order of sale is void for want of jurisdiction. (But see § 7559.)
Needham v. Salt Lake City, 7 U. 319; 26 P. 920.

7689. (3889.) Order for hearing. Notice. Such petitions must be filed and an order thereupon made directing all persons interested in the estate to appear before the court at a time and place specified to show cause why an order should not be granted to sell such real estate of the decedent as is necessary or advantageous. Notice of such hearing shall be given by publication or by posting, as the court may direct, and by mailing notices to the heirs, and to the executor or administrator if he is not the petitioner. Am'd '99, p. 23.

Cal. C. Civ. P., § 1538*. See Cal. Sup. (1893) p. 1011.
Clerk may set time for hearing and fix notice, § 7561.
Form of notice, etc., §§ 7856-7868.

Posting in three public places, § 7864.
Notice waived in writing, § 7868.
Personal service equivalent to mailing, § 7863.

7690. (3890.) Order in force one year. If the court is satisfied, after a hearing, that the sale of the whole or some portion of the real estate is necessary or advantageous, or if such sale be assented to by all the persons interested, an order must be made to sell the whole, or so much and such parts of the real estate described in the petition as the court shall judge necessary or beneficial; *provided,* that no order of sale granted in pursuance of this chapter shall continue in force more than one year after granting the same, unless a sale has been made thereunder.

Cal. C. Civ. P., § 1543*. See Cal. Sup. (1893) p. 1012.

7691. (3891.) Order for sale. Terms. Sale may be on credit. The order of sale must describe the lands to be sold and the terms of sale, which may be for cash or on a credit, which in the opinion of the court is most beneficial to the estate, payable in gross or in instalments, and in such kind of money and with such interest as the court may direct. The land may be sold in one parcel or in subdivisions, as the executor or administrator shall judge most beneficial to the estate, unless the court otherwise specially directs. If it appears that any part of such real estate has been devised, and not charged in such devise with the payments of debts or legacies, the court must order the remainder to be sold before that so devised. Every such sale must be ordered to be made at public auction, unless in the opinion of the court it would benefit the estate to sell the whole or some part of such real estate at private sale. The court may, if the same is asked for in the petition, order or direct such real estate or any part thereof to be sold at either public or private sale, as the executor or administrator shall judge to be most beneficial for the estate. If the executor or administrator neglects or refuses to make a sale under the order and as directed therein, he may be compelled to sell by order of the court, made on motion after due notice by any party interested.

Cal. C. Civ. P., § 1544. Am'd '15, p. 84.

7692. (3892.) Posting of notice of sale. When a sale is ordered to be made at public auction or at private sale, notice of the time and place of sale must be prominently posted on the property at the highway, if the property abuts on a highway, or, if it does not so abut, at a point on the highway near the property, and must also be published as hereinafter provided, unless otherwise ordered.

Cal. C. Civ. P., § 1547*. Posting in three public places, § 7864.

7693. (3893.) Public sales, when and where made. Sales at public auction must be made in the county where the land is situated; but when the land is situated in two or more counties, it may be sold in either. The sale must be made between the hours of nine o'clock in the morning and the setting of the sun on the same day, and must be made on the day named in the notice of sale unless the same is postponed.

Cal. C. Civ. P., § 1548.

7694. (3894.) Time of making private sales. When a sale of real estate is ordered to be made at private sale, the sale shall not be made before the day named, but must be made within six months thereafter.

Cal. C. Civ. P., § 1549*.

7695. (3895.) Confirmation of private sale. No sale of real estate at private sale shall be confirmed by the court unless the sum offered is at least ninety per cent of the appraised value thereof, nor unless such real estate has been appraised within one year of the time of such sale. If it has not been so appraised, or if the court is satisfied that the appraisement is too high or too low, appraisers must be appointed, and they must make an appraisement thereof, as in the case of an original appraisement. This may be done at any time before the sale or the confirmation thereof.

Cal. C. Civ. P., § 1550. Confirmation of public sales, § 7700.
All sales must be confirmed, § 7678.

7696. (3896.) Sales on credit. The executor or administrator must, when the sale is made upon a credit, take the notes of the purchaser for the purchase money, with a mortgage on the property to secure their payment; *provided,* that at least ten per cent of the purchase money shall be paid at time of sale.

Cal. C. Civ. P., § 1551*.

7697. (3897.) Postponement of public sale. If, at the time appointed for a sale at public auction, the executor or administrator deems it for the interest of all persons concerned that the same be postponed, he may postpone it from time to time, not exceeding in all three months; but in case of postponement, notice thereof must be given by a public declaration at the time and place first appointed for the sale, and if the postponement be for more than one day, further notice must be given by reposting, and by republishing the original notice of sale, with a brief statement appended to each of said notices of the fact of postponement and of the time to which the same is made.

Cal. C. Civ. P., §§ 1557, 1558*.

7698. (3898.) Return and hearing. Notice. The executor or administrator shall, within thirty days after making any sale of real estate, make a return of his proceedings to the court. A hearing upon the return of the proceedings may be asked for in the return or by petition subsequently, and thereupon the court must fix the day for the hearing, of which notice must be given, which notice must briefly indicate the land sold and the terms of sale.

Cal. C. Civ. P., § 1552*. See Cal. Sup. (1893) p. 1013. Sale under power granted in will, confirmation, § 7681.
Clerk may fix time for hearing, and notice to be given, § 7561.

7699. (3899.) When sale vacated. Resale. If the proceedings were unfair or the sum bid disproportionate to the value, or if it appears that a sum exceeding such bid at least ten per cent, exclusive of the expenses of a new sale, may be obtained, the court may vacate the sale and direct another to be had, of which notice must be given and the sale in all respects conducted as if no previous sale had taken place. If an offer more in amount than that named in the return be made to the court in writing by a responsible person, the court may accept such offer and confirm the sale to such person, or order a new sale.

Cal. C. Civ. P., § 1552*. See Cal. Sup. (1893) p. 1013.

7700. (3900.) Confirmation. Resale. If it appears to the court that the sale was legally made and fairly conducted, and that the sum bid was not disproportionate to the value of the property sold, and that a greater sum, as above specified, cannot be obtained, or if the increased bid mentioned in the next preceding section is accepted by the court, the court must make an order confirming the sale, and directing conveyances to be executed. The sale from that time is confirmed and valid. If, after the confirmation, the purchaser neglects or refuses to comply with the terms of sale, the court may, on motion of the executor or administrator, and after notice to the purchaser, order a resale of the property to be made. If the amount realized on such resale does not cover the bid and the expenses of the previous sale, such purchaser is liable for the deficiency to the estate.

Cal. C. Civ. P., § 1554*. Confirmation of private sales, § 7695.
All sales must be confirmed, § 7678.

7701. (3901.) Id. Conveyance. After confirmation, conveyances must be executed to the purchaser by the executor or administrator conveying all

the right, title, interest, and estate of the decedent in the premises at the time of his death. If prior to the sale, by operation of law or otherwise, the estate has acquired any right, title, or interest in the premises, other than or in addition to that of the decedent at the time of his death, such right, title, or interest also passes by such conveyances.

Cal. C. Civ. P., § 1555*.
After-acquired title inures to grantee, § 4879.
Recording of decree, notice, § 7871.
A purchaser at an administrator's sale takes subject to the rule of caveat emptor. Moyle v. Thomas, 46 U. 542; 151 P. 361.

7702. (3902.) Contract for purchase of lands. Sale. If the decedent, at the time of his death, was possessed of a contract for the purchase of lands, his interest in such lands thereunder may be sold in the same manner as if he had died seized of such lands, except as hereinafter provided.

Cal. C. Civ. P., § 1565*.

7703. (3903.) Id. Conditions. The sale of such an interest must be made subject to all payments that may thereafter become due on such contracts, and the sale must not be confirmed by the court until the purchasers execute a bond in double the whole amount of payments thereafter to become due on such contracts, with sureties to be approved by the court, conditioned that the purchaser will make all payments for such land that become due after the date of the sale, and will fully indemnify the executor or administrator and the persons entitled to the decedent's interest in the land sold against all demands, costs, charges, and expenses by reason of any covenant or agreement contained in such contract.

Cal. C. Civ. P., § 1566*, 1567*.

7704. (3904.) Id. Assignment of contract. Upon the confirmation of the sale, the executor or administrator must execute to the purchaser an assignment of the contract, which vests in the purchaser, his heirs, and assigns all the right, title, and interest of the estate, or of the persons entitled to the interest of the decedent in the lands sold, at the time of the sale; and the purchaser has the same rights and remedies against the vendor of such land as the decedent would have had if he were living.

Cal. C. Civ. P., § 1568.

7705. (3905.) Sale of lands under mortgage. Proceeds. When any sale is made by an executor or administrator, pursuant to provisions of this chapter, of lands subject to any mortgage or other lien which is a valid claim against the estate of the decedent and has been presented and allowed, the purchase money must be applied, after paying the necessary expenses of the sale, first, to the payment and satisfaction of the mortgage or lien, and the residue, if any, in due course of administration. The application of the purchase money to the satisfaction of the mortgage or lien must be made without delay, and the land is subject to such mortgage or lien until the purchase money has been actually so applied. The purchase money, or so much thereof as may be sufficient to pay such mortgage or lien, with interest, and any lawful costs and charges thereon, may be paid into the court, to be received by the clerk thereof, whereupon the mortgage or lien upon the land must cease, and the purchase money must be paid over by the clerk of the court without delay, in payment of the expenses of the sale, and in satisfaction of the debt to secure which the mortgage or other lien was taken, and the surplus, if any, at once returned to the executor or administrator, unless, for good cause shown, after notice to the executor or administrator, the court otherwise directs.

Cal. C. Civ. P., § 1569*.

7706. (3906.) Id. Mortgagee may purchase. At any sale, under order of the court, of lands upon which there is a mortgage or lien, the holder thereof may become the purchaser, and his receipt for the amount due him from the proceeds of the sale is a payment pro tanto. If the amount for which he purchased the property is insufficient to defray the expenses and discharge his mortgage or lien, he must pay to the court, or the clerk thereof, an amount sufficient to pay such expenses.

Cal. C. Civ. P., § 1570.

7707. (3907.) Liability for fraudulent sales. Any executor or admin-

istrator who fraudulently sells any real estate of a decedent contrary to or otherwise than under the provisions of this chapter is liable in double the value of the land sold, as liquidated damages, to be recovered in an action by the person having an estate of inheritance therein.

Cal. C. Civ. P., § 1572.
Limitation on action to recover land sold by executor, etc., § 6461.
Executor, etc., liable for neglect or misconduct in selling, § 7682.
Damages for alienation, etc., of personal property, § 7732.
Liability of guardian for waste, § 7241.

MORTGAGES A ND LEASES.

7708. (3908.) As to mortgages. Whenever, in any estate now being administered or that may hereafter be administered, it shall appear to the court or judge to be for the advantage of the estate to raise money by a mortgage of the real property or any part thereof, the court, as often as occasion therefor shall arise in the administration of any estate, may, on petition, notice, and hearing, authorize, empower, and direct the executor or administrator to mortgage the real estate or any part thereof, upon such terms and for such length of time as to the court may seem necessary or beneficial. The petition shall be verified, and shall state the purpose sought to be accomplished by the mortgage, the amount to be raised, a general description of the property proposed to be mortgaged, and such other facts as are required in a petition for the sale of real property. Upon filing such petition, the clerk must set the same for hearing, and give notice thereof by publication or by posting, and by mailing notice to the heirs. The order to mortgage shall describe the premises, and shall prescribe the amount of the mortgage, the maximum rate of interest to be paid, the maximum period of time for which the same may be given, and such other terms and conditions as the court may deem advisable. Am'd '17, p. 29.

Cal. C. Civ. P., §§ 1577, 1578*. See Cal. Sup. (1889) pp. 428-430, and Sup. (1893) pp. 1014-1018. Mont. Civ. P., §§ 2720-2722*.
Notice, time, form, etc., §§ 7856-7868.
Lease of mining claim with option to purchase, §§ 7710-7712.

7709. (3909.) As to lease. Whenever, in any estate now being administered or that may hereafter be administered, it shall appear to the court or judge to be for the best interest of the estate to lease the real property or any part thereof, the court, as often as occasion therefor shall arise in the administration of any estate, may, on petition, notice, and hearing, authorize, empower, and direct the executor or administrator to lease the real property or any part thereof, upon such terms and for such length of time as to the court may seem for the best interest of the estate. The petition shall be verified, and shall set forth the facts showing the lease to be for the best interest of the estate, and a description of the property and the terms of the proposed lease. Upon the filing of such petition the clerk must set the same for hearing, and give notice thereof by publication or by posting, and by mailing of notices to the heirs. Am'd '17, p. 30.

Cal. C. Civ. P., § 1579*. Cal. Sup. (1889) pp. 430, 431, and Sup. (1893) p. 1018.

7710. (3909x.) May lease mining claims belonging to estates, with option to purchase. When all or any portion of the estate of any person deceased, or of any ward under guardianship, consists of mining claims, coal lands, or other mining property, whether patented or unpatented, or of interests in mining claims, coal lands, or other mining property, the administrator or executor of such deceased person, or the guardian of the property of the ward, may petition the court having jurisdiction of the estate for leave to lease such mining claims, coal lands, or other mining property, or such interests in mining claims, coal lands, or other mining property, belonging to the estate of the deceased or to the ward, with an option to the lessee to purchase the same; and if upon the hearing it appears to the court that it is for the interests of the estate or of the ward, the court may make an order authorizing the administrator, executor, or guardian to lease all or any portion of such mining claims, coal lands, or other mining property, or all or any portion of the interests therein belonging to the estate or to the ward as he shall designate in the order, and to give an option to the lessee to purchase the

same within a specified time at a stipulated price; and when such order has been made, the executor, administrator, or guardian may lease the property, or the interests in the property specified in said order, and give the lessee an option to purchase the same, within the time, at the price and on the terms specified in the order. '03, p. 9; am'd '13, p. 107.

Lease of real property, § 7708.

7711. (3909x1.) Id. Bond of administrator, etc. Upon making such order, the court may require the administrator, executor, or guardian to give a bond, with sureties, to be approved by the clerk of said court, and, upon the option being accepted, may require additional bond, with sureties, before the sale is confirmed, as in the case of other sales by an administrator, executor, or guardian. '03, p. 10.

Additional bond on making sale, § 7618.

7712. (3909x2.) When lessee is entitled to deed. If the lessee complies with the terms of the lease, and accepts the option, and tenders the stipulated price, he shall be entitled to a deed for the mining claims, coal lands, or other mining property, or the aforesaid interests therein, upon which the option was given, but no title shall pass under such option until the acceptance of the option and the deed executed pursuant thereto have been reported to and approved by the court. '03, p. 10; am'd '13, p. 107.

CHAPTER 11.

POWERS AND DUTIES OF EXECUTORS AND ADMINISTRATORS.

7716. (3910.) Acts of part of executors valid, when. When all the executors named are not appointed by the court, those appointed have the same authority to perform all acts and discharge the trust required by the will as effectually for every purpose as if all were appointed, and should act together; where there are two executors or administrators, the act of one alone shall be effectual, if the other is absent from the state or laboring under any legal disability from serving, or if he has given his co-executor or co-administrator authority in writing to act for both; and where there are more than two executors or administrators, the act of a majority is valid.

Cal. C. Civ. P., § 1355.

Words giving joint authority construed as giving authority to a majority, § 5846.

Trustees after distribution, § 7788.

Where executor named is a non-resident or a minor, § 7583.

Rights in organization of irrigation district, § 3539.

Lease for more than one year by one of six executors without written authority from the others, who were not under disability or absent from the territory, is invalid.

Utah Loan & Trust Co. v. Garbutt, 6 U. 342; 23 P. 758.

The sole heir as administrator can not legally bind an estate by agreeing to settle a claim against the estate by paying a stipulated amount from the estate, on condition that the personal estate should be valued at a certain amount, as far as creditors were concerned; but such agreement would be binding upon the interest of the heir.

Dunn v. Wallingford, 47 U. 491; 155 P. 347.

Administrator acting without authority does not bind the estate, but is personally liable.

Id.

7717. (3911.) Authority of administrators with will annexed. Administrators with the will annexed have the same authority over the estates which executors named in the will would have, and their acts are as effectual for all purposes.

Cal. C. Civ. P., § 1356*.

Letters of administration with will annexed, § 7582.

7718. (3912.) Possession of real and personal estate. Actions for. The executor or administrator is entitled to and must take possession of all the real and personal estate of the decedent, and shall receive the rents and profits of the real estate until the estate is settled, or until delivered over by order of the court to the heirs or devisees; and must keep in good tenantable repair all houses, buildings, and fixtures thereon, which are under his control, and collect all debts due to the decedent or to the estate. The heirs or devisees may themselves, or jointly with the executor or administrator, maintain an action for the possession of the real estate or for the purpose of quieting

title to the same, against any one except the executor or administrator; but this section shall not be so construed as requiring them so to do.

Cal. C. Civ. P., § 1452*.
Possession of real property delivered to heirs, etc., after expiration of time for presentation of claims, § 7761.
Duties and powers of special administrators, §§ 3610, 7786.
Court may order money invested, § 7731.
Executor, etc., charged with estate, § 7735.

As to right of administrator to maintain ejectment, notwithstanding conveyance to heirs of property in dispute.
McClelland v. Dickenson, 2 U. 100.
Administrator acting without authority does property.
Jenkins v. Jensen, 24 U. 108; 66 P. 773.

7719. (3913.) Id. Possession of executor possession of heirs. Exception. For the purpose of bringing suits to quiet title, or for partition of such estate, the possession of the executors or administrators is the possession of the heirs or devisees; such possession by the heirs or devisees is subject, however, to the possession of the executor or administrator for the purposes of administration as provided in this title.

Cal. C. Civ. P., § 1581*.

7720. (3914.) Actions by and against executors and administrators. Actions for the recovery of any property, real or personal, or for the possession thereof, or to quiet title thereto, or to determine any adverse claim thereon, and all actions founded upon contracts, may be maintained by and against executors and administrators, in all cases in which the same might have been maintained by or against their respective testators or intestates.

Cal. C. Civ. P., § 1582*. See Cal. Sup. (1895) p. 40.
Substitution of representative in action by or against deceased, § 6513.
Executor or administrator may sue, § 6495.
Actions by and against special administrators, § 7610.
Actions for waste, §§ 7721, 7722.
Action for damages by administrator of deceased non-resident, note to § 6505.
Executor, etc., charged with estate, § 7735.
L., a resident of Utah, was sued and duly served in Idaho, but died before judgment. His executors, appointed in Utah, were substituted for deceased, entered their appearance, and judgment was obtained against them as such executors. The assignee of this judgment brought suit in Utah against such executors as such; held, that the Idaho judgment was invalid against the estate, but that the executors were liable as executors de son tort. A personal representative cannot bind the estate by his extra-territorial acts.
Nat'l Bank of Hailey v. Lewis, 12 U. 84; 41 P. 712.
Whenever an instrument creating a trust confers upon the trustee any power in trust or imposes any duty relating to management of trust estate, or establishes any agency to be performed by the trustee, the legal title vests in him to enable him to administer the trust, and proceeds of a sale by defendant in carrying out such trust forms no part of decedent's estate, and the administrator cannot maintain an action therefor.
Barrette v. Dooly, 21 U. 81; 59 P. 718.
Where an administrator neglects to bring a suit to recover real property within the prescribed period of limitation, whereby a minor is barred, the heir has a right of action against the administrator and his bondsmen.
Jenkins v. Jensen, 24 U. 108; 66 P. 773.
A conversion of property by an administrator does not give rise to a cause of action in favor of the deceased, but it is a wrong to the heirs.
Reed v. Hume, 25 U. 248; 70 P. 998.
An action cannot be maintained against an administrator and his sureties for a conversion of assets until an accounting is had in the probate court.
Reed v. Hume, 25 U. 248; 70 P. 998.
Barrette v. Dooly, 21 U. 81; 59 P. 718.
It is the duty of an executor to bring suit to cancel his testator's conveyance thought to have been procured by undue influence.
Hatch v. Hatch, 46 U. 218; 148 P. 433.
An administrator may demand of a corporation stock to which the intestate was entitled or bring action for damages for its failure to issue stock.
Coray v. Perry Irr. Co., 50 U. —; 166 P. 672.

7721. (3915.) May maintain action for waste, etc. Executors and administrators may maintain actions against any person who has wasted, destroyed, taken, or carried away, or converted to his own use the goods of their testator or intestate in his lifetime. They may also maintain actions for trespass committed on real estate of the decedent in his lifetime.

Cal. C. Civ. P., § 1583.
Actions by executors or administrators, § 7720.

7722. (3916.) Against executors for waste by testator. Any person or his personal representative may maintain an action against the executor or administrator of any testator or intestate who in his lifetime has wasted, destroyed, taken, or carried away, or converted to his own use the goods or chattels of any such person, or committed any trespass on the real estate of such person.

Cal. C. Civ. P., § 1584.
Where an action is against a defendant for misappropriation or misuse of a trust fund and breach of duty occasioned through neglect while acting in a fiduciary capacity, such action survives against the executors of a party defendant at a former trial, who has since died.
Warren v. Robinson, 21 U. 429; 61 P. 28.

7723. (3917.) Decedent's business continued, when. When the interests of creditors are not prejudiced thereby, the court may prescribe that the business in which the deceased was engaged at the time of his death may be

continued for such length of time as may be necessary to permit the affairs of the estate to be wound up to the best advantage.

Iowa, McClain's An. C. (1888) § 3611*.
Surviving partner to continue and settle partnership business, § 7724.

7724. (3918.) Surviving partner to settle partnership affairs, and account. When a partnership exists between the decedent, at the time of his death, and any other person, the surviving partner has the right to continue in possession of the partnership and to settle its business, but the interest of the decedent in the partnership must be included in the inventory and be appraised as other property. The surviving partner must settle the affairs of the partnership without delay, and account with the executor or administrator, and pay over such balances as may from time to time be payable to him in right of the decedent. Upon the application of the executor or administrator, the court or judge may, whenever it appears necessary, order the surviving partner to give a bond in a prescribed sum or render an account, and in case of neglect or refusal may, after notice, compel it by attachment; and the executor or administrator may maintain against him any action which the decedent could have maintained.

Cal. C. Civ. P., § 1585*.
Surviving partner incompetent as administrator, § 7599.
Decedent's business continued, when, § 7723.
Under provisions of this section, where court ordered the personal property of a deceased partner, which was in possession of the surviving partner, to be sold by decedent's executors, since the court had no jurisdiction to order the sale, it was not error to refuse to confirm it.
Wilson v. Meyer, 23 U. 529; 65 P. 488.
A surviving partner is entitled to sue to recover payment on a usurious contract.
Cobb v. Hartenstein, 47 U. 174; 152 P. 424.
Where a surviving partner joined in a general demurrer, it will be presumed he did so as surviving partner.
Bingham Coal & Lbr. Co. v. Blom, 43 U. 584; 137 P. 630.
There can be no decree of final settlement under partnership affairs as between the surviving partner and the deceased partner's estate without an accounting with the administrators and without the necessary facts being presented to the court in a proper manner.
In re Tripp Estate, 51 U. —; 170 P. 975.

7725. (3919.) May sue on bond of prior executor, etc. An administrator may, in his own name, for the use and benefit of all parties interested in the estate, maintain actions on the bond of an executor, or of any former administrator of the same estate.

Cal. C. Civ. P., § 1586.

7726. (3920.) Executor who has not qualified not made a party. In actions by or against executors, it is not necessary to join those as parties who may have been appointed by the court but who have not qualified.

Cal. C. Civ. P., § 1587.

7727. (3921.) May compound with debtor with consent of court. Whenever a debtor of the decedent is unable to pay all his debts, the executor or administrator, with the approbation of the court or judge, may compound with him and give a discharge upon receiving a fair and just dividend of his effects. A compromise may also be authorized when it appears to be just, and for the best interests of the estate.

Cal. C. Civ. P., § 1588.

7728. (3922.) To set aside fraudulent conveyances by decedent. When there is a deficiency of assets in the hands of an executor or administrator, and when the decedent, in his lifetime, has conveyed any real estate, or any rights or interests therein, with intent to defraud his creditors, or to avoid any right, debt, or duty of any person, or has so conveyed such estate that by law the deeds or conveyances are void as against creditors, the executor or administrator must commence and prosecute to final judgment any proper action for the recovery of the same, and may recover for the benefit of the creditors all such real estate so fraudulently conveyed, and may also for the benefit of the creditors sue for and recover all goods, chattels, rights, or credits which have been so conveyed by the decedent in his lifetime, whatever may have been the manner of such fraudulent conveyance.

Cal. C. Civ. P., § 1589.
Under the provisions of this section and § 7729, creditors of an insolvent estate may not bring an action in their own names to set aside a conveyance made by decedent in his lifetime, without first having made demand on the administrator to bring such suit, and having been met with a refusal by him.
Fehringer v. Com'l Nat. Bank, 23 U. 393; 64 P. 1108.

7729. (3923.) Id. Creditors must pay cost of suit. No executor or ad-

ministrator is bound to sue for such estate as mentioned in the next preceding section for the benefit of the creditors unless on application of creditors, who must pay such part of the costs and expenses of the suit, or give such security to the executor or administrator therefor, as the court or judge shall direct.

Cal. C. Civ. P., § 1590.

7730. (3924.) Id. Estate recovered used to pay debts. All real estate so recovered must be sold for the payment of debts in the same manner as if the decedent had died seized thereof, upon obtaining an order therefor from the court; and the proceeds of all goods, chattels, rights, and credits so recovered must be appropriated in payment of the debts of the decedent in the same manner as other property in the hands of the executor or administrator.

Cal. C. Civ. P., § 1591.

7731. (3925.) Court may order moneys invested. Petition. Notice. Pending the settlement of any estate, on the petition of any party interested therein, and upon good cause shown therefor, the court may upon notice order any moneys in the hands of the executors or administrators to be invested for the benefit of the estate in securities of the United States or other good securities to be approved by the court or judge.

Cal. C. Civ. P., § 1640*.
May be invested in land mortgage bonds, § 1057.

7732. (3926.) Embezzler liable for double value. If any person embezzles or alienates any of the money, goods, chattels, or effects of a decedent, he shall be liable for double the value of the property so embezzled or alienated, to be recovered by action for the benefit of the estate.

Cal. C. Civ. P., § 1458*.
Damages for fraudulently selling real property, § 7707.

7733. (3927.) Id. Citation to person suspected. Order. The court may require any person suspected of having taken wrongful possession of any of the effects of the deceased, or of having had such effects under his control, to appear and submit to an examination under oath touching such matters; and if on such examination it appears that he has the wrongful possession of any such property, the court may order the delivery of the same to the executor or administrator of the estate.

Cal. C. Civ. P., § 1459*. Citation generally, § 7865.

7734. (3928.) Id. Contempt. Imprisonment. If, on being duly served with the order of the court requiring him to do so, any person fails to appear in accordance with such order; or if, having appeared, he refuses to answer any question which the court deems proper to put to him in the course of such examination; or if he fails to comply with the order of the court requiring him to deliver the property, he may be committed to the jail of the county until a compliance is yielded.

Cal. C. Civ. P., § 1460*.

7735. (3929.) Executor charged with estate. Every executor and administrator is chargeable in his account with the whole of the estate of the decedent which may come into his possession at the value of the appraisement contained in the inventory, except as provided in the following sections, and with all the interests, profits, and income of the estate.

Cal. C. Civ. P., § 1613. a claim which the testator held against him,
Naming a person executor does not discharge § 7639.
Possession of estate, § 7718.

7736. (3930.) Id. Not to profit or lose by estate. He shall not make profit by the increase, nor suffer loss by the decrease or destruction, without his fault, of any part of the estate. He must account for the excess when he sells any part of the estate for more than the appraisement, and if any is sold for less than the appraisement he is not responsible for the loss if the sale has been justly made.

Cal. C. Civ. P., § 1614.

7737. (3931.) Id. Not to purchase claim. No administrator or executor shall purchase any claim against the estate he represents; and if he pays any claim for less than its nominal value, he is only entitled to charge in his account the amount he actually paid.

Cal. C. Civ. P., § 1617.
Not to purchase any property of the estate, § 7684.

7738. (3932.) Id. Not accountable for uncollectable debts. No executor or administrator is accountable for any debts due the decedent, if it appears that they remain uncollected without his fault.

Cal. C. Civ. P., § 1615.

7739. (3933.) Id. Necessary expenses allowed. Compensation. He shall be allowed all necessary expenses in the care, management, and settlement of the estate, including reasonable fees paid to attorneys for conducting the necessary proceedings or suits in courts, and for his services the fees provided in this chapter; but when the decedent, by his will, makes some other provision for the compensation of his executor, that shall be a full compensation for his services, unless, by a written instrument filed in the court, he renounces all claim for compensation provided for by the will.

Cal. C. Civ. P., § 1616.

Expense of bond allowed, § 1214.

Fee of attorney appointed for non-resident heir, § 7881.

An administrator is not authorized to use the funds of the estate, or to borrow money for the purpose of improving the real property in the estate. If he does so, he becomes personally liable therefor.

Rolfson v. Cannon, 3 U. 232; 2 P. 205.

See Cain Heirs v. Young, 1 U. 361.

Andrus v. Blazzard, 23 U. 233; 63 P. 888.

Where a guardian presented to the probate court, after the death of his ward, an account for services, and his claim was allowed, such claim was a valid claim against the ward's estate, which the guardian was entitled to pay himself on being appointed the ward's administrator.

Reed v. Hume, 25 U. 248; 70 P. 998.

An administrator, whose appointment, though erroneous, was not made without jurisdiction, is entitled to reasonable compensation for services rendered by him.

In re Owen's Estate, 32 U. 469; 91 P. 283.

Where an estate is administered by successive personal representatives, compensation should be apportioned among them according to the services rendered.

Id.

7740. (3934.) Id. Commissions of executor or administrator. When no compensation is provided by the will, or the executor renounces all claim thereto, he must be allowed commissions upon the amount of estate accounted for by him, as follows: For the first $1,000, at the rate of five per cent; for all above that sum, and not exceeding $5,000, at the rate of two and one-half per cent; for all above $5,000, and not exceeding $10,000, at the rate of two per cent; for all above $10,000, at the rate of one per cent. The same commissions shall be allowed to administrators. In all cases such further allowance may be made as the court may deem just and reasonable for any extraordinary service, but the total amount of such extra allowance must not exceed the amount of commissions allowed by this section. All contracts between an executor or administrator and an heir, devisee, or legatee, for a higher compensation than that allowed by this section, shall be void.

Cal. C. Civ. P., § 1618*.

Under the statute declaring that an administrator shall be allowed commissions on the amount of the estate accounted for by him, there being but one aggregate sum to be allowed as commission, which, in case of successive administrations, must be apportioned by the court, the allowance of commissions to the first of two successive administrators before the closing of the estate was premature.

In re Owen's Estate, 32 U. 469; 91 P. 283.

SPECIFIC PERFORMANCE.

7741. (3935.) Contracts for sale of real or personal property. Specific performance. When a person, who is bound by contract in writing to convey any real estate, or who is bound by contract in writing to assign, transfer, or deliver any personal property, shares of capital stock, bonds, or other choses in action, dies before making the conveyance, assignment, transfer, or delivery, and in all cases when such decedent, if living, might be compelled to make such conveyance, assignment, transfer, or delivery, the court may make a decree authorizing and directing his executor or administrator to convey such real estate, or to assign, transfer, or deliver such personal property, shares of capital stock, bonds, or other choses in action, to the person entitled thereto. Am'd '15, p. 82.

Cal. C. Civ. P., § 1597.

Specific performance in case of part performance, § 5824, and note.

The depositary of an escrow is the agent of both parties and an escrow contract is not revocable at the will of either party or their representatives, but may be enforced under the provisions of this section.

Gammon v. Bunnell, 22 U. 421; 64 P. 958.

A contract to purchase real estate signed by husband alone is not enforcible after his death so far as wife's one-third is concerned. Right to specific performance waived by laches.

Free v. Little, 31 U. 449; 88 P. 407.

7742. (3936.) Id. Petition. Notice. Hearing. On the presentation of a verified petition by any person claiming to be entitled to such conveyance, assignment, transfer, or delivery from an executor or administrator, setting

forth the facts upon which the claim is predicated, the court must appoint a time and place for hearing the petition, which shall be upon notice.
Am'd '15, p. 82.

Cal. C. Civ. P., § 1598*.

7743. (3937.) Id. Decree authorizing possession. If, after a full hearing upon the petition and objections, and examination of the facts and circumstances of the claim, the court is satisfied that the petitioner is entitled to a conveyance of the real estate described in the petition, or to an assignment, transfer, or delivery of the personal property, shares of capital stock, bonds, or other choses in action described in the petition, a decree authorizing and directing the executor or administrator to execute a conveyance, assignment, transfer, or delivery thereof to the petitioner must be made; but the entry of the decree shall give the person entitled to the conveyance, assignment, or transfer a right to the possession of the lands, personal property, shares of capital stock, bonds, or other choses in action contracted for, and to hold the same according to the terms of the intended contract in like manner as if a conveyance, assignment, or transfer had been made in pursuance of the decree. Am'd '15, p. 82.

Cal. C. Civ. P., § 1600*.

7744. (3938.) Id. Denied when right doubtful. If, upon a hearing as hereinbefore provided, the right of the petitioner to have a specific performance of the contract is found to be doubtful, the court must dismiss the petition without prejudice to the right of the petitioner, who may, at any time within six months thereafter, proceed by action to enforce specific performance thereof.

Cal. C. Civ. P., § 1602.

7745. (3939.) Id. Succession to rights and interests. If the person entitled to the conveyance, assignment, transfer, or delivery dies before the commencement of proceedings therefor under this chapter, or before the completion of the conveyance, assignment, transfer, or delivery, any person entitled to succeed to his rights in the contract, or the executor or administrator of such decedent, may, for the benefit of the person so entitled, commence such proceedings or prosecute any already commenced, and the conveyance, assignment, transfer, or delivery must be so made as to vest the estate in the persons entitled to it, or in the executor or administrator, for their benefit.
Am'd '15, p. 82.

Cal. C. Civ. P., § 1606.
Substitution of parties generally, § 6513, and note.

7746. (3940.) Id. Decree may direct surrender of possession. The decree provided for in this chapter may direct the possession of the property therein described to be surrendered to the person entitled thereto, upon his producing the deed, assignment, or transfer and certified copy of the decree when, by the terms of the contract, possession is to be surrendered.
Am'd '15, p. 82.

ACCOUNTS.

7747. (3941.) When account to be rendered. Contents. Six months after his appointment, also within thirty days after the expiration of the time within which creditors must present their claims, and at any other time when required by the court, either upon its own motion or upon the application of any person interested in the estate, every executor or administrator must render for the information of the court an account of his administration, under oath, showing the sums of money received by him and from what sources, the amounts expended by him, a statement of all claims presented against the estate and the names of the claimants, and all other matters necessary to show the condition of its affairs.

Cal. C. Civ. P., § 1622*.
Final account with petition for distribution, §§ 7751, 7763.
Annual account of trustee after distribution, § 7788.
Statement of claims presented, form, § 7778.

7748. (3942.) Hearing on account. Notice of. When any account is

rendered for settlement, the court or clerk must appoint a day for the settlement thereof, of which the clerk must give notice. Am'd '03, p. 44.

Cal. C. Civ. P., § 1633*. See Cal. Sup. (1893) p. 1022.
Notice, time, form, etc., §§ 7856-7868.
Notice when account final, § 7751.

7749. (3943.) Id. Vouchers shall be produced. In rendering his account, the executor or administrator must produce and file vouchers for all charges, debts, claims, and expenses which he has paid, which must remain in the court; and he may be examined on oath touching such payments, and also touching any property and effects of the decedent, and the disposition thereof. When any voucher is required for other purposes, it may be withdrawn on leaving a certified copy on file. If a voucher is lost, or for other good reason cannot be produced on the settlement, the payment may be proved by the oath of any competent witness.

Cal. C. Civ. P., § 1631.

7750. (3944.) Id. Oral proof when vouchers not produced. On the settlement of his account, he may be allowed any item of expenditure not exceeding $20 for which no voucher is produced if such item be supported by his own uncontradicted oath positive to the fact of payment, specifying when, where, and to whom it was made; but such allowances in the whole must not exceed $500 against any one estate; and if upon such settlement of accounts it appear that the debts against the deceased have been paid without the affidavit and allowance prescribed by statute, and it shall be proven by competent evidence to the satisfaction of the court that such debts were justly due, were paid in good faith, that the amount paid was the true amount of such indebtedness over and above all payments or set-off, and that the estate is solvent, it shall be the duty of the said court to allow the said sum so paid in the settlement of said accounts.

Cal. C. Civ. P., § 1632.

7751. (3945.) Id. Final account with petition for distribution. Notice. If the account mentioned in the preceding sections be for a final settlement, and a petition for the final distribution or for final distribution and partition of the estate be filed with said accounts, the notice of the filing of account for settlement must state those facts. On the settlement of said account, distribution or distribution and partition of the estate to all entitled thereto may be had in the manner hereinafter provided without further notice or proceedings.

Cal. C. Civ. P., § 1634*. See Cal. Sup. (1893) p. 1022.
Final account and petition for distribution, § 7763.
Manner and time of giving notice, § 7856.
Mailing copy of notice, § 7863.
Posting in three public places, § 7864.
Proof of notice; decree conclusive, § 7867.
Waiver of notice in writing, § 7868.
Trustee shall render account, § 7788.
Annual report of agent for non-resident holder, § 7783.
Partial distribution, § 7758.
Distribution of real estate, § 7761.
Preliminary account, § 7747.
Final account and distribution, §§ 7763-7772.
Discharge of executor or administrator, § 7776.
Objections to settlement of an executor's account for fraud or mistake, by merely referring to some items in the final account, are insufficient to assail intermediate accounts.
In re Raleigh's Estate, 48 U. 128; 158 P. 705.

7752. (3946.) Settlement of account conclusive, when. The settlement of the account and the allowance thereof by the court, or upon appeal, is conclusive against all persons in any way interested in the estate, saving, however, to all persons laboring under any legal disability, their right to move for cause to reopen and examine the account, or to proceed by action against the executor or administrator, either individually or upon his bond, at any time before final distribution; and in any action brought by any such person, the allowance and settlement of the account is prima facie evidence of its correctness.

Cal. C. Civ. P., § 1637.
Correction of mistakes in settlements, § 7879.
Conclusiveness of decrees, §§ 7559, 7560, 7564, 7796, 7867, 7870.
An allowance of an executor's account before final settlement can be assailed only in equity, and upon the same grounds as other judgments, and such interlocutory accounting cannot be assailed upon final settlement.
In re Raleigh's Estate, 48 U. 128; 158 P. 705.

7753. (3947.) Reference of account. Compensation. The court may appoint one or more referees to examine the accounts and make report thereon, subject to confirmation; and may allow a reasonable compensation to the referees, to be paid out of the estate of the decedent.

Cal. C. Civ. P., § 1636*.
Reference generally, §§ 6835-6841.
Reference of doubtful claim, § 7661.

CHAPTER 12.

DISTRIBUTION AND PARTITION.

PARTIAL DISTRIBUTION.

7758. (3948.) Petition for partial distribution; bond; notice. At any time after the lapse of four months from the issuance of letters testamentary or of administration, any heir, devisee, or legatee may present his petition to the court for the distribution to him of the legacy or share of the estate to which he is entitled, or any person to whom any parcel or parcels of real estate left by deceased may have been conveyed by the heirs or devisees of deceased may present his petition to the court for the distribution to him of such real estate so conveyed. Any partial distribution aforesaid may be made upon such distributee giving bond with security for the payment of his proportion of the debts of the estate as hereinafter provided. Notice of such application for partial distribution must be given. Am'd '01, p. 181.

Cal. C. Civ. P., §§ 1658, 1659*. General distribution, § 7764.

7759. (3949.) Id. When allowed. Bond. Partition. Title. If at the hearing it appears that the estate is but little indebted, and that the share of the party applying, or real estate granted to the party applying, as aforesaid, may be allowed to him without loss to the creditors of the estate, the court must make an order in conformity with the prayer of the applicant requiring:

1. Each heir, legatee, or devisee obtaining such order, before receiving his share or any portion thereof, and each grantee of the heirs or devisees obtaining such order, before receiving distribution of the real estate granted to him as aforesaid, to execute and deliver to the executor or administrator a bond in such sum as shall be designated by the court, with sureties to be approved by the judge or court, payable to the executor or administrator, and conditioned for the payment whenever required of his proportion of the debts due from the estate, not exceeding the value or amount of the legacy or portion or parcel of the estate distributed to him hereunder;

2. The executor or administrator to deliver to the heir, legatee, or devisee or grantee as aforesaid the whole portion of the estate distributed to him as aforesaid, designating it. If in the execution of the order a partition is necessary between two or more of the parties interested, it must be made in the manner hereinafter prescribed. The costs of these proceedings shall be paid by the applicant or, if there be more than one, shall be apportioned equally among them. When any such partial distribution shall be made as herein provided, the title to the estate so distributed shall be freed from the claims of creditors and from the debts, expenses, and obligations of the estate, and of the administration thereof. Am'd '01, p. 181.

Cal. C. Civ. P., § 1661*.

7760. (3950.) Id. Action on bond. If it becomes necessary that any part of any such bond should be paid, the court, after notice and hearing, must make a decree accordingly, designating the amount and giving a time within which the payment must be made. If the money is not paid as ordered, an action may be maintained by the executor or administrator on the bond.

Cal. C. Civ. P., § 1662*.

7761. (3951.) Delivery of real estate, when no debts. Unless it satisfactorily appears to the court that the rents, issues, and profits of the real estate for a longer period are necessary to be received by the executor or administrator, wherewith to pay the debts of the deceased, or that it will probably be necessary to sell the real estate for the payment of such debts, the court, at the end of the time limited for the presentation of the claims against the estate, must direct the executor or administrator to deliver possession of all the real estate to the heirs-at-law or devisees.

Cal. C. Civ. P., § 1453. Decree of distribution of real property to be recorded, § 7871.
Possession of property of the estate, § 7718.
Final account and distribution, §§ 7751, 7763-7772.

7762. (3951x.) Petition. Power of court. Bond not required. Further

administration. Upon the verified petition of any beneficiary or of the executors or administrators of the estate of any deceased person, and upon proof, showing that the time limited for the presentation of claims against the estate of any deceased person has expired, and that all such claims presented and all inheritance taxes payable by the estate, all debts of the estate, all legacies and expenses of administration then payable, and all state, county, and municipal taxes legally levied upon the personal property of the estate have been paid and satisfied in full, and showing to the satisfaction of the court that it is for the best interests of the beneficiaries of the estate, or that they have in writing requested or consented, that a portion only of the estate be distributed and the remainder of the estate held by the executors or administrators for future administration, or for sale, and that no person interested in the estate will be prejudiced, the district court having jurisdiction of the estate may settle the account of the executors or administrators to the date of such petition, and may at the same time, in its discretion, order such partial distribution of such portion of the estate to the persons entitled thereto without requiring any bond from the distributees, and the undistributed portion of the estate shall be held by the executors or administrators subject to further administration, and to sale if for the best interests of all persons interested therein, and to final distribution thereof or the proceeds thereof at a future time, when proper and required by any beneficiary or by the court.
'17, p. 202.

FINAL DISTRIBUTION AND PARTITION.

7763. (3952.) Petition for final account and settlement, when to be presented. When all debts are paid, or sooner, if before that time all the property of the estate has been sold, or there are sufficient funds in his hands for the payment of all the debts due by the estate, and the estate be in proper condition to be closed, the executor or administrator must render a final account and pray for settlement of his administration. Such petition shall contain the names and addresses of the heirs, devisees, or other persons entitled to participate in such distribution, according to the best knowledge, information, and belief of the executor or administrator. The clerk shall file the petition, and fix the date of hearing thereon, and give the notice provided by law. Am'd '05, p. 68.

Cal. C. Civ. P., § 1652.
Notice generally, § 7856; waiver in writing, § 7868.
Notice, when account final, § 7751.
Personal service, §§ 7863, 7865.
Posting, § 7864; mailing, § 7863.
Preliminary account, § 7747.
Final account, decree, §§ 7670, 7751, 7763-7772.
Delivery of real estate when no debts, § 7761.
Where notice was given of a hearing on the petition for letters, failure to give notice of final settlement and distribution does not affect the validity of the decree of final distribution, except on direct proceedings.
Barrette v. Whitney, 36 U. 574; 106 P. 522.
A petition for distribution which fails to mention the names of persons claiming to be children of decedent is defective, and a decree based thereon will be set aside on motion.
R. A. Moyes, administrator, v. A. W. Agee, judge; 52 U. —; 175 P. —.

7764. (3953.) Distribution, how made. Death of minor heir. Supplementary account. Upon the final settlement of the accounts of the executor or administrator, or at any subsequent time upon the petition of the executor or administrator or of any heir, legatee, or devisee, and upon notice, the court must proceed to distribute the residue of the estate in the hands of the executor or administrator, if any, among the persons who by law are entitled thereto; and if the decedent has left a surviving child, and the issue of other children, and any of them, before the close of the administration, have died while under the age and not having been married, no administration on such deceased child's estate is necessary, but all the estate to which such deceased child was entitled by inheritance must, without administration, be distributed to such child's heirs-at-law. A statement of any receipts and disbursements of the executor or administrator, since the rendition of his final accounts, must be reported and filed at the time of making such distribution, and a settlement thereof, together with an estimate of the expenses of closing the estate, must be made by the court, and included in the order or decree, or the court may order notice of the settlement of such supplementary accounts, and refer the same as in other cases of the settlement of accounts.

Cal. C. Civ. P., § 1665*.
Succession, §§ 6404-6430.
Distribution of homestead, §§ 6409-6411, 7644.
Appointment of attorney for non-resident heir, § 7881.
Determination of heirship, §§ 7795-7797.
Distribution to grantees of heirs, § 7772.
Partial distribution, §§ 7758-7761.
Inheritance tax must be paid, § 3205.
Discharge of executor or administrator, §§ 7670-7776.
Conclusiveness of probate decrees, etc., §§ 7559, 7560, 7564, 7752, 7867, 7870.

A decree of a territorial probate court, until reversed or modified, is as final and conclusive between the parties as a judgment of the district court.

Ehrngren v. Gronlund, 19 U. 411; 57 P. 268.

A court has a wide discretion in refusing distribution.

In re Pickard's Estate, 42 U. 105; 129 P. 353.

A decree of distribution made after due notice is conclusive as against collateral attack as to the funds, items, and matters covered by and properly included therein.

In re Evans, 42 U. 282; 130 P. 217.

Decrees of distribution made before the final settlement of the account are not final and they may be set aside on motion.

R. A. Moyes, administrator, v. A. W. Agee, judge; 52 U. —; 175 P. —.

7765. (3954.) Id. Decree to specify shares. Action to recover. In the order or decree the court must name the persons and the proportions or parts to which each shall be entitled, and such persons may demand and sue for, in any court of competent jurisdiction, and recover their respective shares from the executor or administrator or any person having the same in possession.

Cal. C. Civ. P., § 1666*.
Recording of decree, effect, § 7871.

7766. (3955.) Id. Advancements considered. Conclusiveness of decree. All questions as to advancements made or alleged to have been made by the decedent to his heirs may be heard and determined by the court, and must be specified in the decree assigning and distributing the estate; and the final judgment or decree of the court is binding on all parties interested in the estate, subject only to be reversed, modified, or set aside on appeal.

Cal. C. Civ. P., § 1686.
Advancements, §§ 6421-6425.
Validity of decrees, §§ 7559, 7560, 7564, 7752, 7796, 7867, 7870.

7767. (3956.) Id. Taxes must be paid before decree. Before any decree of distribution of an estate is made, the court must be satisfied, by the oath of the executor or administrator, or otherwise, that all state, county, and municipal taxes legally levied upon personal property of the estate have been fully paid.

Cal. C. Civ. P., § 1669.
Assessment of estates of deceased persons, §§ 5887, 5889.
Similar section, § 6013.
Inheritance tax to be paid before final settlement. § 3190.

7768. (3957.) Partition may accompany distribution. Petition. Notice. Decree. The administrator or executor may include in the petition for distribution, or any person interested may at any time before distribution separately file, a petition for the partition of the estate among the persons entitled thereto in proportion to their respective rights. Notice of such petitions shall be given, and the court, after a hearing, may in one decree distribute and partition the whole property of the estate, setting out by metes and bounds, or description, the share of each individual so that the same can be easily distinguished, or the court may, upon request of two or more parties, set off their shares so as to be held by them in common and undivided.

Cal. C. Civ. P., §§ 1675, 1676*, 1679*.
Partition, civil procedure, §§ 7257-7309.
Partition on partial distribution, § 7759.
Decree to be recorded, § 7871.

7769. (3958.) Partition by commissioners. Whenever it is impracticable or inconvenient for the court to make a complete partition among all the parties in the first instance, or on petition of any interested person, the court, having first ascertained and determined the shares or interests of the persons entitled, may appoint one or more disinterested persons to act as commissioners for the purpose of making the partition. In making the partition, the commissioners must divide the property, and allot the several portions thereof to the several parties, quality and quantity relatively considered, according to the respective rights of the parties as determined by the court, designating the several portions by proper landmarks, and may take testimony and order surveys and take such other steps as may be necessary.

Cal. C. Civ. P., §§ 1675, 1676*, 1683*.

7770. (3959.) Report. Confirmation. Decree. As soon as practicable, the commissioners must make a report to the court in writing, and the court may confirm, change, modify, or set aside the report, and, if necessary, appoint new commissioners. Upon the confirmation of the report, the court may include distribution and partition in one decree.

Cal. C. Civ. P., § 1684*.

7771. (3960.) Estate in different counties. If the real estate is in different counties, the court may, if deemed proper, appoint commissioners, who shall make division of such real estate wherever situated within this state.

Cal. C. Civ. P., § 1677*.

7772. (3961.) Distribution to grantees of heirs. Partition or distribution of the real estate may be made as provided in this chapter, although some of the original heirs, legatees, or devisees may have conveyed their shares to other persons, and such shares must be assigned to the person holding the same, in the same manner as they otherwise would have been to such heirs, legatees, or devisees.

Cal. C. Civ. P., § 1678.

Conveyance by heirs before distribution, § 6391.

Authority may be conferred on the probate court by statute to determine the interests of grantees of heirs or devisees in the estate.
Snyder v. Murdock, 26 P. 223; 73 P. 22.

A conveyance by heirs is subject to the rights of administrator's sale.
R. G. W. Ry. Co. v. S. L. Inv. Co., 35 U. 528; 101 P. 586.

In an assignment of a part of an estate by an heir, it is always implied that the assignment relates only to what the heir has after the debts and legal expenses of administration are paid.
Dunn v. Wallingford, 47 U. 491; 155 P. 347.

7773. (3962.) Where partition impracticable. Assignment to one or more. When the real estate cannot be divided without prejudice or inconvenience to the owners, the court may assign the whole to one or more of the parties entitled to share therein who will accept it, always preferring the males to the females, and among children preferring the elder to the younger. The parties accepting the whole must pay to the other parties interested their just proportion of the true value thereof, or secure the same to their satisfaction, or in case of the minority of such party, then to the satisfaction of his guardian; and the true value of the estate must be ascertained and reported by the commissioners. When the commissioners appointed to make partition are of the opinion that the real estate cannot be divided without prejudice or inconvenience to the owners, they must so report to the court, and recommend that the whole be assigned as herein provided, and must find and report the true value of such real estate. On filing the report of the commissioners, and on making or securing the payment as before provided, the court, if it appears just and proper, must confirm the report, and thereupon the assignment is complete, and the title to the whole of such real estate vests in the person to whom the same is so assigned.

Cal. C. Civ. P., § 1680*.

A trustee for the heirs to whom property is distributed may sue, and the order appointing him is not subject to collateral attack.
Kurtz v. Ogden Cany., etc., 37 U. 313; 108 P. 14.

7774. (3963.) Id. When any tract of land or tenement is of greater value than any one's share in the same estate to be divided, and cannot be divided without injury to the same, it may be set off by the commissioners appointed to make partition to any of the parties who will accept it, giving preference as prescribed in the preceding section. The party accepting must pay or secure to the others such sums as the commissioners shall award to make the partition equal, and the commissioners must make their award accordingly; but such partition must not be established by the court until the sums awarded are paid to the parties entitled to the same, or secured to their satisfaction.

Cal. C. Civ. P., § 1681.

7775. (3964.) Estate sold when division impracticable. When it appears to the court from the commissioners' report that it cannot otherwise be fairly divided and should be sold, the court may order the sale of the whole or any part of the estate, real or personal, by the executor or administrator, or by a commissioner appointed for that purpose, and the proceeds distributed. The sale must be conducted, reported, and confirmed, in the same manner and under the same requirements as provided in chap. 10 of this title.

Cal. C. Civ. P., § 1682

Filing of decree, notice, § 7871.

7776. (3965.) Executor's discharge on final settlement. When the estate has been fully administered, and it is shown by the executor or administrator, by the production of satisfactory vouchers, that he has paid all sums of money due from him, and delivered up, under the order of the court, all the

property of the estate to the parties entitled, and performed all the acts lawfully required of him, the court must make a judgment or decree discharging him from all liability to be incurred thereafter.

Cal. C. Civ. P., § 1697.
Final account; discharge of executor or administrator, §§ 3873, 7751.
Where decree directed executor to deposit money in bank for use of an heir, the executor could not be released and bondsmen discharged, until he had fully complied with the decree.
Ehrngren v. Gronlund, 19 U. 411; 57 P. 268.

7777. (3966.) Distribution of property afterward discovered. Reissue of letters. The final settlement of an estate shall not prevent a subsequent distribution and distribution and partition of property afterwards discovered, upon petition and notice, without a reissue of letters. Letters may be reissued at any time if necessary.

Cal. C. Civ. P., § 1698*.

7778. (3967.) Partition allowed within two years after distribution. Notice. Costs. Nothing in this chapter contained shall be construed to prevent the partition of any estate after distribution, by further proceedings in the estate, provided a petition for such partition be presented to the court in which the estate was administered, by one of the parties, within two years after distribution. Notice must be given and served as in original applications for distribution, and costs shall be apportioned as the court may deem just.

ABSENT HEIRS AND ESCHEATS.

7779. (3968.) Non-resident decedent. Absent heirs. Delivery or sale of property. Upon application for distribution, after final settlement of the accounts of administration, if the decedent was a non-resident of this state, leaving a will which has been duly proved or allowed in the state of his residence, an authenticated copy whereof has been admitted to probate in this state, and it is necessary, in order that the estate or any part thereof may be distributed according to the will, that the estate in this state should be delivered to the executor or administrator in the state or place of his residence, the court may order such delivery to be made, and, if necessary, order a sale of the real estate, and a like delivery of the proceeds. The delivery, in accordance with the order of the court, is a full discharge of the executor or administrator with the will annexed in this state, in relation to all property embraced in such order, which, unless reversed on appeal, binds and concludes all parties in interest. Sales of real estate, ordered by virtue of this section, must be made in the same manner as other sales of real estate of decedents by order of the court.

Cal. C. Civ. P., § 1667.
Trustees after distribution, § 7788.
Proof of foreign will, §§ 7586-7588.
Aliens take by successions, § 6427.

7780. (3969.) Id. Local creditors must be paid first. The property of a non-resident decedent shall not be transmitted to a foreign executor or administrator until all the creditors who are citizens of this state have been paid, if the estate is solvent, or until such creditors have received their just proportions, if the estate is insolvent.

N. Dak. (1895) §§ 6526, 6527*.

7781. (3970.) Appointment of agent for absent heir. When any estate is assigned or distributed by a judgment or decree of the court to any person residing out of and having no agent in this state, and it is necessary that some person should be authorized to take possession and charge of the same for the benefit of such absent person, the court may appoint an agent for that purpose, and authorize him to take charge of such estate, as well as to act for such absent person in the distribution; *provided,* that if such estate is in money when so assigned or distributed, the executor or administrator of such estate may deposit the share of such person, in his name as far as known, with the state treasurer, who shall give duplicate receipts for the same, one of which must be filed with the state auditor and the other with the county clerk.

Cal. C. Civ. P., § 1691*. See Cal. Sup. (1895) § 1691*, p. 41.
Attorney for non-resident heirs to be appointed, § 7881.

7782. (3971.) Id. Bond. Compensation and expenses. Action. The agent must execute a bond to the state of Utah, to be approved by the court,

conditioned that he shall faithfully manage and account for the estate. The court appointing such agent may allow a reasonable sum out of the proceeds of the estate for his services and expenses. Such agent may sue and be sued as such.

Cal. C. Civ. P., § 1692*. Qualifications of sureties, §§ 7223, 7621.
Clerk may fix and approve bond, § 7561.

7783. (3972.) Id. Annual report. The agent must render annually to the court appointing him a detailed account showing the condition of the estate.

Cal. C. Civ. P., § 1694* Final settlement by agent, § 7790.

7784. (3973.) Id. Sale of property. Procedure. Proceeds paid into state treasury. The court may at any time direct the sale of all or part of the real or personal property, and such sale shall be conducted and report made to the court in the same manner as is hereinbefore provided for the sale of property of decedents. The proceeds of such sale, after deducting the expenses thereof, must be paid into the state treasury, and receipts taken and filed therefor as hereinbefore provided.

Cal. C. Civ. P., § 1693*. Sales in general, §§ 7677, 7688.

7785. (3974.) Id. Payment to claimant. Escheat. When any person appears and claims the money paid into the treasury, the court making the distribution must inquire into such claim, and, being first satisfied of his right thereto, must grant him a certificate to that effect, under its seal; and, upon presentation of the certificate to him, the county clerk must draw his requisition on the state auditor for the amount, and, upon presentation to him of such requisition, the state auditor shall draw his warrant on the state treasurer in the sum called for in said requisition. If no claimant appears within five years after the decedent's death to claim succession, the property or the proceeds thereof shall escheat to the state, for the benefit of the state school fund. Am'd '03, p. 66.

Cal. C. Civ. P., § 1696*. Cal. Civ. C., § 1406*.
Escheats to go to school fund, Con. art. 10, sec. 3; § 6408.

7786. (3975.) Estates of intestates without heirs. Special administration. When any person has died, or shall hereafter die, intestate and without heirs, leaving property in this state, it shall be the duty of the court, upon notice of that fact, to appoint a special administrator to take charge of such property. The special administrator shall give a bond conditioned for the faithful performance of his trust, and shall annually render to the court appointing him a detailed account of the condition of the estate. The special administrator may sue and be sued, and he shall be allowed by the court, out of the proceeds of the estate, a reasonable sum for his services and expenses.

Mont. Civ. P., § 2900*. Cal. Sup. (1889) p. 436*. Clerk may appoint special administrator, § 7561.
Special administration in general, §§ 7606-7610.

7787. (3976.) Id. Echeat if no claimant appears in two years. At the expiration of two years after such appointment, if no claimant shall have appeared and established his right to the estate, the same shall be deemed to have escheated to the state, and the court shall direct the sale of all of the property, and shall cause the proceeds thereof, after the payment of debts and expenses, and taxes, to be paid into the state treasury for the benefit of the state school fund. The special administrator shall deposit a receipt for such payment with the state auditor, and a duplicate thereof with the county clerk.

TRUSTEES AFTE R DISTRIBUTION.

7788. (3977.) Shall render annual accounts. Any trustee created by will or appointed to execute any trust so created shall annually, pending the execution of his trust, and at the termination thereof, render his accounts as such trustee to the court in which the will was probated. Such accounts shall be heard by the court upon notice. Any such trustee may, in the discretion of the court, upon application of any beneficiary, be ordered to appear and render his account.

Cal. Sup. (1889) p. 436*. Mont. Civ. P., § 2900*.
Notice, time, form, etc., §§ 7856-7868.
General provisions on rendering accounts, §§ 7747, 7751, 7761-7772.
Annual account of agent for absent heir, § 7783.

7789. (3978.) Expenses. Compensation. Vacancies. The court shall allow any such trustee his proper expenses, and such compensation as may be reasonable. Unless the will provide for the resignation of a trustee and the manner of filling the vacancy caused by such resignation, the court may determine upon what terms the resignation of a trustee may be effected, and may appoint a successor.

Mont. Civ. P., § 2901*.

7790. (3979.) Final settlements by agents, special administrators, and trustees. Secs. *7776*, *7777*, relating to final settlements, shall apply to agents, special administrators, and trustees, and to the estates administered by them.

CHAPTER 13.

DETERMINATION OF HEIRSHIP.

7795. (3980.) Petition. Notice. When a person dies intestate leaving real property within this state, and letters of administration have not been applied for, any heir or other person deriving title from or through an heir or heirs of such decedent may, at any time after the expiration of one year from the decedent's death, present to any court that would have jurisdiction to appoint an administrator a verified petition setting forth the name and residence of the decedent, the date of his death, the fact that he died intestate, the names and addresses of the heirs, and a particular description of the real property of the decedent, and praying for a decree determining the right of succession to the same. Upon the presentation of such petition, notice by publication shall be given and notice mailed to all the heirs of the decedent.

N. Dak. (1895) § 6431*.
Notice, time, form, etc., §§ 7856-7868.
An action to determine right of succession, under provisions of this section, was improperly brought where it appeared that letters of administration of the estate of decedent had been issued and the estate was in process of settlement.
Garr v. Davidson, 25 U. 335; 71 P. 481.
Authority may be conferred on the probate court by statute to determine the interests of grantees of heirs or devisees in the estate.
Snyder v. Murdock, 26 U. 233; 73 P. 22.

7796. (3981.) Id. Decree. Nature. Conclusiveness. When the facts are established to the satisfaction of the court, a decree shall be given specifying who are the heirs of the decedent, and what are the interests or shares of the parties, respectively, in the property, and declaring the right of succession accordingly. Such decree is conclusive upon the parties and their successors in interest, subject, however, to such disposition of the property as may be made in any subsequent proceeding in the same court in pursuance of the probate of a will or grant of administration. This section shall not affect a right or interest of any person except an heir unless he becomes a party to the special proceeding.

N. Dak. (1895) § 6343*.

7797. (3982.) Id. Creditors may present claim. Liability of heirs. Any creditor, if he chooses, may present his claim against the decedent at any such hearing, which, if allowed by the court, must be paid by the heirs before the decree is made, or, at the option of the court, may be declared to be a lien upon the real property of the decedent covered by such decree. Any heir and his executors and administrators shall be liable to any creditor for such part of any claim that may be duly allowed in such proceeding, or in a subsequent probate proceeding, as the value of the property received by such heir bears to the whole amount of real property so distributed.

Payment of claims generally, §§ 7657-7673.
Statute of limitations suspended by death, §§ 6481, 6482.

CHAPTER 14.

GUARDIANSHIP.

GUARDIANS IN GENERAL.

7798. (3983.) Guardians, general and special. A general guardian is the guardian of the person, or of all the property of the ward within this state, or of both; every other is a special guardian.

Cal. Civ. C., §§ 239, 240. Power of general guardian, § 7826.

7799. (3984.) Guardian may be appointed by will or by deed. A guardian of the person or estate, or of both, of a child born, or likely to be born, may be appointed by will or by deed, to take effect upon the death of the parent appointing; such appointment may be made by the father, with the written consent of the mother; or by either parent, if the other be dead or incapable of consent.

Cal. Civ. C., § 241*.

7800. (3985.) Guardian of property must be appointed by court. No person, whether a parent or otherwise, shall have any power as a guardian of property, except by apointment as hereinafter provided.

Cal. Civ. C., § 242. Power of guardians, §§ 7826-7833.

7801. (3986.) Guardian controlled by court making appointment. In all cases, the court first making the appointment of a guardian shall have exclusive jurisdiction to control him.

Cal. Civ. C., § 245. As to guardian for non-resident ward, § 7845.

7802. (3987.) More than one may be appointed. Survivor. The court, whenever necessary, may appoint more than one guardian of any person subject to guardianship, who must give bond and be governed and liable in all respects as a sole guardian. On the death of one of two or more joint guardians, the power shall continue to the survivor until a further appointment is made by the court.

Cal. C. Civ. P., § 1807*. Cal. Civ. P., § 252*. Words giving joint authority construed as giving authority to majority, § 5846.

7803. (3988.) Special conditions in order of appointment. When any person is appointed guardian, the court may insert in the order of appointment conditions not otherwise obligatory, providing for the care, treatment, education, and welfare of the ward. The performance of such conditions shall be a part of the duties of the guardian, for the faithful performance of which he and the sureties on his bond shall be responsible.

Cal. C. Civ. P., § 1755*.

7804. (3989.) Testamentary guardian. Bond. Powers. Duties Every testamentary guardian must give bond and qualify, and has the same powers and must perform the same duties with regard to the person and estate of his ward as guardians appointed by court, except so far as their powers and duties are legally modified, enlarged, or changed by the will by which such guardian was appointed.

Cal. C. Civ. P., § 1758.

7805. (3990.) Guardian ad litem not affected hereby. Nothing contained in this title affects or impairs the power of any court to appoint a guardian to defend the interests of any minor interested in any suit or matter pending therein.

Cal. C. Civ. P., § 1759. Appointment of guardian ad litem, § 6501.

7806. (3991.) Oaths. Bonds. Resignation. Removal. The provisions of this title respecting the oaths of office and bonds of executors and administrators, and their resignation and removal, so far as applicable, shall apply to and govern the oaths of office, bonds, resignation, and removal, respectively, of guardians.

Oaths and bonds, §§ 7616-7626. Removal, resignation, §§ 7627-7630.

7807. (3992.) Discharge of guardian when no longer necessary. The guardian of an insane or other person may be discharged by the court when it appears, on the application of the ward or otherwise, that the guardianship is no longer necessary.

7808. (3993.) Laws relating to estates of decedents made applicable. The provisions of this title relative to the estates of decedents shall, as far as conformable, apply also to guardianship matters.

Cal. C. Civ. P., § 1808*.

GUARDIANS FOR MINORS.

7809. (3994.) For whom guardian may be appointed. Petition. Notice. The district court for each county, when it appears necessary or convenient, may appoint guardians for the persons and estates, or either of them, of minors who have no guardian legally appointed by will or deed, and who are inhabitants or residents of the county, or who reside without the state and have estate within the county. Such appointment may be made on the petition of a relative or other person on behalf of the minor, or on the petition of the minor, if fourteen years of age. Before making such appointment, the court must cause such notice as such court deems reasonable to be given to any person having the care of such minor, and to such relatives of the minor residing in the county as the court may deem proper.

Cal. C. Civ. P., § 1747.
Notice, time, form, etc., §§ 7856-7868.
Husband and wife joint guardians, § 7815.
An order of the probate court, directing "the clerk to cause due publication thereof to be given as prescribed by law," was void under § 4347, C. L. 1888, requiring the court, before appointing the guardian, to give notice to all persons interested in such manner as it should order. The notice in pursuance of such order was of no effect, and the order appointing the guardian was void.
Mosby v. Gisborn, 17 U. 257; 54 P. 121.

7810. (3995.) Id. Nomination by ward. Who preferred. In appointing a guardian for a minor, the court shall be guided by the following considerations: If the minor is fourteen years of age, he may nominate his guardian, subject to the approval of the court, but if the court does not approve such nomination, or if the minor resides out of the state, or if, after having been duly cited by the court, he neglects for ten days thereafter to nominate a suitable person, the court may appoint a guardian. If the minor is not fourteen years of age, the court may appoint the guardian, giving due consideration to the preference of the child, if he be of sufficient age to form an intelligent preference, but in such case, the minor, at any time after attaining the age of fourteen years, may appoint his own guardian, subject to the approval of the court. Of persons equally entitled to the custody in other respects, preference shall be given as follows: First, to a parent, but as between parents adversely claiming the guardianship, neither parent shall be entitled to it as of right, but, other things being equal, if the child be of tender age, it shall be given to the mother, or, if it be of an age to require education and preparation for labor or business, then to the father; second, to a person who was indicated by the wishes of a deceased parent; third, to the trustee of a fund applied to the child's support; fourth, to a relative.

Cal. Civ. C., § 246*. Cal. C. Civ. P., §§ 1748-1752*. See Cal. Sup. (1893) p. 1027.
In case of divorce, when child may decide whom to follow, §§ 3000, 3004.
Court must prescribe what notice shall be given.
Mosby v. Gisborn, 17 U. 257; 54 P. 121.

7811. (3996.) How guardianship terminated. The power of a guardian shall be terminated: First, by order of the court; second, by the ward's attaining majority; third, by the marriage of the ward; *provided*, that the guardianship of the estate of the ward may be continued, at the discretion of the court, after the guardianship of his person has been terminated by marriage, and until he reaches the age of majority.

Cal. Civ. C., §§ 254, 255*.
Males are minors until twenty-one; females until eighteen; marriage terminates minority, § 3955.

7812. (3997.) Release of guardian by ward. After a ward has come to his majority, he may settle accounts with his guardian, and give him a release, which shall be valid if obtained fairly and without undue influence.

Cal. Civ. C., § 256.

7813. (3998.) Guardian appointed by court discharged, when. A guardian appointed by a court shall not be entitled to his discharge until one year after the ward's majority.

Cal. Civ. C., § 257.

7814. (3999.) Support of minor out of his own estate directed, when.

If any minor having a father living has property, the income of which is sufficient for his maintenance and education in a manner more expensive than his father can reasonably afford, regard being had to the situation of his father's family and to all the circumstances of the case, the expenses of the education and maintenance of such minor may be defrayed out of the income of his own property, in whole or in part, as judged reasonable, and must be directed by the court; and the charges therefor may be allowed accordingly, in the settlement of the account of his guardian.

Cal. C. Civ. P., § 1757.

7815. Husband and wife are joint guardians. The husband and wife living together are joint guardians of their minor children, with equal powers, rights, and duties in respect of the control and custody and of the services and earnings of their minor children; and neither the husband nor the wife has any right paramount to that of the other in respect of the custody and control or of the earnings of their minor children. '13, p. 93.

GUARDIANS FOR INSANE AND INCOMPETENT PERSONS.

7816. (4000.) Guardian for insane, etc. Petition. Notice. The district court of each county, when it appears necessary, may appoint guardians for the persons and estates of persons who are insane or from any cause mentally incompetent to manage their property, and who are inhabitants or residents of the county, or who reside without the state and have estate within the county. Such appointment may be made on the petition of a relative or friend, after such notice of the time and place of hearing as the court may direct, to the person supposed to be insane or incompetent and to such other persons as the court may designate.

Cal. C. Civ. P., § 1763, 1764*.

District judge may commit insane to asylum, §§ 5388-5414.

Guardian in divorce suit for insane wife, § 2995.

Guardian to transfer dower right of insane wife, § 7820.

Guardian for person in state mental hospital, § 5408.

Neither guardians nor the courts having jurisdiction over the estates of incompetent persons have power to bind the person or estate of such persons, unless expressly authorized to do so by law.

Andrus v. Blazzard, 23 U. 233; 63 P. 888.

7817. (4001.) Definition of terms "incompetent," etc. The phrases "incompetent," "mentally incompetent," and "incapable," as used in this title, shall be construed to mean any person who, though not insane, is, by reason of old age, disease, weakness of mind, or from any other cause, unable, unassisted, to properly manage and take care of himself or his property, and by reason thereof would be likely to be deceived or imposed upon by artful or designing persons.

Cal. C. Civ. P., § 1767. See Cal. Sup. (1893) p. 1027.

"Insane person" includes what, § 5848.

This section does not alter the ordinary test of contractual mental capacity, which is impairment of the mental faculties to such an extent that the subject has not power to comprehend the matter of the contract, its nature, and probable consequences, and to act with discretion in relation thereto, or to the ordinary affairs of life.

Hatch v. Hatch, 46 U. 218; 148 P. 433.

7818. (4002.) Petition for restoration to capacity. Notice. Hearing. Order. Any person who has been declared insane or incompetent, or the guardian, or any relative of such person within the third degree, or any friend, may apply, by petition, to the district court of the county in which he was declared insane, to have the fact of his restoration to capacity judicially determined. The petition shall be verified, and shall state that such person is then sane and competent. Upon receiving the petition, the court must appoint a day for a hearing before the court, and, if the petitioner requests it, shall order an investigation before the court. The court shall cause notice of the trial to be given to the guardian of the person so declared insane or incompetent, if there be a guardian, and to his or her husband or wife, if there be one, and to his or her father or mother, if living in the county. Witnesses may be required to appear and testify as in civil cases, and may be called and examined by the court on its own motion. If it be found that the person be of sound mind and capable of taking care of himself and his property, his restoration to capacity shall be adjudged, and the guardianship of such person, if such person be not a minor, shall cease.

Cal. C. Civ. P., § 1766*.

Notice, time, form, etc., §§ 7856-7868.

Petition for restoration to capacity, § 5420.

GUARDIAN FOR INSANE WIFE IN PROCEEDING TO CONVEY DOWER INTEREST.

7819. (4002x.) When wife incurably insane, relinquishment of interest. Whenever the wife of any person shall have become insane, idiotic, or otherwise mentally incompetent to join her husband in the conveyance of real estate, and shall have remained in that condition for more than two years, or when it shall be made to appear to the court that such married woman is incurably insane, idiotic, or otherwise mentally incompetent, her inchoate interest in the real estate of her husband may be relinquished and cut off as hereinafter provided. '03, p. 114.

7820. (4002x1.) Proceedings to be taken. The husband or any person interested in such real estate may apply to the district court of the county in which such insane, idiotic, or otherwise mentally incompetent wife shall be an inhabitant or resident, by petition under oath, for the appointment of a guardian and for leave to sell the inchoate interest of such insane, idiotic, or otherwise mentally incompetent wife in the real estate of her husband. Said petition shall set forth the name, age, and residence of such married woman, and the name, age, and residence of her husband, as near as may be ascertained; the nature of the disability of such married woman, and the length of time it has existed; a full description of the real estate in this state to be affected by such proceedings, the value of each piece of real estate, and the amount of incumbrance upon it, if any, not affected by or prior to her claim to such inchoate interest; if the real estate is to be sold by the husband, or has been sold by him, the amount of the consideration of such sale as made or agreed upon, and the reason why such sale is desirable to such husband or petitioner. '03, p. 114.

7821. (4002x2.) Id. Notice of hearing. Upon the filing of such petition, the said district court shall enter an order that the petition be heard on a certain day, and that notice thereof, such as the court may direct, stating the time and place of such hearing, be given to the person supposed to be insane, idiotic, or otherwise mentally incompetent, and to such other persons as the court may designate. '03, p. 115.

7822. (4002x3.) Id. Procedure and findings. Decree. At such hearing the said wife may appear by counsel, or in person, or by guardian ad litem, appointed as in other cases, and may answer such petition in the time and manner such court shall direct, and upon the filing of an answer, the case shall be deemed at issue, or if the said wife shall fail to appear as herein provided, the court shall appoint some competent attorney at law to represent the interests of said wife, who, in her behalf, shall be granted time in which to answer or otherwise plead therein, and said cause shall be brought to issue as nearly as may be in the same manner as civil actions. When the case is at issue, the court shall hear and determine the same, and make findings and decree therein, or in its discretion may refer the matter to a referee, to be appointed by the court for that purpose, to take the proofs and report the same to the court with his findings thereon as follows:

1. As to the sanity, idiocy, or mental incompetency of such wife;
2. As to the necessity or propriety of selling said real estate and relinquishing said wife's inchoate interest therein;
3. The cash value, at the time, of such inchoate interest, taking into consideration the respective ages of such husband and wife, and the likelihood of survival.

Upon the coming in of said report the court shall consider the same, and may change or modify said findings, in case, in the court's opinion, they do not conform to the reported testimony, and shall make such decree pursuant to the said findings as may be just and equitable. '03, p. 115.

7823. (4002x4.) Id. Special guardian provided. If said court shall decide that said wife is insane, or idiotic, or otherwise mentally incompetent, and that it is desired that her inchoate interest should be relinquished, it shall fix the then present value of such inchoate interest, and shall thereafter appoint

a special guardian for such insane, idiotic, or otherwise mentally incompetent wife, who shall be some person other than her husband, who shall give bond in a sum to be fixed by the court, with sureties to be approved by the court, conditioned to receive and invest any money that may come into his hands, and reserve the same until it shall be disposed of under the order and direction of the court. '03, p. 115.

7824. (4002x5.) Id. Property to be conveyed. Upon the approval of such bond, said special guardian may, upon the payment to him of the amount fixed by the court as the value of such inchoate interest, convey the said inchoate interest, and relinquish the same to the purchaser of such real estate, or to his heirs or assigns, but to no other person. Such conveyance shall be effective as a relinquishment of such inchoate interest in like manner as though the said wife, being of sound mind, had executed such conveyance by joining her husband in a deed to such premises. '03, p. 116.

7825. (4002x6.) Id. Duties of guardian. Disposition of property. Such guardian shall allow said money to accumulate and shall dispose thereof as the court shall direct, and upon the restoration of said married woman to sound mind, shall, upon the order of the court transfer said money to said wife, in the event she shall survive her said husband, or to her heirs if she shall not be restored to sound mind before her death. In the event said wife shall not survive her said husband, then, upon her death, the said money, together with the interest accruing thereon, less the expenses of special guardian as allowed by the court, shall be transferred to said husband. '03, p. 116.

POWERS AND DUTIES OF GUARDIANS.

7826. (4003.) Powers and duties of general guardians. Every general guardian has the care and custody of the person of his ward, and the management of all his estate until such guardianship is legally terminated.

Cal. C. Civ. P., § 1765*.
Duties of guardian generally, § 7830.
General guardian defined, § 7798.
Guardian for non-resident ward, § 7843.
Guardian for minor, §§ 7809-7814.
Guardian for insane or incompetent, §§ 7816-7825.
Guardian for insane in state mental hospital, § 5408.
Guardian for insane wife in divorce suit, § 2995.
Guardian to convey dower for insane wife, § 7820.

A guardian has no power to make a contract binding upon the ward or upon his estate, without authority, however beneficial to the ward the contract may be; and such contracts made by him impose a personal liability.
Andrus v. Blazzard, 23 U. 233; 63 P. 888.
See Rolfson v. Cannon, 3 U. 232; 2 P. 205.
Cain Heirs v. Young, 1 U. 361.

7827. (4004.) Id. Of guardian appointed by court. A guardian appointed by a court shall have power over the person and property of the ward, unless otherwise ordered.

Cal. Civ. C., § 247.

7828. (4005.) Id. Guardian of the person. A guardian of the person shall be charged with the custody of the ward, and must look to his support, health, and education. He may fix the residence of the ward at any place within the state, but not elsewhere without the permission of the court.

Cal. Civ. C., § 248.

7829. (4006.) Id. Guardian of the property. A guardian of the property must keep safely the property of his ward. He must not permit any unnecessary waste or destruction of the real property, nor make any sale of such property without the order of the court, but must, so far as it is in his power, maintain the same, with its buildings and appurtenances, out of the income or other property of the estate, and deliver it to the ward, at the close of his guardianship, in good condition as he received it, natural wear and tear excepted.

Cal. Civ. C., § 249*.
Action for waste against guardians, treble damages, § 7241.

7830. (4007.) Duties of guardians generally. Management of estate. Every guardian must manage the estate of his ward frugally and without waste, and apply the income and profits thereof, as far as necessary, for the comfortable and suitable maintenance and support of the ward and his family, if there be any; and if such income and profits be insufficient for that purpose,

the guardian may sell, mortgage, or lease the real estate, upon obtaining an order of the court therefor, as provided, and must apply the proceeds of such sale, as far as may be necessary, for the maintenance and support of the ward and his family, if there be any.

Cal. C. Civ. P., § 1770*.
Has general management of the estate, § 7826.
Guardian may be compelled to maintain and educate ward, § 7836.
Sale, mortgage, and lease of property of decedent estates, §§ 7677-7709.
Sale, mortgage, or lease of ward's estate, § 7838.
Lease and bond of mining property by guardian, §§ 7710-7712.
To pay expenses of ward in state mental hospital, §§ 5408, 5417.
Service on guardian is service on ward, § 7877.
A guardian may only mortgage the real estate of his ward when necessary to provide for the suitable maintenance of the ward and his family.
Andrus v. Blazzard, 23 U. 233; 63 P. 888.
No provision in statutes allowing the guardian to mortgage the real property of his ward for the purpose of paying debts, and the guardian who does so binds himself and not the ward.
Id.
Neither guardians nor the courts having jurisdiction over the estates of incompetent persons have power to bind the person or estate of such persons unless expressly authorized to do so by law.
Id.

7831. (4008.) Id. Pay debts out of personalty if possible. Every guardian appointed under the provisions of this title must pay all just debts due from the ward out of his personal estate and the income of his real estate, if sufficient; if not, then out of his real estate.

Cal. C. Civ. P., § 1768*.
Claims and payment of debts, decedent's estate, §§ 7645-7673.
Under this section and § 7838, where the personal property and income from the real estate are insufficient to pay the ward's debts and the expenses of guardianship, the guardian may sell, upon the order of the court, the ward's real estate for that purpose.
Andrus v. Blazzard, 23 U. 233; 63 P. 888.

7832. (4009.) Settle accounts. Compound debts. Sue and be sued. Every guardian must settle all accounts of the ward, and demand, sue for, and receive all debts due to him, or may, with the approbation of the court, compound for the same and give discharges to the debtor, on receiving a fair and just dividend of his estate and effects; and he must appear for and represent his ward in all legal suits and proceedings, unless another person be appointed for that purpose.

Cal. C. Civ. P., § 1769.
Service upon guardian is service upon ward, § 7877.
Ward to appear by guardian, §§ 6500, 7439, 7877.
Substitution of guardian for predecessor, § 7875.

7833. (4010.) Inventory within three months. Annual inventory and account. Every guardian must return to the court, within three months after his appointment, an inventory and appraisement of the estate of his ward, which shall be made by the guardian and appraisers in the manner and form hereinbefore provided for the making of the inventory and appraisement of the estate of a decedent. Annually thereafter, or semi-annually if the value of the estate exceeds $20,000, every guardian must present to the court for settlement and allowance an itemized account and inventory, duly verified as to correctness and completeness by himself or by another with the express permission of the court, containing a full and true statement of all the guardian's receipts and disbursements on account of his ward; and of all money and other personal property of the ward, which have come to the hands of the guardian, or have been received by any other person by his order or authority, or for his use, since his appointment, or since the filing of the last annual inventory and account, as the case requires; and of the value of all such property; together with a full and true statement and account of the manner in which he has disposed of the same, and of all the property remaining in his hands, at the time of filing the inventory and account; and a full and true description of the amount and nature of each investment made by him since his appointment, or since the filing of the last annual inventory and account, as the case requires.

Cal. C. Civ. P., § 1773*.
Inventory and appraisement, decedent estates, §§ 7635-7639.

7834. (4011.) Id. Special accounting on order of court. Newly discovered property. The court may, upon application made for that purpose by any person, compel the guardian to render an account to the court of the estate of his ward. All the estate of the ward described in the first inventory must be appraised by appraisers appointed, sworn, and acting in the manner

provided for regulating the settlement of the estates of decedents; such inventory, with the appraisement of the property therein described, must be recorded by the clerk of the court in a proper book kept in his office for that purpose. Whenever any other property of the estate of any ward is discovered, not included in the inventory of the estate already returned, and whenever any other property has been succeeded to, or acquired by any ward or for his benefit, the like proceedings must be had for the return and appraisement thereof that are herein provided in relation to the first inventory and return.

Cal. C. Civ. P., § 1773*.

7835. (4012.) Guardian may assent to partition. The guardian may join in and assent to a partition of the real estate of the ward, whenever such assent may be given by any person either when action has been brought or otherwise.

Cal. C. Civ. P., § 1772*.

Guardian may assent to partition, § 7303.

7836. (4013.) Support and education of ward. When a guardian has advanced for the necessary maintenance, support, or education of his ward, any amount not disproportionate to the value of his estate, or his condition of life, and the same is made to appear to the satisfaction of the court, by proper vouchers and proofs, the guardian must be allowed credit therefor in his settlements. Whenever a guardian fails, neglects, or refuses to furnish suitable and necessary maintenance, support, or education for his ward, the court may order him to do so, and enforce such order by proper process. Whenever any third person, at his request, supplies a ward with such suitable and necessary maintenance, support, or education, and it is shown to have been done after refusal or neglect of the guardian to supply the same, the court may direct the guardian to pay therefor out of the estate, and enforce such payment by due process.

Cal. C. Civ. P., § 1771.

Support of ward in state mental hospital, §§ 5408, 5417.

This section and section 7837 provide for the expenses and compensation of the guardian and for the allowance of such items in his account.

Andrus v. Blazzard, 23 U. 233; 63 P. 888.

7837. (4014.) Compensation to guardian. Expenses. Every guardian must be allowed the amount of his reasonable expense incurred in the execution of his trust, and he must also have such compensation for his services as the court in which his accounts are settled deems just and reasonable.

Cal. C. Civ. P., § 1776.

Where a guardian is guilty of negligence in the management of the estate of his ward, he is entitled to no compensation.

Scheib v. Thompson, 23 U. 564; 65 P. 499.

Money actually paid out by guardian for court costs and attorney's fees should be allowed him on accounting.

Id.

Expense of bond allowed, § 1214.

7838. (4015.) Sale, mortgage, or lease. When allowed. When a sale of the property of a ward is necessary to maintain him or his family, or to maintain and educate the ward when a minor, or to pay the debts and expenses of guardianship, or when it appears to the satisfaction of the court that it is for the best interests of the estate that the real or personal property, or some part thereof, be sold, mortgaged, or leased, the guardian may sell, mortgage, or lease the same, upon an order of the court; *provided,* that if a ward be insane and confined in the state mental hospital, and have a family in this state, the property of such ward exempt from execution shall not be sold nor used for his care and maintenance in the hospital. The provisions of this title respecting the sale, mortgaging, and leasing of the property of decedents, and the powers, duties, rights, and obligations thereby conferred and imposed shall, as far as applicable, govern the sale, mortgaging, and leasing of property under guardianship.

Cal. C. Civ. P., § 1777*.

Limitation on action to recover land sold by guardian, § 6460.

Sale, mortgage, or lease of estate of ward, § 7830.

Sale, mortgage, or lease of estate of decedent, §§ 7677-7709.

Under this section and § 7831, where the personal property and income from the real estate are insufficient to pay the ward's debts and the expenses of guardianship, the guardian may sell, upon the order of the court, the ward's real estate for that purpose.

Andrus v. Blazzard, 23 U. 233; 63 P. 888.

7839. (4016.) Id. Application of proceeds. If the estate is sold for the purposes mentioned in this title, the guardian must apply the proceeds of the sale to such purposes, as far as necessary, and put out the residue, if any, on interest, or invest it in the best manner in his power, until the capital is want-

ed for the maintenance of the ward and his family, or the education of his children, or for the education of the ward when a minor, in which case the capital may be used for that purpose, as far as may be necessary, in like manner as if it had been personal estate of the ward.

Cal. C. Civ. P., § 1779.

7840. (4017.) Id. Investments. If the estate is sold for the purposes of putting out or investing the proceeds, the guardian must make the investment according to his best judgment, or in pursuance of any order that may be made by the court.

Cal. C. Civ. P., § 1780.

7841. (4018.) Id. Management, investment, and disposition of estate. The court, on the application of a guardian or any person interested in the estate of any ward, after such notice to persons interested therein as the court shall direct, may authorize and require the guardian to invest the proceeds of sales, and any other of his ward's money in his hands, in real estate, or in any other manner most to the interest of all concerned therein; and the court may make such other orders and give such directions as are needful for the management, investment, and disposition of the estate and effects as circumstances require.

Cal. C. Civ. P., § 1792.

A guardian, without authority of the court, purchased real estate with the money of his ward. The value of the real estate had somewhat depreciated when the ward became of age, and it was shown that during the ward's infancy money could be safely loaned at ten per cent per annum; held, that the ward was entitled to recover from the guardian the amount invested by him in the house, with ten per cent interest, compounded annually.

Scheib v. Thompson, 23 U. 564; 65 P. 499.

7842. (4019.) Embezzlement. Citation to person charged. Order. Upon complaint made by any guardian, ward, creditor, or other person interested in the estate or having a prospective interest therein as heir or otherwise, against any one suspected of having concealed, embezzled, or conveyed away any of the money, goods, or effects, or an instrument in writing belonging to the ward or to his estate, the court may cite such suspected person to appear before such court, and may examine and proceed with him on such charge in the manner provided in this title with respect to persons suspected of and charged with concealing or embezzling the effects of a decedent.

Cal. C. Civ. P., § 1800. Guardian liable for treble damages, § 7241.

NON-RESIDENT WARDS.

7843. (4020.) Guardians of non-resident wards. Powers. Every guardian appointed for a non-resident ward shall have the same powers and perform the same duties with respect to the estate of the ward found within this state, and with respect to the person of the ward if he shall come to reside therein, as are prescribed with respect to any other guardian appointed under this title.

Cal. C. Civ. P., § 1794. When both are non-residents, § 7846.

7844. (4021.) Id. Bonds. Every guardian must give bond to the ward in the manner and with the like conditions as hereinbefore provided for other guardians, except that the provisions respecting the inventory, the disposal of the estate and effects, and the account to be rendered by the guardian must be confined to such estate and effects as come to his hands in this state.

Cal. C. Civ. P., § 1795.

7845. (4022.) Id. Guardian first appointed has exclusive jurisdiction. The guardianship which is first lawfully granted of any person residing without this state extends to all the estate of the ward within this state, and excludes the jurisdiction of the court of every other county.

Cal. C. Civ. P., § 1796.

7846. (4023.) Non-resident guardians and wards. When the guardian and his ward are both non-residents, and the ward is entitled to property in this state which may be removed to any state or foreign country, without conflict with any restriction or limitation thereupon, or impairing the right of the ward thereto, such property may be removed to the state or foreign country of the residence of the ward, upon the application of the guardian to the court.

Cal. C. Civ. P., § 1797*.

7847. (4024.) Id. Application for removal of property. Order. The application must be made upon ten days' notice to the resident executor, administrator or guardian, if there be such, otherwise without notice, and upon such application the non-resident guardian must produce and file a certificate, under the hand of the clerk and seal of the court from which his appointment was derived, showing:

1. A transcript of the record of his appointment;
2. That he entered upon the discharge of his duties;
3. A description of the property of the ward with its estimated value;
4. That he is entitled by the laws of the state, territory, or foreign country of his appointment, to the possession of the estate of the ward; or must produce and file a certificate under the hand and seal of the clerk of the court having jurisdiction in the county of his residence of the estates of persons under guardianship, or of the highest court of such country, attested by a minister, consul, or vice-consul of the United States, resident in such country, that by the laws of such country the applicant is entitled to the custody of the estate of his ward, without the appointment of any court. Upon such application, unless good cause to the contrary is shown, the court must make an order granting to such guardian leave to take and remove the property of his ward to the state or place of his residence, which is authority to him to sue for and receive the same in his own name for the use and benefit of his ward.

Cal. C. Civ. P., § 1798*.
When property of non-resident decedent may be removed, §§ 7777, 7780.

7848. (4025.) Id. Order discharges local guardian, etc. Such order is a discharge of the executor, administrator, local guardian, or other person in whose possession the property may be at the time the order is made, on filing with the court the receipt therefor of the foreign guardian of such ward, and transmitting a duplicate receipt or a certified copy of such receipt to the court from which such non-resident guardian received his appointment.

Cal. C. Civ. P., § 1799*.

CHAPTER 15.

NOTICES, ORDERS, AND PROCEDURE.

7856. (4026.) Notices. Manner and time of giving. In all cases in which it is provided in this title, or in which the court, judge, or clerk may direct that notice shall be given, and the manner of giving the same is not provided or directed, it shall be sufficient if the notice be published in any newspaper having general circulation in the county; and in any case in which the time is not provided or directed, it shall be sufficient, whether the notice be given by publication or posting, that the notice be given for not less than ten days; but the court or judge, or the clerk when authorized, may order or direct the precise manner of giving notice, or more than one manner of giving the same or may prescribe a longer notice than ten days. The clerk shall give the notice where not otherwise provided.

Clerk may prescribe notice to be given, § 7561.
Party may designate paper, § 7028.
Proof of posting or publication of notice, §§ 7866, 7867.
Notice may be waived by consent in writing, § 7868.
When personal notice ordered, form, service, § 7865.

Where notice insufficient, order appointing guardian void.

Mosby v. Gisborn, 17 U. 257; 54 P. 121.
An order for notice of an application for the appointment of an administrator required that the notice be published in two issues of a newspaper for a period of at least a week prior to Sept. 28th, and by mailing a copy of the notice to the heirs as required by § 7603. The notice was first published on Sept. 20th, and the second and last insertion was on Sept. 27th, the day prior to the time set for hearing, and no notice was mailed; held, that the court acquired no jurisdiction under such notice to appoint an administrator.
In re Bunting's Estate, 30 U. 251; 84 P. 109.
See Wells v. Kelly, 11 U. 421; 40 P. 705.
Where an executor or administrator is appointed on statutory notice the court acquires jurisdiction of the property; the other notices are not jurisdictional and a disregard thereof is a mere irregularity, assailable, in the absence of fraud, in a direct proceeding only.
Barrette v. Whitney, 36 U. 574; 106 P. 522.

7857. (4027.) Publication of notices, how and when made. Newspapers shall publish all probate and guardianship notices under the heading

"Probate and guardianship notices. Consult county clerk or the respective signers for further information." Such notices shall be published as often during the prescribed period as the paper is regularly issued, unless otherwise provided by law or directed by the court, judge, or clerk; and, as far as possible, in one column in the alphabetical order of the surnames of decedents and wards.

Cal. C. Civ. P., § 1705*. Proof of publication, § 7866.

7858. (4028.) Form of notices in case of petitions. In the case of petitions, the notice shall be substantially in the following form:

Estate of A B—Petition for ("probate of will," "letters of administration," "letters of guardianship," "sale of personal property," "sale of real property," "approval of annual account," "distribution," or "distribution and partition," or other purpose, as the case may be) has been set for hearing at (hour, day, and date), at courthouse (name of city or town). C D, Clerk.

Notice of hearing on petitions for letters of administration, letters testamentary, and for guardianship shall state to whom it is asked to have letters issued. Notices for the hearing of petitions for the sale of real or personal property shall briefly indicate the property sought to be sold.

7859. (4029.) Form of notice to creditors. Notice to creditors shall be substantially in the following form:

Estate of A B—Creditors will present claims with vouchers to the undersigned at (stating place), on or before (stating the last day on which claims may be presented). C D, (administrator or executor).

Time of publication, proof, §§ 7645, 7647, 7866. Time for presentation of claims, §§ 7645-7665.

7860. (4030.) Form of notices of public sales of property. Notices of the sale of personal or real property at public auction shall be substantially in the following form:

Estate of A B—The undersigned will sell at public auction (in case of personal property, describing the articles in general terms; and in the case of real property, stating the number of square rods, or the number of acres, with the lot, block, plat, or quarter section, and city or county in which the same is situated), at (stating the hour, day, and date of sale), at (stating place of sale), for (stating terms of sale as ordered by the court). C D (administrator, executor, or guardian). Dated ....., 19.....

7861. (4031.) Form of notices of private sale of property. Notices of the sale of real or personal property at private sale shall be substantially in the following form:

Estate of A B—The undersigned will sell at private sale (describing the property as hereinbefore prescribed in the case of sales at public auction) on or after (stating the day and date), and written bids will be received at (stating place), terms of sale (describing the same). C D, (administrator, executor, or guardian). Dated ....., 19.....

7862. (4032.) Other notices to conform to foregoing. Other notices shall conform as nearly as may be to the forms hereinbefore prescribed.

7863. (4033.) Contents of notice. Personal service equivalent to mailing. In all cases in which it is provided that notice by mail shall be given, it shall be the duty of the clerk to address to each person entitled to such notice at his place of residence, if known, a written or printed copy of the order or a notice containing the substance of the order, and deposit the same in the post-office with the postage thereon prepaid. Personal service of such notice at least ten days before the day of hearing is equivalent to mailing.

Am'd '01, p. 122.

Personal notice, how given, § 7865.

7864. (4033x.) Notices posted in three public places. In all cases in which it is provided in the Probate Code, or in which the court, judge, or clerk may direct that notice be given by posting notices, it shall be sufficient if the notice or order be posted in at least three public places in the county, one of which must be at the courthouse of the county, for the time required by law, or prescribed by the court, judge, or clerk. '01, p. 122.

7865. (4034.) Personal notice. Citation, how and when served. Upon application of any person interested, or where personal notice is required and no mode of giving it is prescribed, the clerk must issue a citation under the seal of the court, containing the title of the proceeding, a brief statement of the nature thereof, and a direction to the person cited to appear at the time and place specified. The citation must be served in the same manner as a summons in a civil action, and when no other time is or may be prescribed, must be served at least five days before the return day thereof.

Cal. C. Civ. P., §§ 1707-1711*.

Personal notice equivalent to mailing, § 7863.

7866. (4035.) Proof of publication or posting. Evidence of the due publication or posting of a notice required to be published or posted may be given by affidavit, respectively, of the publisher or principal clerk of the newspaper in which notice was published, or of the person who posted the notices.

Cal. C. Civ. P., § 2010*.
Proof of publication of summons, § 6552.

Posting must be in three public places, § 7864.
Proof of publication generally, § 7155.

7867. (4036.) Proof of notice. Decree is conclusive. In all cases in which notice is required or directed as a prerequisite to the action of the court, judge, or clerk, proof of due notice must be made to the satisfaction, respectively, of the court, judge, or clerk; and the decrees of the court in such cases, showing that due notice was given, shall be conclusive evidence of that fact.

Notices generally, §§ 7856-7868.
Conclusiveness of orders and decrees generally, §§ 7559, 7560, 7564, 7752, 7766, 7796, 7870.

Where notice not published and mailed according to law, court did not acquire jurisdiction.
In re Bunting's Estate, 30 U. 251; 84 P. 109.

7868. (4037.) When notice dispensed with. If all persons interested in the estate join in any petition, or signify in writing their assent thereto, notice may be dispensed with and the hearing had at any time.

Notice of hearing for letters is jurisdictional and statutory notice should be given; failure to give notice of other hearings is an irregularity.
Barrette v. Whitney, 36 U. 574; 106 P. 522.

7869. (4038.) Any interested person has right to be heard. Any person shall have a right to be heard by the court at any hearing on any question affecting a probate or guardianship matter in which he is interested.

Objections available only on direct application or on appeal, § 7560.

Any person interested may appeal.
In re Reese Estate, 9 U. 171; 33 P. 698.

7870. (4039.) Decree need not show jurisdictional facts. Recording. Other papers filed. Orders or decrees made by the court or judge in probate proceedings need not recite the existence of facts or the performance of acts upon which the jurisdiction of the court may depend, but it shall only be necessary that they contain the matters ordered or adjudged, except as otherwise provided. All orders and decrees of the court must be entered at length in the record books of the court provided and kept for that purpose, and all other papers in the matter must be filed.

Cal. C. Civ. P., § 1704*.
Validity and conclusiveness of orders and decrees, §§ 7559, 7560, 7564, 7752, 7796, 7867, 7870.

An order made without authority of statute is void.
Andrus v. Blazzard, 23 U. 233; 63 P. 888.

7871. (4040.) Decrees affecting real property to be recorded. Notice. When a judgment or decree is made determining any matter affecting the title to real property, a certified copy of the same must be recorded in the office of the recorder of the county in which the property is situated; and from the time of filing the same, notice of the contents thereof is imparted to all persons.

Cal. C. Civ. P., §§ 1601*, 1706*, 1719*.
Recording conveyances, judgments, etc., gives notice, § 4900.

7872. (4041.) Trial of issues of fact. Judgments and executions. All issues of fact joined in probate and guardianship proceedings must be tried in conformity with the requirements of the Code of Civil Procedure, and in all such proceedings the party affirming is the plaintiff, and the one denying or avoiding is defendant. Judgments therein, on the issue joined, as well as for

costs, may be entered and enforced by execution or otherwise by the court as in civil actions.

Cal. C. Civ. P., § 1716*.
Provisions of Code of Civil Procedure applicable, § 3558.
Trial by court; jury trial, § 7873.
A suit to revoke the probate of a will on the ground of undue influence is an action at law.
Miller v. Livingston, 31 U. 415; 88 P. 338.
In a contested application for a guardian of property on grounds of incompetency, findings of fact are essential.
In re Manning, 38 U. 281; 112 P. 167.

7873. (4042.) Trial by court. Jury trial. Reference. If no jury is demanded, the court or judge must try the issues joined. If on written demand a jury is called by either party, and the issues are not sufficiently made up by the written pleadings on file, the court may direct the preparation of more specific pleadings, or, on due notice to the opposite party, may settle and frame the issues to be tried, and submit the same, together with the evidence of each party, to the jury. If the trial of the issues joined requires the examination of an account, the court or judge must try the matter or refer it, and no jury can be called.

Mont. Civ. P., § 2924.
Demand for jury and deposit of fee, §§ 2553, 6782.
Jury waived unless demanded, Con. art. 1, sec. 10; § 6827.
Issues triable by jury, §§ 6781, 7208.
Provisions of Code of Civil Procedure applicable, § 7558.

7874. (4043.) Acts of executor or guardian de facto valid, when. When the judgment or order appointing an executor, or administrator, or guardian is reversed on appeal, for error, and not for want of jurisdiction of the court, all lawful acts in administration upon the estate performed by such executor, or administrator, or guardian, if he have qualified, are as valid as if such judgment or order had been affirmed.

7875. (4044.) Executor, etc., may be substituted for predecessor in action. Executors, administrators, or guardians appointed to fill vacancies may be substituted for their respective predecessors in any action to which such predecessors were parties.

Continuation of action by successor or representative, § 6513.
Actions by guardian, §§ 7832, 7877.
Actions by executors, etc., §§ 6513, 7610, 7718-7721.

7876. (4045.) Costs paid as directed by court. When not otherwise prescribed in this title, the district court or the supreme court on appeal from the district court, may, in its discretion, order costs to be paid by any party to the proceedings, or out of the assets of the estate, as justice may require.

Cal. C. Civ. P., § 1720*
When executor, etc., personally liable; when not, §§ 7045, 7662.

7877. (4046.) Service on guardian equivalent to service on ward. How made. Waiver. Whenever an infant, insane or incompetent person has a guardian of his estate residing in this state, personal service upon the guardian of any process, notice, or order of the court concerning the estate of a deceased person or of any guardianship matter in which the ward is interested is equivalent to service upon the ward. Such guardian may also appear for his ward and waive any process, notice, or order to show cause which an adult or a person of sound mind might do.

Cal. C. Civ. P., § 1722*.
Guardian for insane wife, §§ 2995, 7822.
Guardian to appear for ward, §§ 6500, 7439, 7832.

7878. (4047.) Construction of words and phrases herein. Unless otherwise defined herein, words and phrases used in this code are to be construed according to the rules and definitions recognized in or prescribed by other statutes applicable thereto.

N. Dak. (1895) § 6165.
Construction of terms generally, §§ 5847,5848.

7879. (4048.) Correction of mistakes in settlements. Mistakes in settlement may be corrected at any time before final settlement and discharge, and, after that time, by equitable proceedings, on such showing as will justify the interference of the court.

Iowa, McClain's An. C. (1888) § 3679*.
Conclusiveness of settlement of account, § 7752.
Validity and conclusiveness of orders and decrees generally, §§ 7559, 7560, 7564, 7752, 7766, 7796, 7867, 7870.
Executor is not prima facie chargeable with interest during the time the law allows for

collecting an estate and settling the account, and charging him with interest must be predicated upon his fault or wrong or if he, having made use of the funds in some way, has profited by the delay in final settlement, or withholding them after demand.
In re Raleigh's Estate, 48 U. 128; 158 P. 705.

The allowance of an executor's account before final settlement cannot be assailed upon final settlement, but only in equity.
Id.

7880. (4049.) Service by publication on executor permitted, when. When the court shall make an order affecting an executor or administrator, and it cannot be personally served upon him, service thereof may be made by publication of a notice, stating the substance of such order, for four weeks in some newspaper having a general circulation in the county where such order was made.

Iowa, McClain's An. C. (1888) §§ 3684, 3685.
Service by publication, civil procedure, §§ 6549, 6550.
Where a court ordered a citation to be published once a week for four successive weeks, and the first publication was made October 28th, and the last November 18th, and the hearing was had on the 27th of November, the court has jurisdiction.
Wells v. Kelly, 11 U. 421; 40 P. 705.
See In re Bunting's Estate, 30 U. 251; 84 P. 109.

7881. (4050.) Attorney for minors or non-residents. Failure to appoint does not invalidate. At or before the hearing of petitions and contests for the probate of wills, for letters testamentary or of administration, for sales of real estate and confirmations thereof, settlements, partitions, and distributions of estates, setting apart homesteads, and all other proceedings where notice is required or prescribed, and before any hearing in any guardianship matter, the court may, in its discretion, appoint some competent attorney at law to represent in all such proceedings all persons interested who are minors and have no general guardian in the county, or who are non-residents of the state, and those interested, who, though they are neither such minors nor non-residents, are unrepresented. The order must specify the names of the parties so far as known for whom the attorney is appointed, who is thereby authorized to represent such parties in all such proceedings had subsequent to his appointment. The attorney may receive a fee, to be fixed by the court, for his services, which must be paid in the case of estates of decedents out of the funds of the estate as necessary expenses of administration, and upon distribution may be charged to the party represented by the attorney, and in guardianship matters shall be paid as the court may direct. If for any cause it becomes necessary, the court may substitute another attorney for the one first appointed, in which case the fee must be proportionately divided. The non-appointment of an attorney will not affect the validity of any of the proceedings.

Cal. C. Civ. P., § 1718*.
Allowance of attorney's fee, § 7739.

TITLE 119.

PENAL CODE.

CHAPTER 1.

PRELIMINARY PROVISIONS.

7891. (4051.) Title known as Penal Code. This title shall be known as the Penal Code.

Cal. Pen. C., § 1*.

7892. (4052.) Provisions not to be strictly construed. The rule of the common law that penal statutes are to be strictly construed has no application to the revised statutes. The provisions of the revised statutes are to be construed according to the fair import of their terms with a view to effect the objects of the statutes and to promote justice.

Cal. Pen. C., § 4.
Statutes to be liberally construed, § 5839, and note
Decisions on construction of statutes, note to § 5839.
Decisions on enactments and repeals, note to § 5839.
Decisions on interpretation of constitution, note to Con. art. 6, sec. 1.

Liberal construction, civil procedure, §§ 6596, 6622, 6968, and notes.
No part of revised statutes retroactive unless expressly so declared, § 5840.
Effect of repeal on prosecution of offenses already committed, §§ 5835, 5836, 5842.
Non-prejudicial informality in pleading, etc., is not error, §§ 8842, 9365.
Forms of pleading those prescribed by the code, § 8828.
Rules of pleading, §§ 8828-8855, and notes.
Information or indictment sufficient, when, § 8841, and note.
Juvenile court act to be construed in accordance with this section, § 1832.
This rule of construction applies to municipal ordinances.
Salina City v. Lewis, 51 U. —; 172 P. 286.
Salina City v. Neilson, 51 U. —; 172 P. 290.

7893. (4053.) Sense in which certain words are used herein. Whenever the terms mentioned in this section are employed in the Penal Code, they are employed in the senses hereafter affixed to them, except where a different sense plainly appears:

1. The term "wilfully," when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage.

2. The terms "neglect," "negligence," "negligent," and "negligently" import a want of such attention to the nature or probable consequences of the act or omission as a prudent man ordinarily bestows in acting in his own concerns.

3. The term "corruptly" imports a wrongful design to acquire or cause some pecuniary or other advantage to the person guilty of the act or omission referred to, or to some other person.

4. The terms "malice" and "maliciously" import a wish to vex, annoy, or injure another person, or an intent to do a wrongful act, established either by proof or by presumption of law.

5. The term "knowingly" imports only a knowledge that the facts exist which bring the act or omission within the provisions of the code. It does not require any knowledge of the unlawfulness of such act or omission.

6. The term "bribe" signifies any money, goods, right in action, property, thing of value, or advantage, present or prospective, or any promise or undertaking to give any, asked, given, or accepted, with a corrupt intent to influence unlawfully the person to whom it is given in his action, vote, or opinion in any public or official capacity.

7. When the term "person" is used in this code to designate the party whose property may be the subject of any offense, it includes this state, and any state, government, or country which may lawfully own any property within this state, and all public and private corporations or joint associations, as well as individuals.

Cal. Pen. C., § 7*.
Construction of terms generally, § 6548.
Intent a necessary element in any crime, §§ 7908, 7909, and notes.
Malice in homicide defined, § 8024, and notes.
Malice in killing of animals defined.
State v. Coleman, 29 U. 417; 82 P. 465.
People v. Olsen, 6 U. 284; 22 P. 163.
Word "knowingly" defined in prosecution for receiving illegal fees.
Skeen v. Chambers, 31 U. 36; 86 P. 492.

7894. (4054.) What intent to defraud is sufficient. Whenever, by any of the provisions of this code, an intent to defraud is required in order to constitute any offense, it is sufficient if an intent appears to defraud any person, association, or body politic or corporate whatever.

Cal. Pen. C., § 8.

7895. (4055.) Civil remedies not affected by penal statutes. The omission to specify or affirm in this code any liability to damages, penalty, forfeiture, or other remedy imposed by law and allowed to be recovered or enforced in any civil action or proceeding, for any act or omission declared punishable herein, does not affect any right to recover or enforce the same.

Cal. Pen. C., § 9.
Civil right not merged in criminal prosecution, § 5841.

7896. (4056.) Power of impeachment or removal not affected hereby. The omission to specify or affirm in this code any ground of forfeiture of a public office, or other trust or special authority conferred by law, or any power conferred by law to impeach, remove, depose, or suspend any public officer or other person holding any trust, appointment, or other special authority conferred by law, does not affect such forfeiture or power, or any proceed-

ing authorized by law to carry into effect such impeachment, removal, deposition, or suspension.

Cal. Pen. C., § 10.
Felonious misconduct in office, forfeiture, disqualification, §§ 7906, 7961, 8237.
Removal by judicial proceedings, §§ 8625-8640.
It is not necessary that the specific acts for which a removal is demanded are specified in some section of the code, but it is enough that the particular acts relied on are specified in the accusation filed and that such acts amount to malfeasance.
Law v. Smith, 34 U. 394; 98 P. 300.

7897. (4057.) Military tribunals and punishment for contempt not affected hereby. This code does not affect any power conferred by law upon any court-martial, or other military authority, or officer, to impose or inflict punishment upon offenders; nor any power conferred by law upon any public body, tribunal, or officer, to impose or inflict punishment for a contempt.

Cal. Pen C., § 11. Powers of courts-martial, §§ 3858-3867.

7898. (4058.) Penalty determined and imposed by the court. The several sections of this code which declare certain crimes to be punishable as therein mentioned devolve a duty upon the court authorized to pass sentence, to determine and impose the punishment prescribed.

Cal. Pen. C., § 12.

7899. (4059.) Penalty between limits determined by the court. Whenever in this code the punishment for a crime is left undetermined between certain limits, the punishment to be inflicted in a particular case must be determined by the court authorized to pass sentence, within such limits as may be prescribed by this code.

Cal. Pen. C., § 13.
Penalty when maximum term not fixed by law, § 8532.

7900. (4060.) Witness never exempt from proceedings for perjury. The various sections of this code which declare that evidence obtained upon the examination of a person as a witness cannot be received against him in any criminal proceedings do not forbid such evidence being proved against such person upon any proceedings founded upon a charge of perjury committed in such examination.

Cal. Pen. C., § 14. Perjury, §§ 7980-7988.

7901. (4061.) Crime defined. A crime or public offense is an act committed or omitted in violation of a law forbidding or commanding it, and to which is annexed, upon conviction, any of the following punishments:

1. Death;
2. Imprisonment;
3. Fine;
4. Removal from office;
5. Disqualification to hold and enjoy any office of honor, trust, or profit in this state.

Cal. Pen. C., § 15.
Removal from office by impeachment, Con. art. 6, secs. 17-20, §§ 8600-8618.
Removal from office by judicial proceedings, Con. art. 6, sec. 21; §§ 8625-8640.
Power of removal not affected hereby, § 7896.

7902. (4062.) Crimes, how divided. Crimes are divided into:

1. Felonies;
2. Misdemeanors.

Cal. Pen. C., § 16.

7903. (4063.) Felony defined. Misdemeanor defined. A felony is a crime which is or may be punishable with death, or by imprisonment in the state prison. Every other crime is a misdemeanor.

Cal. Pen. C., § 17*.
Prohibited acts for which no penalty is imposed are misdemeanors, § 8014.
Wilful omission to perform a duty prescribed by law a misdemeanor, § 8013.

7904. (4064.) Id. Penalty for felony when not prescribed. Corporations. Except in cases where a different punishment is prescribed by law, every offense declared to be a felony is punishable by imprisonment in the state prison not exceeding five years. In all cases where a corporation is convicted of an offense for the commission of which a natural person would be punishable as for a felony, and there is no other punishment prescribed by law, such corporation is punishable by a fine of not less than $500 and not more than $10,000.

N. Dak. (1895) § 6811. Cal. Pen. C., § 18*.
Court to determine and impose penalty, §§ 7898, 7899.
Criminal action against corporation, §§ 9354-9361.

7905. (4065.) Id. Penalty for misdemeanor when not prescribed. Corporations. Except in cases where a different punishment is prescribed by law, every offense declared to be a misdemeanor is punishable by imprisonment in a county jail not exceeding six months, or by a fine in any sum less than $300, or by both. In all cases where a corporation is convicted of an offense for the commission of which a natural person would be punishable as for a misdemeanor, and there is no other punishment prescribed by law, such corporation is punishable by a fine not exceeding $1,000.

Cal. Pen. C., § 19*.
Court to determine and impose penalty, §§ 7898, 7899.

7906. (4066.) Felonious misconduct in office. Forfeiture. Disqualification. The conviction of any state, county, city, town, or precinct officer of a felony involving misconduct in office involves as a consequence, in addition to the punishment prescribed by law, a forfeiture of his office, and disqualifies him ever afterwards from holding any public office in this state.

Mont. Pen. C., § 198*.
Disqualification by crime, §§ 7961, 8237.
Power of removal, etc., not affected hereby, § 7896.
Removal by judicial proceedings, §§ 8625-8640.
See note to § 7896.

7907. (4067.) Who deemed habitual criminal. Penalty. Whoever has been previously twice convicted of crime, sentenced, and committed to prison, in this or any other state, or once in this or once at least in any other state, for terms of not less than three years each, shall, upon conviction of a felony committed in this state other than murder in the first or second degree, be deemed to be a habitual criminal, and shall be punished by imprisonment in the state prison for not less than fifteen years; *provided,* that if the person so convicted shall show to the satisfaction of the court before which such conviction was had that he was released from imprisonment upon either of said sentences, upon a pardon granted on the ground that he was innocent, such conviction and sentence shall not be considered as such under this section.

7908. (4068.) Union of act and intent to constitute crime. In every crime or public offense, there must exist a union or joint operation of act and intent, or criminal negligence.

Cal. Pen. C., § 20.
Intoxication affecting intent, § 7910, and note.
Assault with intent to commit rape, § 8047.
Assault to commit other felony, § 8048.
Intent, how manifested, § 7909, and note.
Witness' ignorance of materialty of evidence no excuse, § 7985.
Ignorance or mistake of fact, § 7915.
Persons not liable to punishment, § 7915.

A criminal intent is generally an element of crime; but every man is presumed to intend the necessary and legitimate consequences of what he knowingly does. Ignorance of a fact may sometimes be taken as evidence of a want of criminal intent, but not ignorance of the law.

Reynolds v. U. S., 1 U. 319; 98 U. S. 145.

It is no defense to an indictment for charging illegal fees, that the defendant honestly believed the law to be that he could charge fees under the by-laws of the mining district.

People v. Monk, 8 U. 35; 28 P. 1115.

Larceny of horse by convict to assist escape.

People v. Flynn, 7 U. 378; 26 P. 1114.

The intent which the law requires as necessary to the commission of an offense is the intent to commit the act, which is defined as illegal and punishable, but not the having of an evil purpose to commit a crime.

U. S. v. Buford, 8 U. 173; 30 P. 433.
See People v. Colton, 2 U. 457.

In larceny, the intent to steal must exist at the time of taking.

People v. Miller, 4 U. 410; 11 P. 514.
See State v. McKee, 17 U. 370; 53 P. 733.

Where one by threats obtains from the person of another property which he believes to he his own, the felonious intent to commit a robbery is lacking.

People v. Hughes, 11 U. 100; 39 P. 492.

In case of a public nuisance, the intent or motive is immaterial.

People v. Burtleson, 14 U. 258; 47 P. 87.

Where a person violates a statute making an act criminal, and no reference is made in the statute to a criminal intent, the provisions of this section must control, and it is error to withhold the question of intent from the jury.

State v. Blue, 17 U. 175; 53 P. 978.

7909. (4069.) Intent, how manifested. Who are of sound mind. The intent or intention is manifested by the circumstances connected with the offense, and the sound mind and discretion of the accused. All persons are of sound mind who are neither idiots, nor lunatics, nor affected with insanity.

Cal. Pen. C., § 21.
Union of act and intent, § 7908, and note.
Persons incapable of crime, § 7915.

Where it is certain that one of two persons did the criminal act, but it is uncertain which is the guilty agent, neither of them can be convicted, but such is not the rule where the two persons had a common purpose.

People v. Olsen, 6 U. 284; 22 P. 163.

It was not necessary to prove that defendant and others actually intended to convert the sheep to their own use. It was sufficient to prove beyond a reasonable doubt that they took the sheep away against the will of their owners, with the intention of permanently depriving them of their property.

State v. McKee, 17 U. 370; 53 P. 733.

Where intent is the gist of the offense, that intent should be shown by such evidence as, uncontradicted, will authorize it to be presumed beyond a reasonable doubt.

State v. McCune, 16 U. 170; 51 P. 818.

Intent may be shown by circumstantial evidence.

State v. Overson, 30 U. 22; 83 P. 557.

An insane person cannot legally be guilty of a criminal intent.

State v. Brown, 36 U. 46; 102 P. 641.

7910. (4070.) Drunkenness no excuse for crime. Mitigation. No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition. But whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act.

Cal. Pen. C., § 22.
Union of act and intent, § 7908, and note.
Under a statute establishing degrees of murder, and providing that wilful, deliberate, and premeditated killing shall be murder in the first degree, evidence that the accused was intoxicated at the time of the killing is competent for the consideration of the jury upon the question whether he was in such a condition of mind as to be capable of deliberate premeditation.
Hopt v. People, 104 U. S. 631; same case, 4 U. 247; 9 P. 407.
It is error to instruct in a murder trial that evidence of drunkenness was admissible only on the question of premeditation, followed by instructions that in case of premeditated murder, drunkenness is immaterial.
State v. Dewey, 41 U. 538; 127 P. 275.
An instruction in the words of this section is not sufficient; the jury should have been given concrete instructions applicable to the case at bar.
State v. Anselmo, 46 U. 137; 148 P. 1071.

CHAPTER 2.

PERSONS LIABLE TO PUNISHMENT.

7915. (4071.) All persons capable of committing crime, except following. All persons are capable of committing crimes except those belonging to the following classes:

1. Children under the age of seven years;
2. Children between the ages of seven years and fourteen years, in the absence of clear proof that at the time of committing the act charged against them they knew its wrongfulness;
3. Idiots;
4. Lunatics and insane persons;
5. Persons who committed the act or made the omission charged under an ignorance or mistake of fact, which disproves any criminal intent;
6. Persons who committed the act charged without being conscious thereof;
7. Persons who committed the act or made the omission charged, through misfortune or by accident, when it appears that there was no evil design, intention, or culpable negligence;
8. Married women, unless the crime be punishable with death, acting under the threats, command, or coercion of their husbands;
9. Persons, unless the crime be punishable with death, who committed the act or made the omission charged under threats or menaces sufficient to show that they had reasonable cause to believe, and did believe, their lives would be endangered if they refused.

Cal. Pen. C., § 26*.
Intoxication no excuse for crime, § 7910.
Who are of sound mind, § 7909.
Insane person defined, § 5848.
Inquiry into insanity of defendant, §§ 9327-9336.
Power of juvenile courts, §§ 1826-1844.
Intent a necessary element, § 7908, and note.
A corporation may be neither arrested nor imprisoned, though it may be indicted or informed against, and by special process brought into court, and tried and convicted of certain offenses, and be fined in a specific sum of money, and the fine collected by execution.
American Fork v. Charlier, 43 U. 231; 134 P. 739.
The agents of a corporation are subject to the same punishment as other individuals, and for ultra vires acts the agents are the only ones who can be punished and for acts not ultra vires they and the corporation may both be punished.
Id.

7916. (4072.) Persons liable to punishment. The following persons are liable to punishment under the laws of this state:

1. All who commit, in whole or in part, any crime within this state;
2. All who commit larceny or robbery out of this state, and bring or are found with the property stolen within this state;
3. All who, being out of this state, cause or aid, advise or encourage, another person to commit a crime within this state, and are afterward found therein.

Cal. Pen. C., § 27.
Larceny without state; property brought within, § 8298.
Local jurisdiction of public offenses, §§ 8645-8660.

CHAPTER 3.

PARTIES TO CRIME.

7918. (4073.) Classified as principals and accessories. Parties to crimes are classified as:

1. Principals; and
2. Accessories.

Cal. Pen. C., § 30.

7919. (4074.) Id. Principals defined. All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, and all persons counseling, advising, or encouraging children under the age of fourteen years, lunatics, or idiots to commit any crime, and all persons who by fraud, contrivance, or force occasion the drunkenness of another for the purpose of causing him to commit any crime, or who by threats, menaces, command, or coercion compel another to commit any crime, are principals in any crime so committed.

Cal. Pen. C., § 31.

Principals and accessories; certain distinctions abolished, § 8851.

Principals without the state, §§ 7916, 8645.

Jurisdiction over principal and accessory, §§ 8645, 8650, 8651.

Criminal conspiracy, § 8018.

Where two persons are jointly associated in the commission of an offense, it is immaterial which one performed the act.

People v. Olsen, 6 U. 284; 22 P. 163.

When two defendants and another were associated together to rob a person, and such person was killed, the killing, by whichever of the three it was done, was the act of each and all three of the conspirators, and the two defendants were chargeable therewith, whether they or their companion fired the fatal shot.

State v. King, 24 U. 482; 68 P. 418.

State v. Morgan, 22 U. 162; 61 P. 527.

Where two or more were associated together in the commission of an offense, the act of one was the act of each of the conspirators, and each may be convicted therefor.

State v. Morgan, 22 U. 162; 61 P. 527.

State v. King, 24 U. 482; 68 P. 418.

People v. Coughlin, 13 U. 58; 44 P. 94.

People v. Olsen, 6 U. 284; 22 P. 163.

7920. (4075.) Id. Accessories defined. All persons who, after full knowledge that a felony has been committed, conceal it from the magistrate, or harbor and protect the person charged therewith or convicted thereof, are accessories.

Cal. Pen. C., § 32.

Compounding felony, § 8005.

Compromising offenses, §§ 9339-9341.

An accessory after the fact could not be jointly indicted or tried with the principal. He is not an accomplice, and his testimony need not be corroborated.

People v. Chadwick, 7 U. 134; 25 P. 737.

A party persuading a victim of a fraudulent transaction to postpone the institution of a suit until the defrauder had left the state is not an accessory after the fact.

Ex parte Overfield, 152 P. 568 (Nevada).

7921. (4076.) Id. Punishment of accessory when not defined. Except in cases where a different punishment is prescribed, an accessory is punishable by imprisonment in the state prison not exceeding five years, or in the county jail not exceeding one year, or by fine not exceeding $5,000, or by both fine and imprisonment.

Cal. Pen. C., § 33*.

Accessory may be tried and punished though principal not tried, or, if tried, acquitted, § 8852.

CHAPTER 4.

CRIMES AGAINST THE EXECUTIVE POWER.

7923. (4077.) Exercising public office without having qualified. Every person who exercises any of the functions of a public office without having taken and filed the oath of office, or without having executed and filed the required bond, is guilty of a misdemeanor.

Cal. Pen. C., § 65*.

7924. (4078.) Qualification of preceding section. The next preceding section shall not be construed to affect the validity of acts done by a person exercising the functions of a public office in fact, where other persons than himself are interested in maintaining the validity of such acts.

Cal. Pen. C., § 66.

Cited in: Peterson v. Benson, 38 U. 286; 112 P. 801.

7925. (4079.) Giving or offering bribe to executive officer. Every person who gives or offers any bribe to any executive officer in this state, with intent to influence him in respect to any act, decision, vote, opinion, or other proceeding as such officer, is guilty of a felony.

Cal. Pen. C., § 67*.
Construction of "bribe," § 7893.
Bribery of judicial officer, §§ 7954-7956.
Bribery of legislative officer, §§ 7940-7942.
Officer asking or receiving a gratuity, § 7928.
Bribery of jurors, §§ 7957, 7958.
Bribery of witnesses, § 7996.
Extortion, § 8323.

7926. (4080.) Executive officer asking or receiving bribe. Every executive officer, or person elected or appointed to an executive office, who asks, receives or agrees to receive any bribe, upon any agreement or understanding that his vote, opinion, or action upon any matter then pending, or which may be brought before him in his official capacity, shall be influenced thereby, is guilty of felony.

Cal. Pen. C., § 69*.

7927. (4081.) Interfering with or resisting officer. Every person who attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon such officer by law, or who knowingly resists, by the use of force or violence, such officer in the performance of his duty, is punishable by fine not exceeding $1,000 and imprisonment in the county jail not exceeding one year.

Cal. Pen. C., § 69*.
Retaking goods from officer, § 7965.
Resisting or obstructing officer, § 8002.

7928. (4082.) Officer asking or receiving gratuity. Every executive or ministerial officer who asks or receives any emolument, gratuity, or reward, or any promise thereof, excepting such as may be authorized by law, for doing any official act, is guilty of a misdemeanor.

Cal. Pen. C., § 70.
Giving or offering bribe, § 7925, and note.
Gratuity to judicial officer, § 7956.

7929. (4083.) Presentation of unlawful claim. Every person who, with intent to defraud, presents for allowance or for payment to any state board or officer or to any county, city, town, or district board or officer, authorized to allow or pay the same, if genuine, any false or fraudulent claim, bill, account, voucher, or writing is guilty of felony.

Cal. Pen. C., § 72.
County commissioners personally liable for allowing false claims, § 1381.
Claims against the county, §§ 1427-1434.
One presenting false claim for bounty may be prosecuted hereunder without reference to § 143x11, C. L. 1907.
State v. Swan, 31 U. 336; 88 P. 12.
Where the claim presented is one which on its face purports to be a charge against the political division for which the officer acts in allowing or paying it, the mere fact that the claim is unauthorized by law, and that the officer cannot legally allow or pay it, is not decisive; and so long as the claim, if valid, is one that could or should be allowed or paid, it is within the statute, though the claim itself may be for a matter which the law does not authorize or even forbids, the word "genuine" referring to a real claim as distinguished from a counterfeit.
Law v. Smith, 34 U. 394; 98 P. 300.
Presentation for allowance and payment of a false claim against the county for expense in performing certain duties after he presented a claim therefor to the state, and which claim had been allowed and paid, states facts authorizing conviction for violation of this section, but it is a question for the jury to determine whether he proffered the claim knowing that he had no legal right to claim it.
Id.

7930. (4084.) Buying appointment to office. Every person who gives or offers any gratuity or reward, in consideration that he or any other person shall be appointed to any public office, or shall be permitted to exercise or discharge the duties thereof, is guilty of a misdemeanor.

Cal. Pen. C., § 73.

7931. (4085.) Selling appointment to office. Every public officer who, for any gratuity or reward, appoints another person to a public office, or presents another person to exercise or discharge any of the duties of his office, is punishable by a fine not exceeding $1,000.

Cal. Pen. C., § 74*.

7932. (4086.) Wrongful exercise of functions of public office. Every person who wilfully and knowingly intrudes himself into any public office to which he has not been elected or appointed, and every person who, having been an executive officer, wilfully exercises any of the functions of his office after his term has expired and a successor has been elected or appointed, and has qualified, is guilty of a misdemeanor.

Cal. Pen. C., § 75.

7933. (4087.) Officer withholding records, etc., from successor. Every officer whose office is abolished by law, or who, after the expiration of the time for which he may be appointed or elected, or after he has resigned or been legally removed from office, wilfully and unlawfully withholds or detains from his successor or other person entitled thereto the official seal or any records, papers, documents, or other writing appertaining or belonging to his office, or mutilates, destroys, or takes away the same, is guilty of a felony.

Cal. Pen. C., § 76*. Mutilating or destroying public records, §§ 7976, 7977, 8235.

7934. (4088.) Officer withholding books, etc., from successor. Every officer whose office is abolished by law, or who, after the expiration of the time for which he may be appointed or selected, or after he has resigned or been legally removed from office, who wilfully or unlawfully withholds or detains from his successor or other person entitled thereto any volume of the laws, or of supreme court reports, or of other like books belonging to the office, shall be deemed guilty of a misdemeanor.

CHAPTER 5.

CRIMES AGAINST THE LEGISLATIVE POWER.

7936. (4089.) Preventing meetings of legislature or members thereof. Every person who wilfully, and by force or fraud, prevents the legislature of this state, or either of the houses composing it, or any of the members thereof, from meeting or organizing, is guilty of a felony.

Cal. Pen. C., § 81.

7937. (4090.) Disturbing the legislature. Every person who wilfully disturbs the legislature of this state, or either of the houses composing it, while in session, or who commits any disorderly conduct in the immediate view and presence of either house, tending to interrupt its proceedings or impair the respect due its authority, is guilty of a misdemeanor.

Cal. Pen. C., § 82.

7938. (4091.) Altering draft of bill. Every person who fraudulently alters the draft of any bill or resolution which has been presented to either of the houses composing the legislature, to be passed or adopted, with intent to procure it to be passed or adopted by either house, or certified by the presiding officer of either house, in language different from that intended by such house, is guilty of a felony.

Cal. Pen. C., § 83.

7939. (4092.) Altering engrossed copy of bill. Every person who fraudulently alters the engrossed copy or enrollment of any bill or resolution which has been passed or adopted by the legislature of this state, with intent to procure it to be approved by the governor, or certified by the secretary of state, or printed or published by the printer of statutes, in language different from that in which it was passed or adopted by the legislature, is guilty of a felony.

Cal. Pen. C., § 84.

7940. (4093.) Giving or offering bribe to member. Every person who gives or offers a bribe to any member of the legislature or to another person for him, or attempts by menace, deceit, suppression of truth, or any corrupt means to influence a member in giving or withholding his vote, or in not attending the house or any committee of which he is a member, is guilty of a felony.

Cal Pen. C., § 85.
"Bribe" defined, § 7893.
Corruption of executive officers, §§ 7923-7934.
Corruption of judicial officers, §§ 7954-7961.
Corruption of jurors, § 7957; of witnesses, § 7996.

7941. (4094.) Members asking or receiving bribe. Every member of either of the houses composing the legislature of this state who asks, receives, or agrees to receive any bribe, upon any understanding that his official vote,

opinion, judgment, or action shall be influenced thereby, or shall be given in a particular manner, or upon any particular side of any question or matter upon which he may be required to act in his official capacity, or gives or offers, or promises to give any official vote in consideration that another member of the legislature shall give any such vote, either upon the same or another question, is guilty of a felony.

Cal. Pen. C., § 86*.

7942. (4095.) Member promising to trade vote or influence. Every person elected to either house of the legislature who offers or promises to give his vote or influence in favor of or against any measure or proposition pending or proposed to be introduced into the legislature, in consideration or upon condition that any other person elected to the same legislature will give, or will promise or assent to give, his vote or influence in favor of or against any other measure or proposition pending or proposed to be introduced into such legislature, the person making such offer or promise is guilty of a felony.

Mont. Pen. C., § 166.

7943. (4096.) Members trading votes or influence. Every member of the legislature who gives his vote or influence for or against any measure or proposition pending or proposed to be introduced in such legislature, or offers, promises, or assents to give, upon condition that any other member will give, or will promise or assent to give, his vote or influence in favor of or against any other measure or proposition pending or proposed to be introduced in such legislature, or in consideration that any other member has given his vote or influence for or against any other measure or proposition in such legislature, is guilty of a felony.

Mont. Pen. C., 167.

7944. (4097.) Corruptly soliciting official action of public officer. Every person who corruptly solicits, directly or indirectly, the official action of any member of the legislature or of any public officer of the state, or of any municipal division thereof, is guilty of a felony.

Mont. Pen. C., § 169.

7945. (4098.) Member failing to disclose personal interest in bill. Every member of the legislature who has a personal or private interest in any measure or bill proposed or pending before the legislature of which he is a member, and does not disclose the fact to the house of which he is a member, and votes thereon, is guilty of a misdemeanor.

Mont. Pen. C., § 170.

7946. (4099.) Vote in consideration of governor's action on bill. Every person elected to either house of the legislature who gives, or offers or promises to give, his official vote or influence in favor of or against any measure or proposition pending or proposed to be introduced into, or that has already passed or been passed by, either house of the legislature, in consideration or on condition that any person, being governor of this state, shall approve or disapprove, veto or sign, or agree to approve or disapprove, veto or sign, any such measure or proposition, or any measure, proposition, bill, or act or proposed law that has already passed or been passed by said legislature, or either house thereof, or in consideration or upon condition that any person, being or acting governor of this state, shall nominate for appointment or appoint or remove any person or persons to or from any office or position under the laws of this state, shall be deemed guilty of a felony.

N. Dak. (1895) § 6930*.

7947. (4100.) Id. Vote of senator in consideration of appointment. Every person elected to the senate of this state who shall offer or agree to give his official vote or influence for or against the confirmation of any person or persons nominated or to be nominated for appointment, or appointed or to be appointed to any office in this state, in consideration or upon condition that the person being governor of this state shall nominate for appointment or appoint or refuse to appoint or nominate for appointment any person or persons to or for any office or position in this state, shall be guilty of a felony.

N. Dak. (1895) § 6931*.

7948. (4101.) Witness refusing to attend or testify before legislature. Every person who, being summoned to attend as a witness before either house of the legislature or any committee thereof, refuses or neglects, without lawful excuse, to attend pursuant to such summons, and every person who, being present before either house of the legislature, or any committee thereof, wilfully refuses to be sworn, or to answer any material and proper question, or to produce, upon reasonable notice, any material and proper books, papers, or documents in his possession or under his control, is guilty of a misdemeanor.

Cal. Pen. C., § 87.

7949. (4102.) Lobbying for hire. Every person who obtains, or seeks to obtain, money or other thing of value from another person upon a pretense, claim, or representation that he can or will improperly influence in any manner the action of any member of any legislative body in regard to any vote or legislative matter, is guilty of a felony.

Mont. Pen. C., § 172.

7950. (4103.) Testimony must be given though incriminating. Upon the trial, no person, otherwise competent as a witness, shall be excused from testifying as such concerning any offense charged under this chapter, on the ground that such testimony may criminate himself, or subject him to public infamy, but such testimony shall not afterward be used against him in any judicial proceeding, except for perjury in giving such testimony.

Mont. Pen. C., § 172.

CHAPTER 6.

CORRUPTION OF JUDICIAL OFFICERS.

7954. (4104.) Giving bribes to judicial officers, etc. Every person who gives or offers to give a bribe to, or who attempts corruptly to influence, any judicial officer, juror, referee, arbitrator, umpire, appraiser, or any person who may be authorized by law to hear and determine any question or controversy, with intent to influence his vote, opinion, or decision upon any matter or question which is or may be brought before him for decision, is guilty of a felony.

Cal. Pen. C., § 92*.
"Bribe" defined, § 7893.
Corruption of executive officers, §§ 7923-7934.
Corruption of legislative power, §§ 7936-7950.
Corruption of witnesses, §§ 7995-7997; of jurors, § 7957.

7955. (4105.) Judicial officer, etc., receiving bribe. Every judicial officer, juror, referee, arbitrator, umpire, appraiser, or other person authorized by law to hear or determine any question or controversy, who asks or receives, or agrees to receive, any bribe, upon any agreement or understanding that his vote, opinion, or decision upon any matter or question which is or may be brought before him for decision shall be influenced thereby, is guilty of a felony.

Cal. Pen. C., § 93*.

7956. (4106.) Judicial officer receiving gratuity, etc. Every judicial officer who asks or receives any emolument, gratuity, or reward, or any promise thereof, except such as may be authorized by law, for doing any official act, is guilty of a misdemeanor.

Cal. Pen. C., § 94. Cal. Sup. (1895) § 94*, p. 2.
Executive or ministerial officer asking or receiving a gratuity, § 7928.

7957. (4107.) Attempt to corruptly influence juror, referee, etc. Every person who corruptly attempts to influence a juror, or any person summoned or drawn as a juror, or chosen as an arbitrator or umpire, or appointed a referee, in respect to his verdict in, or decision of, any cause or proceeding pending or about to be brought before him, either:

1. By means of any communication, oral or written, had with him except in the regular course of proceedings; or

2. By means of any book, paper, or instrument exhibited otherwise than in the regular course of proceedings; or

3. By means of any threat, intimidation, persuasion or entreaty; or

4. By means of any promise, or assurance of any pecuniary or other advantage,—is guilty of a misdemeanor.

Cal. Pen. C., § 95*.

7958. (4108.) Misconduct of juror, referee, etc. Every juror or person drawn or summoned as a juror, or chosen arbitrator or umpire, or appointed referee, who:

1. Makes any promise or agreement to give a verdict or decision for or against any party; or

2. Wilfully and corruptly permits any communication to be made to him or receives any book, paper, instrument, or information relating to any cause pending before him, except according to the regular course of proceedings upon the trial of such cause,—is punishable by fine not exceeding $1,000, or by imprisonment in the state prison not exceeding one year.

Cal. Pen. C., § 96*.

7959. (4109.) Drawing of jurors fraudulently. Every person authorized by law to assist at the drawing of any jurors to attend any court, who wilfully puts or consents to the putting upon any list of jurors as having been drawn, any name which shall not have been drawn for that purpose in the manner prescribed by law; or who omits to place on such list any name that shall have been drawn in the manner prescribed by law; or who signs or certifies any list of jurors as having been drawn which was not drawn according to law; or who is guilty of any other unfair, partial, or improper conduct in the preparation or drawing of any list of jurors, is guilty of a misdemeanor.

N. Dak. (1895) § 6942. Jurors, how drawn, §§ 3609-3612.

7960. (4110.) Justice or constable purchasing judgment. Every justice of the peace or constable of the same precinct who purchases, or is interested in the purchase of any judgment or part thereof, on the docket of, or on any docket in possession of, such justice, is guilty of a misdemeanor.

Cal. Pen. C., § 97. Justice or constable not to be interested in action as attorney, agent, etc., penalty, § 8015.

7961. (4111.) Officer convicted to forfeit office. Every officer convicted of any crime defined in this chapter, in addition to the punishment prescribed, forfeits his office.

Cal. Pen. C., § 98*. Disqualification by crime, §§ 7906, 8237.

CHAPTER 7.

RESCUES.

7964. (4112.) Rescuing prisoners. Every person who rescues, or attempts to rescue, or aids another person in rescuing or attempting to rescue, any prisoner from any prison or jail, or from any officer or person having him in lawful custody, is punishable as follows:

1. If such prisoner was in custody upon a conviction of felony punishable with death, by imprisonment in the state prison not less than one nor more than five years;

2. If such prisoner was in custody upon a conviction of any other felony, by imprisonment in the state prison not less than six months nor more than one year;

3. If such prisoner was in custody upon a charge of felony, by fine not exceeding $500, or by imprisonment in the county jail not exceeding one year, or by both;

4. If such prisoner was in custody otherwise than upon a charge or conviction of felony, by fine in any sum less than $300, or by imprisonment in the county jail not exceeding six months, or by both.

Cal. Pen. C., § 101*. Retaking after rescue, §§ 8732, 8733.

7965. (4113.) Taking or destroying goods in possession of officer. Every person who wilfully injures or destroys, or takes or attempts to take, or assists any person in taking or attempting to take, from the custody of any officer or person any personal property which such officer or person has in charge under any process of law, is guilty of a misdemeanor.

Cal. Pen. C., § 102.
Resisting or interferiing with officer, §§ 7927, 8002.

CHAPTER 8.

ESCAPES AND DELIVERY OF DRUGS, ETC.

7967. (4114.) Penalty for escape. Information. Trial. Every prisoner confined in the state prison for a term less than for life, and every such prisoner who, while in custody of the warden, deputy warden, or any keeper or guard in any convict camp, or any other place where he may be at work or housed or kept while outside the state prison walls, who escapes, or attempts to escape from such prison, convict camp, or place of work, house, or from any keeper or guard, or from any other place where such prisoner may be kept, shall, upon conviction, be imprisoned in the state prison for a term of not more than ten years, said second term of imprisonment to commence from the time he would otherwise have been discharged from said prison. All information filed under this section shall be filed in the county in which the alleged offense is committed, and the case shall be tried in such county unless a change of venue is allowed as provided by law. Am'd '15, p. 2.

Mont. Pen. C., §§ 220, 221*. Jurisdiction of escape, §§ 8657, 8658.
Retaking after escape, §§ 8732, 8733.

7968. (4115.) Escaping from other than state prison. Every prisoner confined in any prison other than the state prison, who escapes or attempts to escape therefrom, is guilty of a misdemeanor.

Mont. Pen. C., § 222.

7969. (4116.) Officer aiding or permitting escape. Every keeper of a prison, sheriff, deputy sheriff, constable, or jailer, or person employed as a guard, who fraudulently contrives, procures, aids, connives at, or voluntarily permits, the escape of any prisoner in custody, is punishable by imprisonment in the state prison not exceeding three years, and by fine not exceeding $1000.

Cal. Pen. C., § 108*.

7970. (4117.) Assisting prisoner to escape. Every person who wilfully assists any prisoner confined in any prison, or in the lawful custody of any officer or person, to escape, or in an attempt to escape, from such prison or custody, is punishable as provided in the next preceding section.

Cal. Pen. C., § 109.

7971. (4118.) Furnishing implements, etc., to aid in escape. Every person who carries or sends into a prison anything to aid a prisoner in making his escape, with intent thereby to facilitate the escape of any prisoner confined therein, is punishable as provided in § 7969.

Cal. Pen. C., § 110.

7972. Delivery of poisons, weapons, etc., prohibited. Penalty. Every person who, without the consent of the warden of the Utah state prison, shall deliver to any convict or person within the state prison, or who shall give or deliver to any convict when outside of the state prison, or leave, deposit, or place at or near any camp or other place where convicts are kept at work on public roads or otherwise, or who shall leave within the Utah state prison grounds, or within any cell or cell-house or buildings of any kind belonging to said state prison, or who shall leave, deposit, or place at or near any such buildings, grounds, or premises any explosives or explosive substance of any kind or character, or any poison of any kind, or any opium, or any preparation of like character, or any preparation commonly called "dope," or any substitute therefor, or any deleterious drug of any kind, or any knife, dirk,

or any weapon of any kind or character whatsoever, including firearms of all kinds, or any implement, instrument, or substance which can be used by any convict, or any person in said state prison, as a means of injuring the warden, his deputy, or any guard, convict, or any person whomsoever, or which can be used as a means of escape from said state prison by any such convict or person, shall be deemed guilty of a felony, and upon conviction shall be punished by imprisonment in the Utah state prison at hard labor for a term of not more than ten years. '15, p. 18.

7973. Copies of section to be posted. The warden of the Utah state prison shall cause to be posted and maintained in conspicuous places outside and within the buildings and upon the grounds of said state prison, and at and near any camp where convicts are at work, copies of § 7972. '15, p. 18.

CHAPTER 9.

PUBLIC RECORDS.

7976. (4119.) Larceny or mutilation of records, etc., by a custodian. Every officer having the custody of any record, map, or book, or of any paper or proceedings of any court, filed or deposited in any public office, or placed in his hands for any purpose, who is guilty of stealing, wilfully destroying, mutilating, defacing, altering, falsifying, removing, or secreting the whole or any part of such record, map, book, paper, or proceeding, or who permits any other person so to do, is guilty of a felony.

Cal. Pen. C., § 113*.
No limitation upon prosecution for falsification of public records, § 8665.
Forgery, §§ 8270-8276.
Falsifying evidence, §§ 7991-7997.
Withholding records from successor or mutilating or destroying records, §§ 7933, 8235.

7977. (4120.) Id. By other than custodian. Every person, not an officer such as is referred to in the preceding section, who is guilty of any of the acts specified in that section, is punishable by imprisonment in the state prison not exceeding three years, or in a county jail not exceeding one year, or by a fine not exceeding $100, or by both.

Cal. Pen. C., § 114*.

7978. (4121.) Offering false or forged instrument for record. Every person who knowingly procures or offers any false or forged instrument to be filed, registered, or recorded in any public office within this state, which instrument, if genuine, might be filed, or registered, or recorded under any law of this state or of the United States, is guilty of a felony.

Cal. Pen. C., § 115.

CHAPTER 10.

PERJURY.

7980. (4122.) Perjury defined. Every person who, having taken an oath that he will testify, declare, depose, or certify truly before any competent tribunal, officer, or person, in any of the cases in which such an oath may by law be administered, wilfully and contrary to such oath, states as true any material matter which he knows to be false, is guilty of perjury.

Cal. Pen. C., § 118.
Indictment for perjury, proof, § 8848.
The testimony of a witness may always be used against him in a prosecution for perjury, § 7900.
Defined under liquor prohibition act, § 3373; fraternal insurance society act, §§ 3303.
Perjury before public utility commission, sub. 4, § 4822.
It is perjury to testify falsely before a grand jury.
People v. Greenwell, 5 U. 112; 13 P. 89.
Indictment for perjury set out and held good.
State v. Anderson 35 U. 496; 101 P. 385.
Id.
Defendant was indicted for perjury for swearing upon his voir dire that he believed polygamy to be wrong, and afterward explaining to several witnesses that he did not believe polygamy to be right because he went further and knew it to be right.
U. S. v. Brown, 6 U. 115; 21 P. 461.
The proof of falsity of any one of several matters alleged in the information charging perjury and containing several assignments of perjury supports a general verdict of guilt, though the other assignments are not sustained by the evidence.
State v. Anderson, 35 U. 496; 101 P. 385.
Information in perjury which alleged suc-

cessive statements made by accused while testifying as a witness, which statements were so related to the subject matter and were so linked together in point of time as to constitute but one act, states but one offense, and is good.
Id.

Perjury and subornation of perjury are separate and distinct offenses, and one charged with subornation of perjury is not an accessory of one committing perjury.
State v. Justensen, 35 U. 105; 99 P. 457.

7981. (4123.) Term "oath" defined. The term "oath," as used in the next preceding section, includes an affirmation, and every other mode authorized by law of attesting the truth of that which is stated.

Cal. Pen. C., § 119. "Oath" defined, § 5848.

7982. (4124.) Oath of office, part not included. So much of an oath of office as relates to the future performance of official duties is not such an oath as is intended by the two preceding sections.

Cal. Pen. C., § 120.

7983. (4125.) Irregularity in administering oath no defense. It is no defense to a prosecution for perjury that the oath was administered or taken in an irregular manner.

Cal. Pen. C., § 121.

7984. (4126.) Incompetency of witness no defense. It is no defense to a prosecution for perjury that the accused was not competent to give the testimony, deposition, or certificate of which falsehood is alleged. It is sufficient that he did give such testimony or make such deposition or certificate.

Cal. Pen. C., § 122.

7985. (4127.) Witness' ignorance of materialty no defense. It is no defense to a prosecution for perjury that the accused did not know the materiality of the false statement made by him; or that it did not, in fact affect the proceeding in or for which it was made. It is sufficient that it was material and might have been used to affect such proceeding.

Cal. Pen. C., § 123. Ignorance of law no excuse, note to § 7908.

7986. (4128.) Deposition deemed complete, when. The making of a deposition or certificate is deemed to be complete, within the provisions of this chapter, from the time when it is delivered by the accused to any other person with the intent that it be uttered or published as true.

Cal. Pen. C., § 124.

7987. (4129.) Penalty for perjury. Perjury is punishable by imprisonment in the state prison not less than one nor more than ten years.

Cal. Pen. C., § 126*.

7988. (4130.) Subornation of perjury. Every person who wilfully procures another person to commit perjury is guilty of subornation of perjury, and is punishable in the same manner as he would be if personally guilty of the perjury so procured.

Cal. Pen. C., § 127.
On a trial for subornation of perjury, the record of the plea of guilty of perjury by the person alleged to have been procured to commit the perjury is inadmissible.
State v. Justensen, 35 U. 105; 99 P. 457.

CHAPTER 11.

FALSIFYING EVIDENCE.

7991. (4131.) Offering false documentary evidence. Every person who, upon any trial, proceeding, inquiry, or investigation whatever, authorized or permitted by law, offers in evidence as genuine or true, any book, paper, document, record, or other instrument in writing, knowing the same to have been forged or fraudulently altered or antedated, is guilty of a felony.

Cal. Pen. C., § 132. Mutilating or falsifying public records, §§ 7933, 7976, 8235.
Forgery, §§ 8270-8276.

7992. (4132.) Unlawfully influencing witness. Every person who practices any fraud or deceit, or knowingly makes or exhibits any false statement, representation, token, or writing, to any witness or any person about to be called as a witness upon any trial, proceeding, inquiry, or investigation what-

ever authorized by law, with intent to affect the testimony of such witness, is guilty of a misdemeanor.

Cal. Pen. C., § 133.

7993. (4133.) Preparing false evidence. Every person guilty of preparing any false or antedated book, paper, record, instrument in writing, or other matter or thing, with intent to produce or allow it to be produced for any fraudulent or deceitful purpose, as genuine or true, upon any trial, proceeding, or inquiry whatever authorized by law, is guilty of a misdemeanor.

Cal. Pen. C., § 134.

7994. (4134.) Destroying or concealing evidence. Every person who, knowing that any book, paper, instrument in writing, or other matter or thing is about to be produced in evidence upon any trial, inquiry, or investigation whatever authorized by law, wilfully destroys or conceals the same, with intent thereby to prevent it from being produced, is guilty of a misdemeanor.

Cal. Pen. C., § 135.

7995. (4135.) Preventing or dissuading witness from attending. Every person who wilfully prevents or dissuades any person who is or may become a witness from attending upon any trial, proceeding, or inquiry authorized by law, is guilty of a misdemeanor.

Cal. Pen. C., § 136.

7996. (4136.) Bribing witness. Every person who gives, or offers, or promises to give to any witness, or person about to be called as a witness, any bribe, upon any understanding or agreement that the testimony of such witness or person about to be called as a witness shall be thereby influenced, or who attempts by any other means fraudulently to induce any witness or person about to be called as a witness to give false or to withhold true testimony, is guilty of a felony. Am'd '05, p. 56.

Cal. Pen. C., § 137.
"Bribe" defined, § 7893.
Corruption of jurors, § 7957.
Corruption of executive officers, §§ 7923-7934.
Corruption of legislative officers, §§ 7940-7942.
Corruption of judicial officers, §§ 7954-7961.

7997. (4137.) Receiving or offering to receive bribe. Every person who is a witness, or is about to be called as such, who receives or offers to receive any bribe, upon any understanding that his testimony shall be influenced thereby or that he will absent himself from the trial or proceeding upon which his testimony is required, is guilty of a misdemeanor.

Cal. Pen. C., § 138*.

CHAPTER 12.

OTHER OFFENSES AGAINST PUBLIC JUSTICE.

7998. (4138.) Officer refusing to receive or arrest criminal. Every sheriff, keeper of a jail, constable, or other peace officer who wilfully refuses to receive or arrest any person charged with a criminal offense is punishable by fine not exceeding $1000, and imprisonment in the county jail not exceeding one year.

Cal. Pen. C., § 142*.

7999. (4139.) Delay in taking arrested person before magistrate. Every public officer or other person, having arrested any person upon a criminal charge, who wilfully delays taking such person before a magistrate having jurisdiction to take his examination, is guilty of a misdemeanor.

Cal. Pen. C., § 145.
Defendant to be taken before magistrate without delay, §§ 8701, 8727.

8000. (4140.) Making arrest, etc., without lawful authority. Every public officer, or person pretending to be a public officer, who, under the pretense or color of any process or other legal authority, arrests any person or detains him against his will, or seizes or levies upon any property, or dispossesses any one of any lands or tenements, without a regular process or other lawful authority therefor, is guilty of a misdemeanor.

Cal. Pen. Ci., § 146.

8001. (4141.) Inhumanity to prisoner. Every officer who is guilty of wilful inhumanity or oppression toward any prisoner under his care or in his custody is punishable by fine not exceeding $1000, or by imprisonment in the county jail not exceeding one year.

Cal. Pen. C., § 147*.
Assault by officer, § 8003.
Inhumanity to prisoner, § 8536.
Arrested person not to be treated with unnecessary rigor, Con. art. 1, sec. 9.

8002. (4142.) Resisting or obstructing officer. Every person who wilfully resists, delays, or obstructs any public officer in the discharge or attempt to discharge any duty of his office, when no other punishment is prescribed, is punishable by fine not exceeding $1000, or by imprisonment in the county jail not exceeding one year, or by both.

Cal. Pen. C., § 148*.
Interfering with or resisting officer, §§ 7927, 8240.

8003. (4143.) Assaults by officer under color of authority. Every public officer who, under color of authority, without lawful necessity, assaults or beats any person, is punishable by a fine not exceeding $1000, or by imprisonment in the county jail not exceeding one year.

Cal. Pen. C., § 149*.
Inhumanity to prisoner, §§ 8001, 8536.

8004. (4144.) Refusing to aid officer in arrest, etc. Every male person over eighteen years of age who neglects or refuses to join the posse comitatus or power of the county, by neglecting or refusing to aid and assist in taking or arresting any person against whom there may be issued any process, or by neglecting to aid and assist in retaking any person who, after being arrested or confined, may have escaped from such arrest or imprisonment, or by neglecting or refusing to aid and assist in preventing any breach of the peace, or the commission of any criminal offense, being thereto lawfully required by any sheriff, deputy sheriff, constable, judge, or justice of the peace, or other officer concerned in the administration of justice, is punishable by a fine of not exceeding $100.

Cal. Pen. C., § 150*.
Officer may command assistance, § 8591.

8005. (4145.) Compounding or concealing crimes, etc. Every person who, having knowledge of the actual commission of a crime, takes money or property of another, or any gratuity or reward, or any engagement or promise thereof, upon any agreement or understanding to compound or conceal such crime, or to abstain from any prosecution thereof, or to withhold any evidence thereof, except in the cases provided for by law in which crimes may be compromised by leave of court, is punishable as follows:

1. By imprisonment in the state prison not exceeding five years, or in a county jail not exceeding one year, where the crime was punishable by death or imprisonment in the state prison for life;

2. By imprisonment in the state prison not exceeding three years, or in the county jail not exceeding six months, where the crime was punishable by imprisonment in the state prison for any other term than for life;

3. By imprisonment in the county jail not exceeding six months, or by fine not exceeding $100, where the crime was a misdemeanor.

Cal. Pen. C., § 153*.
Certain offenses may be compromised with leave of court, §§ 9339-9341.
When person concealing a crime an accessory, § 7920.

8006. (4146.) Debtor fraudulently selling or concealing property. Every debtor who fraudulently removes his property or effects out of this state, or fraudulently sells, conveys, assigns, or conceals his property with intent to defraud, hinder, or delay his creditors of their rights, claims, or demands, is punishable by imprisonment in the county jail not exceeding one year, or by fine not exceeding $1000, or by both.

Cal. Pen. C., § 154*.
Fraudulently conveying lands or chattels, § 8343.
Conveyances to hinder and delay creditors, § 5821, and note.
Sales of personalty without delivery, § 5135, and note.
Arrest of absconding debtor, §§ 6630-6664.

8007. (4147.) Defendant fraudulently selling or concealing property. Every person against whom any action is pending, or against whom a judgment has been rendered, for the recovery of any personal property, who fraud-

ulently conceals, sells, or disposes of such property, with intent to hinder, delay, or defraud the person bringing such action or receiving such judgment, or with such intent removes such property beyond the limits of the county in which it may be at the time of the commencement of such action or the rendering of such judgment, is punishable as provided in the next preceding section.

Cal. Pen. C., § 155. See notes to § 8006.

8008. (4148.) Common barratry. Common barratry is the practice of exciting groundless judicial proceedings, and is punishable by imprisonment in the county jail not exceeding six months, or by a fine in any sum less than $300, or by both.

Cal. Pen. C., § 158*. Champerty, etc., notes to §§ 331, 346.

8009. (4149.) Id. Proof required. No person can be convicted of common barratry except upon proof that he has excited suits or proceedings at law in at least three instances, and with a corrupt and malicious intent to vex and annoy.

Cal. Pen. C., § 159.

8010. (4150.) Grand juror acting after allowance of challenge. Every grand juror who, with knowledge that a challenge interposed against him by a defendant has been allowed, is present at, or takes part in, or attempts to take part in, the consideration of the charge against the defendant who interposed the challenge, or the deliberations of the grand jury thereon, is guilty of a misdemeanor.

Cal. Pen. C., § 164. Punishable as contempt, § 8795.

8011. (4151.) Disclosure of indictment for felony. Every grand juror, prosecuting attorney, clerk, judge, or other officer who, except by issuing or in executing a warrant of arrest, wilfully discloses the fact of a presentment of an indictment having been made for a felony, until the defendant has been arrested, is guilty of a misdemeanor.

Cal. Pen. C., § 168. Similar section, § 8854.

8012. (4152.) Grand juror disclosing proceedings. Every grand juror who, except when required by a court, wilfully discloses any evidence adduced before the grand jury, or anything which he himself or any other member of the grand jury may have said, or in what manner he or any other grand juror may have voted on a matter before them, is guilty of a misdemeanor.

Cal. Pen. C., § 169. Grand juror not to be questioned for vote, etc., § 8816.
Disclosure on order of court, § 8815.

8013. (4153.) Omission of duty by public officer. Every wilful omission to perform any duty enjoined by law upon any public officer, or person holding any public trust or employment, where no special provision shall have been made for the punishment of such delinquency, is punishable as a misdemeanor.

Cal. Pen. C., § 176.

8014. (4154.) Prohibited acts are misdemeanors. Where the performance of any act is prohibited by any statute, and no penalty for the violation of such statute is imposed by any statute, the doing of such act is a misdemeanor.

Cal. Pen. C., § 177*.

8015. (4155.) Justice or constable not to be interested in suit. No justice of the peace or constable shall be interested in any suit or action in any court of any justice of the peace , as attorney, agent, collector, or otherwise, except when a plaintiff or defendant in action. Every justice of the peace or constable who shall violate any of the provisions of this section shall be guilty of a misdemeanor, and in addition to the penalty prescribed shall forfeit his office.

Justice or constable not to purchase judgment, § 7960. Judicial officers not to practice law, §§ 1796, 7438.

CHAPTER 13.

CONSPIRACY.

8018. (4156.) Criminal conspiracy. If two or more persons conspire:

1. To commit a crime; or,

2. Falsely and maliciously to indict or convict another for any crime, or to procure another to be charged or arrested for any crime; or,

3. Falsely to move or maintain any suit, action, or proceeding; or,

4. To cheat and defraud any person of any property by any means which are in themselves criminal, or by any means which, if executed, would amount to a cheat, or to obtaining money or property by false pretenses; or,

5. To commit any act injurious to the public health, to public morals, or to trade or commerce, or for the perversion of obstruction of justice or the due administration of the laws,—they are punishable by imprisonment in the county jail not exceeding one year, or by fine not exceeding $1000.

Cal. Pen. C., § 182*.

Conspiracy, pleading and proof, § 8985.

Conspiracy to rob, resulting in murder, note to § 7919.

Larceny by two or more, note to § 8285.

An indictment charging defendant with entering into a conspiracy with one F. to keep a house of ill fame, and that between the 20th day of June, 1885, and the 1st day of October, 1885, the said F., in pursuance of such conspiracy, did keep such house; held, to sufficiently charge a public offense.

People v. Hampton, 4 U. 258; 9 P. 508.

Conspiracy of officers to entrap defendants into committing crime not shown.

People v. Morton, 4 U. 407; 11 P. 512.

Where two or more were associated together in the commission of an offense, the act of one was the act of each of the conspirators, and each may be convicted therefor.

State v. Morgan, 22 U. 162; 61 P. 527.

State v. King, 24 U. 482; 68 P. 418.

People v. Coughlin, 13 U. 58; 44 P. 94.

People v. Olsen, 6 U. 284; 22 P. 163.

Where defendant's answer alleged that a justice of the supreme court had conspired with plaintiff and used the weight of his personal as well as judicial influence to induce plaintiff to bring the suit, that it was not bona fide, and was brought solely for the purpose of gratifying the malicious instincts of the justice, the language charged a conspiracy rendering the justice, if true, liable to removal from office.

In re Snow, 27 U. 265; 75 P. 741.

Declaration made by one co-conspirator out of the presence of another, after the conspiracy has been carried out, is inadmissible against the other conspirator.

State v. Barretta, 47 U. 479; 155 P. 343.

Evidence on trial for larceny by taking money through fixed card game, held to authorize finding that there was conspiracy among the persons concerned in the taking.

State v. Donaldson, 35 U. 96; 99 P. 447.

To constitute a criminal conspiracy it is not necessary that the acts agreed to be done would be criminal, if done, if they would amount to a civil wrong; as inducing the purchase of worthless mining stock by false representation as to the value.

State v. Blake, 36 U. 605; 105 P. 910.

While a conspiracy cannot be established by the acts or declaration of only one of the alleged co-conspirators, so as to render such act or declaration admissible against accused, yet a conspiracy may be established by circumstantial evidence, and in such case the acts of one co-conspirator are admissible against the other.

State v. Inlow, 44 U. 485; 141 P. 530.

In determining whether accused and his wife were co-conspirators, their relationship may be considered.

Id.

In a trial of two parties for murder, the admission of evidence of a statement made by a third party already convicted for the same offense was not error where the evidence showed the statement was made within the hearing of both defendants.

State v. Romeo, 42 U. 46; 128 P. 530.

On the trial of two conspirators, evidence admissible as to one could not be excluded, though inadmissible as to the other.

State v. Gillies, 40 U. 541; 123 P. 93.

Where two or more persons conspire together to committ a crime, and either accomplish or abandon their designs, no one of them can, by subsequent act or declaration, affect the co-conspirators.

State v. Justensen, 35 U. 105; 99 P. 457.

8019. (4157.) Conspiracies not enumerated not punishable. No conspiracies other than those enumerated in the next preceding section are punishable criminally.

Cal. Pen. C., § 183.

8020. (4158.) Overt act necessary to conspiracy. Exceptions. No agreement, except to commit a felony upon the person of another, or to commit arson or burglary, amounts to a conspiracy, unless some act, besides such agreement, be done to affect the object thereof by more of the parties to such agreement.

Cal. Pen. C., § 184.

CHAPTER 14.

HOMICIDE.

8023. (4159.) Murder defined. Murder is the unlawful killing of a human being with malice aforethought.

Cal. Pen. C., § 187.

Attempts to kill, §§ 8045, 8046.

Under §§ 4928, 4938, C. L. 1888, it was sufficient to allege facts presenting a clear case of unlawful killing without employing the word "unlawful."

Davis v. People, 151 U. S. 262; see People v. Davis, 8 U. 412; 32 P. 670.

Judge may instruct as to statutory definition of murder.

People v. Thiede, 11 U. 241; 39 P. 837; affirmed 159 U. S. 510.

Where the defendant and another were associated together to rob, and one of the persons attempting arrest was killed, the killing, by whomsoever done, was the act of each and both of the conspirators, and defendant is chargeable therewith whether he or his companion fired the fatal shot.

State v. Morgan, 22 U. 162; 61 P. 527.

State v. King, 24 U. 482; 68 P. 418.

People v. Coughlin, 13 U. 58; 44 P. 94.

Where the evidence showed that the killing occurred during an attempt to perpetrate a robbery, though the defendant claimed the gun was accidentally discharged, held on instruction that the defendant could be convicted even though the information did not set out the killing under such circumstances was not erroneous.

State v. Thorn, 39 U. 208; 117 P. 58.

8024. (4160.) Malice may be express or implied. Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take the life of a fellow creature. It is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.

Cal. Pen. C., § 188.

"Malice" defined, § 7893.

Union of act and intent, §§ 7908, 7909, and notes.

Malice defined. "Malice," as used in § 8023, is malice as defined in sub. 4 of § 7893.

People v. Callaghan, 4 U. 49; 6 P. 49.

On a trial for murder, the homicide of itself does not imply malice, still the circumstances attending the homicide are to be considered by the jury in ascertaining whether there was malice.

People v. Tracy, 1 U. 343.

An indictment alleging that defendant, with premeditated malice, assaulted deceased with a revolver, and beat her upon the head, inflicting a wound from which she instantly died, is not rendered insufficient by alleging in terms an attempt to kill, when murder as defined by the statute may consist in an unlawful killing without any considerable provocation or under circumstances showing an abandoned or malignant heart.

Davis v. People, 151 U. S. 262; same case, 8 U. 412; 32 P. 670.

It is not necessary for a court in its charge to use all the words in the description of a statutory definition, and the use of the words "without just cause or excuse" was sufficient without adding the words "or when no considerable provocation appeared."

State v. McDonald, 14 U. 173; 46 P. 872.

See People v. Fairbanks, 7 U. 3; 24 P. 538.

State v. Williamson, 22 U. 248; 62 P. 1022.

A person who uses a deadly weapon in an unlawful manner must be taken to intend the natural and usual consequences resulting from such use.

People v. Davis, 8 U. 412; 32 P. 670; affirmed 161 U. S. 262.

People v. Halliday, 5 U. 467; 17 P. 118.

Statement by defendant made five days before the killing, when informed that officers were after him, "Let them come; I am ready for them," was admissible as showing malice against all who might attempt to arrest him.

People v. Coughlin, 13 U. 58; 44 P. 94.

Evidence of an attempt to kill the sheriff while attempting to arrest the defendant four days before the killing for which he was on trial was admissible as showing a deliberate intention to kill any person attempting his arrest.

Id.

To convict of murder it is not essential that intent and malice be shown by direct evidence; they may be presumed from the fact of a killing where no attendant and explanatory facts and circumstances are shown, and where the attendant facts and circumstances are shown, they may be inferred.

State v. Dewey, 41 U. 538; 127 P. 275.

8025. (4161.) Degrees of murder. Every murder perpetrated by poison, lying in wait, or any other kind of wilful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary, or robbery; or pereptrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed; or perpetrated by any act greatly dangerous to the lives of others and evidencing a depraved mind, regardless of human life,—is murder in the first degree. Any other homicide committed under such circumstances as would have constituted murder at common law is murder in the second degree.

Cal. Pen. C., § 189*.

No limitation on prosecution for murder, § 8665.

In capital case, right of trial by jury inviolate, Con. art. 1, sec. 10.

Burden of proof on trial for murder, § 8986.

Local jurisdiction of public offenses, §§ 8645-8660.

When doubt as to degree, conviction to be of lowest, § 9979, and note.

Information or indictment shall charge but one offense, § 8834, and notes.

"Premeditated" means thought of beforehand, for any length of time, however short; it is not inconsistent with premeditation that no appreciable space of time should lapse between the intent to kill and the act of killing.

People v. Callaghan, 4 U. 49; 6 P. 49.

State v. Morgan, 22 U. 162; 61 P. 527.

It is improper to charge a jury that premeditated means thought of beforehand, for any length of time, however short, and there need be no appreciable space of time between the intention to kill and the act, the instruction practically not giving any time for premeditation.

State v. Anselmo, 46 U. 137; 148 P. 1071.

INDICTMENT; INFORMATION:

Murder in the first and second degree are not two distinct offenses, but a common law indictment is insufficient to charge the offense of murder in the first degree; all the elements entering into murder in the first degree should be alleged; but an indictment in charging the offense need not follow the language of the statute if other equivalent words are used; therefore an indictment charging that the offense of murder was committed "feloniously, deliberately, wilfully, and of malice aforethought," omitting the word of the statute "premeditated," charges murder in the first degree.

Brannigan v. People, 3 U. 488; 24 P. 767.

Indictment charging a wilful, felonious assault, beating, bruising, and wounding with a revolver, all of deliberately premeditated malice, then and there inflicting a mortal wound, of which the deceased instantly died, charges murder in the first degree.

People v. Davis, 8 U. 412; 32 P. 670; 151 U. S. 262.

People v. Halliday, 5 U. 467; 17 P. 118.

Any kind of wilful, deliberate, malicious, and premeditated killing is sufficient to constitute

murder in the first degree, and ...e wilful, deliberate, and malicious intent may be formed the instant the criminal act is done.

State v. Morgan, 22 U. 162; 61 P. 527.

An information charging a killing by shooting to have been done unlawfully, wilfully, intentionally, feloniously, and with malice aforethought; held, sufficient to sustain a verdict of murder in the first degree, and the accused was entitled to a jury of twelve under Con. art. 1, sec. 10.

State v. Campbell, 24 U. 103; 66 P. 771.

An information charging a killing by shooting to have been done feloniously, unlawfully, wilfully, and with deliberate, premeditated malice aforethought, sufficiently charges murder in the first dgree.

State v. Haworth, 24 U. 398; 68 P. 155.

An information for murder alleging that the accused wilfully, deliberately, maliciously, and with premeditated malice killed and murdered decedent, is sufficient to charge murder in the first degree, and evidence tending to show that the murder was committed in the perpetration of robbery was properly admissible.

State v. King, 24 U. 482; 68 P. 418.

It is not error for the court to instruct that, though the killing was done in the perpetration, or in the attempt to perpetrate, a robbery, though the information did not show allegations of the killing under such circumstances, and the accused could, under the allegations contained in the information, be convicted of first degree murder.

State v. Sirmay, 40 U. 525; 122 P. 748.

State v. Thorn, 39 U. 208; 117 P. 58.

INSTRUCTIONS AS TO DECREE:

Instructions generally, note to § 8975.

In murder case, failure of court to charge jury as to the different degrees of the offense, and as to manslaughter, and to state punishment for various degrees of homicide, is error. The fact that counsel has read the statutes on these subjects to the jury does not cure omission.

Brannigan v. People, 3 U. 488; 24 P. 767.

A charge defining murder in the first degree as murder, cannot be taken advantage of by defendant because he is not prejudiced thereby.

People v. Halliday, 5 U. 467; 17 P. 118.

In murder case court should not instruct jury that facts do not bring case within any of higher degrees of homicide unless the testimony reducing the degree is clear, positive, and uncontradicted.

People v. Callaghan, 4 U. 49; 6 P. 49.

Where it is for the jury to say whether the facts make a case of murder in the first degree or murder in the second degree, it is error for the court to say, in its charge, that the offense, by whomsoever committed, was that of murder in the first degree.

Hopt v. People, 110 U. S. 574; same case, 4 U. 247; 9 P. 407.

Where the court fully instructed as to the different degrees of homicide, and a verdict was returned for first degree without any recommendation, the defendant was not prejudiced by the court's failure to instruct as to the punishment appropriate to each degree of homicide.

State v. Dye, 44 U. 190; 138 P. 1193.

A charge defining first degree murder in the language of the statute is not erroneous.

State v. Morris, 40 U. 431; 122 P. 380.

Where the information is framed on the theory of a premeditated murder committed during an attempt to commit robbery, and where the evidence was to this effect, the refusal to instruct on second degree murder was not error.

State v. Mewhinney, 43 U. 135; 134 P. 632.

8026. (4162.) Penalty for murder. Every person guilty of murder in the first degree shall suffer death, or, upon the recommendation of the jury, may be imprisoned at hard labor in the state prison for life, in the discretion of the court. Every person guilty of murder in the second degree shall be imprisoned at hard labor in the state prison for a term which shall be not less than ten years and which may be for life.

Cal. Pen. C., § 190*.

On conviction for murder in the first degree; held, that the court erred in not directing the attention of the jury to the provision of the Penal Code as to their right to recommend imprisonment for life, at hard labor in the penitentiary, in place of the punishment of death. By such action of the court the prisoner was deprived of a substantial right.

Calton v. People, 130 U. S. 83; same case, 5 U. 451; 16 P. 902.

Where the court advised the jury that the making or withholding of a recommendation was entirely within their discretion and gave them no intimation or direction as to what should control or influence in reaching a conclusion, the imposition of the death penalty, upon a verdict of murder in the first degree without recommendation, was proper.

State v. Morris, 44 U. 31; 122 P. 380.

The power to make or withhold a recommendation is conferred on the jury, and the court cannot instruct on matters to be considered in making such determination.

State v. Thorne, 39 U. 208; 117 P. 58.

State v. Thorne, 41 U. 414; 126 P. 286.

8027. (4163.) Manslaughter defined. Voluntary and involuntary. Manslaughter is the unlawful killing of a human being without malice. It is of two kinds:

1. Voluntary, upon a sudden quarrel or heat of passion;

2. Involuntary, in the commission of an unlawful act not amounting to a felony, or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection.

Cal. Pen. C., § 192.

Burden of proof, § 8986.

An information charging an accused with having operated a motor vehicle upon a public street at a higher rate of speed than was safe, and so as to endanger life, without having it under immediate control, and driving it past and in close proximity to a street car when the same was standing still for the purpose of letting off passengers, and while operating the vehicle in such unlawful manner, without due caution and circumspection, is insufficient to charge involuntary manslaughter.

State v. Gesas, 49 U. 181; 162 P. 366.

8028. (4164.) Penalty for manslaughter. Voluntary manslaughter is punishable by imprisonment in the state prison for a term not less than one nor more than ten years. Involuntary manslaughter is punishable by imprisonment in the county jail not exceeding one year.

Cal. Pen. C., § 193*.

8029. (4165.) Death must result within a year and a day. To make the killing either murder or manslaughter, it is requisite that the party die within a year and a day after the stroke received or the cause of death adminis-

tered; in the computation of which the whole of the day on which the act was done shall be reckoned the first.

Cal. Pen. C., § 194.

8030. (4166.) Excusable homicide. Homicide is excusable in either of the following cases:

1. When committed by accident and misfortune, in doing any lawful act by lawful means, with usual and ordinary caution and without any unlawful intent;

2. When committed by accident and misfortune, in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, when no undue advantage is taken nor any dangerous weapon used, and when the killing is not done in a cruel or unusual manner.

Cal. Pen. C., § 195*.
Burden of proving homicide excusable, § 8986.
A mere assault, not directed at life or chastity, etc., cannot excuse a homicide committed with a deadly weapon.
People v. Olsen, 4 U. 413; 11 P. 577.
Words of reproach or abuse, or irritating and provoking gestures do not render homicide excusable hereunder when committed with a deadly weapon.
Id.

8031. (4167.) Justifiable homicide by officers. Homicide is justifiable when committed by public officers and those acting by their command in their aid and assistance in either of the following cases:

1. In obedience to any judgment of a competent court;

2. When necessarily committed in overcoming actual resistance to the execution of some legal process, or in the discharge of any other legal duty;

3. When necessarily committed in retaking felons who have been rescued or who have escaped, or when necessarily committed in arresting persons charged with felony and who are fleeing from justice or resisting such arrest.

Cal. Pen. C., § 196.
Escape, rescue, retaking, §§ 7964, 7971, 8732, 8733.
Burden of proving homicide justifiable, § 8986.
Lawful resistance, § 8560.

8032. (4168.) Id. By other persons. Homicide is also justifiable when committed by any person in either of the following cases:

1. When resisting any attempt to murder any person, or to commit a felony, or to do some great bodily injury upon any person;

2. When committed in defense of habitation, property, or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony; or against one who manifestly intends and endeavors, in a violent, riotous, or tumultuous manner, to enter the habitation of another for the purpose of offering violence to any person therein;

3. When committed in the lawful defense of such person, or of a wife, husband, parent, child, master, mistress, or servant of such person, when there is a reasonable ground to apprehend a design to commit a felony or to do some great bodily injury, and there is imminent danger of such design being accomplished; but such person, or the person in whose behalf the defense was made, if he was the assailant or engaged in mortal combat, must really and in good faith have endeavored to decline any further struggle before the homicide was committed;

4. When committed in a sudden heat of passion caused by the attempt of the deceased to commit a rape upon or to defile the wife, daughter, sister, mother, or other female relative or dependent of the accused, or when the defilement has actually been committed;

5. When necessarily committed in attempting, by lawful ways and means, to apprehend any person for any felony committed, or in lawfully suppressing any riot, or in lawfully keeping and preserving the peace.

Cal. Pen. C., § 197*.
Lawful resistance, §§ 8560-8562.
Excusable homicide, § 8030.
Defense of homicide in attempting to arrest; evidence.
Brannigan v. People, 3 U. 488; 24 P. 767.
Where the defendant seeks the deceased with the intention of having a difficulty with him, he is required to decline in good faith any further difficulty before killing the deceased, and if he does wrongfully bring on the difficulty, and does not in good faith decline any further difficulty, he cannot justify himself on the grounds of self defense.
People v. Hite, 8 U. 461; 33 P. 254.
One making an unprovoked assault upon another for the purpose of committing a felony must, before he can claim the right of self defense, in good faith withdraw from the contest and notify his adversary of such abandonment so as to remove all just apprehension that such withdrawal may be only a ruse.
State v. Shockley, 29 U. 25; 80 P. 865.

The instruction given held to correctly state the law of self defense.
People v. Callaghan, 4 U. 49; 6 P. 49.
Sub. 4 does not justify homicide committed after twenty-four hours' deliberation over the fact of a wife's adultery, defendant having gone a considerable distance to seek deceased.
People v. Halliday, 5 U. 467; 17 P. 118.
This statute only applies to a killing done in a sudden heat of passion, and does not shield one who, because of mere rumors or appearances of improper relations with wife, has sought out another and deliberately taken his life.
State v. Botha, 27 U. 289; 75 P. 731.
One who, after remonstrating with another who was in the act of committing a robbery, went away and armed himself and returned and approached the robber with a gun in his hand just as the robbery was being completed, and the person robbed forced to leave at the point of the gun, was justified in so doing, and the robber thereupon shot and killed him, was not entitled to claim self defense, regardless of who fired the first shot.
State v. White, 40 U. 342; 121 P. 579.
While the person need not actually have been armed to justify shooting in self defense, the shooting must not have been without apparent cause, and a mere showing that the person shot made a motion towards his hip pocket will not necessarily excuse his assailant from criminal liability for his act.
State v. Nolitz, 40 U. 443; 122 P. 86.

8033. (4169.) Id. Bare fear does not justify killing. A bare fear of the commission of any of the offenses mentioned in subs. 2 and 3 of the preceding section, to prevent which homicide may be lawfully committed, is not sufficient to justify it. But the circumstances must be sufficient to excite the fears of a reasonable person, and the party killing must have acted wholly under the influence of such fears.

Cal. Pen. C., § 198.

8034. (4170.) Id. Justifiable or excusable homicide not punishable. When the homicide appears to be justifiable or excusable, the person indicted must, upon his trial, be fully acquitted and discharged.

Cal. Pen. C., § 199.
Burden of proving homicide justifiable or excusable, § 8986.

CHAPTER 15.

MAYHEM.

8037. (4171.) Mayhem defined. Every person who unlawfully and maliciously deprives a human being of a member of his body, or disables or renders it useless, or who cuts out or disables the tongue, puts out an eye, slits the nose, ear, or lip, is guilty of mayhem.

Cal. Pen. C., § 203*. Assault with intent to commit, § 8047.

8038. (4172.) Id. Penalty. Mayhem is punishable by imprisonment in the state prison not exceeding ten years.

Cal. Pen. C., § 204.

CHAPTER 16.

KIDNAPING.

8040. (4173.) Kidnaping defined. Penalty. Every person who wilfully:

1. Seizes, confines, inveigles, or kidnaps another with intent to cause him, without authority of law, to be secretly confined or imprisoned within this state, or to be sent out of the state, or in any way held to service or kept or detained against his will; or,

2. Leads, takes, entices away, or detains a child under the age of twelve years with intent to keep or conceal it from its parent, guardian, or other person having lawful care or control thereof, or to extort or obtain money or reward for the return or disposition of the child, or with intent to steal any article about or on the person of the child; or,

3. Abducts, entices, or by force or fraud unlawfully takes or carries away another, at or from a place without the state, or procures or advises, aids or abets such an abduction, enticing, taking, or conveying away, and afterwards sends, brings, has, or keeps such person, or causes him to be kept

or secreted within this state,—is guilty of kidnaping, and is punishable by imprisonment in the state prison not less than one nor more than ten years.

Mont. Pen. C., § 380.
Jurisdiction of indictment for kidnaping, § 8655.

8041. (4174.) Consent of person kidnaped no defense. Upon a trial for a violation of the offense mentioned in the next preceding section, the consent of the person kidnaped or confined is not a defense, unless it appear that such person was above the age of twelve years, and that the consent was not extorted by threats or duress.

Mont. Pen. C., § 382.

CHAPTER 17.

ROBBERY.

8043. (4175.) Robbery defined. Robbery is the felonious taking of personal property in the possession of another, from his person, or immediate presence, and against his will, accomplished by means of force or fear.

Cal. Pen. C., § 211.
Assault with intent to commit, § 8047.
Indictment when property taken to another county, § 8656.
Jurisdiction when committed without state and property brought within, § 8656.
Information or indictment may also contain a count for larceny, § 8834.

Indictment charging a felonious taking by defendant by means of force, violence and fear, from the immediate presence of and against the will of a party is sufficient to charge robbery, where no objection was taken until after verdict.
People v. Kern, 8 U. 268; 30 P. 988.

Burglary and robbery in same house at nearly the same time.
Id.

Where a man under bona fide belief that the property is his own obtains it by menaces, there is trespass but no robbery.
People v. Hughes, 11 U. 100; 39 P. 492.

The defendant may testify that at the time of the alleged robbery he thought the money was his own, and that he had a right to take it.
Id.

The provisions of this section and § 8715, subs. 2, 3, are sufficient warrant for the members of a sheriff's posse, although private citizens and non-residents of the county, to follow and capture the persons who committed the crime, using sufficient force to accomplish the capture.
State v. Morgan, 22 U. 162; 61 P. 527.
People v. Coughlin, 13 U. 58; 44 P. 94.

Conspiracy to rob, resulting in murder; all conspirators equally liable.
State v. King, 24 U. 482; 68 P. 418.
State v. Morgan, 22 U. 162; 61 P. 527.

An indictment for robbery failing to state that the property taken from the person of the prosecutor was taken "by means of force or fear" was insufficient.
State v. Davis, 28 U. 10; 76 P. 705.

An indictment not alleging the value of the money taken "in current U. S. silver coin" was sufficient, and an amendment inserting these terms was not prejudicial to defendant.
State v. LaChall, 28 U. 80; 77 P. 3.

The indictment having charged that the robbery was "from the person and immediate presence of one R., and by means of force and fear, and by threatening to shoot and kill him," and that defendants feloniously took a certain sum from the possession of said R., was sufficient, and the insertion of the words "and against his will" was unnecessary and not prejudicial.
Id.

Evidence held insufficient to connect accused with a bank robbery.
State v. Bridwell, 48 U. 97; 158 P. 710.

8044. (4176.) Penalty. Robbery is punishable by imprisonment in the state prison for a term not less than five years, and which may be for life.

Am'd '11, p. 9.

Cal. Pen. C., § 213*

CHAPTER 18.

ATTEMPTS TO KILL.

8045. (4177.) Administering poison. Every person who, with intent to kill, administers, or causes or procures to be administered to another, any poison or other noxious or destructive substance or liquid, but by which death is not caused, is punishable by imprisonment in the state prison not less than five nor more than twenty years.

Cal. Pen. C., § 216*.
Homicide, §§ 8023-8034.
Mingling poison with food or drink, penalty, § 8171.
"Attempt" defined, penalty, §§ 8527, 8528.

8046. (4178.) Assault with intent to murder. Every person who assaults another with intent to commit murder is punishable by imprisonment in the state prison not less than one nor more than twenty years.

Cal. Pen. C., § 217*.
Felonious assaults, §§ 8047-8048.
Assault with caustic chemical, § 8069.
Assault with deadly weapon, § 8070.
Where defendant shot at L. intending to kill him, but accidentally hit H. instead, he cannot be convicted of assault with intent to murder H.
People v. Robinson, 6 U. 101; 21 P. 403.

Indictment held to charge assault only.
People v. Chalmers, 5 U. 201; 14 P. 131.
An allegation in an indictment that an assault was unlawful, and that it was done with intent to murder, excludes the existence of "just cause" or "excuse" or "considerable provocation," and renders the use of such words in the indictment unnecessary.
State v. McDonald, 14 U. 173; 46 P. 872.

CHAPTER 19.

FELONIOUS ASSAULTS.

8047. (4179.) Assault with intent to commit rape, etc. Punishment. Every person who assaults another with intent to commit rape, the infamous crime against nature, or mayhem is punishable by imprisonment in the state prison not less than one nor more than ten years. Am'd '11, p. 9.

Cal. Pen. C., § 220*.
Assault with intent to commit murder, § 8046.
Assault defined, § 8065.
Assault with deadly weapon, § 8070.
Assault by convicts, §§ 8051, 8052.
Assault with intent to commit rape; intent; violence; resistence; consent; reasonable doubt.
State v. McCune, 16 U. 170; 51 P. 818.

8048. (4180.) Assault with intent to commit other felony. Exceptions. Every person who is guilty of an assault with intent to commit any felony, except an assault with intent to commit murder, and except assaults enumerated in the next preceding section, is punishable by imprisonment in the state prison not exceeding five years, or in a county jail not exceeding one year, or by fine not exceeding $300, or by both.

Cal. Pen. C., § 221*.
Attempts, penalties, §§ 8527, 8528.
Assault with caustice chemical, § 8041.

8049. Indecent assault defined. Every person who shall assault a child, whether male or female, under the age of fourteen years, and shall take indecent liberties with or on the person of such child, without committing, intending, or attempting to commit the crime of rape, or the crime of assault with intent to commit rape, upon such child, with or without the child's consent, shall be deemed guilty of an indecent assault, and on conviction thereof shall be guilty of a felony. '09, p. 25.

An indictment in the language of the statute is sufficient; and the terms "indecent assault" and "indecent liberties" are convertible and self defining.
State v. McMillan, 46 U. 19; 145 P. 833.
State v. Therkelsen, 48 U. 629; 161 P. 59.

8050. (4181.) Administering narcotics to further felony. Every person guilty of administering to another chloroform, ether, laudanum, or other narcotic, anæsthetic, or intoxicating agent, with intent thereby to enable or assist himself or any other person to commit a felony, is guilty of felony.

Cal. Pen. C., § 222*.
Administering poison, etc., § 8045.
Administering narcotics, etc., to accomplish rape, § 8105.

8051. To punish certain convicts for committing assaults. Any convict sentenced to imprisonment in the state prison for a term less than life imprisonment, who commits an assault upon any other convict, or upon the warden, or any guard, or other person whomsoever, with a deadly weapon or instrument, or by means of force, or by administering any poisonous or other substance which is likely to produce great bodily harm or injury, shall be deemed guilty of a felony, and, upon conviction thereof, be punished by imprisonment in the state prison for not less than three nor more than twenty years. '09, p. 5.

8052. Punishment of life convicts for committing assaults. Every convict undergoing a life sentence in the state prison of the state of Utah, who, with malice aforethought, commits an assault upon any other convict, or upon the warden, or any guard, or upon any other person whomsoever, with a deadly weapon, or instrument of any kind, or by means of force, or by administering any poisonous or deleterious substance, which will likely produce great bodily injury, shall, upon conviction, be punishable with death. '09, p. 8.

CHAPTER 20.

DUELS AND CHALLENGES.

8055. (4182.) Duel defined. A duel is any combat with deadly weapons fought between two or more persons, by previous agreement or upon a previous quarrel.

Cal. Pen. C., § 225.
Leaving state to engage in duel, jurisdiction, §§ 8646, 8647.

8056. (4183.) Murder, when death ensues. Every person guilty of fighting any duel, from which death ensues within a year and a day, is guilty of murder in the first degree.

Cal. Pen. C., § 226*.

8057. (4184.) Dueling punishable though no death or wound ensues. Every person guilty of fighting any duel, although no death or wound ensues, is punishable by imprisonment in the state prison not exceeding one year.

Cal. Pen. C., § 227*, 228*.

8058. (4185.) Sending or accepting challenge, etc. Seconds. Every person guilty of sending or accepting a challenge to fight a duel, or who acts as a second therein, or who posts or publishes another for not fighting a duel, or for not sending or accepting a challenge to fight a duel, or who uses any reproachful or contemptuous language, verbal, written, or printed, to or concerning another for not sending or accepting a challenge to fight a duel, or with intent to provoke a duel, is guilty of a misdemeanor.

Cal. Pen. C., §§ 227*, 228*, 229*.

8059. (4186.) Officer failing to prevent a duel. Every judge, justice of the peace, sheriff, or other officer bound to preserve the public peace, who has knowledge of the intention on the part of any person to fight a duel, and who does not exert his official authority to arrest the party and prevent the duel, is punishable by a fine not exceeding $500.

Cal. Pen. C., § 230*.

8060. (4187.) Testimony must be given though incriminating. No person shall be excused from testifying or answering any question upon any investigation or trial for a violation of any of the provisions of this chapter, upon the ground that his testimony might tend to convict him of a crime. But no evidence given upon any examination of a person so testifying shall be received against him in any criminal prosecution or proceeding.

Cal. Pen. C., § 232*.

CHAPTER 21.

FALSE IMPRISONMENT.

8062. (4188.) False imprisonment defined. False imprisonment is the unlawful violation of the personal liberty of another.

Cal. Pen. C., § 236.
False imprisonment is the unlawful arrest and detention of the person of another, with or without a warrant or other process, or an unlawful restraint on his person, or control over the freedom of his movements, by force or threats.
Smith v. Clark, 37 U. 116; 106 P. 653.

8063. (4189.) Id. Penalty. False imprisonment is punishable by a fine not exceeding $3000, or by imprisonment in the county jail not more than one year, or by both.

Cal. Pen. C., § 237*.

CHAPTER 22.

ASSAULT AND BATTERY.

8065. (4190.) Assault defined. An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.

Cal. Pen. C., § 240.
Felonious assaults, §§ 8046-8050.

Attempt must be unlawful.
Ganaway v. S. L. Dram. Ass'n, 17 U. 37; 53 P. 830.

8066. (4191.) Id. Penalty. An assault is punishable by fine in any sum less than $300, or by imprisonment in the county jail not exceeding three months.

Cal. Pen. C., § 314.

8067. (4192.) Battery defined. A battery is any wilful and unlawful use of force or violence upon the person of another.

Cal. Pen. C., § 242.
Indictment alleging unlawful and felonious assault and shooting with a pistol charges a battery.
People v. Chalmers, 5 U. 201; 14 P. 131.

8068. (4193.) Id. Penalty. A battery is punishable by a fine in any sum less than $300, or by imprisonment in the county jail not exceeding six months, or by both.

Cal. Pen. C., § 243*.

8069. (4194.) Assault with caustic chemical. Every person who wilfully and maliciously places or throws, or causes to be placed or thrown upon the person of another, any vitriol, corrosive acid, or caustic chemical of any nature with intent to injure the flesh or disfigure the body of such person, is punishable by imprisonment in the state prison not less than one nor more than ten years.

Cal. Pen. C., § 244*.
Felonious assaults, §§ 8046-8050.

8070. (4195.) Assault with deadly weapon. Every person who, with intent to do bodily harm, and without just cause or excuse, or when no considerable provocation appears, or when the circumstances show an abandoned or malignant heart, commits an assault upon the person of another, with a deadly weapon, instrument, or other thing, is punishable by imprisonment in the state prison not exceeding five years, or by fine not exceeding $1000, or by both.

Cal. Pen. C., § 245.
Having deadly weapon with intent to assault another, § 8265.
Exhibiting deadly weapon in angry and threatening manner, § 8229.
Assault with intent to murder, § 8046.
Assaults by convicts, §§ 8051, 8052.
Felonious assaults, §§ 8047-8050.
Indictment must allege act to have been committed "without just cause or excuse."
People v. Fairbanks, 7 U. 3; 24 P. 538.
People v. Parman, 7 U. 7; 24 P. 539.
See State v. McDonald, 14 U. 173; 46 P. 872, and State v. Williamson, 22 U. 248; 62 P. 1022.
The intent to do bodily harm is the very essence of the offense.
State v. Potello, 42 U. 396; 132 P. 14.
Where the defendant contends that the complaining witness, a man of known bad reputation, who had been making threats against his life, assaulted him and was about to draw a revolver when defendant shot, an instruction that great bodily harm meant something more than injury ordinarily resulting from battle inflicted by hand or fist, without a weapon, is improper, having no basis in the evidence.
State v. Kakarikos, 45 U. 470; 146 P. 750.
This offense is not necessarily included in the crime of assault with intent to murder.
State v. Jukanovich, 45 U. 372; 146 P. 289.

CHAPTER 23.

CRIMINAL LIBEL AND SLANDER.

8072. (4196.) Libel defined. A libel is a malicious defamation, expressed either by printing, or by signs, or pictures, or the like, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue, or reputation, or publish the natural defects, of one who is alive, and thereby to expose him to public hatred, contempt, or ridicule.

Cal. Pen. C., § 248*.
Imputing unchastity to females, §§ 8082, 8083.
Civil actions for libel or slander, §§ 3692, 6604, 6605.
Sending threatening letter, § 8325.
Conveying false reports to newspapers, § 8084.
A candidate for a public office is amenable to public and private criticism made in good faith and based upon a reasonable and practical

cause, and when he becomes such a candidate he is regarded in law as putting his character in issue in respect to his qualifications and fitness for the office for which he is a candidate.
People v. Glasmann, 12 U. 238; 42 P. 956.
A conviction for criminal libel is sustained by evidence that defendant circulated a letter capable of the construction that the person libeled was guilty of maladministration of the affairs of the corporation and that, in order to conceal the same, resort was had to fraudulent practices.
People v. Ritchie, 12 U. 180; 42 P. 209.

8073. (4197.) Id. Penalty. Every person who wilfully, and with a malicious intent to injure another, publishes or procures to be published any libel is punishable by fine not exceeding $1000, or by imprisonment in the county jail not exceeding one year.

Cal. Pen. C., § 249*.

8074. (4198.) Libel presumed malicious. An injurious publication is presumed to have been malicious if no justifiable motive for making it is shown.

Cal. Pen. C., § 250.

8075. (4199.) Truth may be given in evidence. Jury to determine law and fact. In all criminal prosecutions for libel, the truth may be given in evidence to the jury, and, if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted. The jury shall have the right to determine the law and the fact.

Cal. Pen. C., § 251.
Constitutional provisions, Con. art. 1, sec. 15.
Libel; retraction, damages, § 3692.
Truth and mitigating circumstances, §§ 6605, 6606.
In a prosecution for criminal libel of a candidate for public office, the evidence upon which the publication was made is admissible to rebut malice.
People v. Glasmann, 12 U. 238; 42 P. 956.
In a prosecution for criminal libel, during the proceedings of the trial the court said: "Now, then, the defendants in this case are charged with publishing certain matter with respect to a citizen of this town which is libel. It is libelous by its terms and charges not only crimes but charges matters which are intended to make a man infamous and ridiculous in the eyes of the community;" held, error.
Id.
When a grand jury is investigating as to whether a libel has been published, the facts as to whether the publication was true or false and the motive for its publication are "material matters" hereunder.
People v. Greenwell, 5 U. 112; 13 P. 89.
Where a publication referred to the record in a criminal case to support certain defamatory statements, the testimony given in said case is admissible in a prosecution for libel to show that the publication was a fair report of said testimony.
People v. Glasmann, 12 U. 238; 42 P. 956.

8076. (4200.) Libel need not be seen or read. To sustain a charge of publishing a libel, it is not needful that the words or things complained of should have been read or seen by another. It is enough that the accused knowingly parted with the immediate custody of the libel under circumstances which exposed it to be read or seen by any other person than himself.

Cal. Pen. C., § 252.
Indictment for libel, sufficiency, § 8846.

8077. (4201.) Liability of authors, editors, and proprietors. Each author, editor, and proprietor of any newspaper, or serial publication, is chargeable with the publication of any words contained in any part of such book or number of such newspaper or serial.

Cal. Pen. C., § 253*.

8078. (4202.) Privilege of fair report of public proceedings. No reporter, editor, or proprietor of any newspaper is liable to any prosecution for a fair and true report of any judicial, legislative, or other public official proceedings, or of any statement, speech, argument, or debate in course of the same, except upon proof of malice in making such report, which shall not be implied from the mere fact of publication.

Cal. Pen. C., § 254.
Libel published in good faith, retraction, damages, § 3692.
Libel and slander, how pleaded in civil action, §§ 6604, 6605.

8079. (4203.) Id. Privilege does not extend to libelous matter. Libelous remarks or comments connected with matter privileged by the next preceding section receive no privilege by reason of their being so connected.

Cal. Pen. C., § 255.

8080. (4204.) Privileged communication to interested person. A communication made to a person interested in the communication, by one who was also interested or who stood in such relation to the former as to afford a reasonable ground for supposing his motive innocent, is not presumed to be malicious, and is a privileged communication.

Cal. Pen. C., § 256.
Where defendants, husband and wife, unrelated to plaintiff, wrote to plaintiff's wife in such terms as to imply that he had illicit re-

lations with another woman, the communications were not conditionally privileged, having been made merely on the assumption that plaintiff's wife would regard the act as friendly.

Burton v. Mattson, 50 U. —; 166 P. 979.

8081. (4205.) Threat to publish libel. Blackmail. Every person who threatens another to publish a libel concerning him, or any parent, husband, wife, or child of such person, or member of his family, and every person who offers to prevent the publication of any libel upon another person, with intent to extort any money or other valuable consideration from any person, is guilty of a misdemeanor.

Cal. Pen. C., § 257. Extortion by means of threats, §§ 8320, 8325.

8082. (4206.) Slander. Imputing unchastity to females. If any person shall orally or otherwise, falsely and maliciously, or falsely and wantonly impute to any female, married or unmarried, a want of chastity, he shall be deemed guilty of criminal slander, and upon conviction shall be punished by a fine of not less than $100 nor more than $1000, or by imprisonment in the county jail not exceeding one year, or by both.

Texas Pen. C., (1895) art. 750*. Criminal libel and slander, §§ 8072-8075.

8083. (4207.) Id. Evidence. Imputation need not be false. Justification. In any prosecution under the next preceding section, it shall not be necessary for the state to show that such imputation was false, but the defendant may in justification show the truth of the imputation, and the general reputation for chastity of the female alleged to have been slandered may be inquired into.

8084. Conveying false news to newspaper. Any person who wilfully states, conveys, delivers, or transmits, by any means whatsoever, to the manager, editor, publisher, or reporter of any newspaper, magazine, periodical, or serial, for publication therein, any false or libelous statement concerning any person, persons, companies, or corporations, and thereby secures actual publication of the same, is hereby declared guilty of a misdemeanor.

'09, p. 223.

CHAPTER 24.

POLYGAMY, ETC.

8086. (4208.) Polygamy defined. Exceptions. Every person who has a husband or wife living, who hereafter marries another, whether married or single, and any man who hereafter simultaneously, or on the same day, marries more than one woman, is guilty of polygamy, and shall be punished by a fine of not more than $500, and by imprisonment in the state prison for a term of not more than five years; but this section shall not extend to any person by reason of former marriage whose husband or wife by such marriage shall have been absent for five successive years, and is not known to such person to be living, and is believed by such person to be dead, nor to any person by reason of any former marriage which shall have been dissolved by a valid decree of a competent court, nor to any person by reason of any former marriage which shall have been pronounced void by a valid decree of a competent court, on the ground of nullity of the marriage contract.

Polygamous or plural marriages to be forever prohibited, Enabling Act, sec. 3.

Polygamous or plural marriages forever prohibited, Con. art. 3, sec. 1.

This chapter declared in force by the constitution, Con. art. 24, sec. 2.

Counts for polygamy and unlawful cohabitation may be joined, § 8091.

When wife competent witness against her husband charged with polygamy, note to § 9278.

The constitutional guaranty of religious freedom was not intended to prohibit legislation in respect to polygamy. Religious belief cannot be accepted as a justification of an overt act made criminal by the law of the land.

Reynolds v. U. S., 98 U. S. 145; same case, 1 U. 319.

Miles v. U. S., 103 U. S. 304; same case, 2 U. 19.

On an indictment for bigamy, the first marriage may be proved by the admissions of the prisoner.

Miles v. U. S., 103 U. S. 304; same case, 2 U. 19.

Or by facts from which it may be inferred.

Miles v. U. S., 103 U. S. 304; same case, 2 U. 19.

See also U. S. v. Simpson, 4 U. 227; 7 P. 257.

In a prosecution for polygamy, the polygamous marriage may be proven by the confessions of the defendant and by circumstances tending to corroborate the confessions.

U. S. v. Basset, 5 U. 131; 13 P. 237.

See U. S. v. Miles, 2 U. 19; 103 U. S. 304, U. S. v. Harris, 5 U. 621; 19 P. 197.

It was not error in the court in its charge to the jury to call their attention to the evil consequences of bigamy or to remind them of the duty they had to perform.

Reynolds v. U. S., 98 U. S. 145; same case, 1 U. 319.

8087. (4209.) Unlawful cohabitation. If any male person hereafter cohabits with more than one woman, he shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than $300, or by imprisonment in the county jail for not more than six months, or by both said punishments, in the discretion of the court.

As to competency of wife as witness, § 9278.

As to testimony of accomplice, § 8992.

As to joinder of offenses in same indictment, § 8091, 8834.

The offense of cohabiting with more than one woman is complete when a man to all outward appearances lives and associates with two or more women as wives in the habit and repute of marriage, and sexual intercourse is not a necessary ingredient of this offense.

U. S. v. Snow, 4 U. 280; 9 P. 501; see 118 U. S. 346.

U. S. v. Musser, 4 U. 153; 7 P. 389.

U. S. v. Cannon, 4 U. 122; 7 P. 369; affirmed 116 U. S. 55.

But see Cannon v. U. S., 118 U. S. 355.

U. S. v. Harris, 5 U. 436; 17 P. 75.

U. S. v. Smith, 5 U. 232; 14 P. 291.

U. S. v. Peay, 5 U. 263; 14 P. 342.

State v. Graham, 23 U. 278; 64 P. 557.

A man is guilty of unlawful cohabitation even though he deserts the lawful wife and cohabits exclusively with the plural wife.

U. S. v. Clark, 6 U. 120; 21 P. 463.

A continuing offense such as that of cohabiting with more than one woman, in the sense of sec. 3 of the Edmunds-Tucker act, can be committed but once for the purposes of the indictment or prosecution prior to the time the prosecution is instituted. (Overruling U. S. v. Snow, 4 U. 295; 9 P. 686.)

In re Lorenzo Snow, 120 U. S. 274.

Ex parte Neilsen, 131 U. S. 176.

But where offense was committed after indictment, there can be a subsequent prosecution.

U. S. v. Eldredge, 5 U. 161; 13 P. 673.

If a man has a legal wife living, the presumption of fact is that he cohabits with her, but this is a disputable presumption, which may be rebutted. But if a man having a legal wife living makes habitual visits to her at her house, the presumption of law is that he makes the visits as a husband, and he should not be permitted to say that the visits were made by him in any character other than as a husband.

U. S. v. Clark, 5 U. 226; 14 P. 288.

U. S. v. Clark, 6 U. 120; 21 P. 463.

U. S. v. Snow, 4 U. 295; 9 P. 686; 118 U. S. 346.

U. S. v. Smith, 5 U. 273; 15 P. 1.

U. S. v. Harris, 5 U. 436; 17 P. 75.

Where defendant is charged with unlawfully cohabiting with two women between two stated dates, evidence of his conduct and relationship to the women prior to the first date is admissible.

U. S. v. Musser, 4 U. 153; 7 P. 389.

U. S. v. Groesbeck, 4 U. 487; 11 P. 542.

U. S. v. Smith, 5 U. 273; 15 P. 1.

U. S. v. Peay, 5 U. 263; 14 P. 342.

If a relationship is formed, which in its inception is unlawful, it is not presumed to cease on the enacting of a law providing for its punishment; otherwise, if the relationship be lawful when formed.

U. S. v. Musser, 4 U. 153; 7 P. 389.

While it is not necessary to show actual sexual relations, yet a defendant cannot be convicted upon proof of affirmative acts upon his part from which the jury might infer guilt.

State v. Graham, 23 U. 278; 64 P. 557.

The deliberate confession of defendant that he committed the offense, which confession was proven by two witnesses, is sufficient to sustain a conviction.

U. S. v. Schow, 6 U. 381; 24 P. 30.

An indictment for unlawful cohabitation need not state that the defendant is a male person.

U. S. v. Cannon, 4 U. 122; 7 P. 369; affirmed 116 U. S. 55.

U. S. v. Eldredge, 5 U 161; 13 P. 673.

Sexual intercourse is not a necessary element in the crime of unlawful cohabitation.

State v. Springer, 40 U. 471; 121 P. 976.

8088. (4210.) Adultery; punishment. Whoever commits adultery shall be punished by imprisonment in the state prison not exceeding three years; and when the act is comitted between a married woman and a man who is unmarried, both parties to such act shall be deemed guilty of adultery; and when such act is committed between a married man and a woman who is unmarried, the man shall be deemed guilty of adultery.

Counts for adultery and fornication may be joined, § 8092.

A conviction for unlawful cohabitation bars a prosecution for adultery under the act of March 3, 1887, when the latter offense is a part of a continuous cohabitation with the women named in the first indictment, though the time of its commission is laid after the period during which the cohabitation was alleged to have continued.

Ex parte Neilsen, 131 U. S. 176.

In re Barton, 6 U. 264; 21 P. 998.

In re Maughan, 6 U. 167; 21 P. 1088.

But see U. S. v. West, 7 U. 437; 27 P. 84.

Sec. 3, chap. 7, laws of 1892, respecting polygamy, adultery, and other offenses, is not in conflict with any act of congress, was a valid law of the territory, and was continued in force under the state government. Under § 3 of said act, adultery became a crime against laws of the state.

State v. Norman, 16 U. 457; 52 P. 986.

Acts of congress defining "adultery," and prescribing punishment therefor in the territories, as a crime against the United States, did not prevent the territorial legislature from punishing by statute the same act as an offense against the territorial government and its laws.

Id.

In a prosecution for adultery, evidence of subsequent acts of association not amounting to crime are admissible as tending to show the probability of guilt in the crime charged, and this rule is not in violation of the rule announced in State v. Hilberg, 22 U. 27; 61 P. 215.

State v. Snowden, 23 U. 318; 65 P. 479.

Complaint for adultery held sufficient.

State v. Thompson, 31 U. 228; 87 P. 709.

Evidence held sufficient to sustain a conviction.

State v. Kimball, 45 U. 443; 146 P. 313.

In a prosecution for adultery, testimony that the accused was the first man with whom the woman involved had intercourse was irrelevant and prejudicial.

State v. Hansen, 40 U. 418; 122 P. 375.

The testimony of the woman identifying her child in court is competent to corroborate her testimony that she gave birth to a child.

State v. Cluff, 48 U. 102; 158 P. 701.

A confession of accused is not alone sufficient to prove the corpus delicti, and mere admission of intimacy with the prosecutrix, not amounting to an acknowledgment of guilt of the act relied on for conviction or any other specific act within the period of limitation, was not a confession of guilt.

State v. Sheffield, 45 U. 426; 146 P. 306.

The corpus delicti was sufficiently shown by proof that the prosecutrix, an unmarried woman, gave birth to a child, and accused's admission that he had sexual intercourse with her.
State v. Greene, 38 U. 389; 115 P. 181.

MARRIAGE MAY BE PROVED BY:

The defendant's admission.
State v. Greene, 38 U. 389; 115 P. 181.
State v. Moore, 41 U. 124; 126 P. 322.
State v. Moore, 36 U. 521; 105 P. 293.

A deed signed and acknowledged by defendant and the woman as husband and wife.
State v. Greene, 33 U. 497; 94 P. 987.

A certified copy of a marriage record showing accused's marriage with a woman other than one he is charged to have had intercourse with, where the party is identified as the one named in the certificate.
State v. Springer, 40 U. 471; 121 P. 976.

Evidence held sufficient to support a jury finding that accused was married.
State v. Park, 44 U. 360; 140 P. 768.

8089. (4211.) Incest. If any person related to another person within and not including the fourth degree of consanguinity, computed according to the rules of the civil law, shall marry or cohabit with, or have sexual intercourse with, such other so related person, knowing her or him to be within said degree of relationship, the person so offending shall be deemed guilty of incest, and, on conviction thereof, shall be punished by imprisonment in the state rison not less than three years and not more than fifteen years.

A father having intercourse with his daughter may be convicted of incest, or of attempt to commit incest, though the daughter did not consent and the intercourse was had by force.
State v. Winslow, 30 U. 403; 85 P. 433.

The words "within and not including the fourth degree of consanguinity," etc., as used in this section, relating to the crime of incest, are descriptive of the class of persons who are prohibited from marrying, cohabiting, or having sexual intercourse with each other, and are intended to group together all of the different degrees of relationship to which the statute applies, and thereby to avoid the necessity of specifically enumerating them.
State v. James, 32 U. 152; 89 P. 460.

8090. (4212.) Fornication. If an unmarried man or woman commits fornication, each of them shall be punished by imprisonment in the county jail not exceeding six months, or by a fine not exceeding $100.

Carnal knowledge of female under eighteen, § 8109.

Sec. 5, chap. 7, Laws 1892, respecting polygamy, adultery, fornication, and other offenses, is not in conflict with any act of congress, was a valid law of the territory, and was continued in force under the state government. Under the provisions of said section, fornication became a crime against the laws of the state.
State v. Pierpont, 16 U. 476; 52 P. 992.

Evidence sufficient to identify the woman named in the information, though under the wrong christian name, as the one with whom the act was committed.
State v. Chipman, 40 U. 549; 123 P. 89.

8091. (4213.) Counts for polygamy and unlawful cohabitation may be joined. Counts for any or all offenses named in §§ 8086, 8087, may be joined in the same information or indictment.

8092. (4214.) Counts for adultery and for fornication may be joined. Counts for any or all offenses named in §§ 8088, 8090, may be joined in the same information or indictment.

8093. (4215.) Acquittal or conviction under U. S. law a bar. In all cases where there has been a prosecution, acquittal, or conviction under any of the laws of the United States, for any of the crimes defined in this chapter, such prosecution, acquittal, or conviction shall operate as a bar for any prosecution for the same offenses under the provisions of this chapter.

8094. (4216.) Jurisdiction in district court. In all prosecutions under this chapter, the district court shall have exclusive original jurisdiction.

CHAPTER 25.

PANDERING.

('11, p. 178.)

8095. Pandering prohibited. Penalty. Any person who shall procure a female inmate for a house of prostitution; or who shall induce, persuade, encourage, inveigle, or entice a female person to become a prostitute; or who by promises, threats, violence, or by any device or scheme, shall cause, induce, persuade, encourage, take, place, harbor, inveigle, or entice a female person to become an inmate of a house of prostitution or assignation place, or any place where prostitution is practiced, encouraged, allowed; or any person who shall, by promises, threats, violence, or by any device or scheme, cause, induce, persuade, encourage, inveigle, or entice an inmate of a house of prostitution or place of assignation to remain therein as such inmate; or any person who by

promises, threats, violence, or by any device or scheme, or by fraud or artifice, or by duress of person or goods, or by abuse of any position of confidence or authority, or having legal charge, shall take, place, harbor, inveigle, entice, persuade, encourage, or procure any female person to enter any place within this state in which prostitution is practiced, encouraged, or allowed, for the purpose of prostitution or, not being her husband, for the purpose of sexual intercourse, or to inveigle, entice, persuade, encourage, or procure any female person to come into this state or to leave this state for the purpose of prostitution or, not being her husband, for the purpose of sexual intercourse; or who takes or detains a female with the intent to compel her by force, threats, menace, or duress to marry him or to marry any other person or to be defiled; or upon the pretense of marriage takes or detains a female person for the purpose of sexual intercourse; or who shall receive or give, or agree to receive or give, any money or thing of value for procuring or attempting to procure any female person to become a prostitute or to come into this state or leave this state for the purpose of prostitution or, not being her husband, for the purpose of sexual intercourse, shall be guilty of pandering, and upon conviction shall be punished by imprisonment in the state prison for a term of not more than twenty years.

An information in the language of the statutes is insufficient, it must set forth the facts constituting the threats, promises, etc.
State v. Topham, 41 U. 39; 123 P. 888.
The fact that accused told an inmate that, if the inmate's mother were willing to let her stay there, accused would fit the inmate out with nice clothes and send her to another house of prostitution run by accused, did not show a promise within the statute.
Id.

8096. Id. Any person who, by force, fraud, intimidation, or threats, places or leaves, or procures any other person or persons to place or leave, his wife in a house of prostitution or to lead a life of prostitution shall be guilty of a felony, and upon conviction thereof shall be sentenced to the state prison for not more than ten years.

8097. Definition. Penalty. Any person who shall knowingly accept, receive, levy, or appropriate any money or other valuable thing, without consideration, from the proceeds of the earnings of any woman engaged in prostitution, shall be deemed guilty of a felony, and on conviction thereof shall be punished by imprisonment for a period of not less than two nor more than twenty years. Any such acceptance, receipt, levy, or appropriation of such money or valuable thing shall, upon any proceeding or trial for violation of this section, be presumptive evidence of lack of consideration; any person who shall procure a female person for the purpose of prostitution for another male person by either personal solicitation, messenger, telephone call, or other means, or who shall send or direct any female person to the sleeping apartment or lodging room of any male person, or to any other place for the purpose of prostitution, whether for hire or for a commission of the proceeds of the prostitution, or for any other consideration of value, from either the man for whom such female was procured, sent, or directed, or from the female so procured, sent, or directed, whether collected at the time or not; every messenger, every hotel or rooming house proprietor, clerk, or other employe of such place, and every chauffeur or hack driver, or any other person, who by any means sends, directs, takes, or conveys any female person to any room or other place for the purpose of prostitution with or for another male person, or any person who keeps a list of female persons to call or to be called for the purpose of prostitution, shall be deemed guilty of a felony, and on conviction thereof shall be punished by imprisonment for not less than two nor more than ten years. Any cafe, restaurant, or coffee house proprietor, manager, waiter, or other employe having full or temporary charge of such place, or any proprietor, manager, or other person having charge of any road house or assignation house, or any other person who knowingly permits prostitutes to solicit patronage for prostitution in their place of business, or any place over which such person has control, or aids or abets such prostitutes in so soliciting or securing patronage for prostitution in any place or in any manner whatsoever; and every hotel, rooming house,

lodging house, or boarding house keeper, proprietor, or manager, or other person having charge of such place, or any other person who knowingly rents any of the rooms of such a place, or any other room or rooms of any place for the purpose of prostitution, or knowingly permits any of such rooms or any other room or rooms over which they have control to be used for the purpose of prostitution, shall be deemed guilty of a felony, and on conviction thereof shall be punished by imprisonment for a period of not less than one nor more than five years; *provided,* that, in the case of the procuring of a female for the purpose of prostitution, such female being under the age of twenty-one years at the time of procurement, and such female being procured, sent, or directed by any of the persons or by any of the methods in this section described, or by any other person or method for the purpose of prostitution, and whether or not such female be of chaste character at the time of such procurement, or, if the procurer be the lawful husband of such female, such person shall on conviction be punished by imprisonment for a period of not less than five nor more than twenty years. Am'd '15, p. 4.

8098. Detention of female in house of prostitution. Penalty. Any person or persons who attempts to detain any female person in a disorderly house or house of prostitution because of any debt or debts she has contracted, or is said to have contracted, while living in said house, shall be guilty of a felony, and upon conviction thereof shall be sentenced to the state prison for not more than ten years.

8099. Obtaining transportation for prostitutes prohibited. Penalty. Any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, by any means of conveyance into, through, or across this state, any female person for the purpose of prostitution, or with intent and purpose to induce, entice, or compel such female person to become a prostitute, shall be deemed guilty of a felony, and upon conviction thereof be sentenced to the state prison for not more than ten years. Any person who may commit the crime in this section mentioned may be prosecuted, indicted, tried, and convicted in any county or city in or through which he shall so transport or attempt to transport any female person, as aforesaid.

8100. Where acts are committed, no defense. It shall not be a defense to a prosecution for any of the acts prohibited in the foregoing sections that any parts of such act or acts shall have been committed outside this state, and the offense shall in such case be deemed and alleged to have been committed and the offender tried and punished in any county in which the prostitution was intended to be practiced or in which the offense was consummated, or any overt act in furtherance of the offense shall have been committed.

Jurisdiction in case of kidnaping, § 8655.

8101. Witnesses. Any such female person referred to in the foregoing sections shall be a competent witness in any prosecution under this chapter to testify for or against the accused as to any transaction or as to any conversation with the accused or by him with another person or persons in her presence, notwithstanding her having married the accused before or after the violation of any of the provisions of this chapter, whether called as a witness during the existence of the marriage or after its dissolution.

Husband and wife incompetent witnesses, generally, § 9278.

CHAPTER 26.

RAPE, ETC.

8105. (4217.) Rape defined. Rape is an act of sexual intercourse accomplished with a female, not the wife of the perpetrator, under either of the following circumstances:

1. When the female is under the age of thirteen years;

2. Where she is incapable, through lunacy or any other unsoundness of mind, whether temporary or permanent, of giving legal consent;

3. Where she resists, but her resistence is overcome by force or violence;

4. Where she is prevented from resisting by threats of immediate and great bodily harm, accompanied by apparent power of execution, or by any intoxicating, narcotic, or anæsthetic substance administered by or with the privity of the accused;

5. When she is at the time unconscious of the nature of the act, and this is known to the accused;

6. Where she submits under the belief that the person committing the act is her husband, and this belief is induced by any artifice, pretense, or concealment practiced by the accused, with intent to induce such belief.

Cal. Pen. C., § 261*. Cal. Sup. (1889) § 261, p. 259.

Assault with intent to commit, § 8047, and note.

Administering narcotics, etc., with intent to commit felony, § 8050.

Carnal knowledge of female under eighteen, § 8109.

Rape and assault to commit rape defined.

State v. McCune, 16 U. 170; 51 P. 818.

A charge of rape includes the lesser offense of assault with intent to commit rape.

State v. Blythe, 20 U. 378; 58 P. 1108.

In a prosecution for rape, it is not necessary to show in the information that the person ravished was not the wife of defendant.

State v. Williamson, 22 U. 248; 62 P. 1022.

In the absence of threats, no act of defendant constitutes an assault, if consented to by the woman, provided she had the capacity to consent.

State v. McCune, 16 U. 170; 51 P. 818.

No more resistance in any case is required by law than the condition of the woman will permit her to make.

State v. McCune, 16 U. 170; 51 P. 818.

State v. Halford, 17 U. 475; 54 P. 819.

A motion in arrest of judgment, where information charged that accused unlawfully, forcibly, feloniously, and against the will and without the consent of the prosecutrix, ravished her, but did not allege resistance overcome by fear or violence, was properly overruled.

State v. Delvecchio, 25 U. 18; 69 P. 58.

In prosecution for rape, prosecutrix may testify that she made complaint, to whom, when and where, but not to particulars thereof.

State v. Neel, 21 U. 151; 60 P. 510.

State v. Halford, 17 U. 475; 54 P. 819.

When the complaint of the prosecutrix is part of the res gestae, the particulars thereof are admissible in evidence on the part of the state.

State v. Imlay, 22 U. 156; 61 P. 557.

State v. Neel, 21 U. 156; 60 P. 510.

State v. Halford, 17 U. 475; 54 P. 819.

Circumstances affecting credibility of prosecutrix.

State v. Halford, 17 U. 475; 54 P. 819.

8106. (4218.) When physical ability of boy must be proved. No conviction for rape can be had against one who was under the age of fourteen years at the time of the act alleged, unless his physical ability to accomplish penetration is proved as an independent fact, and beyond a reasonable doubt.

Cal. Pen. C., § 262.

8107. (4219.) Any penetration is sufficient. The essential guilt of rape consists in the outrage to the person and feelings of the female. Any sexual penetration, however slight, is sufficient to complete the crime.

Cal. Pen. C., § 263.

8108. (4220.) Penalty for rape. Rape is punishable by imprisonment in the state prison not less than five years.

Cal. Pen. C., § 264.

8109. (4221.) Carnal knowledge of female under eighteen. Any person who shall carnally and unlawfully know any female over the age of thirteen years and under the age of eighteen years shall be guilty of a felony.

Fornication, § 8090.

Sexual intercourse constitutes the offense named in this section, even if prosecutrix consented to the act.

State v. Hilberg, 22 U. 27; 61 P. 215.

In prosecutions under this section, great care should be exercised in eliciting the truth from the witness, so that innocent parties may not be punished.

Id.

In a prosecution under this section, where but a single offense is charged, and on the trial, six different offenses are proven, four of them prior to the offense charged, and the prosecution fails to elect no which offense to stand, the law makes the election and chooses the first offense of which evidence is offered to secure a conviction, and the prosecution could not prove any other act of the kind as a substantial offense upon which a conviction could be had.

State v. Hilberg, 22 U. 27; 61 P. 215.

The provisions of this section make the male participant the only guilty party, the female, although consenting, is not liable to indictment for the offense charged; she is therefore not an accomplice, and her evidence does not, under § 8992, need corroboration.

Id.

State v. Hoben, 36 U. 186; 102 P. 1000.

State v. Brazes, 47 U. 474; 155 P. 334.

State v. Carter, 52 U. —; 173 P. 459.

Evidence tending to show a want of chastity in the prosecutrix is inadmissible.

State v. Williamson, 22 U. 248; 62 P. 1022.

State v. Hilberg, 22 U. 27; 61 P. 215.

State v. Burns, 168 P. 955.

Admissions of defendant as to paternity of child of prosecutrix admissible in a prosecution hereunder.

State v. Neel, 23 U. 541; 65 P. 494.

The child of prosecutrix may be brought into court to corroborate her testimony, but not to show a resemblance to defendant.

Id.

Evidence of improper familiarity between defendant and prosecutrix, before the commission of the alleged criminal act, but not thereafter, is admissible on behalf of the state in a prosecution hereunder.

State v. Neel, 23 U. 541; 65 P. 494.

State v. Hilberg, 22 U. 27; 61 P. 215.

The offense being one that only a male person could commit, the information need not specify the sex of defendant.

State v. Williamson, 22 U. 248; 62 P. 1022.

Information hereunder following the language of the statute is sufficient, and need not allege that the person with whom the offense was committed was not the wife of defendant.

Id.

Under the provisions of this section and § 8527, providing that any act done with intent to commit a crime but failing to effect its commission is an attempt to commit a crime, an information charging that accused did attempt to have sexual intercourse with a female under the age of consent sufficiently charges a public offense as against an attack made after verdict.

State v. Evans, 27 U. 12; 73 P. 1047.

In a prosecution for rape on a child of ten, evidence of prosecutrix, that after the assault had been completed defendant stated that there were other female children that had come to his house with whom he had committed the same offense, was inadmissible.

State v. Williams, 36 U. 273; 103 P. 250.

Where prosecutrix for a rape delays making complaint for three years, the jury should be instructed that they might consider this delay.

Id.

In an indictment alleging that the defendand "did lay hold upon the person of said ***, and threw her to the ground," etc., is not improper as embodying unnecessary allegations tending to prejudice the jury.

State v. Benson, 46 U. 74; 148 P. 445.

A skirt, worn and torn at the time of the assault, and worn afterwards and washed, is admissible to show the extent of the tear as bearing on the violence.

Id.

8110. (4223.) Id. Of female under eighteen. Every person who takes away any female under the age of eighteen years from her father, mother, guardian, or other person having the legal charge of her person, with or without their consent, for the purpose of prostitution, is punishable by imprisonment in the state prison not exceeding five years, or by a fine not exceeding $1000, or by both.

Cal. Pen. C., § 267*.

CHAPTER 27.

ABANDONMENT OR WILFUL NEGLECT OF WIFE OR MINOR CHILDREN.

('11, p. 149.)

8112. (4224.) Wilful neglect. Penalty. Disposition of fines. Any person who shall, without just cause, desert or wilfully neglect or refuse to provide for the support and maintenance of his wife in destitute or necessitous circumstances, or any person who shall, without just excuse, desert or wilfully neglect or refuse to provide for the support and maintenance of his or her minor child or children under the age of sixteen years, in destitute or necessitous circumstances, shall be deemed guilty of a misdemeanor and proceeded against by indictment or information, and on conviction thereof shall be punished by a fine of not more than $500 or by imprisonment in the county jail at hard labor for not more than six months, or by both such fine and imprisonment, and should a fine be imposed, it may be directed by the court to be paid in whole or in part into the county treasury, to be used for the support of the dependents involved as hereinafter provided; *provided,* that before the trial, with the consent of the defendant, or after conviction, instead of imposing the punishment hereinbefore or hereinafter provided, the court in its discretion, having regard to the circumstances and financial ability or earning capacity of the defendant, shall have the power to make an order which shall be subject to change by it from time to time, as circumstances may require, directing the defendant to pay a certain sum weekly, for the space of one year, into the county treasury, to be used for the support of the dependents involved, as hereinafter provided, and to release the defendant from custody on probation for the space of one year upon his entering into a recognizance with or without security in such sum as the court may direct. The condition of the recognizance shall be such that if the defendant shall make his or her personal appearance in court whenever ordered to do so within the year, and shall further comply with the terms of the order and any subsequent modifications thereof, then the recognizance shall be void, otherwise of full force and effect. If the court be satisfied by information and due proof under oath that, at any time during the year, the defendant has violated the terms of such order, it may forthwith proceed with the trial

of the defendant under the original charge, or sentence him under the original conviction, or enforce the original sentence, as the case may be. In the case of forfeiture of recognizance and the enforcement thereof by execution, the sum recovered may, in the discretion of the court, be paid in whole or in part into the county treasury, to be used for the support of the dependents involved, as hereinafter provided. Am'd '13, p. 118.

Husband and wife competent witnesses, § 9278.
Adoption of deserted child, § 20.
Power of juvenile court, §§ 1814-1823.
Dependent neglected childhen, §§ 1853-1859.
Employment of children, §§ 1860-1873.
Support of poor by relatives, § 5853.

Not much evidence is required to sustain a judgment which inflicted no punishment upon an able-bodied man and only required him to pay $5 a week toward the support of a wife and child.
State v. Smith, 45 U. 381; 146 P. 286.

In the prosecution of the father for non-support of child, it is no defense that the destitution of the child was relieved by the charitable acts of third persons.
State v. Bess, 44 U. 39; 137 P. 828.

There can be no conviction unless the neglect and refusal to provide be wilful and without cause.
Id.

8113. Evidence. Proof. No other evidence shall be required to prove the marriage of such husband and wife, or that such person is the legal father or mother of such child or children, than is or shall be required to prove such fact in civil action. In all prosecutions under §§ 8112-8115, any existing provisions of law prohibiting the disclosure of confidential relations between husband and wife shall not apply, and both husband and wife shall be competent witnesses to testify to any and all relevant matters, including the fact of such marriage, and the parentage of such child or children. Proof of the desertion of such wife, child, or children, in destitute or necessitous circumstances, or of neglect to furnish such wife, child, or children necessary and proper food, clothing, or shelter, is prima facie evidence that such desertion or neglect is wilful.

Husband or wife incompetent witness against other, § 9278.
Marriage, how proven, note § 8088.

8114. Duty of county treasurer. It shall be the duty of the county treasurer, in the event money is paid into the county treasury by order of the court under the provisions of §§ 8112-8115, to have an account of such funds kept separate from that of all other funds of the county, and the amount so deposited in each case, unless otherwise ordered by the court, shall be subject to the written order of the board of county commissioners, or the written order of some clerk or employe of their office authorized by them to act in the matter, such orders to be drawn only in support of dependents involved as designated by the court.

8115. Regulation of prisoner's labor. Allowance. The board of county commissioners shall have the right to make such use of the labor of any person confined under the provisions of §§ 8112-8115 as they may see fit, under the direction of the sheriff or road commissioner, and it shall be the duty of the sheriff or road commissioner to furnish the board of county commissioners with a weekly report of all such prisoners as are in his care, by reason of the enforcement of the provisions of §§ 8112-8115, and the board of county commissioners shall have an amount equal to $1 per day for each day of actual labor performed by each of these prisoners passed to the credit of the dependents involved according to the order of the court in the case, such an amount to be supplied from any funds that may be available in the county treasurer's hands for this purpose, and the same to be paid over upon order of the board of county commissioners, or such clerk or employe of their office as may be authorized to make such order, in favor of the wife, or the person who has legal custody of the dependent children involved in the order of the court governing the case.

8116. (4225.) Desertion of child. Every parent of any child under the age of six years, and every person to whom any such child has been confided for nurture or education, who deserts such child in any place whatever, with intent wholly to abandon it, is punishable by imprisonment in the state prison not exceeding five years, or in a county jail not exceeding six months.
Cal. Pen. C., § 271*

CHAPTER 28.

ABORTION.

8118. (4226.) Administering drugs, etc. Using instruments. Every person who provides, supplies, or administers to any pregnant woman, or procures any such woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the state prison not less than two nor more than ten years.

Cal. Pen. C., § 274*.

Conviction cannot be had on testimony of woman alone, § 8988, and note.

It is competent for a doctor giving expert testimony to give his opinion, from an examination of the body after death, and from his previous knowledge of the deceased, that it was not necessary to produce an abortion in order to save her life.

State v. McCoy, 15 U. 136; 49 P. 420.

Where an indictment for murder contains allegations concerning an abortion and miscarriage and the instruments and drugs used to produce the miscarriage, which merely show the manner of and the means used in perpetrating the offense, it is not bad for duplicity.

State v. Carrington, 15 U. 480; 50 P. 526.

The terms "procuring a miscarriage" and "procuring an abortion" mean, in common language and under the statute, substantially the same thing in characterizing the crime; but in charging the criminal act of destroying the foetus at any time before birth, it is necessary to charge the offense named in the statute which declares the act a crime.

State v. Crook, 16 U. 212; 51 P. 1091.

A contention in an action on a bail bond given by one charged with an abortion that no such crime was known to the law of the state was without merit.

State v. Davis, 27 U. 368; 75 P. 857.

Evidence on a prosecution for abortion held insufficient to show the production of the miscarriage was not necessary to save the woman's life, the burden of proof being on the state.

State v. Wells, 35 U. 400; 100 P. 681.

For the purpose of showing intent, evidence that the defendant performed operations on others who were in good health is admissible.

State v. McCurtain, 51 U. —; 172 P. 481.

The person on whom the criminal operation is performed, though at her request and at her consent, is not an accomplice.

Id.

8119. (4227.) Woman producing miscarriage on self. Penalty. Every woman who solicits of any person any medicine, drug, or substance whatever, and takes the same, or who submits to any operation, or to the use of any means whatever, with intent thereby to procure a miscarriage, unless the same is necessary to preserve her life, is punishable by imprisonment in the state prison not less than one nor more than five years.

Cal. Pen. C., § 275.

CHAPTER 29.

CRIME AGAINST NATURE.

8121. (4228.) Penalty. Every person who is guilty of the infamous crime against nature, committed with mankind or with any animal, is punishable by imprisonment in the state prison not less than three years nor more than twenty years.

Cal. Pen. C., § 286*.

Assault with intent to commit, § 8047.

Sodomy may only be committed per anum, not in the mouth.

State v. Johnson, 44 U. 18; 137 P. 632.

Evidence held sufficient to support a conviction of assault with intent to commit a crime against nature, evidence of substance found on underwear worn by the boy at the time was admissible.

State v. Morasco, 42 U. 5; 128 P. 571.

8122. (4229.) Any penetration sufficient. Any sexual penetration, however slight, is sufficient to accomplish the crime against nature.

Cal. Pen. C., § 287.

CHAPTER 30.

VIOLATING SEPULCHER.

8124. (4230.) Mutilation or removal of dead bodies. Every person who mutilates, disinters, or removes from the place of sepulture the dead body of a human being without authority of law, is guilty of felony. But the provisions of this section do not apply to any person who removes the dead body of a relative or friend for reinterment, nor to any physician who shall make a post mortem examination with the consent of relatives or friends of the deceased.

Cal. Pen. C., § 290*.

8125. (4231.) Removal of dead body for dissection, etc. Every person who removes any part of the dead body of a human being from any grave or other place where the same has been buried, or from any place where the same is deposited while awaiting burial, with intent to sell the same or to dissect it without authority of law, or from malice or wantonness, is punishable by imprisonment in the state prison not exceeding five years.

Cal. Pen C., § 291.
Unknown dead to University medical department, §§ 5558-5561.

8126. (4232.) Removal or mutilation of gravestones, etc. Every person who wilfully and maliciously defaces, breaks, destroys, or removes any tomb, monument, or gravestone erected to any deceased person, or any memento or memorial, or any ornamental plant, tree, or shrub appertaining to the place of burial of a human being, or who shall mark, deface, injure, destroy, or remove any fence, post, rail, or wall of any cemetery or graveyard, is guilty of a misdemeanor.

Cal. Pen. C., § 296.

CHAPTER 31.

CRIMES AGAINST GOOD MORALS.

8128. (4233.) Barbarous and noisy amusements on Sunday. Every person who on Sunday gets up, exhibits, opens, or maintains, or aids in getting up, exhibiting, opening, or maintaining, any bull, bear, cock, or prize fight, horse race, circus, gambling house, or saloon, or any barbarous and noisy amusement; or who keeps, conducts, or exhibits any theater, melodeon, dance cellar, or other place of musical, theatrical, or operatic performance, spectacle, or representation, where any wines, liquors, or intoxicating drinks are bought, sold, used, drank, or given away; or who purchases any ticket of admission, or directly or indirectly pays any admission fee to or for the purpose of witnessing or attending any such place, amusement, spectacle, performance, or representation, is guilty of a misdemeanor.

Cal. Pen. C., § 299.
Fighting or baiting animals a misdemeanor, § 8417.
Prize fighting generally, penalty, §§ 8225, 8226.

8129. (4234.) Keeping open place of business on Sunday. Every person who keeps open on Sunday any store, workshop, bar, saloon, banking house, or other place of business for the purpose of transacting business therein, is punishable by a fine not less than $5 nor more than $100.

Cal. Pen. C., § 300*.
This section, as applied to a barber's shop, is not unconstitutional as being an undue restraint of personal liberty, but is a proper exercise of the police power of the state.
State v. Sopher, 25 U. 318; 71 P. 482.
This section is not unconstitutional as special legislation, based on an arbitrary classification, by § 8130 excepting from such prohibition hotels, baths, etc.
Id.

8130. (4235.) Id. Hotels, boarding houses, baths, etc., excepted. The provisions of the preceding section do not apply to persons who, on Sunday, keep open hotels, boarding houses, baths, restaurants, taverns, livery stables, or retail drug stores, for the legitimate business of each, or such manufacturing establishments as are usually kept in continuous operation.

Cal. Pen. C., § 301*.
The keeping open on Sunday of a barber's shop connected with a hotel is not a work of necessity.
State v. Sopher, 25 U. 318; 71 P. 482.

8131. (4236.) Disturbing religious meetings. Every person who wilfully disturbs or disquiets any assemblage of people met for religious worship, by noise, profane discourse, rude or indecent behavior, or by any unnecessary noise, either within the place where such meeting is held or so near it as to disturb the order and solemnity of the meeting, is guilty of a misdemeanor.

Cal. Pen. C., § 302. Disturbing any lawful meeting, § 8217.

8132. (4237.) Selling liquors at theaters, etc. Every person who sells or furnishes any malt, vinous, or spirituous liquors to any person in the auditorium or lobbies of any theater, melodeon, museum, circus, or caravan, or place where any farce, comedy, tragedy, ballet, opera, or play is being performed, or any exhibition of dancing, juggling, wax-work figures, and the like is being given for public amusement, and every person who employs or procures, or causes to be employed or procured, any person to sell or furnish any malt, vinous, or spirituous liquors at such place, is guilty of a misdemeanor.

Cal. Pen. C., § 303. Selling liquor near camp meeting, etc., § 8136, and note.
Selling intoxicating liquors prohibited, §§ 3341-3378.

8133. (4238.) Performing unnecessary labor or business on Sunday. Every person who performs any unnecessary labor or does any unnecessary business on Sunday is guilty of a misdemeanor, and shall be fined in any sum not exceeding $25.

8134. (4239.) Id. Exception. Labor performed by employes of such works as are usually kept in constant operation, and in irrigating, is not included in the foregoing section.

8135. (4240.) When Sunday begins and ends. For the purposes of this title, Sunday shall commence at midnight Saturday and terminate the following midnight.

8136. (4241.) Selling liquors near camp meeting. Every person who erects or keeps a booth, tent, stall, or other contrivance for the purpose of selling or otherwise disposing of any wine, or spirituous or intoxicating liquors, or any drink of which wines, or spirituous or intoxicating liquors form a part, or for selling or otherwise disposing of any article of merchandise, or who peddles or hawks about any such drink or article, within one mile of any camp or field meeting for religious worship, during the time of holding such meeting, is punishable by fine of not less than $5 nor more than $500.

Cal. Pen. C., § 304. Sale of liquor at theater, etc., § 8132.
Sale of liquor to Indians, or near reservation, §§ 8208, 8209. Sale of liquor prohibited, §§ 3341-3373.

8137. (4243.) Procuring females to play musical instruments at saloons, etc. Every person who causes, procures, or employs any female to play for hire, drink, or gain upon any musical instrument in any drinking saloon, dance room, or dance cellar, public garden, or any public highway, common, or street, or on a vessel, steamboat, or railroad car, or in any lewd house, or disorderly place whatsoever, where two or more persons are assembled together, is punishable by a fine in any sum less than $300, or by imprisonment in the county jail not exceeding three months, or by both; and any female so playing upon any musical instrument whatsoever is punishable by fine not exceeding $100, or by imprisonment in the county jail not exceeding one month or by both.

Cal. Pen. C., § 306*.

8138. (4244.) Procuring females to dance at saloons, etc. Every person who causes or procures or employs any female to dance, promenade, or otherwise exhibit herself for hire, drink, or gain in any drinking saloon, dance cellar, or dance room, public garden, public highway, or in any place whatsoever, theaters excepted, where two or more persons are assembled together, is punishable by a fine in any sum less than $300, or by imprisonment in the county jail not exceeding three months, or by both; and every female so dancing, promenading, or exhibiting herself is punishable by a fine not exceeding $100, or by imprisonment in the county jail not exceeding one month, or by both.

Cal. Pen. C., § 306*.

CHAPTER 32.

INDECENT EXPOSURE, EXHIBITIONS, ETC.

8144. (4247.) Indecent exposure, exhibiting, writings, etc. Every person is guilty of a misdemeanor who wilfully and lewdly, either:

1. Exposes his person or the private parts thereof in any public place or in any place where there are present other persons to be offended or annoyed thereby; or,

2. Procures, counsels, or assists any person so to expose himself, or to take part in any model artist exhibition, or to make any other exhibition of himself to public view, or to the view of any number of persons, such as is offensive to decency, or is adapted to excite to vicious or lewd thoughts or acts; or,

3. Writes, composes, stereotypes, prints, publishes, sells, distributes, keeps for sale, or exhibits any obscene, or indecent writing, paper, book, picture, print, design, figure, or device; or designs, copies, draws, engraves, paints, or otherwise prepares any obscene or indecent picture or print, or moulds, cuts, casts, or otherwise prepares any obscene or indecent figure; or,

4. Writes, composes, or publishes any notice or advertisement of any such writing, paper, book, picture, print, or figure; or any notice or advertisement of any article, prescription, or preparation for producing or facilitating a miscarriage; or,

5. Sings any lewd or obscene song, ballad, or other words in any public place, or in any place where there are persons present to be annoyed thereby.

Am'd '09, p. 26.

Cal. Pen. C., § 311*.

Obscene literature, sufficient allegation, § 8850.

Printing, having, or selling obscene books, etc., indictment, § 8850.

8145. (4248.) Seizure of indecent books, pictures, etc. Every person who is authorized or enjoined to arrest any person for a violation of sub. 3 of the next preceding section is equally authorized and enjoined to seize any obscene or indecent writing, paper, book, picture, print, or figure found in possession or under the control of the person so arrested, and to deliver the same to the magistrate before whom the person so arrested is required to be taken.

Cal. Pen. C., § 312.

8146. (4249.) Id. Summary destruction of. The magistrate to whom any obscene or indecent writing, paper, book, picture, print, or figure is delivered, pursuant to the foregoing section, must, upon the examination of the accused, or, if the examination is delayed or prevented, without awaiting such examination, determine the character of such writing, paper, book, picture, print, or figure, and if he finds it to be obscene or indecent, he must deliver one copy to the prosecuting attorney of the county in which the accused is liable to complaint or trial, and must at once destroy all the other copies.

Cal. Pen. C., § 313.

8147. (4250.) Id. Destruction of books, etc., remaining after trial. Upon the final conviction of the accused, such attorney must cause any writing, paper, book, picture, print, or figure, in respect whereof the accused stands convicted, and which remains in the possession or under the control of such attorney, to be destroyed.

Cal. Pen. C., § 314.

8148. (4251.) Keeping, residing in, resorting to, owning, or having control of house of ill-fame. It shall be unlawful for any person within the limits of the state of Utah:

1. To keep a house of ill-fame resorted to for the purpose of prostitution or lewdness; or to wilfully reside in such house; or to resort thereto for lewdness; or,

2. To be the owner of any building or tenement, the whole or any part of which is used for any of the purposes mentioned in the first subdivision of this section;

3. Or to have control of such building or tenement as agent, guardian, or lessee of such owner; after written notice to such owner, agent, guardian, or lessee that such building or tenement is being used for the purposes mentioned in sub. 1;

4. To let any building or tenement, knowing that the lessee intends using the same, or any part thereof, for any of the purposes mentioned in the first subdivision of this section; or to harbor or keep about his or her premises any person known to be guilty of following a lewd course of life.

Any person violating any of the provisions of this section shall be punished by a term of imprisonment in the county jail which shall not be less than three months nor more than one year. Any corporation violating any of the provisions of this section shall be punished by a fine which shall not be less than $1000 nor more than $10,000. Am'd '09, p. 186.

Cal. Pen. C., § 315*.
Pandering, §§ 8095-8101.

House of ill fame defined.
People v. Hampton, 4 U. 258; 9 P. 508.

8149. (4252.) Keeping disorderly house. Every person who keeps any diorderly house or any house of public resort, by which the peace, comfort, or decency of the immediate neighborhood is habitually disturbed, or who keeps any inn in a disorderly manner, is guilty of a misdemeanor.

Cal. Pen. C., § 316*.
Disturbing the peace, § 8227.

CHAPTER 33.

LOTTERIES.

8153. (4253.) Lottery defined. A lottery is any scheme for the disposal or distribution of property by chance, among persons who have paid or promised to pay any valuable consideration for the chance of obtaining such property or a portion of it, or for any share, or any interest in such property, upon any agreement, understanding, or expectation that it is to be distributed or disposed of by lot or chance, whether called a lottery, raffle, or gift enterprise, or by whatever name the same may be known.

Cal. Pen. C., § 319.
Legislature not to authorize lottery, Con. art. 6, sec. 28.

8154. (4254.) Contriving or drawing lottery. Every person who contrives, prepares, sets up, proposes, or draws any lottery, is guilty of a misdemeanor.

Cal. Pen. C., § 320.

8155. (4255.) Vending lottery tickets. Every person who sells, gives, or in any manner whatever furnishes or transfers to or for any other person any ticket, chance, share, or interest, or any paper, certificate, or instrument purporting or understood to be or to represent any ticket, chance, share, or interest in, depending upon the event of, any lottery, is guilty of a misdemeanor.

Cal. Pen. C., § 321.
Signing and issuance of lottery ticket, evidence, § 8990.

Sale of lottery tickets, a joint criminal enterprise and civil relief refused.
Mexican Int. B. C. v. Lichtenstein, 10 U. 338; 37 P. 574.

8156. (4256.) Aiding or assisting lottery. Every person who aids or assists, either by printing, writing, advertising, publishing, or otherwise in setting up, managing, or drawing any lottery, or in selling or disposing of any ticket, chance, or share therein, is guilty of a misdemeanor.

Cal. Pen. C., § 322.

8157. (4257.) Keeping office for sale of lottery tickets. Advertising. Every person who opens, sets up, or keeps, by himself or by any other person, any office or other place for the sale of, or for registering the number of, any ticket in any lottery, or who, by printing, writing, or otherwise, advertises or publishes the setting up, opening, or using of any such office, is guilty of a misdemeanor.

Cal. Pen. C., § 323.

8158. (4258.) Insuring lottery tickets. Every person who insures or receives any consideration for insuring for or against the drawing of any ticket in any lottery whatever, whether drawn or to be drawn within the state or elsewhere, or who receives any valuable consideration upon any agreement to repay any sum, or deliver the same, or any other property, if any lottery ticket or number of any ticket in any lottery shall prove fortunate or unfortunate, or shall be drawn or not be drawn, at any particular time or in any particular order, or who promises or agrees to pay any sum of money, or to deliver any goods, things in action, or property, or to forbear to do anything for the benefit of any person with or without consideration, upon any event or contingency dependent on the drawing of any ticket in any lottery, or who publishes any notice or proposal of any of the purposes aforesaid, is guilty of a misdemeanor.

Cal. Pen. C., § 324.

8159. (4259.) Forfeiture of lottery property to state. All money and property offered for sale or distribution in violation of any of the provisions of this chapter are forfeited to the state, and may be recovered by information filed or by an action brought by the attorney-general, or by any county attorney, in the name of the state. Upon the filing of the information or complaint, the clerk of the court, or if the suit be brought in a justice's court, the justice, must issue an attachment against the property mentioned in the complaint or information, which attachment has the same force and effect against such property, and is issued in the same manner as attachments issued from the respective courts in civil cases.

Cal. Pen. C., § 325.

8160. (4260.) Letting building for lottery purposes. Every person who lets, or permits to be used, any building or vessel, or any portion thereof, knowing that it is to be used for setting up, managing, or drawing any lottery, or for the purpose of selling or disposing of lottery tickets, is guilty of a misdemeanor.

Cal. Pen. C., § 326.

CHAPTER 34.

POOL SELLING AND BOOK MAKING A FELONY.

('13, p. 13.)

8161. Offenses defined. Penalty. Any person who engages in pool selling or book making, with or without writing, at any time or place; or any person who keeps or occupies any room, shed, tenement, tent, booth, or building, float or vessel, or any part thereof, or who occupies any place or stand of any kind upon any public or private grounds within this state, with books, papers, apparatus, or paraphernalia for the purpose of recording, reporting, or registering bets or wagers, or of selling pools; and any person who records, reports, or registers bets or wagers, or sells pools, or makes books, with or without writing, upon the result of trial or contest of skill, speed, or power of endurance of man or beast; or upon the result of lot, chance, casualty, unknown or contingent event whatsoever, or any person who receives, registers, reports, or records or forwards, or purports or pretends to receive, register, report, or forward, in any manner whatsoever, any money, thing, or consideration of value, bet or wagered, or offered for the purpose of being bet or wagered, by or for any other person, or sells pools upon such result or pretended result; or any person who, being the owner, lessee, or occupant of any room, shed, tenement, tent, booth, or building, float or vessel, or any part thereof, or of any grounds within this state, knowingly permits the same to be used or occupied for any of these purposes, therein keeps, exhibits, or employs any device or apparatus for the purpose of recording,

reporting, registering, transmitting, communicating, or transferring such bets or wagers or the selling of such pools, or becomes the custodian, stakeholder, or depositary for gain, hire, or reward of any money, property, or thing of value, stake, wagered or pledged, or to be wagered or pledged, on any such result; or any person who aids, assists, or abets in any manner in any of the said acts which are hereby forbidden, is guilty of a felony, and upon conviction is punishable by imprisonment in the state prison for a period not exceeding one year, or by a fine in any sum not exceeding $2000, or by both such fine and imprisonment.

CHAPTER 35.

GAMING.

8162. (4261.) Gaming defined. Seizure and destruction of device, etc. Every person who deals or carries on, opens or causes to be opened, or who conducts, either as owner or employe, whether for hire or not, any game of faro, monte, roulette, lansquenet, rouge et noir, rondo, or any game played with cards, dice, or any other device, for money, checks, credit, or any other representative of value shall be deemed guilty of a felony, and it shall be the duty of all sheriffs, constables, police, and other peace officers whenever it shall come to the knowledge of such officer that any person has in his possession any cards, tables, checks, balls, wheels, slot machines, or gambling devices of any nature or kind whatsoever used or kept for the purpose of playing for money or for tokens redeemable in money at any of the games mentioned in this chapter, or that any cards, tables, checks, balls, wheels, slot machines, or gambling devices used or kept for the purposes aforesaid may be found in any place, to seize and take such cards, tables, checks, balls, wheels, slot machines, or other gambling devices, and convey the same before a magistrate of the county in which said devices shall be found; and it shall be the duty of such judge to inquire of such witnesses as he shall summon or as may appear before him in that behalf, touching the nature of such gambling devices, and if such judge shall determine that the same are used or kept for the purpose of being used at any game or games of chance described in this chapter, it shall be his duty to destroy the same. Am'd '11, p. 265.

Cal. Pen. C., § 330*. Cal. Sup. (1893) § 330*, p. 1045.

The offense of opening and conducting faro game is complete each day.

People v. Sullivan, 9 U. 195; 33 P. 701.

The statute may be enforced wholly independent of the seizure of the property, and the constitutionality of that portion of the statute is not passed on.

Bruce v. Sharp, 41 U. 566; 127 P. 343.

The power of a city is not limited to suppression of the precise games mentioned, and may include trade slot machines.

S. L. City v. Doran, 42 U. 401; 131 P. 636.

A short sale of stock by a customer to a broker without any delivery being made or intended, the intention being to receive and pay the difference between the contract price and the future market price, was illegal.

Hudson v. Moon, 42 U. 377; 130 P. 774.

To convict, it is not necessary to prove that the accused conducted a regular gambling place; the offense is complete if he conducts or carries on the game in any place.

State v. Poulis, 45 U. 340; 145 P. 1044.

8163. (4262.) Permitting gaming in house. Every person who knowingly permits any of the games mentioned in the preceding section to be played, conducted, or dealt in any house owned or rented by such person, in whole or in part, and any person who plays at or against any of said prohibited games, is guilty of a misdemeanor. Am'd '11, p. 265.

Cal. Pen. C., § 331.

8164. (4263.) Winning fraudulently punishable as larceny. Every person who, by any practice, cheat, or device, or false pretense whatsoever, while playing at any game of chance, or while bearing any share in wagers played for, or while betting on sides or hands of such play, wins or acquires to himself or another any sum of money or valuable thing, must be punished as in case of larceny of property of like value.

Cal. Pen. C., § 332*.

Penalty for larceny, §§ 8291, 8292.

Where a husband took the proceeds from the sale of homestead and lost it gambling, the wife may recover it, if she in no wise consented to the gambling.

Terry v. Peterson, 37 U. 401; 108 P. 1106.

8165. (4264.) Refusal to attend as witness a misdemeanor. Every person duly summoned as a witness for the prosecution, on any proceedings had under this chapter, who neglects or refuses to attend, as required, is guilty of a misdemeanor.

Cal. Pen. C., § 333.

8166. (4265.) Witness not privileged from answering. No person otherwise competent as a witness is disqualified from testifying as such concerning the offense of gaming on the ground that such testimony may criminate himself; but no prosecution can afterwards be had against him for any offense concerning which he is compelled to testify.

Cal. Pen. C., § 334*.
But where a witness was testifying before the grand jury concerning another offense, and voluntarily admitted himself guilty of gaming, he may be prosecuted therefor.
People v. Reggel, 8 U. 21; 28 P. 955.

8167. (4266.) Officers must prosecute. Penalty. Every prosecuting attorney, sheriff, constable, or police officer must inform against and diligently prosecute persons whom they have reasonable cause to believe offenders against the provisions of this chapter, and every such officer refusing or neglecting so to do is guilty of a misdemeanor.

Cal. Pen. C., § 335.

CHAPTER 36.

INJURIES TO PERSONS.

8170. (4267.) Intoxicated physician endangering life. Every physician who, in a state of intoxication, does any act as such physician to another person, by which the life or health of such other person is endangered, is guilty of a misdemeanor.

Cal. Pen. C., § 346*.

8171. (4268.) Mingling poison with food or drink. Every person who wilfully mingles any poison with any food, drink, or medicine, with intent that the same shall be taken by any human being, to his injury, and every person who wilfully poisons any spring, well, stream, or reservoir of water is punishable by imprisonment in the state prison for a term not less than one nor more than ten years.

Cal. Pen. C., § 347*.
Administering poison with intent to kill, §§ 8045; administering narcotics to commit felony, 8050.

8172. (4269.) Endangering life by misuse of boiler on boat. Every captain or other person having charge of any steamboat used for the conveyance of passengers, or of the boilers and engines thereof, who, from ignorance or gross neglect, or for the purpose of excelling any other boat in speed, creates, or allows to be created, such an undue quantity or pressure of steam as to burst or break the boiler, or any apparatus or machinery connected therewith, by which bursting or breaking human life is endangered, is guilty of a misdemeanor.

Cal. Pen. C., § 348*.

8173. (4270.) Endangering life by misuse of steam boiler. Every engineer or other person having charge of any steam boiler, steam engine, or other apparatus for generating or employing steam who wilfully, or from ignorance or gross neglect, creates, or allows to be created, such an undue quantity of steam as to burst or break the boiler, or engine, or apparatus, or cause any other accident whereby human life is endangered, is guilty of a misdemeanor.

Cal. Pen. C., § 349*.

8174. (4271.) Causing death by misuse of steam boiler. Every person having charge of any steam boiler or steam engine, or other apparatus for generating or employing steam, who wilfully, or from ignorance or neglect, creates, or allows to be created, such an undue quantity or pressure of steam as to burst or break the boiler, engine, or apparatus, or to cause any other ac-

cident whereby the death of a human being is produced, is punishable by imprisonment in the state prison for not less than one nor more than ten years.

Cal. Pen. C., § 368*.

8175. (4272.) Negligently causing collision resulting in death. Every conductor, engineer, brakeman, switchman, or other person having charge, wholly or in part, of any railroad car, locomotive, or train, who wilfully or negligently permits or causes the same to collide with another car, locomotive, or train, or with any other object or thing, or any train dispatcher who wilfully or negligently permits any such collision, whereby the death of a human being is produced, is punishable by imprisonment in the state prison for not less than one nor more than ten years.

Cal. Pen. C., § 369*. Intoxication of engineers, brakemen, etc., § 8202.
Violation of duty by railroad employe, § 8204.
Placing freight car in rear of train, § 8203.

8176. (4273.) Cruelly treating insane, etc. Every person guilty of any unnecessarily harsh, cruel, or unkind treament of, or any neglect of duty towards, any idiot, lunatic, or insane person, is guilty of a misdemeanor.

Cal. Pen. C., § 361*.

UNAUTHORIZED USE OF NAMES OR PICTURES.

('09, p. 83.)

8177. Unlawful to use picture, etc., without consent. Penalty. Any person who uses for the purpose of advertising any articles of merchandise the name or picture of any public institution of this state, or any person who uses for advertising purpose or purposes of trade the official title of any public officer of this state, without the consent in writing, of such officer, or of the managing officers or board of such public institution, is guilty of a misdemeanor.

8178. Id. Any person who uses for advertising purposes, or for purposes of trade, or upon any postal card, the name, portrait, or picture of any person, if such person be living, without first having obtained the written consent of such person, or, if a minor, of his parent or guardian, of if such person be dead, without the written consent of his heirs or personal representatives, is guilty of a misdemeanor.

8179. Action to prevent or restrain. Damages. Any living person, or the heirs or personal representatives of any deceased person, whose name, portrait, or picture is used within this state for advertising purposes, or for purposes of trade, without the written consent first obtained as herein provided, may maintain an action against such person so using his name, picture, or portrait, to prevent and restrain the use thereof; and may in the same action recover damages for any injuries sustained by reason of such use, and if the defendant shall have knowingly used such person's name, portrait, or picture in such manner as is declared to be unlawful by this chapter, the jury or court, if tried without a jury, in its discretion, may award exemplary damages.

CHAPTER 37.

PUBLIC HEALTH AND SAFETY.

PUBLIC NUISANCES.

8184. (4274.) Befouling waters. Any person who shall either:

1. Construct or maintain any corral, sheep-pen, stable, pig-pen, chicken-coop, or other offensive yard or outhouse, where the waste or drainage therefrom shall flow directly into the waters of any stream, well, or spring of water used for domestic purposes; or,

2. Deposit, pile, unload, or leave any manure heap, offensive rubbish, or the carcass of any dead animal, where the waste or drainage therefrom will

flow directly into the waters of any stream, well, or spring of water used for domestic purposes; or,

3. Dip or wash sheep in any stream, or construct, maintain, or use any pool or dipping vat for dipping or washing sheep in such close proximity to any stream used by the inhabitants of any city, town, or village for domestic purposes as to make the waters thereof impure or unwholesome; or,

4. Construct or maintain any corral, yard, or vat to be used for the purpose of shearing or dipping sheep within twelve miles of any city, town, or village, where the refuse or filth from said corral or yard would naturally find its way into any stream of water used by the inhabitants of any city, village, or town for domestic purposes; or,

5. Establish and maintain any corral, camp, or bedding place for the purpose of herding, holding, or keeping any cattle, horses, sheep, or hogs within seven miles of any city, town, or village, where the refuse or filth from said corral, camp, or bedding place will naturally find its way into any stream of water used by the inhabitants of any city, town, or village for domestic purposes,—shall be guilty of a misdemeanor.

Refouling water a nuisance, §§ 2735-2742.
Insanitary conditions at hotels, etc., § 1954; dairies, § 1941.
Where a settlement consisted of fourteen families, and extended to about two and a half miles along a stream, the settlement containing a school house and a postoffice, the nearest settlement thereto being about six miles distant; held, to be a village within the meaning of the statute.
People v. McCune, 14 U. 151; 46 P. 658.
This section does not impliedly repeal section 8185.
People v. Burtleson, 14 U. 258; 47 P. 87.

The complaint by Salt Lake City, which charged that defendant unlawfully, wilfully, and continuously for ten days or more, permitted twenty-seven head of horses to run at large on defendant's fifteen acres of land and to be at all times accessible to the stream from which the city secured its water supply, charges an offense which the city should prohibit by ordinance.
Salt Lake City v. Young, 45 U. 349; 145 P. 1047.

8185. (4275.) Id. Public nuisance defined. A public nuisance is a crime against the order and economy of the state, and consists in unlawfully doing any act, or omitting to perform any duty, which act or omission either:

1. Annoys, injures, or endangers the comfort, repose, health, or safety of three or more persons; or,

2. Offends public decency; or

3. Unlawfully interferes with, obstructs, or tends to obstruct, or renders dangerous for passage any lake, stream, canal, basin, or any public park, square, street, or highway; or

4. In any way renders three or more persons insecure in life or the use of property.

Cal. Pen. C., § 370*.
Nuisances dangerous to health, etc., §§ 2735-2742.
Premises used for prostitution a nuisance and abatement, §§ 4275-4282.
Nuisances under liquor prohibition act, §§ 3350-3353.
Crop pests, §§ 1888-1911.
Civil action for nuisances, § 7240, and note.
Infected orchard and crop, § 1899.
Where a party so uses his property as to annoy, injure, or endanger the comfort, repose, health, or safety of three or more persons, his acts are unlawful, and he is liable to prosecution, even though he may be in pursuit of a lawful business and conducting it in a reasonable and careful manner.
People v. Burtleson, 14 U. 258; 47 P. 87.
In determining the question of a nuisance, under this section, the motive or intent with which the act complained of was committed cannot be considered.
Id.
The befouling of waters of a canal, from which a number of persons obtained water for irrigation, domestic and other purposes, so that it is unfit for use, creates a public nuisance, and the right to maintain it cannot be gained by prescription.
North Point C. I. Co. v. Utah & S. L. C. Co., 16 U. 246; 52 P. 168.
Crane v. Winsor, 2 U. 248.
Though an encroachment on a public street is a "public nuisance," it will not always be abated at suit of a private person sustaining special damages; but the court must determine whether it is equitable to compel an abatement or permit the encroachment to remain and award damages only.
Lewis v. Pingree, 47 U. 35; 151 P. 558.

8186. (4276.) Id. Unequal effects not material. An act which affects three or more persons in either of the ways specified in the next preceding section is not less a nuisance because the extent of the annoyance or damage inflicted on individuals is unequal.

Cal. Pen. C., § 371*.

8187. (4277.) Maintaining nuisance or failing to perform duty. Every person who maintains or commits any public nuisance, the punishment for which is not otherwise prescribed, or who wilfully omits to perform any legal duty relating to the removal of a public nuisance, is guilty of a misdemeanor.

Cal. Pen. C., § 372.

8188. (4278.) Maintaining pesthouse, etc., at or near city or town. Every person who establishes or keeps, or causes to be established or kept, within the limits of any city, town, or village, any pesthouse, hospital, or place for persons affected with smallpox, is guilty of a misdemeanor.

Am'd '09, p. 234.

Cal. Pen. C., § 373.
Health and quarantine, §§ 2725-2757.
Location of pesthouse, § 2765.
Exposing public to contagion, § 8205.

8189. (4279.) Placing dead animals in street or stream. Burning carcass. Every person who puts the carcass of any dead animal, or the offal from any slaughter pen, corral, or butcher shop into any river, creek, pond, street, alley, public highway, or road in common use, or who attempts to destroy the same by fire, within one-fourth of a mile of any city, town, or village, is guilty of a misdemeanor.

Cal. Pen. C., § 374*. Cal. Sup. (1893) § 374*, p. 1046.
Befouling stream, §§ 2735-2742, 8184, 8185.
Removal or burial of dead animals, §§ 106-109.

EXPLOSIVES, POWDER-HOUSES, ETC.

8190. (4280.) Keeping explosives in city, etc. Every person who makes or keeps gunpowder, nitro-glycerine, or other highly explosive substance within any city, town, or village, or who carries the same through the streets thereof, in any quantity or manner such as is prohibited by law or by any ordinance of such city or town, is guilty of a misdemeanor.

Cal. Pen. C., § 375.
Power of city to regulate, § 570x60.

8191. (4280x.) Delivering dangerous explosives unmarked for storage or transportation. Penalty. Every person who knowingly leaves with or delivers to another, or to any express or railway company, or other common carrier, or to any warehouse or storehouse any package containing nitro-glycerine, dynamite, guncotton, gunpowder, or other highly explosive compound, or any benzine, gasoline, phosphorous, or other highly inflamable substance, or any vitriol, sulphuric, nitric, carbolic, muriatic, or other dangerous acid, chemical, or compound, to be handled, stored, shipped or transported, without plainly marking and indicating on such package the name and nature of the contents thereof, is guilty of a misdemeanor, and punishable by a fine not exceeding $300, or by imprisonment in the county jail not exceeding six months. '01, p. 76.

8192. (4280x1.) Powder-house, etc., near residence or road. No powder-house, magazine, or building in which powder, dynamite, or other explosive is kept in quantities exceeding 500 pounds shall hereafter be built or constructed or used within a distance of 300 feet of any residence or traveled county road in this state; *provided,* that the foregoing provisions shall not apply to any magazine maintained at any mine or stone quarry. '03, p. 65.

8193. (4280x2.) Id. Violation a misdemeanor. Any person violating any of the provisions of § 8192 shall be deemed guilty of a misdemeanor.

'03, p. 65.

8194. (4280x3.) Explosives to be marked with maker's name, date, and percentage. It shall be unlawful, after the 1st day of January, A. D. 1904, for any person or persons, partnership, or corporation to sell or offer for sale, or take or solicit orders of sale, or purchase or use, or have on hand or in store for the purpose of sale or use in this state any giant, hercules, atlas, venture, or any other high explosive containing nitro-glycerine, unless on each and every box or package and wrapper containing any such giant, hercules, atlas, or venture, or any other high explosive containing nitro-glycerine, there shall be plainly stamped or printed the name and place of business of the person or partnership or corporation by whom or which the same was manufactured, and the exact and true date of its manufacture, and the percentage of nitro-glycerine or other high explosive contained therein. '03, p. 201.

8195. (4280x4.) Explosives of different dates kept separate. Boxes, etc. Restrictions. It shall be unlawful for any person or persons, partnership, or corporation to have two or more different dates in any such box or package

containing giant, hercules, atlas, or venture, or any other high explosive containing nitro-glycerine. It shall further be unlawful to use any box, package, or wrapper formerly used by any other person or persons, partnership, or corporation in the packing of such giant, hercules, atlas, venture, or other high explosive containing nitro-glycerine, and the name and date on such box or package shall be the same as on the wrapper containing such giant, hercules, atlas, venture, or other explosive containing nitro-glycerine. '03, p. 201.

8196. (4280x5.) Id. Violation a felony. If any person or persons, partnership, or corporations shall violate any of the provisions of §§ 8194, 8195, such person or persons, the members of such partnership, or the officer or agents of such corporations shall be deemed guilty of a felony, and on conviction thereof shall be punished by a fine of not more than $5,000, or imprisonment not to exceed two years, or by both such fine and imprisonment, in the discretion of the court. '03, p. 201.

Storage of powder in mines, § 3921, sub. 10; § 3944.

8197. Unlawful use with intent to destroy, etc. Penalty. Destruction of property. Penalty. Every person who shall place gun powder, or any other explosive substance in, upon, under, against, or near to any building, car, vessel, or structure with intent to destroy, throw down or injure the whole or any part thereof, under such circumstances that if the intent should be accomplished human life or safety would thereby be endangered, although no damage be actually done, shall be guilty of a felony.

Every person who shall unlawfully and maliciously, by explosion of gun powder or other explosive substance, destroy, throw down, or injure the whole or any part of any building, car, vessel, or other structure, shall be guilty of a felony and be punished as follows:

1. If the life or safety of a human being is endangered, by imprisonment in the state prison for not more than twenty years;

2. In every other case, by imprisonment in the state prison for not more than ten years. '11, p. 82.

TOY PISTOLS.

8198. (4281.) Selling or giving away toy pistols. Any one selling or giving a toy pistol to any person in this state shall be guilty of a misdemeanor.

MISLABELING OR SUBSTITUTING DRUGS.

8199. (4282.) Omitting to label or mislabeling drugs. Prescriptions. Every apothecary, druggist or person carrying on business as a dealer in drugs or medicines, or person employed as clerk or salesman by such person, who, in putting up drugs or medicines, or making up any prescription, or filling any order for drugs or medicines, wilfully, negligently, or ignorantly omits to label the same, or puts an untrue label, stamp, or other designation of contents, upon any box, bottle, or other package containing any drug or medicines, or substitutes a different article for any article prescribed or ordered, or puts up a greater or less quantity of any article than that prescribed or ordered, or otherwise deviates from the terms of the prescription or order which he undertakes to follow, in consequence of which human life or health is endangered, is guilty of a misdemeanor, or, if death ensues, is guilty of a felony. Am'd '09, p. 345.

Cal. Pen. C., § 380. Sale of certain drugs prohibited, §§ 4432-4434.
Poisons must bear label, §§ 4420, 4425, 4431.

ADULTERATION OF OILS, ETC.

8200. (4290x.) Standard of oils to be maintained. Penalty. It shall be unlawful for any person, firm, or corporation to mix, adulterate, sell, or offer for sale any oils used for illuminating purposes, with benzine, naphtha, gasoline, or any other substance, and all oils or fluids manufactured from petroleum or its products, to be used for illuminating purposes, which will not stand a fire test of 110 degrees Fahrenheit, before they shall flash or emit any inflammable vapor; *provided,* that in making such test the oil shall not be heated faster than two degrees per minute, in open Tagliabue cup. Any per-

son, firm, or corporation found guilty of violating any of the provisions of this section shall be deemed guilty of a misdemeanor. '03, p. 156.

NEGLIGENCE, ETC., OF RAILROAD EMPLOYE.

8201. (4291.) Omitting to ring locomotive bell or sound whistle. Every person in charge of a locomotive engine, who, before crossing any traveled street, road, or highway, omits to cause a bell to ring or steam whistle to sound at the distance of at least eighty rods from the crossing and up to it, is guilty of a misdemeanor.

Cal. Pen. C., § 390*.
Passing through cities or over crossings, §1239.

8202. (4292.) Intoxication of engineers, conductors, operators, etc. Every person who is intoxicated while in charge of a locomotive engine, or while acting as conductor or driver upon any railroad train or car, or as motorman or as conductor of any street car, whether propelled by steam or electricity, or drawn by horses or otherwise, or while acting as train dispatcher or as telegraph operator, and receiving or transmitting dispatches in relation to the movement of trains, is guilty of a misdemeanor.

Cal. Pen. C., § 391*.

8203. (4293.) Placing freight car in rear of train. Every person who, in making up or running railroad trains, places or runs, or causes to be placed or run, any freight car in the rear of passenger cars is guilty of a misdemeanor, and, if loss of life or limb results from such placing or running, is guilty of felony. The term "freight car," as used in this section, does not include a baggage, express, or mail car.

Cal. Pen. C., § 392.

8204. (4294.) Violation of duty by railroad employe. Every engineer, conductor, brakeman, switchtender, or other officer, agent, or servant of any railroad company who is guilty of any wilful violation or omission of his duty as such officer, agent, or servant, whereby human life or safety is endangered, the punishment of which is not otherwise prescribed, is guilty of a misdemeanor.

Cal. Pen. C., § 393.
Negligently causing collision, § 8175.
Assisting person to ride without paying fare, § 8267.
Injuries to railroads, § 8383.

EXPOSING PUBLIC TO CONTAGION.

8205. (4295.) Exposing public to contagion. Every person who wilfully exposes himself or another afflicted with any contagious or infectious disease in any public place or thoroughfare, except in his necessary removal in a manner the least dangerous to the public health, is guilty of a misdemeanor.

Cal. Pen. C., § 394.
Negligently spreading contagion, §§ 2726-2728.
Contagious diseases, quarantine rules, etc., §§ 2743-2755.
Location of pesthouses, §§ 2765, 8188.

RACING ON HIGHWAYS, ETC.

8206. (4296.) Fast riding or driving on highways, etc. Every person operating, running, managing, controlling, or driving any vehicle, conveyance, or car over or upon any public road, street, public square, or school ground, who wilfully causes or permits such vehicle, conveyance, or car to run at a speed sufficient to endanger human life or bodily safety, or to cause the destruction of property, or causes or permits such vehicle, conveyance, or car to run at a dangerous speed in attempting to pass another vehicle, conveyance, or car, or to prevent such other vehicle, conveyance, or car from passing his own; and any person who rides or drives any animal or animals over or upon any public road, street, highway, public square, or school ground at a speed sufficient to endanger human life or bodily safety, or to cause the destruction of property, shall be deemed guilty of a misdemeanor. Am'd '07, p. 6.

Cal. Pen. C., § 396*.

DEATH BY VICIOUS ANIMAL.

8207. (4297.) Mischievous animal causing death. Owner's liability. If the owner of a mischievous animal, knowing its propensities, wilfully suffers it to go at large, or keeps it without ordinary care, and such animal, while so at large, or while not kept with ordinary care, kills any human being who has taken all the precaution which the circumstances permitted, or which a reasonable person would ordinarily take in the same situation, such owner is guilty of a felony.

Cal. Pen. C., § 399.

SALE OF LIQUOR TO INDIANS, ETC.

8208. (4298.) Disposing of liquor to Indians. Every person who sells, exchanges, gives, barters, or disposes of any intoxicating drink to any Indian of the whole or half blood, or to any person living or cohabiting with an Indian woman, shall be guilty of a felony, and upon conviction shall be punished by imprisonment in the state prison for a period of not more than three years, or by a fine of not more than $300, or by both.

Cal. Pen. C., § 397*. Cal. Sup. (1893) p. 1049. Sale of liquor near camp meetings, § 8136. Intoxicating liquors, prohibition act, §§ 3341-3381.

This section, except selling, etc., "to any person living or cohabiting with an Indian woman" shall be guilty of a felony, was declared to have been repealed by chap. 106, Laws '11, in State v. Carman, 44 U. 353; 140 P. 670, and State v. Justice, 44 U. 484; 141 P. 109, and chap. 106, Laws '11, was expressly repealed by chap. 2, Laws '17 (§§ 3341-3381), and query: is the whole section repealed by the latter act?

8209. (4299.) Id. Sale of liquor within ten miles of Indian reservation. Penalty. It shall be unlawful to sell intoxicating liquor within ten miles of an Indian reservation, except in incorporated cities or towns. Any person violating the provisions of this section shall, upon conviction, be fined not more than $300, or imprisoned in the county jail not more than six months, or be both so fined and imprisoned, and all such fines shall be deposited in the county treasury of the county in which the offense is committed.

Repealed '99, p. 71; re-enacted '01, p. 55.

Intoxicating liquors prohibition act, §§ 3341-3381.

DOORS OF PUBLIC BUILDINGS.

8210. (4299x.) Doors to swing outward. All public buildings now in process of construction, or hereafter to be built or constructed, which may or shall be used for churches, schoolhouses, operas, theaters, lecture-rooms, public meetings, town halls, or which may or shall be used for any purpose whereby a collection of people may be assembled together for religious worship, amusement, instruction, or other purpose, shall be so built and constructed that all doors leading from the main hall, or place where said collection of people may be assembled, or from the principal room, which may be used for any of the purposes aforesaid, shall be so swung upon their hinges and constructed that they shall open outward, and that all means of egress for the public from the main hall or principal room and from the buildings, shall be by means of doors which shall open outward from the main hall or building.

'03, p. 121.

8211. (4299x1.) Id. Doors to be changed. All public buildings now built and used for any of the purposes mentioned in § 8210 shall, within one year from the 1st day of July, A. D. 1903, be so changed that their doors and means of egress shall be in conformity with the provisions of § 8210.

'03, p. 121.

8212. (4299x2.) Id. Penalty. Any person or persons who shall fail or refuse to comply with the provisions of §§ 8210, 8211, shall be fined in any sum not less than $100 nor more than $1000. '03, p. 121.

CHAPTER 38.

CRIMES AGAINST PUBLIC PEACE.

8217. (4300.) Disturbing meetings. Every person who, without authority of law, wilfully disturbs or breaks up any assembly or meeting, not unlawful in its character, is guilty of a misdemeanor.

Cal. Pen. C., § 403*. Disturbing religious meetings, § 8131.

8218. (4301.) Riot defined. Any use of force or violence, disturbing the public peace, or any threat to use such force or violence, if accompanied by immediate power of execution, by two or more persons acting together and without authority of law, is a riot.

Cal. Pen. C., § 404.

The terms "force" and "violence" in this section do not necessarily mean the actual use of physical force accompanied with violence. People v. O'Loughlin, 3 U. 133; 1 P. 653.

If, by the assembly, resolution, marching, and demand of defendants and their companions, and the manner and circumstances accompanying the same, well-grounded fear of injury would be raised in the minds of men of ordinary courage by a resistance to such demands, and if well-grounded fears existed in the minds of the residents of the town for the safety of life or property, the same constituted a breach of the public peace by force and violence. Id.

8219. (4302.) Id. Penalty. Every person who participates in any riot is punishable by imprisonment in the state prison not exceeding two years, or by fine not exceeding $1000, or by both.

Cal. Pen. C., § 405*.

8220. (4303.) Rout defined. Whenever two or more persons, assembled and acting together, make any attempt or advance towards the commission of an act which would be a riot if actually committed, such assembly is a rout.

Cal. Pen. C., § 406.

8221. (4304.) Unlawful assembly defined. Whenever two or more persons assemble together to do any unlawful act, and separate without doing or advancing toward it, or do a lawful act in a violent, boisterous or tumultuous manner, such assembly is an unlawful assembly.

Cal. Pen. C., § 407.

8222. (4305.) Penalty for rout or unlawful assembly. Every person who participates in any rout or unlawful assembly is guilty of a misdemeanor.

Cal. Pen. C., § 408.

8223. (4306.) Remaining at riot after warning to disperse. Every person remaining present at the place of any riot, rout, or unlawful assembly, after the same has been lawfully warned to disperse, except public officers and persons assisting them in attempting to disperse the same, is guilty of a misdemeanor.

Cal. Pen. C., § 409. Suppression of riots, etc., §§ 8591-8595.

8224. (4307.) Officer neglecting to suppress riotous assembly. If a magistrate or officer, having notice of an unlawful or riotous assembly mentioned in this chapter, neglects to proceed to the place of assembly, or as near thereto as he can with saftey, and to exercise the authority with which he is invested for suppressing the same and arresting the offenders, he is guilty of a misdemeanor.

Cal. Pen. C., § 410.

8225. (4308.) Prize fighting. Every person who engages in, instigates, encourages, or promotes any ring or prize fight, or any other premeditated fight or contention, without deadly weapons, either as principal, aid, second, umpire, surgeon, or otherwise, is punishable by imprisonment in the state prison not exceeding two years.

Cal. Pen. C., § 412*. Prize fighting on Sunday, § 8128.

8226. (4309.) Id. Witnessing. Every person wilfully present as a spectator at any fight or contention mentioned in the next preceding section is guilty of a misdemeanor.

Cal. Pen. C., § 413.

8227. (4310.) Disturbing the peace. Penalty. Every person who maliciously and wilfully disturbs the peace or quiet of any neighborhood, family, or person by loud or unusual noise, or by discharging firearms, or by tumultu-

ous or offensive conduct, or by threatening, traducing, quarreling, challenging to fight, or fighting, is punishable by a fine not exceeding $200, or by imprisonment in the county jail not exceeding two months, or by both such fine and imprisonment. Am'd '09, p. 60; '13, p. 22.

Cal. Pen. C., § 415*. Keeping disorderly house, § 8149.
Security to keep the peace, §§ 8567-8583.

8228. (4311.) Unlawful assembly refusing to disperse. If two or more persons assemble for the purpose of disturbing the public peace or committing any unlawful act, and do not disperse on being desired or commanded so to do by a public officer, the persons so offending are severally guilty of a misdemeanor.

Cal. Pen. C., § 416.

8229. (4312.) Exhibiting deadly weapon. Every person who, not in necessary self defense, in the presence of two or more persons, draws or exhibits any deadly weapon in an angry and threatening manner, or who, in any manner, unlawfully uses the same in any fight or quarrel, is guilty of a misdemeanor.

Cal. Pen. C., § 417. Having deadly weapon with intent to commit assault, § 8265.
Assault with deadly weapon, § 8070.

8230. Unlawful to carry concealed weapons. It shall be unlawful for any person, except a peace officer, without the written consent of a peace officer, to carry any slingshot, brass knuckles, revolver, dagger, stilletto, or other concealed deadly weapon. Any person found guilty of violating any provision of this section shall be deemed guilty of a misdemeanor. '09, p. 16.

8231. (4313.) Forcible entry or detainer. Every person using, or procuring, encouraging, or assisting another to use any force or violence in entering upon or detaining any lands or other possessions of another, except in the cases and in the manner allowed by law, is guilty of a misdemeanor.

Cal. Pen. C., § 418.
Forcible entry and detainer, civil procedure, §§ 7313-7327.

8232. (4314.) Returning to lands after removal by lawful process. Every person who has been removed from any lands by process of law, or who has removed from any lands pursuant to the lawful adjudication or direction of any court, tribunal, or officer, and who afterwards unlawfully returns to settle, reside upon, or take possession of such lands, is guilty of a misdemeanor.

Cal. Pen. C., § 419. And is guilty of contempt, § 7059.

CHAPTER 39.

CRIMES AGAINST PUBLIC PROPERTY.

8235. (4315.) Misusing public money or falsifying public accounts. Every officer of this state, or of any county, city, town, precinct, or district of this state, and every other person charged with the receipt, safe keeping, transfer, or disbursement of public money, who either:

1. Without authority of law appropriates the same or any portion thereof to his own use, or to the use of another; or,
2. Loans the same or any portion thereof without authority of law; or,
3. Fails to keep the same in his possession until disbursed or paid out by authority of law; or,
4. Unlawfully deposits the same or any portion thereof in any bank, or with any banker or other person; or,
5. Knowingly keeps any false account, or makes any false entry or erasure in any account of or relating to the same; or,
6. Fraudulently alters, falsifies, conceals, destroys, or obliterates any such account; or,
7. Wilfully refuses or omits to pay over, on demand, any public moneys in his hands, upon the presentation of a draft, order, or warrant drawn upon such moneys by competent authority; or,

8. Wilfully omits to transfer the same, when such transfer is required by law; or,

9. Wilfully omits or refuses to pay over, to any officer or person authorized by law to receive the same, any money received by him under any duty imposed by law so to pay over the same,—is guilty of a felony.

Cal. Pen. C., § 424*.
Mutilating or destroying public records, §§ 7933, 7976, 7977, 8271.
Forgery defined, § 8270.
Larceny of public records, § 7976.

Various objections to an indictment hereunder discussed and overruled.
People v. Rogerson, 4 U. 231; 7 P. 255, 410.
Felonious intent is an essential element of an offense hereunder.
State v. Blue, 17 U. 175; 53 P. 978.

8236. (4316.) Failure to keep and pay over public money. Every officer charged with the receipt, safe keeping, or disbursement of public money who neglects or fails to keep and pay over the same, in the manner prescribed by law, is guilty of a felony.

Cal. Pen. C., § 425.

8237. (4317.) Making profit out of public money, etc. The making of profit out of public money, or using the same for any purpose not authorized by law, by any public officer, shall be deemed a felony, and, upon conviction thereof, any such officer, in addition to the punishment provided by law, shall be disqualified to hold public office.

Prohibited by Con. art. 13, sec. 8.
Felony involving misconduct in office, disqualification to hold office, §§ 7906, 7961.

8238. (4318.) "Public money" defined. The phrase "public money," as used in the three preceding sections, includes all bonds and evidences of indebtedness and all money belonging to the state, or to any town, city, county, precinct, or district therein, and all money, bonds, and evidences of indebtedness received or held by state, county, district, city, town, or precinct officers in their official capacity.

Cal. Pen. C., § 426.

8239. (4319.) Failing to pay over fines or fees. If any public officer who receives any fine, forfeiture, or fee refuses or neglects to pay over the same within the time prescribed by law, he is guilty of a misdemeanor.

Cal. Pen. C., § 427*
Charging or receiving illegal fees, § 2589.
Failure to keep fee book, etc., a misdemeanor § 2587.

8240. (4320.) Obstructing collection of revenue. Every person who wilfully obstructs or hinders any public officer from collecting any revenue, taxes, or other sums of money in which the people of this state are interested, and which such officer is by law empowered to collect, is guilty of a misdemeanor.

Cal. Pen. C., § 428.
Interfering with or obstructing officer, §§ 7927, 8002.

8241. (4321.) Refusing list or giving false information to assessor. Every person who unlawfully refuses, upon demand, to give to any district or county assessor a list of his property subject to taxation, or to swear to such list, or who gives a false name, or fraudulently refuses to give his true name to any assessor, when demanded by such assessor in the discharge of his official duties, is guilty of a misdemeanor.

Cal. Pen. C., § 429*.

8242. (4322.) Using false tax or license receipt. Failing to give receipt. Every person who uses or gives any receipt except that prescribed by law, as evidence of the payment of any poll tax, road tax, or license of any kind, or who receives payment of such tax or license without delivering the receipt prescribed by law, is guilty of a misdemeanor.

Cal. Pen. C., § 431*.
Poll tax, §§ 4465-4470.

8243. (4323.) Refusing names of employes to tax collector, etc. Every person who, when requested by the assessor or collector of taxes or licenses, refuses to give to such assessor or collector the name and residence of each man in his employment, or to give such assessor or collector access to the building or place where such men are employed, is guilty of a misdemeanor.

Cal. Pen. C., § 434*.

8244. (4324.) Doing business without license. Every person who com-

mences or carries on any business, trade, profession, or calling, for the transaction or carrying on of which a license is required by any law of this state, or by any county, city, or town regulation, without taking out the license required by law or by the county regulation, is guilty of a misdemeanor.

Cal. Pen. C., § 435*.

8245. (4325.) Officer discounting warrants. No state, county, city, town, or district officer shall, either directly or indirectly, contract for or purchase any warrant or order issued by the state, county, city, town, or district of which he is an officer, at any discount whatever upon the sum due on such warrant or order, and if any state, county, city, town, or district officer shall so contract for or purchase any such order or warrant, he shall be guilty of a misdemeanor.

CHAPTER 40.

ARSON.

8248. (4326.) Arson defined. Arson is the wilful and malicious burning of a building with intent to destroy it.

Cal. Pen. C., § 447.

8249. (4327.) "Building" defined. Any house, edifice, structure, vessel, or other erection, railroad car, capable of affording shelter for human beings or for storage of goods, or appurtenant to or connected with any erection so adapted, is a "building" within the meaning of this chapter.

Am'd '07, p. 83.

Cal. Pen. C., § 448*.
Agreement to commit arson a conspiracy, § 8020.
Destruction of insured property, §§ 8360, 8361.
Burning property not the subject of arson, §§ 8389, 8395.

8250. (4328.) "Inhabited building" defined. Any building which has usually been occupied by any person lodging therein at night is an "inhabited building" within the meaning of this chapter.

Cal. Pen. C., § 449.

8251. (4329.) "Night time" defined. The phrase "night time," as used in this chapter, means the period between sunset and sunrise.

Cal. Pen. C., § 450.

8252. (4330.) "Burning" defined. To constitute burning, within the meaning of this chapter, it is not necessary that the building set on fire shall have been destroyed. It is sufficient that fire is applied so as to take effect upon any part of the substance of the building.

Cal. Pen. C., § 451.

8253. (4331.) Ownership or possession as affecting arson. To constitute arson it is not necessary that a person other than the accused should have had ownership in the building set on fire. It is sufficient that at the time of the burning another person was rightfully in possession of, or was actually occupying such building or any part thereof.

Cal. Pen. C., § 452.

8254. (4332.) Degrees of arson. Arson is divided into two degrees. Maliciously burning in the night time an inhabited building in which there is, at the time, some human being, is arson in the first degree; all other kinds of arson are of the second degree.

Cal. Pen. C., §§ 453, 454.

8255. (4333.) Penalty for arson. Arson is punishable by imprisonment in the state prison as follows:

1. Arson in the first degree, for a term not less than two years nor more than fifteen years;

2. Arson in the second degree, for a term not less than one year nor more than ten years.

Cal. Pen. C., § 455*.

CHAPTER 41.

BURGLARY AND HOUSEBREAKING.

8257. (4334.) Burglary in first degree. Every person who, in the night time, forcibly breaks and enters, or without force enters an open door, window, or other aperture of any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse, or other building, or any tent, vessel, water craft, or railroad car, with intent to commit larceny or any felony by the use of nitro-glycerine, dynamite, gunpowder, or any other explosive, is guilty of burglary in the first degree. When in a prosecution for burglary in the first degree the question as to whether or not nitro-glycerine, dynamite, gunpowder, or any other explosive was used or intended to be used by the defendant in the commission of the crime cannot be definitely arrived at by the jury, a verdict of guilty of burglary in the second degree, as defined in § 8259, may be found; *provided,* the other elements of the crime of burglary in the second degree, as defined in § 8259, have been proved.

Am'd '05, p. 16; '07, p. 50.

Burglarious tools, § 8264.
Information or indictment may also contain a count for larceny and a count for housebreaking, § 8834.
Agreement to commit burglary a conspiracy, § 8020.
Jurisdiction where property is taken to another county, § 8656.

8258. (4334x.) Id. Penalty. Burglary in the first degree is punishable by imprisonment in the state prison for a term not less than twenty-five years nor more than forty years. '07, p. 51.

Evidence held not sufficient to connect accused with the burglary.
State v. Karas, 43 U. 506; 136 P. 788.

8259. (4334x1.) Burglary in second degree. Every person who, in the night time, forcibly breaks and enters, or without force enters an open door, window, or other aperture of any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse, or other building, or any tent, vessel, water craft, or railroad car, with intent to commit larceny or any felony, is guilty of burglary in the second degree. Where, in a prosecution for burglary in the second degree, the question as to whether the crime has been committed in the night time or in the day time cannot be definitely arrived at by the jury, a verdict of guilty of burglary in the third degree, as defined in § 8261, may be found; *provided,* the other elements of the crime of burglary in the third degree, as defined in § 8261, have been proved.

'07, p. 51.

Cal. Pen. C., § 459*.
Where one, learning of a plot to burglarize his property, permits officers to occupy the premises in order to make arrests should the crime be committed, and makes no effort to prevent the entry, but does not offer any encouragement or inducement, he does not thereby consent and the entry is burglarious.
People v. Morton, 4 U. 407; 11 P. 512.
Evidence examined and held sufficient to sustain conviction for burglary.
Id.
A burglary by entering a house through a window on the second floor, with intent to steal the goods of H., is not the same offense or part of the same transaction as an entering from the outside of a room on the first floor, and the committing of a robbery on W., although it was the same house, the same day, with just enough time intervening between the two acts to permit defendant to pass from the upper story to the lower one.
People v. Kerm, 8 U. 268; 30 P. 988.
Burglary, which under this section and section 8263, must be committed between sunset and sunrise, is not proven by evidence that goods were stolen from the building between 9:30 p. m. and 6:30 a. m., the sun rising at 4:38 a. m.
State v. Miller, 24 U. 312; 67 P. 790.
Under this section and section 8263, a larceny, to constitute burglary, must be committed in the night time, and affirmative proof that it was so committed must be adduced; but such proof need not be direct, but may be circumstantial, in character.
State v. Richards, 29 U. 310; 81 P. 142.
Evidence examined and held insufficient to sustain a conviction for burglary.
State v. Hutchings, 30 U. 319; 84 P. 893.
See People v. Hart, 10 U. 204; 37 P. 330.
Information not stating value upheld. An information charging the breaking and entering a building at night with intent to steal goods, without stating their value, sufficiently charges a burglary in the first degree.
State v. Hows, 31 U. 168; 87 P. 163.

8260. (4335.) Id. Penalty. Burglary in the second degree is punishable by imprisonment in the state prison for a term not less than one year nor more than twenty years. Am'd '05, p. 16; '07, p. 51.

Cal. Pen. C., § 461*.

8261. (4336.) Burglary in third degree. Every person who, in the day time, enters any dwelling house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse, or other building, or any tent, vessel, water

craft, or railroad car, with intent to steal or to commit any felony whatever therein, is guilty of burglary in the third degree. Am'd '05 p. 16; '07, p. 51.

8262. (4337.) Id. Penalty. Burglary in the third degree is punishable by imprisonment in the state prison for a term not less than six months nor more than three years. Am'd '05, p. 17; '07, p. 51.

8263. (4338.) "Night time" defined. The phrase "night time," as used in §§ 8257, 8259, means the period of time between sunset and sunrise. Am'd '05, p. 16; '07, p. 51.

Cal. Pen. C., § 463*.

CHAPTER 42.

BURGLARIOUS TOOLS AND DEADLY WEAPONS.

8264. (4339.) Having or making burglarious tools. Every person having upon him or in his possession a picklock, crow, key, bit, or other instrument or tool with intent feloniously to break into or enter any building; or who shall knowingly make or alter, or shall attempt to make or alter, any key or other instrument above named so that the same will fit or open the lock of a building, without being requested so to do by some person having the right to open the same, or who shall make, alter, or repair any instrument or thing, knowing or having reason to believe that it is intended to be used in committing a misdemeanor or felony, is guilty of a misdemeanor. Any of the structures mentioned in § 8257 shall be deemed to be a building within the meaning of this section.

Cal. Pen. C., § 466*. Mont. Pen. C., § 830.

8265. (4340.) Having deadly weapon with intent to assault. Every person having upon him any deadly weapon, with intent to assault another, is guilty of a misdemeanor.

Cal. Pen. C., § 467*. Mont. Pen. C., § 831.
Assault with deadly weapon, § 8070.
Exhibiting deadly weapon angrily, § 8229.
Attempt to commit crime, § 8527.

CHAPTER 43.

ENTERING RAILROAD CARS.

8266. (4341.) Unlawfully entering car. Every person who clandestinely enters into or upon any railroad car, for the purpose and with the intention of riding or being transported thereon, or who, having entered into or upon any railroad car, rides over any railroad line or portion thereof in this state, without the knowledge and consent of the company or person owning or operating such car or railroad, and with the intention to defraud such company or person of the fare or compensation for such transportation, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by imprisonment in the county jail not exceeding fifty days, or by fine in any sum less than $50, or by both.

8267. (4342.) Id. Employes aiding in. Every person, being at the time a servant or employe of any railroad company, who aids, abets, assists, counsels, advises, or encourages another person to enter into or ride upon any railroad car for the purpose, with the intention, and in a manner specified in the preceding section, shall be guilty of a misdemeanor.

Negligence, etc., of railroad employes, §§ 8201-8204. Injuries to railroads, § 8383.

CHAPTER 44.

FORGING AND COUNTERFEITING.

8270. (4343.) Forgery defined. Every person who, with intent to defraud another, falsely makes, alters, forges, or counterfeits any charter, letters patent, deed, lease, indenture, writing obligatory, will, testament, codicil, annuity, bond, covenant, bank bill or note, money order, check, draft, bill of exchange, contract, promissory note, due bill for the payment of money or property, receipt for money or property, passage ticket, power of attorney; or any certificate of any share, right, or interest in the stock of any corporation or association; or any auditor's warrant for the payment of money at the treasury; or any state, county, city, or town order or warrant; or request for the payment of money, or the delivery of goods or chattels of any kind, or for the delivery of any instrument of writing or acquittance, release, or receipt for money or goods; or any acquittance, release, or discharge for any debt, account, suit, action, demand, or other thing, real or personal; or any transfer or assurance of money, certificates of shares of stock, goods, chattels, or other property whatever; or any letter of attorney or other power to receive money, or to receive or transfer certificates of shares of stock or annuities; or to let, lease, dispose of, alien, or convey any goods, chattels, lands, or tenements, or other estate, real or personal; or any acceptance or indorsement of any bill of exchange, promissory note, draft, order or assignment of any bond, writing obligatory, promissory note for money or other property; or any letter of service, clearance card, or union labor card; or time checks, or other evidence of indebtedness; or any card of any lodge of any benevolent, charitable, or fraternal order, or any post of the Grand Army of the Republic or commandery of the Royal Legion; or counterfeits or forges the seal or handwriting of another, or any official certificate; or utters, publishes, passes, or attempts to pass as true or genuine any of the above-named false, altered, forged, or counterfeited matters, as above specified and described, knowing the same to be false, altered, forged, or counterfeited, with intent to prejudice, damage, or defraud any person; or who, with intent to defraud, alters, corrupts, or falsifies any record of any will, codicil, conveyance, or other instrument, the record of which is by law evidence; or any record of any judgment of a court, or the return of any officer to any process of any court, is guilty of forgery. Am'd '05, p. 2.

Cal. Pen. C., § 470*.
Penalty for forgery, § 8273.
Indictment or information may contain a count for uttering a forged instrument knowing it to be a forgery, § 8834.
Expert testimony to prove forgery, etc., § 8987.
Allegation when instrument withheld or destroyed, § 8847.
Altering or falsifying public records, §§ 7933, 7976, 7977, 8235.
Falsifying evidence, §§ 7991-7997.
Proof of incorporation of bank or company, § 8987.

Person whose signature is alleged to be forged is a competent but not indespensable witness. A clerk or other person acquainted with his handwriting is competent to prove that the signature to the note is a forgery.
People v. Mahon, 1 U. 205.
The allegation that a company was a corporation, in an information charging that the defendant, knowing the instrument to be forged, and with intent to damage a certain company, incorporated and organized under certain laws, uttered and passed as true to the bank, a writing purporting to be a check, is a material allegation.
State v. Brown, 33 U. 109; 93 P. 52.

8271. (4344.) Altering record. Every person who, with intent to defraud another, makes, forges, or alters any entry in any book of record, or any instrument purporting to be any record or return specified in the preceding section, is guilty of forgery.

Cal. Pen. C., § 471.
Falsifying public accounts, § 8235.
Mutilating or destroying public records, §§ 7933, 7976, 7977.

8272. (4345.) Counterfeiting seal. Every person who, with intent to defraud another, forges or counterfeits the seal of this state, the seal of any public officer authorized by law, the seal of any court of record, or the seal of any corporation, or any other public seal authorized or recognized by the laws of this state or of any state, government, or country, or who falsely makes, forges, or counterfeits any impression purporting to be an impression of any such seal, or who has in his possession any such counterfeited seal or

impression thereof, knowing it to be counterfeited, and wilfully conceals the same, is guilty of forgery.

Cal. Pen. C., § 472.

8273. (4346.) Penalty for forgery. Forgery is punishable by imprisonment in the state prison for a term not less than one nor more than twenty years.

Cal. Pen. C., § 473*.

8274. (4347.) False or forged messages by telegraph or telephone. Penalty. Every person who knowingly and wilfully sends by telegraph or telephone to any person a false or forged message purporting to be from such telegraph or telephone office, or from any other person, or who wilfully delivers or causes to be delivered to any person any such message falsely purporting to have been received by telegraph or telephone, or who furnishes, or conspires to furnish, or causes to be furnished, to any agent, operator, or employe to be sent by telegraph or telephone, or to be delivered, any such message, knowing the same to be false or forged, with the intent to deceive, injure, or defraud another, is punishable by imprisonment in the state prison not exceeding five years, or in the county jail not exceeding one year, or by fine not exceeding $1000, or by both such fine and imprisonment. Am'd '07, p. 24.

Cal. Pen. C., § 474*.
Notices, checks, instruments, etc., sent by telegraph or telephone, §§ 6117-6119.
Summons, writs, etc., may be sent by telegraph or telephone, § 7032.
Altering or disclosing contents of telegraphic or telephonic messages, §§ 8403-8405.

8275. (4348.) Having or using forged note or bill. Every person who has in his possession, or receives from another person, any forged promissory note or bank bill, for the payment of money or property, with the intention to pass the same, or permit, cause, or procure the same to be uttered or passed, with the intention to defraud any person, knowing the same to be forged or counterfeited, or has or keeps in his possession any blank or unfinished note or bank bill made in the form or similitude of any promissory note or bill for payment of money or property, made to be issued by any incorporated bank or banking company, with intention to fill up or complete such blank and unfinished note or bill, or to permit, or cause, or procure the same to be filled up or completed in order to utter or pass the same, or to permit, or cause, or procure the same to be uttered or passed, or to defraud any person, is punishable by imprisonment in the state prison for not less than one nor more than ten years.

Cal. Pen. C., § 475*.

8276. (4349.) Making or using fictitious bill, check, etc. Every person who makes, passes, utters, or publishes, with intention to defraud any other person, or who, with the like intention, attempts to pass, utter, or publish, or who has in his possession, with like intent to utter, pass, or publish, any fictitious bill, note, or check, purporting to be the bill, note, check, or other instrument in writing for the payment of money or property of some bank, corporation, co-partnership, or individual when in fact there is no such bank, corporation, co-partnership, or individual in existence, knowing the bill, note, check, or instrument in writing to be fictitious, is punishable by imprisonment in the state prison for not less than one nor more than ten years.

Cal. Pen. C., § 476*.

8277. (4350.) Counterfeiting coin or precious metal. Every person who counterfeits any of the species of gold or silver coin current in this state, or any kind or species of gold dust, gold or silver bullion, or bars, lumps, pieces, or nuggets, or who sells, passes, or gives in payment such counterfeited coin, dust, bullion, bars, lumps, pieces, or nuggets, or permits, causes, or procures the same to be sold, uttered, or passed, with intention to defraud any person, knowing the same to be counterfeited, is guilty of counterfeiting.

Cal. Pen. C., § 477.

8278. (4351.) Penalty for counterfeiting. Counterfeiting is punishable by imprisonment in the state prison for not less than one nor more than ten years.

Cal. Pen. C., § 478*.

8279. (4352.) Possession of counterfeit coin or bullion. Every person who has in his possession, or receives from any other person, any counterfeit gold or silver coin of the species current in this state, or any counterfeit gold dust, gold or silver bullion, or bars, lumps, pieces, or nuggets, with the intention to sell, utter, put off, or pass the same, or permits, causes, or procures the same to be sold, uttered, or passed, with intention to defraud any person, knowing the same to be counterfeit, is punishable by imprisonment in the state prison for a term not less than one nor more than ten years.

Cal. Pen. C., § 479*.

8280. (4353.) Possession of dies for counterfeiting. Every person who makes, or knowingly has in his possession, any die, plate, or any apparatus, paper, metal, machine, or other thing whatever, made use of in counterfeiting coin current in this state, or in counterfeiting gold dust, gold or silver bars, bullion, lumps, pieces, or nuggets, or in counterfeiting bank notes or bills, is punishable by imprisonment in the state prison for a term not less than one nor more than ten years; and all such dies, plates, apparatus, paper, metal, or machines, intended for the purpose aforesaid, must be destroyed.

Cal. Pen. C., § 480*.

8281. (4354.) Using note, check, etc., as money. Any person who issues or circulates any note, check, memorandum, token, or other obligation for use as money in lieu of lawful money or other lawful medium of exchange shall be deemed guilty of a misdemeanor, and shall, on conviction thereof in any court having jurisdiction, be punished for each offense by fine not exceeding $1000, to be paid into the state treasury, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment.

Cal. Pen. C., § 648*.

CHAPTER 45.

LARCENY.

8285. (4355.) Larceny defined. Larceny is the felonious stealing, taking, carrying, leading, or driving away the personal property of another. Possession of property recently stolen, when the party in possession fails to make a satisfactory explanation, shall be deemed prima facie evidence of guilt.

Am'd '05, p. 70.

Cal. Pen. C., § 484*.

Information or indictment may contain a count for obtaining money by false pretenses, a count for embezzlement, and a count for receiving or buying stolen property knowing it to be stolen, § 8834.

INDICTMENT; DESCRIPTION:

Indictment for larceny of two "horses" is sufficient description of property stolen. Not necessary to use technically descriptive words designating sex or artificial character of animal.

People v. Sensabaugh, 2 U. 473.

Proof that one animal was a gelding, one a mare, supports an indictment for stealing two horses.

People v. Butler, 2 U. 504.

In prosecution for larceny, indictment charging the property stolen belonged to the husband is supported by proof that it was money furnished by him to his wife, and in her possession.

People v. McCarty, 5 U. 280; 17 P. 734.

The alleged larceny of several distinct articles may be joined in the same count, although such several articles belonged to different owners, where the time and the taking of each are the same.

People v. Lyman, 2 U. 30.

Where many articles are stolen at one time, there is but one larceny, whether the ownership is in one person or many.

State v. Mickel, 23 U. 507; 65 P. 484.

State v. Spencer, 15 U. 149; 49 P. 302.

Evidence that a railroad was in possession of goods, transporting them as a common carrier, was sufficient to show title in it.

State v. Reese, 44 U. 256; 140 P. 126.

INTENT:

Union of act and intent to constitute a crime, § 7908, and note.

In larceny, the intent to steal must exist at the time of the taking, and where the defendant took the property innocently, under a mistake of facts, and thereafter converted it to his use without a felonious intent, he is not guilty of larceny.

People v. Miller, 4 U. 410; 11 P. 514.

Where convict took a horse to assist escape, it was larceny.

People v. Flynn, 7 U. 378; 26 P. 1114.

If by means of fraud or trick the owner is induced to part with the possession of personal property only, still meaning to retain the right of property, and the person using the fraud has at the time the intention of converting the property to his own use without the consent of the owner, the crime is larceny. But if the owner intended to part with the title as well as possession, there is no larceny.

People v. Berlin, 9 U. 383; 35 P. 498.

It is not necessary to prove that defendant intended to convert the sheep to his own use. It is sufficient that he took the sheep against the will of the owners, with the intention of permanently depriving them of their property; and the fact that he killed many, wound-

ed others, and never returned the rest was sufficient proof of such intention.
State v. McKee, 17 U. 370; 53 P. 733.
Obtaining money under pretext of betting at cards, where everything is fixed so that only one can win, is larceny.
State v. Donaldson, 35 U. 96; 99 P. 447.

PROOF:

Evidence that, at or about the time of the alleged taking, a third person had offered for sale stock similar to that which defendant was accused of stealing, and that defendant had stated that he had purchased such stock of such third person is proper as tending to disprove felonious taking.
Territory v. Woolsey, 3 U. 470; 24 P. 765.
The evidence examined and held not to justify a verdict of guilty, and therefore should be set aside.
People v. Swasey, 6 U. 93; 21 P. 400.
State v. Nelson, 39 U. 238; 117 P. 71.
State v. Morrell, 39 U. 498; 118 P. 215.
Evidence held insufficient to show that accused knew, or had reason to believe when he branded the calf, that it was not his property.
State v. Chynoweth, 41 U. 354; 126 P. 302.
Evidence held insufficient to establish grand larceny of horses.
State v. Gordon, 28 U. 15; 76 P. 882.
Evidence held sufficient to support a verdict of guilty of larceny.
People v. Wright, 11 U. 41; 39 P. 477.
State v. Overson, 30 U. 27; 83 P. 577.
Larceny of a heifer.
State v. Frisby, 49 U. 227; 162 P. 616.
Where C. and M. went to a store during the night and C. remained outside and M. entered by the back door, and was arrested near the safe, and the drill purchased by C. that day was found near M. when arrested; held, that there was an attempt to commit larceny on the part of C. and M., and that the entry was burglarious.
People v. Morton, 4 U. 407; 11 P. 512.
"Prima facie" means presumptive evidence; the term not meaning that unless rebutted by other evidence or discredited by the circumstances, the proof becomes conclusive as to guilt.
State v. Potello, 40 U. 56; 119 P. 1023.
In a prosecution for larceny of a cow, evidence by a butcher, that shortly after the date of the larceny he purchased from the defendant a slaughtered cow, is admissible.
State v. Tidwell, 44 U. 248; 139 P. 863.
Defendant, being charged with larceny of a cow, and the hide of the cow being found on his premises, evidence of the finding of other hides on his premises is inadmissible in the absence of evidence that the animals from which the other hides had been taken had been stolen.
State v. Bowen, 43 U. 111; 134 P. 623.

POSSESSION OF STOLEN PROPERTY:

The provision concerning possession is constitutional.
State v. Converse, 40 U. 70; 119 P. 1030.
State v. Potello, 40 U. 56; 119 P. 1023.
The possession of personal property recently stolen, and the possession of which is not explained is a circumstance which the jury can consider in connection with other circumstances indicative of guilt, in arriving at their verdict.
People v. Garns, 2 U. 260.
The recent possession of stolen property seems not in this western country to be sufficient to warrant a conviction, or, at any rate, if the identification of the property was not positive, the rule of recent possession should not apply.
People v. Swasey, 6 U. 93; 21 P. 400.
If a reasonable explanation of the possession of alleged stolen property is made, and the explanation is not challenged, the defendant is entitled to an acquittal.
Id.
The defendant pointed out a certain animal in the pound to be poundkeeper and sold it to him as his own; the keeper took the animal out of the pound and turned it upon the range. Subsequently it was learned that the defendant never owned the animal and had never had it in his possession; held, that there was no trespass nor asportation, and hence no larceny.
People v. Gillis, 6 U. 84; 21 P. 404.
Possession of stolen property, if unexplained, may constitute prima facie evidence of guilt, but this presumption weakens with time; but when possession is accompanied with denials, efforts to conceal, contradictory statements, etc., it may raise a strong presumption of guilt.
People v. Chadwick, 7 U. 134; 25 P. 737.
The fact that stolen property was found in the possession of the defendant six hours after it had been stolen, even though no attempt was made to explain such possession, is not sufficient evidence to warrant a conviction.
People v. Hart, 10 U. 204; 37 P. 330.
See People v. Kerm, 8 U. 266; 30 P. 998.
But conviction sustained largely upon evidence of recent possession of stolen property.
People v. Wright, 11 U. 41; 39 P. 477.
State v. Overson, 30 U. 22; 83 P. 577.
Where the accused produces a bill of sale for the cattle, duly witnessed, and the witnesses testify as to the execution thereof, also corroborate defendant with reference to other statements, and his explanation of his possession of the cattle, not denied nor the witness impeached, held this did not entirely overcome prima facie evidence of guilt established by recent possession, and required the submission of the question to the jury.
State v. Gurr, 40 U. 162; 120 P. 209.
It is improper to charge that the possession of recently stolen property shall be deemed prima facie evidence of guilt when the party in the possession fails to make a satisfactory explanation; the burden remains with the state to prove defendant's guilt beyond a reasonable doubt.
State v. Barretta, 47 U. 479; 155 P. 343.
Where it was proven that the hide in defendant's possession was that of a stolen cow, and that the defendant stated that it was the hide of a cow belonging to him, there was sufficient evidence of the possession of a cow, within this section.
State v. Bowen, 45 U. 130; 143 P. 134.
The jury is to determine whether possession is recent or too remote.
Id.
The state cannot rely on accused's recent possession of the property, if the only evidence of the larceny is afforded by the defendant's evidence, and that shows that the larceny was committed by another.
State v. Potello, 40 U. 56; 119 P. 1023.

8286. (4356.) Larceny from mining claim, etc. Every person who shall feloniously steal, take, and carry away, or attempt to take, steal, and carry away, from any mining claim, tunnel, sluice, under-current, riffle box, or sulphuret machine, any gold dust, amalgam, or quicksilver, the property of another, shall be deemed guilty of larceny.

Cal. Pen. C., § 495s*.
Wrongful taking of ores, arrest, damages, §3938.

8287. (4357.) Larceny of lost property. Every person who finds lost property under circumstances which give him knowledge of a means of inquiry as to the true owner, and who appropriates such property to his own use, or to the use of another person not entitled thereto, without first making

reasonable and just efforts to find the owner and restore the property to him, is guilty of larceny.

Cal. Pen. C., § 485.

8288. (4358.) Degrees of larceny. Larceny is divided into two degrees, the first of which is termed grand larceny; the second, petit larceny.

Cal. Pen. C., § 486.

When statute does not define degrees of larceny, jury need not find value of property stolen.

People v. Gough, 2 U. 70.

8289. (4359.) Grand larceny defined. Grand larceny is committed in either of the following cases:

1. When the property taken is of a value exceeding $50;
2. When the property taken is from the person of another;
3. When the property taken is a horse, mare, colt, gelding, cow, heifer, steer, ox, bull, calf, sheep, mule, jack, or jenny. Am'd '99, p. 50.

Cal. Pen. C., § 487*.

Under R. S. 1898, sub. 3 of above section was omitted. The next legislature re-enacted it.

Decision pointing out the distinction between § 4643 and § 2209, C. L. 1888.

In re Gannett, 11 U. 283; 39 P. 496.

A phonographic report of testimony taken upon a trial and having no intrinsic value except for such report may be the subject of larceny as personal property.

People v. McGrath, 5 U. 525; 17 P. 116.

Such phonographic report, having no market value, its value to the person who can use the testimony is the proper standard of value.

Id.

Although section 4643, C. L. 1888, was repealed by section 4359, R. S. 1898, its provisions were continued in force by § 5835, as to all offenses committed before the revised statutes went into effect, and all penalties incurred thereunder may be enforced the same as if the revised statutes had never taken effect.

State v. Woolsey, 19 U. 486; 57 P. 426.

An indictment charging the defendants with having stolen twenty mares and three horses, the property of different owners, with the names of the several owners, and specifying the number of animals belonging to each owner, and stating that "all then and there being found, unlawfully, wilfully, and feloniously did steal, take, and drive away," charges one offense, and states the facts with sufficient certainly to notify the defendants as to what they would be called on to answer.

State v. Mickel, 23 U. 507; 65 P. 484.

Under provisions of this section, it is not error in prosecution for grand larceny to instruct that the value of the stolen animal is immaterial.

State v. Bates, 25 U. 1; 69 P. 70.

Where accused was employed to solicit advertising contracts, and within about thirty-eight days collected $235 from various persons, and appropriated it to his own use, but $48 was the largest amount collected from one person at one time the taking of $235 was one embezzlement, and is grand larceny.

State v. Gibson, 37 U. 330; 108 P. 349.

8290. (4360.) Petit larceny defined. Larceny in other cases is petit larceny.

Cal. Pen. C., § 488.

8291. (4361.) Penalty for grand larceny. Grand larceny is punishable by imprisonment in the state prison for a term not less than one year nor more than ten years, and by a fine of not less than $50 nor more than $1000, or by imprisonment only. Am'd '03, p. 4.

Cal. Pen. C., § 489*.

8292. (4362.) Penalty for petit larceny. Petit larceny is punishable by a fine in any sum less than $300, or by imprisonment in the county jail not exceeding six months, or by both.

Cal. Pen. C., § 490*.

8293. (4363.) Larceny of written instrument. Value. If the thing stolen consists of any evidence of debt, or other written instrument, the amount of money due thereupon, or secured to be paid thereby, and remaining unsatisfied, or which in any contingency might be collected thereon, or the value of the property the title to which is shown thereby, or the sum which might be recovered in the absence thereof, is the value of the thing stolen.

Cal. Pen. C., § 492.

8294. (4364.) Larceny of passage ticket. Value. If the thing stolen is any ticket or other paper or writing entitling or purporting to entitle the holder or proprietor thereof to a passage upon any railroad, or vessel, or other public conveyance, the price at which tickets entitling a person to a like passage are usually sold by the proprietors of such conveyance is the value of such ticket, paper, or writing.

Cal. Pen. C., § 493.

8295. (4365.) Provisions apply to undelivered instrument. All the provisions of this chapter apply where the property taken is an instrument for the payment of money, evidence of debt, public security, or passage ticket, completed and ready to be issued or delivered, although the same has never

been issued or delivered by the makers thereof to any person as a purchaser or owner.

Cal. Pen. C., § 494.
Indictment need not recite denomination of coin, number of security, etc., § 8849.

8296. (4366.) Provisions apply to thing severed from realty. The provisions of this chapter apply where the thing taken is any fixture or part of the realty, and is severed at the time of the taking, in the same manner as if the thing had been severed by another person at some previous time.

Cal. Pen. C., § 495. See malicious mischief, § 8390.

8297. (4367.) Receiving stolen property. Every person who, for his own gain, or to prevent the owner from again possessing his property, buys or receives any personal property exceeding $50 in value, knowing the same to have been stolen, is punishable by imprisonment in the state prison not exceeding five years; if the value of the property so bought or received be $50 or less in value, he is guilty of a misdemeanor.

Cal. Pen. C., § 496*.
Indictment hereunder describing offense in language of statute is sufficient, common law strictness not required.
People v. Gough, 2 U. 70.

8298. (4368.) Bringing stolen property into the state. Every person who, in another state or country, steals the property of another, or receives such property knowing it to have been stolen, and brings the same into this state may be convicted and punished in the same manner as if such larceny or receiving had been committed in this state.

Cal. Pen C., § 497.
Persons liable to punishment, § 7916.
Jurisdiction in such case, § 8660.
Jurisdiction where property stolen in one county is brought into another, § 8656.

8299. (4369.) Butcher failing to keep record. Every licensed butcher who fails to faithfully record and keep subject to public inspection, in a book kept by him for that purpose, a true description of the age, size, color, earmarks, and brands of all cattle killed by him, together with the name of the person from whom received, and the date of the killing of the same, upon conviction thereof, is punishable by a fine in any sum not exceeding $100 for each offense.

8300. (4370.) Larceny of gas. Every person who, with intent to injure or defraud, makes or causes to be made any pipe, tube, or other instrument, and connects the same, or causes it to be connected, with any main, service-pipe, or other pipe used for conducting or supplying any artificial or natural gas, in such manner as to supply such gas to any burner or orifice, by or at which such gas is consumed, around or without passing through the meter provided for the measuring and registering the quantity consumed, or in any other manner so as to evade payment therefor, and every person who, with like intent, injures or alters any gas meter, or obstructs its action, is guilty of a misdemeanor.

Cal. Pen. C., § 498*. Injury to gas main, § 8408.

8301. (4371.) Larceny of electricity. Every person who, with intent to injure or defraud, makes or causes to be made any connection by wire or other instrument with any cable or wire used for conducting or supplying electricity for power, lighting, heating, or other purpose to any burner or orifice by or at which such electricity is used or consumed for lighting, heating, power, or any other purpose, around or without passing through the meter provided for measuring and registering the quantity used or consumed, or in any other manner so as to evade payment therefor, and every person who, with like intent, injures or alters any electric meter, or obstructs its action, is guilty of a misdemeanor.

Injury to electrical apparatus, etc., penalty, §§ 8408, 8435, 8436-8438.

8302. (4372.) Larceny of water. Every person who, with intent to injure or defraud, connects or causes to be connected any pipe, tube, or other instrument with any main, service-pipe, or other pipe, or conduit, or flume used for conducting water, for the purpose of taking water from such main,

service-pipe, conduit, or flume without the knowledge of the owner thereof, and with intent to evade payment therefor, is guilty of a misdemeanor.

Cal. Pen. C., § 499.
Larceny of water, §§ 8409, 8410.
Interfering with flow of water in stream, etc., § 8514.
Injuring canal, dam, etc., § 8394.

8303. (4373.) Larceny of goods saved from fire. Every person who saves from fire, or from a building endangered by fire, any property, and for two days thereafter corruptly neglects to notify the owner, or the chief police officer of the city or town, or sheriff of the county, in which such property is situated, is guilty of larceny.

Cal. Pen. C., § 500*.

8304. Penalty for stealing, etc., journals, brasses, etc. Any person or persons who shall unlawfully remove, take, steal, change, add to, take from, or in any manner interfere with any journal bearings or brasses, or any parts or attachments of any locomotive, tender, or car, or any fixture or attachment belonging thereto, connected with, or used in operating any locomotive, tender, or car owned, leased, or used by any railway or transportation company in this state, is guilty of a felony. '09, p. 32.

8305. Id. Penalty for buying or receiving. Every person who buys or receives any of the property described in § 8304, knowing the same to have been stolen, is guilty of a felony. '09, p. 32.

CHAPTER 46.

EMBEZZLEMENT.

8306. (4374.) Embezzlement defined. Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted.

Cal. Pen. C., § 503.
Jurisdiction where property embezzled in one county and brought into another, § 8656.
Denomination of coin, number of security, etc., need not be pleaded, § 8849.
Complaint for embezzlement held sufficient.
State v. Blue, 17 U. 175; 53 P. 978.
Complaint for embezzlement held to charge but one offense.
Id.

8307. (4375.) Id. By officer, agent, etc. Every officer, director, trustee, clerk, servant, or agent of any association, society, or corporation, public or private, who fraudulently appropriates, to any use or purpose not in the due and lawful execution of his trust, any property which he has in his possession or under his control by virtue of his trust, or secretes the same, with a fraudulent intent to appropriate it to such use or purpose, is guilty of embezzlement.

Cal. Pen. C., § 504*.
No limitation upon prosecution for embezzlement of public money, § 8665.
An agent is guilty of embezzlement though he did not have authority from his principal to collect the money due.
State v. Gibson, 37 U. 330; 108 P. 349.

8308. (4376.) Id. By carrier. Every carrier or other person having under his control personal property for the purpose of transportation for hire, who fraudulently appropriates it to any use or purpose inconsistent with the safe keeping of such property and its transportation according to his trust, is guilty of embezzlement, whether he has broken the package in which such property is contained, or has otherwise separated the items thereof, or not.

Cal. Pen. C., § 505.

8309. (4377.) Id. By banker, trustee, etc. Every trustee, banker, merchant, broker, attorney, agent, assignee in trust, executor, administrator, or collector, or person otherwise intrusted with or having in his control property for the use of any other person, who fraudulently appropriates it to any use or purpose not in the due and lawful execution of his trust, or secretes it with a fraudulent intent to appropriate it to such use or purpose, is guilty of embezzlement.

Cal. Pen. C., § 506.

8310. (4378.) Id. By bailee, tenant, attorney in fact. Every person intrusted with any property as bailee, tenant, or lodger, or with any power of

attorney for the sale or transfer thereof, who fraudulently converts the same, or the proceeds thereof, to his own use, or secretes it or them with a fraudulent intent to convert to his use, is guilty of embezzlement.

Cal. Pen. C., § 507.

8311. (4379.) Id. Bank officer overdrawing account. Every officer, agent, teller, or clerk of any savings bank who knowingly overdraws his account with such bank and thereby wrongfully obtains the money, note, or funds of such bank, is guilty of embezzlement.

Cal. Pen. C., § 561.

8312. (4380.) By clerk, agent, or servant. Every clerk, agent, or servant of any person who fraudulently appropriates to his own use, or secretes with a fraudulent intent to appropriate to his own use, any property of another which has come into his control or care by virtue of his employment as such clerk, agent, or servant, is guilty of embezzlement.

Cal. Pen. C., § 508.

Where an attorney entered into an arrangement with a firm of attorneys to supervise their collection business, without any right, indorsed and deposited to his account, checks payable to the firm's clients, neither he nor the firm had any right to the funds, hence he was not guilty of appropriating the firm's money.

State v. Harcombe, 48 U. 89; 158 P. 1096.

8313. (4381.) Distinct act of taking unnecessary. A distinct act of taking is not necessary to constitute embezzlement.

Cal. Pen. C., § 509.

8314. (4382.) Embezzlement of any evidence of debt. Any evidence of debt, negotiable by delivery only, and actually executed, is the subject of embezzlement, whether it has been delivered or issued as a valid instrument or not.

Cal. Pen. C., § 510.

8315. (4383.) Claim of title, ground of defense. Upon any indictment for embezzlement, it is a sufficient defense that the property was appropriated openly and avowedly, and under a claim of title preferred in good faith, even though such claim is untenable.

Cal. Pen. C., § 511*.

Where one defends on the ground of title, evidence that he openly offered to sell the property, and his testimony to such effect, is admissible.

State v. Coyle, 41 U. 320; 126 P. 305.

8316. (4384.) Embezzlement punishable as larceny. Every person guilty of embezzlement is punishable in the manner prescribed for feloniously stealing property of the value of that embezzled, and, where the property embezzled is an evidence of debt or right of action, the sum due upon it, or secured to be paid by it, shall be taken as its value.

Cal. Pen. C., § 514*.

Larceny, § 8285; penalty for larceny, §§ 8291, 8292; count for embezzlement, § 8834.

Cited in: State v. Gibson, 37 U. 330; 108 P. 349.

CHAPTER 47.

EXTORTION.

8320. (4385.) Extortion defined. Extortion is the obtaining of property from another with his consent, induced by a wrongful use of force or fear, or under color of official right.

Cal. Pen. C., § 518.

8321. (4386.) Id. Fear induced by threats. Fear, such as will constitute extortion, may be induced by a threat, either:

1. To do an unlawful injury to the person or property of the individual threatened, or to any relative of his, or member of his family; or,
2. To accuse him, or any relative of his, or member of his family, of any crime; or,
3. To expose or impute to him or them any deformity or disgrace; or,
4. To expose any secret affecting him or them.

Cal. Pen. C., § 519.

Threat to publish libel, penalty, § 8081.

8322. (4387.) Extortion by means of force or threat. Every person

who extorts any money or other property from another, under circumstances not amounting to robbery, by means of force, or any threat, such as is mentioned in the next preceding section, is punishable by imprisonment in the state prison for a term not exceeding three years.

Cal. Pen. C., 520*.

8323. (4388.) Extortion under color of official right. Every person who commits any extortion under color of official right, in cases for which a different punishment is not prescribed in this code, is guilty of a misdemeanor.

Cal. Pen. C., § 521.
Bribery, §§ 7926-7961.
Penalty for receiving illegal fees, §§ 2587-2589.

8324. (4389.) Obtaining signature by extortion. Transfer. Every person who, by any extortionate means, obtains from another his signature to any paper or instrument whereby, if such signature were freely given any property would be transferred, or any debt, demand, charge, or right of action created, is punishable in the same manner as if the actual delivery of such debt, demand, charge, or right of action were obtained.

Cal. Pen. C., § 522.

8325. (4390.) Sending threatening letter. Every person who, with intent to extort any money or other property from another, sends or delivers to any person any letter or other writing, whether subscribed or not, expressing or implying, or adapted to imply, any threat, such as is specified in § 8321, is punishable in the same manner as if such money or property were actually obtained by means of such threat.

Cal. Pen. C., § 523.
Sending threatening letter, § 8402.
Offense of sending letter deemed complete, when, § 8525.

8326. (4391.) Unsuccessful verbal threat. Every person who unsuccessfully attempts, by means of any verbal threat, such as is specified in § 8321, to extort money or other property from another is guilty of a misdemeanor.

Cal. Pen. C., § 524.

8327. (4392.) Overcharge by railroad employe. Every officer, agent, or employe of a railroad company who asks or receives a greater sum than is allowed by law for the carriage of passengers or freight is guilty of a misdemeanor.

Cal. Pen. C., § 525.

8328. Penalty for receiving or soliciting money from employes. Any superintendent, foreman, assistant, boss, or any other person or persons who shall receive or solicit, or cause to be received or solicited, any sum of money or other valuable consideration from any person for or on account of the employment, or the continuing of the employment, of such person, or of any one else, shall be deemed guilty of a misdemeanor. '09, p. 62.

CHAPTER 48.

COERCION.

8329. Unlawful coercion. It shall be unlawful for any person to exact, by threat or coercion, any money, tribute, or support whatsoever from any person; or to induce him, by threats or coercion, to join any organization.

Interference with personal rights, penalty, § 3688.
Workers may organize, § 3651.

8330. Penalty. Any person violating any of the provisions of the preceding section shall be guilty of a misdemeanor; *provided*, that any person who commonly practices, or who follows the occupation of exacting money, tribute, or support from any person by means of threats or coercion, for any purpose whatsoever, shall be deemed a common vagrant and punished accordingly. '11, p. 104.

CHAPTER 49.

UNFAIR CAMPETITION AND DISCRIMINATION.

8333. Unfair competition and discrimination prohibited. Any person, firm, or corporation, foreign or domestic, doing business in the state of Utah, and engaged in the production, manufacture, or distribution of any commodity in general use, that intentionally, for the purpose of destroying the competition of any regular, established dealer in such commodity, or to prevent the competition of any person who in good faith intends and attempts to become such dealer, shall discriminate between different sections, communities, or cities of this state by selling such commodity at a lower rate in one section, community, or city, or any portion thereof, than such person, firm, or corporation, foreign or domestic, charges for such commodity in another section, community, or city, after equalizing the distance from the point of production, manufacture, or distribution and freight rates therefrom, shall be deemed guilty of unfair discrimination.

8334. Attorney-general to prosecute. Charter may be revoked. If complaint shall be made to the attorney-general that any corporation is guilty of unfair discrimination as defined by the preceding section, he shall investigate such complaint, and for that purpose he may subpœna witnesses, administer oaths, take testimony, and require the production of books or other documents, and, if in his opinion sufficient grounds exist therefor, he may prosecute an action in the name of the state in the proper court to annul the charter or revoke the permit of such corporation, as the case may be, and to permanently enjoin such corporation from doing business in this state, and if in such action the court shall find that such corporation is guilty of unfair discrimination as defined by the preceding section, such court shall annul the charter or revoke the permit of such corporation, and may permanently enjoin it from transacting business in this state.

8335. Penalty. Any person, firm, or corporation violating the provisions of § 8333 shall, upon conviction thereof, be fined not less than $100, nor more than $3000 for each offense. '13, p. 53.

8336. Unfair discrimination. Penalty. Any person, firm, company, association, or corporation, foreign or domestic, doing business in the state of Utah and engaged in the business of buying milk, cream, or butter fat for the purpose of manufacture or sale, or of buying poultry or eggs for the purpose of sale or storage, that shall, for the purpose of creating a monopoly or destroying the business of a competitor, discriminate between different sections, communities, localities, cities, or towns of this state by purchasing such commodity or commodities at a higher price or rate in one section, community, location, city, or town than is paid for the same commodity by said person, firm, company, association, or corporation in another section, community, locality, city, or town, after making due allowance for the difference, if any, in the grade or quality, and in the actual cost of transportation from the point of purchase to the point of manufacture, sale, or storage, shall be deemed guilty of unfair discrimination, which is hereby prohibited and declared to be unlawful; and any person, firm, company, association, or corporation, or any officer, agent, receiver, or member of such firm, company, association, or corporation, found guilty of unfair discrimination, as herein defined, shall be punished by a fine in any sum not more than $5000, or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment. '13, p. 16; am'd '17, p. 30.

CHAPTER 50.

FALSE PERSONATION AND CHEATS.

8340. (4393.) Marrying under false personation. Every person who falsely personates another, and in such assumed character marries, or pretends to marry, or to sustain the marriage relation toward another, with or without the connivance of such other, is guilty of a felony.

Cal. Pen. C., § 528.

8341. (4394.) False personation in other cases. Every person who falsely personates another, and in such assumed character either:

1. Becomes bail or surety for any party in any proceeding whatever, before any court or officer authorized to take bail or surety; or,

2. Verifies, publishes, acknowledges, or proves, in the name of another person, any written instrument, with intent that the same may be recorded, delivered, and used as true; or,

3. Does any other act whereby, if it were done by the person falsely personated, he might, in any event, become liable to any suit or prosecution, or to pay any sum of money, or to incur any charge, forfeiture, or penalty, or whereby any benefit might accrue to the party personating, or to any other person,—is punishable by imprisonment in the county jail not exceeding one year, or by fine not exceeding $1000, or by both.

Cal. Pen. C., § 529*.

8342. (4395.) Receiving property under false personation. Every person who falsely personates another, and in such assumed character receives any money, or property, knowing that it is intended to be delivered to the individual so personated, with intent to convert the same to his own use, or to that of another person, or to deprive the true owner thereof, is punishable in the same manner and to the same extent as for larceny of the money or property so received.

Cal. Pen. C., § 530. Penalty for larceny, § 8291, 8292.

8343. (4396.) Fraudulently conveying lands or chattels. Every person who is a party to any fraudulent conveyance of any lands, tenements, or hereditaments, goods, or chattels, or any right or interest issuing out of the same, or to any bond, suit, judgment, or execution, contract, or conveyance, had, made, or contrived, with intent to deceive and defraud others, or to defeat, hinder, or delay creditors or others of their just debts, damages, or demands, is guilty of a misdemeanor.

Cal. Pen. C., § 531*. Conveyances to hinder or defraud, §§ 5134, 5135, 5821.
Debtor fraudulently selling or concealing property, §§ 8006, 8007.

8344. (4397.) Obtaining money by fraud punishable as larceny. Every person who knowingly and designedly, by false or fraudulent representations or pretenses, shall obtain from any other person any chose in action, money, goods, wares, chattels, effects, or other valuable thing, with intent to cheat or defraud any person of the same, if the value of the property so obtained does not exceed $50, is punishable as in cases of petit larceny, and when the property so obtained is of the value of more than $50, the person so offending shall be punishable as in cases of grand larceny.

Cal. Pen. C., § 532*. Cal. Sup. (1889) p. 466.
Penalty for larceny, §§ 8291, 8292.
Evidence on prosecution for obtaining money or property by means of false pretenses, § 8891.
An information alleging that stock subscriptions were obtained by falsely representing the corporation's condition, etc., is sufficient, although the stock was delivered, and its value may have been as represented; but if the information does not allege the value of a $250 promissory note obtained by accused, it is insufficient, and a verdict finding accused guilty as charged does not cure the failure to allege in the information the value of the property secured.
State v. Seymour, 49 U. 285; 163 P. 789.

OBTAINING CREDIT BY FALSE REPRESENTATIONS.

8345. (4397x.) Obtaining credit by false representations unlawful. Penalty.

1. Any person who shall knowingly make or cause to be made, either directly or indirectly, or through any agency whatsoever, any false statement in writing respecting the financial condition, or means of ability to pay, of

himself or any other person, firm, or corporation in whom he is interested, or for whom he is acting, and thereby fraudulently procure in any form whatsoever, either the delivery of personal property, the payment in cash, the making of a loan or credit, the extension of a credit, the discount of an account receivable, or the making, acceptance, discount or indorsement of a bill of exchange, promissory note, either for the benefit of himself or such person, firm or corporation; or,

2. Who, knowing that a false statement in writing has been made, respecting the financial condition or means or ability to pay of himself, or other person, firm, or corporation in which he is interested, or for whom he is acting, procures, upon the faith thereof, either for the benefit of himself or such person, firm, or corporation, either or any of the things of benefit mentioned in the first subdivision of this section; or,

3. Who, knowing that a statement in writing has been made, respecting the financial condition or means or ability to pay of himself, or such person, firm, or corporation in which he is interested, or for whom he is acting, represents on a later day, either orally or in writing, that such statement theretofore made, if then again made on said day, would be true, and procures upon the faith thereof, either for the benefit of himself or such person, firm, or corporation either or any of the things of benefit mentioned in the first subdivision of this section, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than $1000, or by imprisonment in the county jail for not more than six months, or by both.

'05, p. 102; am'd '13, p. 55.

Obtaining food, etc., under false pretenses, § 8444.

8346. (4398.) Fraud in sale or mortgage without wife's assent. Every person who falsely represents himself as competent to sell or mortgage any real estate, to the validity of which sale or mortgage the assent or concurrence of his wife is necessary, and under such representation wilfully conveys or mortgages the same, is guilty of a felony.

Mont. Pen. C., § 936.
Wife's consent to mortgage exempt chattels, § 486.
Homestead, §§ 2862-2882.
Wife's statutory interest in husband's real property, §§ 6311, 6406.

ISSUING CHECKS WITHOUT SUFFICIENT FUNDS FOR PAYMENT.

8347. Issuing fraudulent check unlawful. Any person who, with intent to defraud, shall make or draw or utter or deliver any check, draft, or order for the payment of money upon any bank or other depositary, knowing at the time of such making, drawing, uttering, or delivery that the maker or drawer has not sufficient funds in or credit with such bank or other depositary for the payment of such check, draft, or order in full upon its presentation, shall be guilty of a misdemeanor. The making, drawing, uttering or delivering of such check, draft, or order as aforesaid shall be prima facie evidence of intent to defraud. The word "credit" as used herein shall be construed to mean an arrangement or understanding with the bank or depositary for the payment of such check, draft or order. '13, p. 28.

SALTING MINES; FALSE ASSAYS.

8348. (4399.) Salting mines. Fraudulent assay. Every person who, with intent to cheat, wrong, or defraud, places in or upon any mine or mining claim any ores or specimens of ores not extracted therefrom, or exhibits any ore or certificate of assay of ore not extracted therefrom, for the purpose of selling any mine or mining claim or interest therein, or who obtains any money or property by any such false pretense or artifice, is guilty of a felony.

Mont. Pen. C., § 942*.
Wrongful taking of ores, § 3938.

8349. (4400.) Changing samples or assay certificate. Every person who interferes with or in any manner changes samples of ores or bullion produced for sampling, or changes or alters samples or packages of ores or bullion which have been purchased for assaying, or who shall change or alter any certificate of sampling or assaying, with intent to cheat, wrong, or defraud, is guilty of a misdemeanor.

8350. (4401.) Making or publishing false assay. All assayers, samplers, and dealers in ores are required to keep records containing the amount of ore received by them, the assay value thereof, the amount paid therefor or advanced thereon, the mine or prospect from which said ore was extracted or the person from whom procured, a general description of the person from whom purchased, together with his name and address and the date of the transaction. Every person who, with intent to cheat, wrong, or defraud, knowingly makes or publishes a false sample of ore or bullion, or who makes, or publishes, or causes to be published a false assay of ore or bullion, or violates any provision of this section, shall be deemed guilty of a misdemeanor.

Am'd '07, p. 19.

FRAUDULENT ADVERTISING.

('13, p. 25.)

8351. Fraudulent advertising unlawful. Every person, whether in his own behalf or as an officer of a corporation or as an agent, employe, or representative of another person, firm, or corporation, who shall knowingly produce, publish, print, use, circulate, display, or transport, or cause to be produced, published, printed, used, circulated, displayed, or transported, any false, fraudulent, or misleading advertisement, or any advertisement which is objectionable or pernicious, as hereinafter defined, shall be guilty of a misdemeanor.

8352. Construction. Within the meaning of §§ 8351-8353, an advertisement shall be defined to be any notice or announcement made by a handbill placard, sign, newspaper, magazine, or other public print, or by an oral proclamation, of any article or thing, whether real or personal, for sale or exchange, or of any entertainment, exhibit, or amusement to which an admission fee is charged.

8353. Definition. The following kinds of advertisement shall be deemed objectionable and pernicious within the meaning of §§ 8351-8353: Advertisements of sales of "damaged goods," of "fire sales," of "bankrupt sales," of "wreck sales," and the like, where merchandise not a part of such "damaged," "fire damaged," "bankrupt stock," "wreckage stock," or other stock represented in the advertisement is offered, represented or sold as a part of such stock, and all other advertisements wilfully designed or calculated to deceive or to mislead the persons to whom they are directed.

SALE OF COAL UNDER FALSE NAME.

8354. Unlawful to sell coal under false name. No person shall sell or exchange, or offer or expose for sale or exchange, coal of any particular name or designation, or as the output of any particular mine under the name or designation of another coal or mine. '15, p. 62.

8355. Penalty. Any person who shall violate any provision of § 8354 shall be guilty of a misdemeanor. '15, p. 62.

CONFIDENCE GAME.

8356. Punishment prescribed. Every person who shall obtain or attempt to obtain from any other person or persons, any money or property, by any means, instrument, or device, commonly called confidence game, shall be imprisoned in the state prison not more than ten years. '17, p. 252.

8357. Content of indictment, information, or complaint. In every indictment, information, or complaint under the preceding section, it shall be deemed and held a sufficient description of the offense, to charge that the accused did, on, etc., unlawfully and feloniously obtain or attempt to obtain (as the case may be) from A B (here insert the name of the person or persons defrauded or attempted to be defrauded) his money (or property, in case it be not money), by means and by use of such confidence game. '17, p. 252.

CHAPTER 51.

DESTRUCTION OF PROPERTY INSURED.

8360. (4402.) Injury or destruction of insured property. Every person who wilfully burns, or in any manner injures or destroys any property which is at the time insured against loss or damage by fire or by any other casualty, with intent to defraud or prejudice the insurer, whether the same be the property of or in possession of such person or of any other, is punishable by imprisonment in the state prison not less than one nor more than ten years.

Cal. Pen. C., § 548. Arson, §§ 8248-8255.

8361. (4403.) Fraudulent claim for loss of insured property. Every person who presents, or causes to be presented, any false or fraudulent claim, or any proof in support of any such claim, upon any contract of insurance for the payment of any loss, or who prepares, makes, or subscribes any account, certificate of survey, affidavit, proof of loss, or other book, paper, or writing, with intent to present or use the same, or to allow it to be presented or used in support of any such claim, is punishable by imprisonment in the state prison not exceeding three years, or by a fine not exceeding $1000, or by both.

Cal. Pen. C., § 549.

CHAPTER 52.

FRAUDS RELATING TO CORPORATIONS.

8365. (4408.) Fraud in subscriptions for stock. Every person who signs the name of a fictitious person to any subscription for or agreement to take stock in any corporation existing or proposed, and every person who signs to any such subscription or agreement the name of any person, knowing that such person has not means or does not intend in good faith to comply with all the terms thereof, or under any understanding or agreement that the terms of such subscription or agreement are not to be complied with or enforced, is guilty of a misdemeanor.

Cal. Pen. C., § 557. Formation of corporations, §§ 860-870.

8366. (4409.) Fraud in organizing corporation or increasing capital stock. Every officer, agent, or clerk of any corporation, or of any person proposing to organize a corporation, or to increase the capital stock of any corporation, who knowingly exhibits any false, forged, or altered book, paper, voucher, security, or other instrument of evidence, to any public officer or board authorized by law to examine the organization of such corporation, or to investigate its affairs, or to allow an increase of its capital, with intent to deceive such officer or board in respect thereto, is punishable by imprisonment in the state prison not less than one year nor more than ten years.

Cal. Pen. C., § 558*. Limitation on issuance and increase of capital stock, Con. art. 12, sec. 5.

8367. (4410.) Unauthorized use of name in prospectus. Every person who, without being authorized so to do, subscribes the name of another to, or inserts the name of another in, any prospectus, circular, or other advertisement or announcement of any corporation or joint stock association, existing or intended to be formed, with intent to permit the same to be published, and thereby to lead persons to believe that the person whose name is so subscribed is an officer, agent, member, or promoter of such corporation or association, is guilty of a misdemeanor.

Cal. Pen. C., § 559.

8368. (4411.) Misconduct of directors. Every director of any stock corporation who concurs in any vote or act of the directors of such corporation or any of them, by which it is intended either:

1. To make any dividend, except from the surplus profits arising from the business of the corporation, and in the cases and manner allowed by law, or,

2. To divide, withdraw, or in any manner, except as provided by law, pay to the stockholders, or any of them, any part of the capital stock of the corporation; or,

3. To discount or receive any note or other evidence of debt in payment of any instalment actually called in and required to be paid, or with the intent to provide the means of making such payment; or,

4. To receive or discount any note or other evidence of debt, with the intent to enable any stockholder to withdraw any part of the money paid in by him, or his stock; or,

5. To receive from any other stock corporation in exchange for the shares, notes, bonds, or other evidences of debt of their own corporation, shares of the capital stock of such other corporation, or notes, bonds, or other evidences of debt issued by such corporation,—is guilty of a misdemeanor.

Cal. Pen. C., § 560.
Dividends may be paid out of profits earned and on hand, § 869.
Civil liability of directors, note to § 871.
Bank may purchase bank stock, § 968.
Irrigation company may take stock in another irrigation company, § 1228, sub. 11.
Railroad company may purchase or exchange stock, § 1228, sub. 11.
Capital stock means the capital stock of the corporation on which it transacts business, whether it consists of moneys, properties, or other valuable commodities, and the transfer of all the property rights, except the franchises to exist, of the corporation, to another corporation, on an agreement that the consideration of the transfer must be distributed to the stockholders of the selling corporation, is, as to the creditors of the selling corporation, not only fraudulent, but unlawful.
Cooper v. Utah Light & Ry. Co., 35 U. 570; 102 P. 202.

8369. (4412.) Agent of insolvent bank receiving deposits. Every officer, agent, teller, or clerk of any bank, and every individual banker, or agent, teller, or clerk of any individual banker, who receives any deposits, knowing that such bank or banker is insolvent, is guilty of a felony.

Cal. Pen. C., § 562.
Legal reserve, §§ 996-998.

8370. (4413.) Fraud or misconduct of officer or agent of corporation. Every director, officer, or agent of any corporation or association who knowingly receives or possesses himself of any property of such corporation or association, otherwise than in payment of a just demand, and who, with intent to defraud, omits to make, or to cause or direct to be made, a full and true entry thereof in the books or accounts of such corporation or association; and every director, officer, agent, or member of any corporation or association who embezzles, abstracts, or wilfully misapplies any of the money, funds, or credits of the corporation or association; or who, without authority from the directors, issues or puts in circulation any of the notes of the corporation or association; or who, without such authority, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment, or decree; or who makes any false entry in any book, report, or statement of the corporation or association; or who issues any fraudulent, fictitious, or illegal stock in any such corporation or association, with intent in either case to injure or defraud the corporation or association, or any other company, body politic or corporate, or any individual person, or to deceive any officer of the corporation or association, or any agent appointed to examine the affairs of any such corporation or association; and every person who, with like intent, aids or abets any officer, clerk, or agent in any violation of this section, shall be deemed guilty of a felony, and, on conviction thereof, shall be imprisoned in the state prison for not less than one year nor more than ten years, and be fined in any sum less than $10,000. Am'd '01, p. 60.

R. S. U. S. (1878) § 5209*. Cal. Pen. C., § 563*.

8371. (4414.) Making false reports of corporation or bank. Every director, officer, or agent of any corporation or joint stock association, and every private banker who knowingly makes or concurs in making or publishing any written report, exhibit, or statement of its affairs or pecuniary condition, containing any material statement which is false, other than such as are mentioned in this chapter, is guilty of a misdemeanor.

Cal. Pen. C., 564*.
Bank reports to secretary of state, §§ 1002, 1003.

8372. (4415.) Refusal of inspection of corporate books. Every officer or agent of any corporation, having or keeping an office within this state, who

has in his custody or control any book, paper, or document of such corpration, and who refuses to give to a stockholder or member of such corporation, lawfully demanding, during office hours, to inspect or take a copy of the same, or of any part thereof, a reasonable opportunity so to do, is guilty of a misdemeanor.

Cal. Pen. C., § 565.
Books subject to inspection of bona fide stockholders, § 876.
The stockholder has a right to inspect the corporate books, regardless of his purpose.
Kimball v. Dern, 39 U. 181; 116 P. 28.
He may do so by an agent, the only qualification being that he must examine them at a reasonable time and not unnecessarily interfere with the corporation's work.
Clawson v. Clayton Inv. Co., 33 U. 266; 93 P. 729.

8373. (4416.) Railroad creating debt in excess of available means. Every officer, agent, or stockholder of any railroad company who knowingly assents to, or has an agency in contracting, any debt by or on behalf of such company, unauthorized by a special law for the purpose, the amount of which debt, with other debts of the company, exceeds its available means for the payment of its debts, in its possession, under its control and belonging to it at the time such debt is contracted, including its bona fide and available stock subscriptions and exclusive of its real estate, is guilty of a misdemeanor.

Cal. Pen. C., § 566.

8374. (4417.) Id. Validity of debt not affected. The next preceding section does not affect the validity of a debt created in violation of its provisions, as against the company.

Cal. Pen. C., § 567.

8375. (4418.) Director presumed to have knowledge. Every director of a corporation or joint stock association is deemed to possess such a knowledge of the affairs of his corporation as to enable him to determine whether any act, proceeding, or omission of its directors is a violation of this chapter.

Cal. Pen. C., § 568.
Director liable for good faith and diligence, note to § 871.

8376. (4419.) Concurrence of director presumed if present. Every director of a corporation or joint stock association who is present at a meeting of the directors at which any act, proceeding, or omission of such directors in violation of this chapter occurs, is deemed to have concurred therein, unless he at the time causes, or in writing requires, his dissent therefrom to be entered in the minutes of the directors.

Cal. Pen. C., § 569.

8377. (4420.) When assent presumed if director absent. Every director of a corporation or joint stock association, although not present at a meeting of the directors at which any act, proceeding, or omission of such directors in violation of this chapter occurs, is deemed to have concurred therein, if the facts constituting such violation appear on the records or minutes of the proceedings of the board of directors, and he remains a director of the same company for six months thereafter, and does not within that time cause, or in writing require, his dissent from such illegality to be entered in the minutes of the directors.

Cal. Pen. C., § 570.

8378. (4421.) Foreign corporation on same footing as local. It is no defense to a prosecution for a violation of any of the provisions of this chapter that the corporation was one created by the laws of another state, government, or country, if it was one carrying on business or keeping an office therefor within this state.

Cal. Pen. C., § 571.
Foreign corporations, Con. art. 12, sec. 6; §§ 914, 915, 917.

8379. (4422.) "Director" defined. The term "director," as used in this chapter, embraces any of the persons having by law the direction or management of the affairs of a corporation, by whatever name such persons are described in its charter or known by law.

Cal. Pen. C., § 572.

CHAPTER 53.

INJURIES TO RAILROADS, HIGHWAYS, ETC.

8383. (4423.) Injuring or obstructing railroads. Every person who maliciously either:

1. Removes, disables, injures, or in any way interferes with, changes, or destroys any part of any railroad, whether for cars propelled by steam or any other motive power, or any track of any railroad, or any branch or branch-way, switch, block, or other signal or signaling device, turnout, bridge, viaduct, culvert, embankment, station house, or other structure or fixture, or any part thereof, attached to or connected with any railroad; or,

2. Places any obstruction upon the rails or track of any railroad, or of any switch, branch, branch-way, or turnout connected with any such railroad,

—is punishable by imprisonment in the state prison not exceeding ten years, or in the county jail not exceeding one year. Am'd '07, p. 59.

Cal. Pen. C., § 587*.

Negligence, etc., of railroad employes, §§ 8201-8204.

Entering, etc., railroad cars, §§ 8266, 8267.

An information under this section which failed to allege that the cars were connected with the railroad and propelled by steam or other motive power was insufficient.
State v. McKenna, 24 U. 317; 67 P. 815.

The provisions of Con. art. 8, sec. 9, authorize an appeal by the state on the discharge of one accused of a violation of the provisions of this section.
Id.

8384. (4424.) Injuring highway. Every person who maliciously digs up, removes, displaces, breaks, or otherwise injures or destroys any public highway or bridge, or any private way laid out by authority of law, or bridge upon such highway or private way, is punishable by imprisonment in the state prison not exceeding three years, or in the county jail not exceeding six months.

Cal. Pen. C., § 588*.

CHAPTER 54.

MALICIOUS MISCHIEF.

8385. (4425.) Malicious mischief defined. Every person who maliciously injures or destroys any real or personal property not his own, in cases otherwise than such as are specified in this code, is guilty of a misdemeanor.

Cal. Pen. C., § 594.

8386. (4426.) Succeeding sections not restrictive. The specification of the acts enumerated in the following sections of this chapter is not intended to restrict or qualify the interpretation of the preceding section.

Cal. Pen. C., § 595.

8387. (4427.) Poisoning animals. Every person who wilfully, unlawfully, and maliciously administers any poison to an animal, the property of another, or maliciously exposes any poisonous substance, with intent that the same shall be taken or swallowed by any such animal, is punishable by imprisonment in the state prison not exceeding three years, or in the county jail not exceeding six months, or by fine not exceeding $300, or by both.

Cal. Pen. C., § 596*.

Dogs are property.
Jenkins v. Ballantyne, 8 U. 245; 30 P. 760.

Though the owner of a dog poisoned by defendant was unknown to defendant, that fact did not preclude a finding that the poison was administered maliciously.
State v. Coleman, 29 U. 417; 82 P. 465.

8388. (4428.) Killing or maiming animals. Cruelty. Every person who maliciously kills, maims, or wounds an animal, the property of another, or who maliciously and cruelly beats, tortures, or injures any animal, whether belonging to himself or another, is guilty of a misdemeanor.

Cal. Pen. C., § 597.
Cruelty to animals, §§ 8416-8427.
Docking horses' tails, penalty, § 8423.

Malice must be proved, but malicious character of act hereunder may be inferred from circumstances.
People v. Olsen, 6 U. 284; 22 P. 163.

8389. (4429.) Burning property not the subject of arson. Every person who wilfully and maliciously burns any bridge, or any building, snowshed,

or vessel, not the subject of arson, or any stack of grain of any kind, or of hay, or any growing or standing grain, grass, or tree, or any fence, not the property of such person, and exceeding in value $50, is punishable by imprisonment in the state prison for not more than ten years.

Cal. Pen. C., § 600*. Arson, §§ 8248-8255.
Burning rafts, wood, etc., penalty, § 8395.

8390. (4430.) Trespass and injury to property. Every person who wilfully, and maliciously administers any poison to an animal, the property of

1. Cutting down, destroying, or injuring any kind of wood or timber standing or growing upon land of another; or,

2. Carrying away any kind of wood or timber that has been cut down and lying on such lands; or,

3. Maliciously injuring or severing from the freehold of another anything attached thereto, or the product thereof; or,

4. Digging, taking, or carrying away from any lot situated within the limits of any incorporated city, without the license of the owner or legal occupant thereof, any earth, soil, or stone; or,

5. Digging, taking, or carrying away from any land in any of the cities of the state, laid down on the map or plan of such city, or otherwise recognized or established as a street, alley, avenue, or park, without the license of the proper authorities, any earth, soil, or stone; or,

6. Putting up, affixing, fastening, printing, or painting upon any property belonging to the state, or to any city, county, or village, or dedicated to the public, or upon any property of any person, without license from the owner, any notice, advertisement, or designation of, or any name for, any commodity, whether for sale or otherwise, or any picture, sign, or device, intended to call attention thereto; or,

7. Using any animal, vehicle, machine, or other personal property of the owner or person having charge of such property, without the consent of the owner or owners thereof, or any person or persons having charge of such property,—is guilty of a misdemeanor. Am'd '03, p. 107; '05, p. 54.

Cal. Pen. C., § 602*. Larceny of things severed from realty, § 8296.
Destroying monuments or trees, § 8406. Wrongful taking of ore from mine, arrest, damages, § 3938.
Injury or destruction of another's property a misdemeanor, § 8385.

8391. (4431.) Injuring or detsroying standing crops. Every person who maliciously injures or destroys any standing crops, grain, cultivated fruits, or vegetables, the property of another, in any case for which a punishment is not otherwise prescribed by this code, is guilty of a misdemeanor.

Cal. Pen. C., § 604.

8392. (4432.) Removing or defacing landmark. Every person who either:

1. Maliciously removes any monument erected for the purpose of designating any point in the boundary of any lot or tract of land; or,

2. Maliciously defaces or alters the marks upon any such monument; or,

3. Maliciously cuts down or removes any tree upon which any such marks have been made for such purpose, with intent to destroy such marks, —is guilty of a misdemeanor.

Cal. Pen. C., § 605*. Injuring or destroying mining notices, etc., § 3937.
U. S. Monuments, etc., §§ 8396, 8406.

8393. (4433.) Injuring or destroying jail. Every person who wilfully and intentionally breaks down, pulls down, or otherwise destroys or injures any public jail or other place of confinement, is guilty of a felony.

Cal. Pen. C., § 606*.

8394. (4434.) Injuring or destroying canal, reservoir, etc. Every person who wilfully and maliciously cuts, breaks, injures, or destroys any bridge, dam, canal, flume, aqueduct, levee, embankment, reservoir, or other structure erected to create hydraulic power, or to drain or reclaim any swamp and overflowed or marsh land, or to conduct water for mining, manufacturing, reclamation, or agricultural purposes, or for the supply of the inhabitants of any city or town, or any embankment necessary to the same, or either of them; or

wilfully or maliciously makes or causes to be made any aperture in such dam, canal, flume, aqueduct, reservoir, embankment, levee, or structure, with intent to injure or destroy the same; or draws up, cuts, or injures any piles fixed in the ground and used for securing any lake or river bank or walls, or any dock, quay, jetty, or lock, is punishable by fine not exceeding $500, or by imprisonment in the state prison not exceeding two years, or by both such fine and imprisonment.

Cal. Pen. C., § 607*.
Interfering with water faucet, etc., §§ 8408, 8409.
Interference with or larceny of water, §§ 8302, 8410.
Interference with flow of water in stream, etc., § 8514.

8395. (4435.) Burning or destroying lumber, etc. Boats. Every person who wilfully and maliciously burns, injures, or destroys any pile or raft of wood, plank, boards, or other lumber, or any part thereof, or cuts loose or sets adrift any such raft or any part thereof, or cuts, breaks, injures, sinks, or sets adrift any vessel, boat, or skiff, the property of another, is punishable by a fine in any sum less than $300, or by imprisonment in the county jail not exceeding six months.

Cal. Pen. C., § 608*.
Burning property not the subject of arson, § 8389.

8396. (4436.) Injuring or defacing U. S. monuments, etc. Every person who wilfully injures, defaces, or removes any signal, monument, building, or appurtenance thereto, placed, erected, or used by persons engaged in the United States or state survey, is guilty of a misdemeanor.

Cal. Pen. C., § 615*.
Removing or defacing other monuments, §§ 3937, 8392, 8406.
Malicious injury of mining notices, etc., § 3937.

8397. (4437.) Injuring or destroying toll-house or gate. Every person who maliciously injures or destroys any toll-house or turnpike gate is guilty of a misdemeanor.

Cal. Pen. C., § 589.

8398. (4438.) Removing or injuring milepost, etc. Every person who maliciously removes or injures any mileboard, post, or stone, or guide post, or any inscription on such, erected upon any highway, is guilty of a misdemeanor.

Cal. Pen. C., § 590.

8399. (4439.) Defacing or destroying official notice or proclamation. Every person who intentionally defaces, obliterates, tears down, or destroys any copy or transcript, or extract from, or of, any law of the United States, or of this state, or any proclamation, advertisement, or notification set up at any place in this state, by authority of any law of the United States or of this state, or by order of any court or of any public officer, before the expiration of the time for which the same was to remain set up, is punishable by fine not less than $20 nor more than $100, or by imprisonment in the county jail not more than one month.

Cal. Pen. C., § 616*.

8400. (4440.) Destroying or mutilating written instrument. Every person who maliciously mutilates, tears, defaces, obliterates, or destroys any written instrument, the property of another, the false making of which would be forgery, is punishable by imprisonment in the state prison for not less than one year nor more than two years.

Cal. Pen. C., § 617*.

8401. (4441.) Opening sealed letter of another. Every person who wilfully and corruptly opens or reads, or causes to be read, any sealed letter not addressed to himself, without being authorized so to do either by the writer of such letter or by the person to whom it is addressed, and every person who, without the like authority, publishes any of the contents of such letter, knowing the same to have been unlawfully opened, is guilty of a misdemeanor.

Cal. Pen. C., § 618.
Opening messages, §§ 8405, 8433.

8402. (4442.) Sending threatening letter. Every person who knowingly and wilfully sends or delivers to another any letter or writing, whether

subscribed or not, threatening to accuse him or another of a crime, or to expose or publish any of his failings or infirmities, is guilty of a misdemeanor.

Cal. Pen. C., § 650.
Extortion, §§ 8320-8327.
Offense of sending letter deemed complete, when, § 8525.

8403. (4443.) Disclosing contents of telegraphic or telephonic message. Penalty. Every person who wilfully and corruptly discloses the contents of a telegraphic or telephonic message, or any part thereof, addressed to another person, without the permission of such person, is punishable by imprisonment in the state prison not exceeding five years, or in the county jail not exceeding one year, or by fine not exceeding $1000, or by both fine and imprisonment. Am'd '07, p. 24.

Cal. Pen. C., § 619*.
Bribery of agent, etc., § 8434.
False or forged messages, § 8274.
Using information, penalty, § 8432.

8404. (4444.) Altering telegraphic or telephonic message. Penalty. Every person who wilfully alters the purport, effect, or meaning of a telegraphic or telephonic message to the injury of another is punishable as provided in the next preceding section. Am'd '07, p. 24.

Cal. Pen. C., § 620*.

8405. (4445.) Opening telegraphic or telephonic message. Penalty. Every person not connected with any telegraphic or telephonic office who, without the authority or consent of the person to whom the same may be directed, wilfully opens any sealed envelope inclosing a telegraphic or telephonic message and addressed to any other person, with the purpose of learning the contents of such message, or who fraudulently represents any other person, and thereby procures to be delivered to himself any telegraphic or telephonic message addressed to such other person, with the intent to use, destroy, or detain the same from the person or persons entitled to receive such message, is punishable as provided in § 8403. Am'd '07, p. 24.

Cal. Pen. C., § 621.
Reading message or disclosing contents, §§ 8433, 8434.

8406. (4446.) Injuring or destroying monuments, trees, etc. Every person, not the owner thereof, who wilfully injures, disfigures, or destroys any monument, work of art, or useful or ornamental improvement within the limits of any village, town, or city, or any shade tree or ornamental plant growing therein, whether situated upon private ground or on any street, sidewalk, or public park or place, is guilty of a misdemeanor.

Cal. Pen. C., § 622.
Injuring or destroying U. S. and other monuments, §§ 3937, 8392, 8394, 8396.

8407. (4447.) Defacing or injuring property in public museum, etc. Every person who maliciously cuts, tears, defaces, breaks, or injures any book, map, chart, picture, engraving, statue, coin, model, apparatus, or other work of literature, art, or mechanics, or object of curiosity deposited in any public library, gallery, museum, collection, fair, or exhibition, is guilty of a misdemeanor.

Cal. Pen. C., § 623.

8408. (4448.) Injuring gas or water main or electrical apparatus. Every person who wilfully breaks, digs up, obstructs, or injures any pipe or main for conducting gas or water, or any works erected for supplying buildings with gas, electricity, or water, or any appurtenance or appendages therewith connected, is guilty of a misdemeanor.

Cal. Pen. C., § 624*.
Larceny of gas, electricity, and water, §§ 8300, 8302.
Injury to electrical lines, etc., §§ 8435-8438.

8409. (4449.) Interfering with water faucet, etc. Every person who, with intent to defraud or injure, opens or causes to be opened, or draws water from any stopcock or faucet by which the flow of water is controlled, after having been notified that the same has been closed or shut for specific cause, by order of competent authority, is guilty of a misdemeanor.

Cal. Pen. C., § 625.

8410. (4450.) Larceny of water unlawful. Penalty. Any person who, in violation of any right of any other person, wilfully turns or uses the water,

or any part thereof, of any canal, ditch, pipe line, or reservoir, except at a time or times when the use of such water has been duly distributed to such person, or wilfully uses any greater quantity of such water than has been duly distributed to him, or in any way changes the flow of water when lawfully distributed for irrigation or other useful purposes, except when duly authorized to make such change, or wilfully and maliciously breaks or injures any dam, canal, pipe line, watergate, ditch, or other means of diverting or conveying water for irrigation or other useful purposes, is guilty of a misdemeanor. Am'd '13, p. 81.

Injuring or destroying canal, dam, etc., § 8394.
Larceny of water, § 8302.
Interference with flow of water in stream, etc., § 8514.

8411. (4451.) Obstructing watergates by floating timber. Any person who shall raft or float timber or wood down any river or stream of this state, and shall allow such timber or wood to accumulate at or obstruct the watergates owned by any person or irrigation company taking or diverting the water of said river or stream for irrigation or manufacturing purposes, is guilty of a misdemeanor.

8412. (4452.) Fraudulently affecting market prices. Every person who wilfully makes or publishes any false statement, spreads any false rumor, or employs any other false or fraudulent means or device, with intent to affect the market price of any kind of property, is guilty of a misdemeanor.

Cal. Pen. C., § 395.

CHAPTER 55.

CRUELTY TO ANIMALS.

8416. (4453.) Overworking, underfeeding, or beating animals. Every person who overdrives, overloads, drives when overloaded, overworks, tortures, torments, deprives of necessary sustenance, cruelly beats, mutilates, or cruelly kills any animal, or causes or procures the same to be done; and every person having the charge or custody of any animal, either as owner or otherwise, who inflicts unnecessary cruelty upon the same, or wilfully fails to provide such animal with proper food, drink, shelter, or protection from the weather, shall, for every such offense, be punished by imprisonment in the county jail not exceeding three months, or by fine not exceeding $100, or by both such fine and imprisonment; *provided,* that nothing in this section requiring food, drink, shelter, and protection from the weather to be furnished any animal shall be construed to apply to animals running at large upon the range.

Mont. Pen. C., § 1090*.
Cruelty to animals, § 8388; docking horses' tails, § 8423.

8417. (4454.) Fighting or baiting animals. Witnessing. Any person who shall keep or use any bull, bear, dog, cock, or other animal, fowl, or bird, for the purpose of fighting or baiting, and any person who shall be a party to or be present as a spectator at any such fighting or baiting of any bear, bull, dog, cock, or other animal, fowl, or bird, and any person who shall rent any building, shed, room, yard, ground, or premises for the purpose of fighting or baiting any animal, fowl, or bird, as aforesaid, or shall knowingly suffer or permit the use of any building, shed, room, yard, ground, or premises belonging to him or under his control for either or any of the purposes aforesaid, shall, on conviction thereof, be adjudged guilty of a misdemeanor.

8418. (4455.) Working animals unfit for labor. Transportation. Abandonment. Every owner, possessor, or person having the charge or custody of any animal, who cruelly drives or works the same when unfit for labor, or who shall carry, or cause to be carried, in or upon any vehicle or otherwise, any live animal having the feet or legs tied together, or in any other cruel or inhuman manner; or who shall abandon any maimed, sick, infirm, or dis-

abled animal to die in any public place; or who shall carry, or cause to be carried, any live animal in or upon any vehicle ,or otherwise, without providing suitable racks, cars, crates, or cages, in which such animals may stand or lie down during transportation, and whilst awaiting slaughter, shall, upon conviction thereof, be adjudged guilty of a misdemeanor, and shall be punished for every such offense in the manner provided in § 8416.

8419. (4456.) Id. Arrest of violators. Seizure of animals. Any person found violating any of the provisions of this chapter may be arrested and held without warrant in like manner as in the case of persons found breaking the peace, and it shall be the duty of the sheriff, constable, or other officer witnessing a violation of any of the provisions of this chapter, or upon request of any person who did witness a violation of any of the provisions of this chapter, to make such arrest; and it shall be the duty of the person making the arrest to seize all animals found in the keeping or custody of the person arrested, and which are then being used or held for use in violation of any of the provisions of this chapter, and the person making such seizure shall cause such animals or fowls to be at once delivered to a poundmaster of the town, village, or city in which the same may be, and it shall be the duty of such poundmaster to receive such animals or fowls, and to hold the same to be delivered to the owner or his agent upon the payment of all charges for the maintenance of said animals or fowls. Am'd '07, p. 229.

8420. (4457.) Id. Search warrant. Arrest. Destruction of implements. When complaint is made, on oath or affirmation, to any magistrate of competent jurisdiction, that the complainant believes that any of the provisions of this chapter are being, or are about to be, violated in any particular building or place, such magistrate, if satisfied that there is reasonable cause for such belief, shall issue and deliver a search warrant to any sheriff, constable, or police officer, authorizing him to search such building or place, and to arrest any person engaged in violating any of the provisions of this chapter, as well as any person there present and aiding or abetting therein, and to bring such persons before some magistrate of competent jurisdiction, to be dealt with according to law. Such officer shall, at the same time, seize and bring to said magistrate every article or instrument found in said building or place especially designed or adapted to torture or inflict wounds upon any animal, or to aid in the fighting or baiting of any animal; and unless, within ten days after the trial of the person or persons so arrested, the owner of such article or instrument shall show to the satisfaction of said magistrate that the same is not designed or adapted to the wounding or torture of animals, or, if so designed or adapted, is not intended to be used or employed for such purpose, the magistrate shall destroy such article or instrument.

8421. (4458.) Society for prevention of cruelty to animals may nominate deputy sheriff. Any society incorporated in this state for the purpose of preventing cruelty to animals may designate one or more persons in each county of the state to discover and prosecute all cases of the violation of the provisions of this chapter; and it shall be the duty of the sheriff of such county to appoint each person so designated a deputy sheriff, provided such person shall be of good moral character, and each person so appointed by the sheriff shall possess all the powers of a sheriff of the county in the enforcement of the provisions of this chapter. The sheriff, however, shall not be responsible for any acts of such person, but the society, if incorporated, and, if not, then the officers and members of the society, on the request of which such person was appointed, shall be liable in the degree of a principal for the acts of an agent. Such deputy so appointed shall receive no compensation from the county for such services.

8422. (4459.) Words in this chapter defined. Acts of agents. In this chapter the word "animal" or "animals" shall be held to include all brute creatures, and the words "owner" and "person" and "whoever" shall be held to include corporations as well as individuals; and the knowledge and acts of

agents of, and persons employed by, corporations in regard to animals transported, owned, or employed by, or in custody of, such corporations, shall be held to be the acts and knowledge of such corporations.

DOCKING HORSES' TAILS.

8423. (4459x.) Penalty for docking horse's tail. Whoever cuts the bone of the tail of any horse for the purpose of docking the tail, or whoever causes or knowingly permits it to be done upon premises of which he is the owner, lessee, proprietor, or user, or whoever assists in the operation, shall be punished by fine of not less than $25 nor more than $100. '01, p. 182.

8424. (4459x1.) Id. Prima facie evidence. If a horse is found with its tail so cut, and with the wound resulting from such cutting unhealed, upon the premises of any person, such fact shall be prima facie evidence that the person who occupies or has the use of the premises on which such horse is so found has committed the offense described in § 8423. '01, p. 182.

8425. (4459x2.) Id. If a horse is found with his tail so cut, and with the wound resulting from such cutting unhealed, in the charge or custody of any person, such fact shall be prima facie evidence that the person having charge or custody of such horse has committed the offense charged in § 8423. '01, p. 182.

8426. (4459x3.) Id. Fines collected for cruelty to animals paid to Utah Humane Society. In all cases of prosecution for cruelties inflicted upon dumb animals, the fines collected upon or resulting from the complaint or information of any officer or agent of the Utah Humane Society shall be paid to said society, less a sum equal to the expense of prosecution, which sum shall be determined by the court or trial justice. '01, p. 182.

APPRAISEMENT AND DISPOSITION OF USELESS ANIMALS.

8427. (4459x4.) Disposal of abandoned diseased or disabled animal. Any officer or agent of the Utah Humane Society may take charge of any animal found abandoned that may appear to be diseased or disabled beyond recovery for any useful purpose; and thereupon shall, as quickly as may be, cause such animal to be appraised under oath by two reputable citizens who shall view the same in his presence and determine its value, and if such appraised value does not exceed $5, such officer may at once cause said animal to be killed in a humane manner. Said society shall thereupon be indebted to the owner for the amount of its value, except when the appraisers determine that the death of the animal was rendered necessary by the owner's wilful abandonment or cruelty; and said society shall pay to the appraisers a reasonable compensation for their services. '01, p. 182.

CHAPTER 56.

MISCELLANEOUS OFFENSES.

TELEGRAPHIC, ETC., MESSAGES; OFFENSES.

8430. (4460.) Sending message out of its order. Every agent, operator, or employe of any telegraph or telephone office who wilfully refuses or neglects to send any message received at such office for transmission, or wilfully postpones the same out of its order, or wilfully refuses or neglects to deliver any message received by telegraph or telephone, is guilty of a misdemeanor; *provided,* that nothing herein contained shall be construed to require any message to be received, transmitted, or delivered unless the charges thereon have been paid or tendered, nor to require the sending, receiving, or delivering of any message counseling, aiding, abetting, or encouraging treason against the government of the United States, or the resistance to lawful authority, or any message calculated to further any fraudulent plan or pur-

pose, or to instigate or encourage the perpetration of any unlawful act, or to facilitate the escape of any criminal or person accused of crime.

Am'd '07, p. 25.

Cal. Pen. C., § 638*. Altering or disclosing contents of message, §§ 8403-8405.
Sending false or forged message, § 8274.

8431. (4461.) Official telegrams, etc., have precedence. Communications to and from public officers on official business may have precedence over all other communications, and intelligence of general and public interest for publication may be transmitted out of its order.

8432. (4462.) Operators using information. Penalty. Every agent, operator, or employe of any telegraph or telephone office who in any way uses or appropriates any information derived by him from any private message passing through his hands and addressed to any other person, or in any other manner acquired by him by reason of his trust as such agent, operator, or employe, or trades or speculates upon any such information so obtained, or in any manner turns, or attempts to turn, the same to his account, profit, or advantage, is punishable by imprisonment in the state prison not exceeding one year, or by fine not exceeding $1000, or by both such fine and imprisonment.

Am'd '07, p. 25.

Cal. Pen. C., § 639*. Disclosing contents, § 8403.

8433. (4463.) Unlawful connection with telephone or telegraph lines. Penalty. Every person who shall wilfully and fraudulently, or clandestinely, tap, or make any unauthorized connection by any means whatever, with any telegraph or telephone wire, line, cable, or instrument under the control of any telegraph or telephone company, within this state; or wilfully and fraudulently, or clandestinely, read, or attempt to read, or learn the contents or meaning of any message, report, or communication, by means of any machine, instrument, or contrivance, or in any unauthorized manner, while such message, report, or communication is in transit or passing over any telegraph or telephone wire, line, or cable, or is being sent from or received at any place within this state; or use, or attempt to use, in any manner, or for any purpose, or communicate in any way, any information so obtained; or aid, agree with, employ, or conspire with any person or persons to unlawfully do, or permit, or cause to be done any of the acts or things hereinabove mentioned is punishable as provided in § 8432. Am'd '07, p. 25; '15, p. 50.

Cal. Pen. C., § 640.
Opening telegraphic or telephonic message addressed to another, § 8405.

8434. (4464.) Bribery of telegraph or telephone agent. Penalty. Every person who, by the payment or promise of any bribe, inducement, or reward, procures, or attempts to procure any telegraph or telephone agent, operator, or employe to disclose any private message, or the contents, purport, substance, or meaning thereof, or offers to any such agent, operator, or employe any bribe, compensation, or reward for the disclosure of any private information received by him by reason of his trust as such agent, operator, or employe, or uses or attempts to use any such information so obtained, is punishable as provided in § 8432. Am'd '07, p. 26.

Cal. Pen. C., § 641. Disclosing contents of telegraphic or telephonic message, § 8403.
Operator using information, § 8432.

INJURING ELECTRICAL LINE, APPARATUS, ETC.

8435. (4465.) Injuring or interfering with telegraph or electric line, etc. Every person who shall wilfully or maliciously cut, break, or throw down any electric light, power, telegraph, or telephone pole, or any tree or other material used in any electric light, power, telegraph, or telephone line; or who shall wilfully and maliciously break, displace, or injure any insulator in use in any electric light, power, telegraph, or telephone line; or who shall wilfully and maliciously cut, break, or remove from its insulator any wire used as an electric light, power, telegraph, or telephone line; or shall, by the attachment of a ground wire or by any other contrivance, wilfully destroy the insulation of such electric light, power, telegraph, or telephone line, or intercept the

transmission of the electric current through the same; or shall in any other manner wilfully injure, molest, or destroy any property or materials appertaining to any electric light, power, telegraph, or telephone line; or shall wilfully interfere with the use of any such line; or obstruct or postpone the transmission of any message over any telephone or telegraph line, or procure or advise any such injury, interference, or obstruction to any such lines; the person so offending shall be deemed guilty of a misdemeanor.

8436. (4465x.) Injuring or removing electrical wires, etc. It shall be unlawful for any person wilfully or maliciously to take down, remove, injure, obstruct, displace or destroy any line erected or constructed for the transmission of electric current, or any poles, wires, conduits, cables, insulators, or any support upon which wires or cables may be suspended, or any part of any such line or appurtenances or apparatus connected therewith, or to sever any wire or cable thereof, or in any manner interrupt the transmission of electrical current over and along any such line; or to take down, remove, injure, or destroy any house, shop, building, or other structure, or machinery connected with or necessary to the use of any line erected or constructed for the transmission of electrical current. '03, p. 169.

Injury to electrical apparatus, etc., § 8408. Larceny of electricity, § 8301.

8437. (4465x1.) Id. Injury by fire. It shall be unlawful for any person wilfully or maliciously to set any fire that shall result in the destruction or injury of any line erected or constructed for the transmission of electrical current, or any poles, conduits, wires, cables, insulators, or any support upon which wires or cables may be suspended, or any part of any such line or appurtenances or apparatus connected therewith, or any house, shop, building, or other structure, or machinery connected with or necessary to the use of any line erected or constructed for the transmission of electrical current, or to set any fire that shall in any manner interrupt the transmission of electrical current over and along any such line. '03, p. 170.

8438. (4465x2.) Id. Penalty. Any person or persons who shall wilfully or maliciously violate any of the provisions of §§ 8436, 8437, shall, upon conviction thereof, be punished by a fine not exceeding $1000, or by imprisonment in the state prison for not more than five years, or by both such fine and imprisonment, in the discretion of the court. '03, p. 170.

OPIUM, TOBACCO, ETC.

8439. (4466.) Keeping opium den. Selling opium. Any person who shall establish or keep a house wherein opium is smoked or chewed by others than the members of his family, and any person who shall sell or give to another, not a member of his family, in the house where his family shall live, any opium to be smoked or chewed, whether in a house kept or used for such purposes, or elsewhere, shall be deemed guilty of a misdemeanor.

Cities may punish, § 570x49.

8440. (4467.) Id. Renting house to be so used. Where a proprietor, landlord, or agent shall rent any house, knowing that it is intended to be used for any of the purposes mentioned in the next preceding section, and it shall be so used, such proprietor, landlord, or agent shall be deemed guilty of a misdemeanor.

8441. (4468.) Selling or using opium. Any clerk, servant, or employe in any such house who may aid in such use of opium, and every person resorting thereto who shall so use opium by smoking or chewing it, shall be deemed guilty of a misdemeanor.

8442. (4469.) Sale, etc., to minors. Any person who shall sell, give, or furnish any cigar, cigarette, or tobacco in any form, or any opium or other narcotic in any form, to any person under twenty-one years of age in this state shall be guilty of a misdemeanor. The provisions of this section shall not apply to the use, sale, giving, or furnishing of any narcotic upon the prescription of a physician. Am'd '11, p. 68.

Limitations on possession and sale of narcotics, § 4432.

8443. (4469x.) Purchase or possession of liquor, etc., by minors. Penalty. Any person under the age of twenty-one years who shall buy, accept, or have in his possession any intoxicating liquor, cigar, cigarette, or tobacco in any form, or any opium or any other narcotic in any form, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not exceeding $100. Am'd '11, p. 68; '13, p. 92.

Sale intoxicating liquors prohibited, §§ 3341-3375.

8444. (4470.) Obtaining food, lodging, etc., by false pretense unlawful. Any person who shall put up at any hotel, inn, boarding or lodging house, and shall procure any food, entertainment, or accommodation without paying therefor, or who shall obtain credit at any hotel, inn, boarding or lodging house, for such food, entertainment, or accommodation, by means of any false show of baggage or effects brought thereto; or who shall abscond, surreptitiously remove, or cause to be removed any baggage or effects from any hotel, inn, boarding or lodging house, while there is a lien existing thereon for the proper charges due from him for fare, board, or lodging furnished therein, shall be punished by a fine not exceeding $100, or by imprisonment in the county jail not exceeding three months. Am'd '03, p. 5; '13, p. 96.

Obtaining credit by false representation, § 8345.

8445. (4471.) Innkeeper refusing guest. Carrier refusing passenger. Every person and every agent or officer of any corporation carrying on business as an innkeeper, or as a common carrier of passengers, who refuses, without just cause or excuse, to receive and entertain any guest, or to receive and carry any passenger, is guilty of a misdemeanor.

Cal. Pen. C., § 365.

8446. (4472.) Vagrancy defined. Penalty. Every person, except an Indian, without visible means of support, who has the physical ability to work, and who does not seek employment, nor labor when employment is offered him; every healthy beggar who solicits alms as a business; every person who roams about from place to place without any lawful business; every idle or dissolute person, or associate of known thieves, who wanders about the streets at late or unusual hours of the night, or who lodges in any barn, shed, shop, out-house, vessel, or place other than such as is kept for lodging purposes without the permission of the owner or party entitled to the possession thereof; every lewd or dissolute person, who lives in and about houses of ill fame, every woman who from doorways on the streets, or any other place, solicits men for immoral purposes, every common prostitute, and every common drunkard, is a vagrant, and is punishable by imprisonment in the county jail not exceeding ninety days; and may be sentenced to hard labor in the discretion of the court. Am'd '09, p. 4; '11, p. 22.

Cal. Pen. C., § 647.

8447. (4473.) Defacing marks upon lumber, etc. Every person who cuts out, alters, or defaces any mark made upon any log, lumber, or wood, or puts a false mark thereon, with intent to prevent the owner from discovering its identity, is guilty of a misdemeanor.

Cal. Pen. C., § 356.

False weights and measures, § 6303.

8448. (4474.) Branding or altering mark or brand on animal. Every person who marks or brands, or who alters or defaces the mark or brand on any horse, mare, gelding, colt, jack, jenny, mule, bull, ox, steer, cow, calf, sheep, goat, hog, shoat, or pig belonging to another, with intent thereby to steal the same, or to prevent identification thereof by the true owner, shall be punished as in cases of grand larceny. Am'd '05, p. 38.

Cal. Pen. C., § 357*.
Penalty for grand larceny, § 8291.
Using brand in place and position recorded to another a misdemeanor, § 214.

Sheep alleged to have been stolen not properly identified.
People v. Swasey, 6 U. 93; 21 P. 400.

Evidence held insufficient to show that the accused and his partner were not the owners of the sheep whose brand they were altering and defacing.
State v. Blank, 43 U. 211; 134 P. 735.

CASKS, BOTTLES, ETC., TO BEAR OWNER'S NAME, ETC.

8451. (4475x.) Description of brand, label, etc., filed and published. All

manufacturers, bottlers, or dealers in soda or mineral waters, beer, ale, porter, cider, wine, or other beverages, or medical or other preparations, who shall use barrels, kegs, casks, boxes, fountains, tanks, jugs, siphons, bottles, or other vessels, or any tools, implements, or apparatus, upon which shall be stamped, impressed, engraved, printed, painted, or in any manner affixed the names, brands, marks, trade mark, or other designations of ownership by said manufacturers, bottlers, or dealers respectively, shall file in the office of the county clerk of the county wherein the principal office, manufactory, or depot of such business is located in this state, a description of the names, brands, marks, or other designations of ownership so used by them respectively, and cause the same to be published for two successive weeks in a daily newspaper of general circulation in such county; *provided, however,* that it shall be unlawful for any manufacturer, bottler, or dealer aforesaid to file or publish as aforesaid the name, brand, mark, or trade mark, or other designation of ownership by any other manufacturer, bottler, or dealer. '01, p. 125.

"Trade mark," etc., defined, unlawful use, §§ 8473-8476.
See also §§ 6150-6156.

8452. (4475x1.) Id. Unlawful for any person to use, sell, or injure any package labeled with any such brand. It shall be unlawful for any person or persons, without the written consent of the owner or owners thereof, to use, sell, dispose of, buy, or traffic in, or to wilfully break, destroy, or otherwise injure any such barrels, kegs, casks, boxes, fountains, tanks, siphons, bottles, jugs, or other vessels or any of such tools, implements, or apparatus, or to wilfully mar or erase any such names, brands, marks, or other designations so appearing thereon, or to fill any such barrels, kegs, casks, boxes, fountains, tanks, siphons, bottles, jugs, or other vessels with other beverages, medicines, compounds or substances whatever. '01, p. 126.

Unlawful use of another's marked casks, etc., §§ 8476, 6150-6156.

8453. (4475x2.) Id. Penalty. Any person or persons, association or corporation who shall violate any of the provisions of §§ 8451-8456 shall be deemed guilty of a misdemeanor, and, upon conviction thereof before any justice of the peace, shall be fined $5 for every barrel, cask, keg, box, siphon, fountain, or tank, and one dollar for every bottle, jug, or other vessel, and one dollar for every tool, implement, or other apparatus so by him or them used, sold, disposed of, bought, or trafficked in, or so marred, erased, broken, destroyed, or otherwise injured or filled, together with the costs of prosecution; and the employer or principal shall be so liable for the acts of his employes or agents for any such violation of §§ 8451-8456, when engaged in the business of such employer or principal. '01, p. 126.

8454. (4475x3.) Id. Evidence. Warrant. The using by any person other than the rightful owner thereof, without such written permission, of any such cask, barrel, keg, fountain, tank, bottle, siphon, box, or other vessel for the sale therein of ale, porter, lager beer, soda or mineral waters, or other beverages, or any other article of merchandise, medicine, compound, or preparation to be furnished to customers, or the buying, selling, or trafficking in any such barrel, keg, bottle, fountain, tank, siphon, box, or other vessel, or any such tool, implement, or apparatus by any person other than the owner, without the written permission of such owner, or the fact that any junk dealer or other dealer in casks, kegs, bottles, siphons, boxes, fountains, tanks, or other vessels, or the fact that any other manufacturer or bottler who is not the rightful owner thereof shall have in his possession any such cask, barrel, keg, bottle, fountain, tank, siphon, box, or other vessel, tool, implement, or apparatus so marked or stamped and registered as aforesaid, without such written permission, shall and is hereby declared to be prima facie evidence that such use, buying, selling, trafficking in, or possession is unlawful within the meaning of §§ 8451-8456. And it is hereby declared to be the duty of any justice of the peace, upon complaint having been made in writing before him, that any person or persons, association or corporation has violated any of the provisions of §§ 8451-8456, to immediately issue his warrant and cause such

person or persons so accused to be brought before him, and proceed to try such accused party, and in case such accused party be found guilty of having violated any of the provisions of §§ 8451-8456, to assess the fine as provided in § 8453, such fines and costs to be collected as provided by law in other cases of misdemeanor. '01, p. 126.

Refilling cask bearing trade mark, § 8476. Marking cans, bottles, etc., § 6150-6156.

8455. (4475x4.) Search warrant. In case such owner or owners of any such cask, barrel, bottle, box, fountain, tank, siphon, or other vessel, or tool, implement, or apparatus shall, in person or by his agent, make oath in writing before any justice of the peace that he has reason to believe, and does believe, that any other person is possessed of or is using, as by §§ 8451-8456 declared unlawful, any of the casks, barrels, kegs, bottles, boxes, fountains, tanks, siphons, or other vessels, tools, implements, or apparatus of such person or his principal, or that any junk dealer or other dealer in casks, barrels, kegs, bottles, siphons, fountains, tanks, or boxes, or any other dealer, manufacturer, or bottler has any such casks, barrels, kegs, boxes, fountains, tanks, siphons, or other vessels, or tools, implements or apparatus secreted in, about, or upon his, her, or their premises, the said justice of the peace shall issue his search warrant and cause the premises so designated to be searched, as in other cases where search warrants are issued, as is now provided by law. And in case such barrel, cask, keg, bottle, box, fountain, tank, siphon, or other vessel, or any such tools, implements, or other apparatus shall be found in, about, or upon the premises so designated, the officer executing such warrant shall thereupon arrest the person or persons named in such search warrant, and bring him, her, or them before the justice of the peace who issued such warrant, who shall thereupon hear and determine such case, and if the accused is found guilty, he, she, or they shall be fined, as provided in § 8453. '01, p. 127.

Search warrant, §§ 8368-8369.

8456. (4475x5.) Id. Exemption from penalty on condition. No person shall be subject to punishment, or liable to the penalty prescribed in § 8453, who shall, within thirty days after March 23, 1901, in good faith, offer to deliver all such articles in his possession or under his control to the rightful owner, upon payment to him by such owner of any rebate or deposit which such owner received when he parted with possession of the same. '01, p. 127.

BRANDING CLOSED PACKAGES.

8458. Closed packages to be branded. Definition. It shall be unlawful to sell, ship, dispose of, or offer to sell or dispose of, or to have in one's possession for sale or shipment, any closed package of apples, pears, peaches, or apricots which is not marked in plain and legible manner with the name and address of the person, firm, or corporation in possession of the fruit at the time of packing; also the name of the variety or varieties of fruit, and the designation of grade of fruit, as prescribed by the state horticultural commission. The term "closed package," within the meaning of §§ 8458-8461, shall refer to any box, barrel, basket, or other container, the contents of which cannot be seen or inspected without opening such package. '13, p. 95.

8459. Unlawful to misbrand. Proviso. It shall be unlawful to sell, or offer for sale, or have in one's possession for sale or shipment any package of fruit, whether closed or open, which is misbranded. A box, barrel, basket, or package of fruit shall be deemed misbranded within the meaning of §§ 8458-8461 when it is marked in a plain and legible manner with the name and address of any person, firm, or corporation other than that in possession of the fruit at the time of packing; with any other than the correct variety name of the fruit, or any designation of grade which does not comply with the rules and regulations of the state horticultural commission; *provided,* that in case the correct variety name of the fruit is not known to the person, firm, or corporation responsible for the packing, the variety may be marked "unknown." '13, p. 95.

8460. Inspector may enter premises. Any person charged with the enforcement of §§ 8458-8461 may enter upon any premises to make examination of any package of fruit suspected of being falsely marked. '13, p. 95.

8461. Penalty. Any person, firm, or corporation violating any of the provisions of the three next preceding sections shall be guilty of a misdemeanor. '13, p. 95.

TIMBER ON PUBLIC LANDS.

8466. (4476.) Cutting timber on public lands. Exceptions. Every person who wilfully and without authority enters upon the public lands of the state and cuts down, destroys, or injures any kind of wood or timber, except cedar, quaking asp, maple, oak, mahogany, and pinion pine, growing upon such lands, shall be guilty of a misdemeanor; *provided,* that nothing contained herein shall prevent any miner from clearing his land in the ordinary working of his mining claim, or the taking or cutting timber for the making or improvement of roads or bridges.

8467. (4477.) Unlawful to cut green timber from public lands. Penalty. It is hereby declared to be and is hereby made unlawful for any person to cut, use, have in his possession, offer for sale, or convey away from any of the public or state lands of Utah any green spruce, fir, or balsam trees under eight inches in diameter at the butt, except for transplanting; *provided,* that this section shall not be deemed to apply to any cutting of timber on the public domain under authority of congress, or to any cutting of lumber for building purposes that is or may hereafter be authorized by law. Any person found guilty of violating any provisions of this section shall be deemed guilty of a misdemeanor.

State land board to protect growing timber, §§ 5592, 5604.

FIRES.

8468. (4478.) Exposing growing trees to fire. Any person negligently or wilfully exposing growing trees, shrubs, or undergrowth standing on the public domain to danger of destruction by fire shall be guilty of a misdemeanor.

8469. (4479.) Firing prairie, wood, grass, or grain. Every person who maliciously or negligently sets on fire, or causes or procures to be set on fire, any woods, prairies, grasses, or grain on any lands, public or private, is guilty of a misdemeanor.

Cal. Pen. C., § 384*.

8470. (4480.) Obstructing attempts to extinguish fire. Every person who, at the burning of a building, disobeys the lawful orders of any public officer or fireman, or offers any resistance to or interference with the lawful efforts of any fireman or company of firemen to extinguish the same, or engages in any disorderly conduct calculated to prevent the same from being extinguished, or who forbids, prevents, or dissuades others from assisting to extinguish the same, is guilty of a misdemeanor.

Cal. Pen. C., § 385.

TAKING TOLL WITHOUT AUTHORITY.

8471. (4481.) Taking toll without having license. Any person who demands or receives compensation for the use of any bridge or ferry, or who sets up or keeps any road, bridge, or ferry, or constructed ford within this state, for the purpose of receiving remuneration for the use of the same, without authority of law; or any person who refuses to pay on demand the compensation or fee authorized to be collected for use of licensed toll-road, bridge, ferry, or constructed ford, after having used the same, is guilty of a misdemeanor. Am'd '99, p. 53.

Cal. Pen. C., § 386.
Owner of ferry to obtain franchise from county, § 1400x29.

TRADE MARKS.

8472. (4482.) Forging or counterfeiting trade mark. Every person who wilfully forges or counterfeits, or procures to be forged or counterfeited, any trade mark usually affixed by any person, or by any association or union of workingmen, to his goods, which has been recorded in the office of the secretary of state, with intent to pass off any goods to which such forged or counterfeited trade mark is affixed, or intended to be affixed, as the goods of such person or such association or union of workingmen, is guilty of a misdemeanor.

Cal. Pen. C., § 350*. Trade mark, how obtained, §§ 6145-6148, 8451.

8473. (4483.) Selling goods bearing counterfeited trade mark. Every person who sells, or keeps for sale, any goods upon or to which any counterfeited trade mark has been affixed, after such trade mark has been recorded in the office of the secretary of state, intending to represent such goods as the genuine goods of another, knowing the same to be counterfeited, is guilty of a misdemeanor.

Cal. Pen. C., § 351.
Liquids in bottles, casks, etc., must be marked, §§ 8451-8456.

8474. (4484.) "Forged trade mark," etc., defined. The phrases "forged trade mark" and "counterfeited trade mark," or their equivalents, as used in this chapter, include every alteration or imitation of any trade mark so resembling the original as to be likely to deceive.

Cal. Pen. C., § 352.

8475. (4485.) "Trade mark" defined. The phrase "trade mark," as used in the three preceding sections, includes every description of word, letter, device, emblem, stamp, imprint, brand, printed ticket, label, or wrapper, usually affixed by any mechanic, manufacturer, druggist, merchant, or tradesman, or by any association or union of workingmen, to denote any goods to be goods imported, manufactured, produced, compounded, or sold by him, or by such association or union of workingmen, other than any name, word, or expression generally denoting any goods to be of some particular class or description.

Cal. Pen. C., § 353*. "Trade mark" defined, § 6145.

8476. (4486.) Refilling cask, etc., bearing trade mark. Every person who has or uses any cask, bottle, vessel, case, cover, label, or other thing bearing or having in any way connected with it the duly filed trade mark or name of another, for the purpose of disposing, with intent to deceive or defraud, of any article other than that which such cask, bottle, vessel, case, cover, label, or other thing originally contained or was connected with by the owner of such trade mark or name, is guilty of a misdemeanor.

Cal. Pen. C., § 354.
Unlawful use of cask, bottle, etc., of another, §§ 8451-8456, 6150-6156.

HATS IN THEATERS.

8479. (4487.) High hats to be removed at theaters, etc. Penalty. Any person attending a theater, opera house, or an indoor place of amusement as a spectator shall remove headwear tending to obstruct the view of any other person. Any person violating any of the provisions of this section shall be subject to a fine of not less than one dollar nor more than $10 for each offense, upon conviction thereof.

INFERNAL MACHINES.

8480. (4487x.) Infernal machine defined. An infernal machine is any box, package, contrivance, or apparatus containing or arranged with an explosive or acid or poisonous or inflammable substance, chemical, or compound, or knife, or loaded pistol or gun, or other dangerous or harmful weapon or thing, constructed, contrived, or arranged so as to explode, ignite, or throw forth its contents, or to strike with any of its parts, unexpectedly when moved, handled, or opened, or after the lapse of time, or under conditions, or in a manner calculated to endanger health, life, limb, or property. '01, p. 97.

8481. (4487x1.) Penalty for sending by mail or express. Every person

who delivers or causes to be delivered to any express or railway company or other common carrier, or to any person any infernal machine, knowing it to be such, without informing such common carrier or person of the nature thereof, or sends the same through the mail, or throws or places the same on or about the premises or property of another, or in any place where another may be injured thereby, in his person or property, is guilty of a felony, and, upon conviction thereof, shall be punished by imprisonment in the state prison for a term not exceeding twenty-five years. '01, p. 98.

8482. (4487x2.) Penalty for constructing or having in possession. Every person who knowingly constructs or contrives any infernal machine, or, with intent to injure another in his person or property, has any infernal machine in his possession, is guilty of a felony, and, upon conviction thereof, shall be punished by imprisonment in the state prison for a term not exceeding five years. '01, p. 98.

8483. (4487x3.) Where prosecuted in certain cases. Any person knowingly delivering any such infernal machine to any railway, express, or stage company, or to any person or company whatever for transmission to any person in another county may be prosecuted in the county in which he delivers the same, or in the county to which the same is transmitted. '01, p. 98.

DESECRATION OF THE FLAG.

8484. (4487x4.) Desecration of flag. Penalty. Any person who in any manner, for exhibition or display, shall place or cause to be placed any word, figure, mark, picture, design, drawing, or any advertisement of any nature upon any flag, standard, color, or ensign of the United States of America, or who shall expose or cause to be exposed to public view any such flag, standard, ensign, or color upon which shall be printed, painted, or otherwise placed, or to which shall be attached, appended, affixed, or annexed any word, figure, mark, picture, design, or drawing, or any advertisement of any nature, or who shall expose to public view, manufacture, sell, expose for sale, give away, or have in possession for sale or to give away, or for use for any purpose any article or substance being an article of merchandise or a receptacle of merchandise, upon which shall have been printed, painted, attached, or otherwise placed a representation of any such flag, standard, color, or ensign, to advertise, call attention to, decorate, mark, or distinguish the article or substance on which so placed, or who shall publicly mutilate, deface, defile, or defy, trample upon, or cast contempt upon, either by word or act, any such flag, standard, color, or ensign shall be deemed guilty of a misdemeanor, and shall be punished by a fine, not exceeding $100, or by imprisonment for not more than thirty days, or both, in the discretion of the court. '03, p. 29.

8485. (4487x5.) Id. Flag, etc., defined. The words flag, standard, color, or ensign, as used in the next preceding section, shall include any flag, standard, color, ensign, or any picture or representation of either thereof, made of any substance, or represented on any substance, and of any size, evidently purporting to be either said flag, standard, color, or ensign of the United States of America, or a picture, or a representation of either thereof upon which shall be shown the colors, the stars and the stripes, in any number of either thereof, or by which the person seeing the same, without deliberation, may believe to represent the flag, color, standard, or ensign of the United States of America. '03, p. 29.

8486. (4487x6.) Id. Exceptions. The two preceding sections shall not apply to any act permitted by the statute of the United States of America, or by the United States army and navy regulations, nor shall it be construed to apply to a newspaper, periodical, book, pamphlet, circular, certificate, diploma, warrant, or commission of appointment to office, ornamental picture, or stationery, for use in correspondence, on any of which shall be printed, painted, or placed said flag, disconnected from any advertisement. '03, p. 29.

STREET CARS TO BE VESTIBULED.

8487. (4487x7.) Employes on street cars to be protected from inclement weather. From and after the 1st day of November, 1901, it shall be unlawful for any person, partnership, or corporation owning or operating a street railway in this state, or for any officer or agent thereof superintending or having charge or control of the management of the said line of railway or of the cars thereof, operating electric, cable or other cars propelled by steam, cable, or electricity, which require when in operation the constant services, care, or attention of any person or persons on any part of such car, to require or permit such services, attention, or care of any of its employes, or any other person or persons between the 1st day of November and the 1st day of April of each year, unless such person, partnership, or corporation, its officers or superintending or managing agents, have first provided at least one-third of the entire number of cars so owned with a proper and sufficient inclosure, constructed of wood, iron, and glass, or similar suitable materials, sufficient to protect such employes from exposure to the inclemencies of the weather; *provided,* that such inclosure shall be so constructed as not to obstruct the vision of the person operating such car. Two-thirds of the said cars so owned shall be provided with inclosures as heretofore described on or before the 1st day of November, 1902; and the remaining one-third of such cars so owned shall be provided with inclosures in a similar manner on or before the 1st day of November, 1903. 01, p. 44.

8488. (4487x8.) Id. It shall be unlawful for any such person, partnership, or corporation so owning or operating a street railway using steam, electric, or cable cars, or any superintending or managing officer or agent thereof, to cause or permit to be used upon such line of railway between said 1st day of November and said 1st day of April of each and every of said years, any car or cars upon which services of any employe such as specified in § 8487 is required, unless said car or cars shall be provided with the inclosure required by said § 8487. '01, p. 45.

8489. (4487x9.) Penalty. Any person, partnership, or corporation owning, operating, superintending, or managing any such line of street railway, or managing or superintending officer or agent thereof, who shall be found guilty of a violation of the provisions of §§ 8487, 8488, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less than $50, nor more than $250. Each day any of said persons cause or permit any of their said employes to operate such car or cars in violation of the provisions of § 8487, or cause or permit cars to be run or operated in violation of § 8488, shall be deemed a separate offense; *provided,* that the provisions of §§ 8487-8489 shall not apply to cars used and known as trailing cars, or cars used solely in construction or repair work, or cars known as open or summer cars. '01, p. 45.

SLOT MACHINES.

8492. (4487x10.) Keeping "slot machine" a misdemeanor. Every person who keeps or operates, either as owner, agent or employe, or allows to be kept, used, operated, or conducted in his place of business, or elsewhere in this state, the device or instrument commonly known as the "slot machine," or any other similar device or instrument for gambling or exhibiting bawdy pictures, is guilty of a misdemeanor. '01, p. 98.

INTIMIDATING EMPLOYE.

8493. (4487x11.) Intimidating employe a misdemeanor. Any person or persons in this state who shall threaten to destroy property or to do bodily harm, for the purpose of preventing any person or persons from entering or remaining in the employ of any company, corporation, or individual, shall be guilty of a misdemeanor. '05, p. 14.

CHILDREN FORBIDDEN FIREARMS.

8494. (4487x12.) Selling or giving firearms to minors under fourteen. Any person who sells, gives, or disposes of, or offers to sell, give or dispose of any pistol, gun, target gun, or other firearm to any person under the age of fourteen years is guilty of a misdemeanor. '05, p. 60.

8495. (4487x13.) Minor under fourteen must not carry firearms. Any person under the age of fourteen years who shall carry or have in his possession any pistol, gun, target gun, or other firearm, unless accompanied by a parent or guardian, shall be guilty of a misdemeanor. '05, p. 60.

FALSE STAMPING, ETC., OF GOLD ARTICLES.

8497. (4487x14.) False stamping, etc., of gold or gold alloy. Penalty. Any person, firm, corporation, or association who makes, sells, or offers to sell or dispose of, or has in his, her, or its possession with intent to sell or dispose of, any article of merchandise constructed in whole or in part of gold, or of any alloy of gold, and having stamped, branded, engraved, or imprinted thereon any mark indicating, or designed or intended to indicate that the gold or alloy of gold in such article is of greater degree or karat of fineness by more than one karat than the actual quality or fineness of such gold or alloy, shall be deemed guilty of a misdemeanor. '07, p. 13.

FALSE STAMPING ETC., OF SILVER ARTICLES.

8498. (4487x15.) Stamping, etc., silver or sterling silver articles. Any person, firm, corporation, or association who makes or sells, or offers to sell or dispose of, or has in his, her, or its possession with intent to sell or dispose of any article of merchandise marked, stamped, or branded with the words "sterling" or "sterling silver" or any other word or words, figure or figures, or combination of letters or figures, or abbreviation in any manner simulating the words "sterling" or "sterling silver," or whose component parts are made of the same metal soldered together, which article is marked, stamped, or branded with the words "sterling" or "sterling silver," or any other word or words, figure or figures, or combination of letters or figures, or abbreviation in any manner simulating the words "sterling" or "sterling silver," or encased or enclosed in any box, package, cover, or wrapper, or other thing in, by, or with which the said article is packed, enclosed, or otherwise prepared for sale or disposition, having thereon any engraving or printed label, stamp, imprint, mark or trade mark, indicating or denoting by such engraving, printing, stamping, marking, or branding that such article is silver, sterling or solid silver, unless nine hundred and twenty-five one thousandths of the component parts of the metal of which said article of merchandise is manufactured is pure silver, shall be deemed guilty of a misdemeanor. '07, p. 17.

8499. (4487x16.) Sterling silver on certain articles. Stamping. Any person, firm, corporation, or associatian who makes or sells, or offers to sell or dispose of, or has in his, her, or its possession with intent to sell or dispose of, any article of merchandise comprised of leather, shell, ivory, celluloid, pearl, glass, porcelain, pottery, steel, or wood to which is applied or attached a metal mounting marked, stamped, or branded with the words "sterling" or "sterling silver," or any other word or words, figure or figures, or combination of letters or figures, or abbreviation in any manner simulating the words "sterling" or "sterling silver," or any article of merchandise composed of works or movements and a case or covering applied or attached thereto, wholly or partially concealing said works or movements, marked, stamped, or branded "sterling" or "sterling silver," or any other word or words, figure or figures, or combination of letters or figures, or abbreviation in any manner simulating the words "sterling" or "sterling silver," unless said applied or attached metal mounting, case, or covering shall contain not less than nine hundred and twenty-five one-thousandths parts of pure silver, shall be deemed guilty of a misdemeanor. '07, p. 17.

8500. (4487x17.) Id. Coin or coin silver. Stamping. Any person,

firm, corporation, or association who marks or sells or offers to sell or dispose of, or has in his or her possession with intent to sell or dispose of, any article of merchandise marked, stamped, or branded with the words "coin" or "coin silver," whose component parts are made of the same metal soldered together, which article is marked, stamped, or branded with the words "coin" or "coin silver," or encased or enclosed in any box, package, cover, or wrapper, or other thing in, by, or with which the said article is packed, enclosed, or otherwise prepared for sale or disposition, having thereon any engraving or printed label, stamp, imprint, mark, or trade mark indicating or denoting by such engraving, printing, stamping, marking, or branding that such article is coin or coin silver, unless nine hundred one-thousandths parts of the component parts of the metal of which the said article is manufactured is pure silver, shall be deemed guilty of a misdemeanor. '07, p. 18.

8501. (4487x18.) Id. Any person, firm, corporation, or association who makes or sells, or offers to sell or dispose of, or has in his, her, or its possession with intent to sell or dispose of, any article of merchandise comprised of leather, shell, ivory, celluloid, pearl, glass, porcelain, pottery, steel, or wood to which is applied or attached a metal mounting marked, stamped, or branded with the words "coin" or "coin silver," or any article of merchandise comprised of works or movements and a case or covering applied or attached thereto, wholly or partially concealing said works or movements, marked, stamped, or branded "coin" or "coin silver," unless said applied or attached metal mounting, case, or covering shall contain not less than nine hundred one-thousandths parts of pure silver, shall be deemed guilty of a misdemeanor. '07, p. 18.

PROTECTION OF CLIFF DWELLERS' RELICS.

8505. (4487x19.) Removing relics. Effacing hieroglyphics. Any person or persons who shall take from, remove, or carry off from any public land in this state, or any land not his own and without permission of the owner thereof, any relics, consisting of baskets, jars, cups, urns, utensils, bones, bodies, mummies, or any other relics known as cliff dwellers' relics, or the relics of any ancient races of people, or who shall destroy or efface any hieroglyphics, shall be guilty of a misdemeanor. '07, p. 33.

UNLAWFUL USE OF MEDALS, ETC.

8506. (4487x20.) Unlawful to use or wear certain medals. It shall be unlawful for any person to wear the badge, insignia, or rosette of the Grand Army of the Republic, or of the military order of the Loyal Legion of the United States, or the Spanish War Veterans, or the medals presented by the state to the Utah Volunteers, and Indian War Veterans, or the charm, badge, button, or emblem of the Benevolent and Protective Order of Elks of the United States of America, or of the order of the Knights of Pythias, Independent Order of Odd Fellows, or of any society, order, or organization of ten years' standing in the state of Utah, or to use same to obtain aid or assistance within this state, or wilfully to use the name of such society, order, or organization, the title of its officers or its insignia, ritual, or ceremonies, unless entitled to use or wear the same. Any person convicted of a violation of any of the provisions of this section shall be deemed guilty of a misdemeanor. '07, p. 35.

NEGLIGENT USE OF BARBED WIRE.

8507. (4487x21.) Negligent use of unbaled barbed wire. It shall be unlawful for any person, firm, or corporation to leave any unbaled barbed wire loose upon any lane, street, road, highway, range, or public place, or, in using barbed wire for fencing purposes, to permit the same to become loose or unfastened and allow it to so remain as to endanger the public. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and be fined in a sum not exceeding $100. '07, p. 37.

COMMENCING ACTION IN WRONG PRECINCT.

8510. (4487x22.) Commencement of actions in wrong precinct. Any party to any suit or proceeding, or any attorney or agent for such party, who knowingly commences, prosecutes, or maintains any action, suit, or proceeding in any justice's court, other than as provided by § 7426, is guilty of a misdemeanor. '07, p. 86.

8511. (4487x23.) Assuming joint liability to confer jurisdiction. Any person who binds himself, or voluntarily becomes liable jointly or jointly and severally with any other person, for the purpose of conferring jurisdiction of any cause upon any justice of the peace in any precinct or city that would be without jurisdiction except for such liability of such joint obligor, and any person, or his attorney or agent, who induces such person to assume such liability for the purpose of conferring jurisdiction upon the court of such justice of the peace is guilty of a misdemeanor. '07, p. 86.

WRONGFUL ISSUANCE OF ATTACHMENT.

8512. (4487x24.) Unlawful to issue writ of attachment, when. It is hereby declared and made unlawful for any justice of the peace to issue any writ of attachment, and for any party, and any agent or attorney of such party, to advise, induce, or procure the issuance thereof in any action, suit, or proceeding before the affidavit therefor is filed, or where the affidavit filed therefor does not conform substantially with the requirements of § 6706. Any person violating any of the provisions of this section shall be guilty of a misdemeanor, and shall be liable to the person whose property, credits, money, or earnings are so attached for double the value thereof, together with all costs paid by him, and all damages incurred in such attachment proceedings. '07, p. 122.

COERCING EMPLOYE TO BOARD OR TRADE.

8513. (4487x25.) No person must compel employe to board at particular house or trade at particular store. Every person, body corporate, agent, manager, or employer doing business in the state of Utah who, by coercion, intimidation, threats, or undue influence, compels his employes to board at a particular boarding house, or to trade with or at a particular store, shall be deemed guilty of a misdemeanor. '01, p. 39.

8514. (4487x26.) Penalty for interfering with flow of water. Every person who in any way interferes with or alters the flow of water in any stream, ditch, or lateral, while under the control or management of any water commissioner, shall be deemed guilty of a misdemeanor. '07, p. 57.

Interfering with water faucets, etc., §§ 8408, 8409.

Interference with or larceny of water, §§ 8302, 8410.

Injury to canal, dam, etc., § 8394.

CHAPTER 57.

GENERAL PROVISIONS.

8520. (4488.) A crime punishable under one provision only. An act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such provisions, but in no case can it be punished under more than one; an acquittal or conviction and sentence under either one bars a prosecution for the same act or omission under any other.

Cal. Pen. C., § 654.

A person shall not be twice put in jeopardy for the same offense, Con. art. 1, sec. 12.

Decisions on twice in jeopardy, note to § 8905.

A conviction for unlawful cohabitation is a bar to prosecution for adultery, where the act charged was part and incident of the unlawful cohabitation for which a conviction was had.

Ex parte Neilsen, 131 U. S. 176.

This section cannot be considered to authorize the enforcement of both § 8208, making the sale of liquors to an Indian a felony, and chap. 106, Laws 1911, making it a misdemeanor.

State v. Carman, 44 U. 353; 140 P. 670.

8521. (4489.) Act punishable under foreign law also. Effect. An act or omission declared punishable by this code is not less so because it is also punishable under the laws of another state, government, or country, unless the contrary is expressly declared.

Cal. Pen. C., § 655.

8522. (4490.) Foreign acquittal or conviction a bar. Whenever on the trial of an accused person it appears that upon a criminal prosecution under the laws of a state, government, or country, founded upon the act or omission in respect to which he is on trial, he has been acquitted or convicted, it is a sufficient defense.

Cal. Pen. C., § 656.
Similar section, § 8652.
Conviction, acquittal, or once in jeopardy a bar, § 8905, and note.

8523. (4491.) When act both crime and contempt. A criminal act is not less punishable as a crime because it is also declared to be punishable as a contempt.

Cal. Pen. C., § 657.
Contempt generally, §§ 7058-7073.

8524. (4492.) Id. Mitigation if contempt has been punished. When it appears at the time of passing sentence upon a person convicted upon indictment or information, that such person has already paid a fine or suffered an imprisonment for the act of which he stands convicted, under an order adjudging it a contempt, the court authorized to pass sentence may mitigate the punishment to be imposed, in its discretion.

Cal. Pen. C., § 658*.

8525. (4493.) Unlawfully sending letter. When offense complete. In the various cases in which the sending of a letter is made criminal by this code, the offense is deemed complete from the time when such letter is deposited in any postoffice, or any other place, or delivered to any person, with intent that it shall be forwarded.

Cal. Pen. C., § 660.
Sending threatening letter, §§ 8325, 8402.

8526. (4494.) Where act has been performed by one for another. Effect. No person is punishable for an omission to perform an act where such act has been performed by another person acting in his behalf and competent by law to perform it.

Cal. Pen. C., § 662.

8527. (4495.) Attempt defined. Conviction although crime committed. Any act done with intent to commit a crime, and tending but failing to effect its commission, is an attempt to commit a crime. Any person may be convicted of an attempt to commit a crime, although it appears on the trial that the crime intended or attempted was perpetrated by such person in pursuance of such attempt, unless the court, in its discretion, discharges the jury and directs such person to be tried for such crime.

Cal. Pen. C., § 663*.
Description in indictment of person upon whom injury attempted, § 8838.
Attempts to kill, §§ 8045, 8046, and note.
Assaults with intent to commit felonies, §§ 8047-8050.
Failure of attempt but commission of another crime, § 8529.
Under this section, and the provisions of § 8109, making it a felony to have sexual intercourse with a female under the age of consent, an information charging that accused did attempt to have sexual intercourse with a female under the age of consent sufficiently charges a public offense as against an attack made after verdict.
State v. Evans, 27 U. 12; 73 P. 1047
It is proper to prove just what the accused did when he is charged with an attempt at carnal knowledge.
State v. Benson, 46 U. 74; 148 P. 445.

8528. (4496.) Id. Penalties for attempts. Every person who attempts to commit any crime, but fails, or is prevented or intercepted in the perpetration thereof, is punishable, where no provision is made by law for the punishment of such attempt, as follows:

1. If the offense so attempted is punishable by imprisonment in the state prison for five years or more, or by imprisonment in a county jail, the person guilty of such attempt is punishable by imprisonment in the state prison, or in a county jail, as the case may be, for a term not exceeding one-half the longest term of imprisonment prescribed upon a conviction of the offense so attempted; *provided,* that in case such longest term be for life, the imprisonment shall be for not more than twenty years;

2. If the offense so attempted is punishable by imprisonment in the state prison for any term less than five years, the person guilty of such attempt is punishable by imprisonment in the county jail for not more than one year;

3. If the offense so attempted is punishable by a fine, the offender convicted of such attempt is punishable by a fine not exceeding one-half the largest fine which may be imposed upon a conviction of the offense so attempted;

4. If the offense so attempted is punishable by imprisonment and by a fine, the offender convicted of such attempt may be punished by both imprisonment and fine not exceeding one-half the longest term of imprisonment and one-half the largest fine which may be imposed upon a conviction for the offense so attempted.

Cal. Pen. C., § 664.
When agreement to commit a crime is a conspiracy, §§ 8018-8020.
Petitioner was sentenced to imprisonment for twelve years for an attempt to commit murder; held, that under § 4744, C. L. 1888, providing that a person attempting to commit a crime may be sentenced to imprisonment not exceeding half of the longest term for which he might have been imprisoned had he committed the crime, the petitioner might be sentenced for twelve years, although it was uncertain that he would have lived twenty-four years had be committed the crime and been sentenced for life.
In re De Camp, 15 U. 158; 49 P. 823.
Attempts to murder otherwise than by poisoning or assault are included in the general description of attempted crimes defined in § 4744, C. L. 1888.
Id.

8529. (4497.) Id. Failure of attempt, but commission of other crime. The next two preceding sections do not protect a person who, in attempting unsuccessfully to commit a crime, accomplishes the commission of another and different crime, whether greater or less in guilt, from suffering the punishment prescribed by law for the crime committed.

Cal. Pen. C., § 665.
Conspiracy to rob resulting in murder, note to § 8043.

8530. (4498.) When imprisonment commences. When any person is convicted of two or more crimes, either before or after sentence has been pronounced upon him for either, the imprisonment to which he is sentenced upon the second or other subsequent conviction must commence at the termination of the first term of imprisonment to which he shall be adjudged, or at the termination of the second or other subsequent term of imprisonment, as the case may be. Am'd '17, p. 46.

Cal. Pen. C., § 669. Similar section, § 9054, and note.

8531. (4499.) Id. When term of imprisonment begins. Temporary release. The term of imprisonment fixed by the judgment in a criminal action commences to run only upon the actual delivery of the defendant at the place of imprisonment, and if thereafter during such term the defendant by any legal means is temporarily released from such imprisonment and subsequently returned thereto, the time during which he was at large must not be computed as part of such term.

Cal. Pen. C., § 670. Delivery of defendant after judgment, §§ 9169, 9170.
Conviction of two or more offenses, § 9054.

8532. (4500.) Penalty when maximum imprisonment not fixed. Whenever any person is declared punishable for a crime by imprisonment in the state prison for a term not less than any specified number of years, and no limit to the duration of such imprisonment is declared, the court authorized to pronounce judgment upon such conviction may, in its discretion, sentence such offender to imprisonment during his natural life, or for any number of years not less than that prescribed.

Cal. Pen. C., § 671.
Court to determine and impose punishment, §§ 7898, 7899.

8533. (4501.) Civil rights suspended by term less than life. A sentence of imprisonment in the state prison for any term less than for life suspends all civil rights of the person so sentenced during such imprisonment, and forfeits all private trusts and all public offices, authority, or power.

Cal. Pen. C., § 673*.

8534. (4502.) Id. Prisoner for life thereafter deemed civilly dead. A person sentenced to imprisonment in the state prison for life is thereafter deemed civilly dead.

Cal. Pen. C., § 674.

8535. (4503.) Id. Two preceding sections qualified. The provisions of the two next preceding sections must not be construed to render the persons therein mentioned incompetent as witnesses upon the trial of a criminal action or proceeding, or incapable of making and acknowledging a sale or conveyance of property, or to make a last will and testament or to do such other acts as are permitted by law.

Cal. Pen. C., § 675*.

8536. (4504.) Person of convict under protection of law. The person of a convict sentenced to imprisonment in the state prison is under the protection of the law, and any injury to his person, not authorized by law, is punishable in the same manner as if he were not convicted or sentenced.

Cal. Pen. C., § 676.
Inhumanity to prisoner, §§ 8001, 8003.
Persons imprisoned not to be treated with unnecessary rigor, Con. art. 1, sec. 9.

8537. (4505.) No forfeiture unless expressly provided. No conviction of any person for crime works any forfeiture of any property, except in cases in which a forfeiture is expressly imposed by law, and all forfeitures to this state in the nature of a deodand, or where any person shall flee from justice, are abolished.

Cal. Pen. C., § 677.
Bill of attainder forbidden, Con. art. 1, sec. 18.

TITLE 120.

CODE OF CRIMINAL PROCEDURE.

CHAPTER 1.

PRELIMINARY PROVISIONS.

8546. (4506.) Name of title. This title shall be known as the Code of Criminal Procedure.

8547. (4507.) Criminal procedure shall be as herein prescribed. The procedure in criminal cases in the courts of this state shall be as prescribed in this code.

Prosecutions pending when repeal takes effect to be conformed to provisions of revised statutes, as far as consistent, § 5836.
No part of revised statutes retroactive, § 5840.
No ex post facto law shall be passed, Con. art. 1, sec. 18.
Rules of pleading in criminal cases, §§ 8828-8855, and notes.

8548. (4508.) Legal conviction must precede punishment. No person shall be punished for a public offense, except upon a legal conviction in a court having jurisdiction thereof.

Cal. Pen. C., § 681.
No person shall be deprived of life or liberty without due process of law, Con. art. 1, sec. 7.

8549. (4509.) Prosecution by information or indictment. Other prosecutions. Every public offense must be prosecuted by information after examination and commitment by a magistrate, unless the examination be waived by the accused with the consent of the state, or by indictment, with or without such examination and commitment, except:

1. Where proceedings shall be had for the removal of a civil officer of the state, of a political subdivision thereof, of a municipality, or of a school district;

2. Offenses arising in the militia when in actual service, and in the land and naval forces in time of war or public danger, or which the state may keep, with the consent of congress, in time of peace;

3. Offenses triable in justices' and police courts.

Cal. Pen. C., § 682*.
Prosecution by information or indictment after examination and commitment, or waiver, Con. art. 1, sec. 13, and note.
Removal of civil officer, Con. art. 6, sec. 21; §§ 8625-8640.
Powers of courts-martial not affected by Penal Code, § 7897.
Powers of courts-martial, §§ 3858-3862.
All offenses prosecuted by information or indictment, except, § 8773.
Preliminary examination, §§ 8737-8769.
The information filed, when, §§ 8779, 8780.
Rules of pleading, forms of informations and indictments, §§ 8828-8850, and notes.
Finding of indictment, §§ 8820-8823.

By waiving examination, accused waives defects in complaint.
U. S. v. Eldredge, 5 U. 161; 13 P. 673.
It is not necessary that proof be offered at the trial that accused was bound over by a magistrate for the offense charged. Having waived this objection when called upon to plead, it is too late to review it on appeal.
State v. Spencer, 15 U. 149; 49 P. 302.
A prisoner has the right, with consent of the state, to waive examination before committing magistrate; and if none was had and he goes to trial without objection, the examination will be presumed to have been waived, and after trial he will be precluded from insisting on the objection.
State v. Norman, 16 U. 457; 52 P. 986.
State v. Pierpont, 16 U. 476; 52 P. 992.
An information charging that there was inflicted upon the body of deceased one mortal wound, from which mortal wound deceased languished a short time, and then on a certain date died, is not defective in failing to charge that deceased languished and died from the wound inflicted.
State v. Inlow, 44 U. 485; 141 P. 530.

8550. (4510.) Criminal action defined. The proceeding by which a person charged with a public offense is accused and brought to trial and punishment is known as a criminal action.

Cal. Pen. C., § 683.

8551. (4511.) Prosecutions to be in the name of the state. A criminal action shall be prosecuted in the name of the state of Utah, as a party, against the person charged with the offense.

Cal. Pen. C., § 684*.
All prosecutions to be conducted in the name and by the authority of "The State of Utah," Con. art. 8, sec. 18.

8552. (4512.) Party prosecuted known as defendant. The party prosecuted in a criminal action is designated in this code as the defendant.

Cal. Pen. C., § 685.

8553. (4513.) Rights of the defendant. In criminal prosecutions, the defendant shall be entitled:

1. To appear and defend in person and by counsel;
2. To demand the nature and cause of the accusation against him, and to have a copy thereof;
3. To testify in his own behalf;
4. To be confronted by the witness against him, except that where the charge has been preliminarily examined before a committing magistrate and the testimony taken down by question and answer, in the presence of the defendant, who has, either in person or by counsel, cross-examined, or has had an opportunity to cross-examine, the witness, or where the testimony of a witness on the part of the state, who is unable to give security for his appearance, has been taken conditionally in like manner in the presence of the defendant, who has, either in person or by counsel, cross-examined, or has had an opportunity to cross-examine, the witness, the deposition of such witness may be read, upon it being satisfactorily shown to the court that he is dead or insane, or cannot, with due diligence, be found within the state;
5. To have compulsory process to compel the attendance of witnesses in his own behalf;
6. To have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed;
7. To the right of appeal in all cases.

Cal. Pen. C., § 686*.
When reported testimony may be used on subsequent trial, § 9277.
Testimony of witnesses on preliminary may be taken, use as evidence, §§ 8765-8767, and note.
Constitutional rights of accused, Con. art. 1, secs. 7-13, and notes.
Decisions on twice in jeopardy, etc., note to § 8905.
Right to testify; right to refuse to answeer incriminating questions, Con. art. 1, sec. 12, and note.
Right to speedy public trial, and to be confronted by witnesses, Con. art. 1, sec. 12, and note.
In a criminal prosecution, the general rule is that the right to refuse to answer incriminating questions is a personal privilege of the witness, which he can either exercise or waive, and, if he chooses to answer, neither defendant nor his counsel can legally object.
State v. Shockley, 29 U. 25; 80 P. 865.
But a defendant on taking the witness stand does not abandon his constitutional rights to "appear and defend in person and by counsel," and may claim the privilege through his counsel.
Id.
An order of the trial court permitting witness to turn her back to accused and directing removal of defendant so far that he could neither see nor hear the witness nor see the jury, denied defendant a constitutional right, and prevented him from having a fair trial.
State v. Mannion, 19 U. 505; 57 P. 512.
Where, in prosecution for homicide, defendant entered into a stipulation in open court at the trial, admitting that, if a certain witness were present, he would testify to certain facts and agreeing that it should be received in evidence and considered by the jury, he could not subsequently contend that the admission of such was erroneous, on the ground that it was a violation of his right to be confronted by witnesses, conferred by this section, and Con. art. 1, sec. 12, as such right can be waived.
State v. Mortensen, 26 U. 312; 73 P. 562.
A view is not the taking of testimony within the meaning of the constitution, but its sole purpose and object is to enable the jurors to more accurately understand and more fully appreciate the testimony of witnesses given before them.
State v. Mortensen, 26 U. 312; 73 P. 562, 633.
The provisions of section 8553, sub. 4, are not in conflict with Con. art. 1, sec. 12, guaran-

teeing that an accused shall have the right to be confronted by witnesses against him.
State v. King, 24 U. 482; 68 P. 418.
Proceedings for contempt for violation of an injunction as to a trade mark are civil, and it was proper to admit a deposition in evidence.
Davidson v. Munsey, 29 U. 181; 80 P. 743.
A person charged with a crime has a constitutional right to have his case tried by a court having jurisdiction, and his mere silence or failure, during the trial, to object to the jurisdiction assumed by the court does not constitute a waiver of that right, or prevent him from raising the question at any subsequent stage of the proceedings, or after trial.
State v. Morrey, 23 U. 273; 64 P. 764.
Where a defendant, in the progress of a case in open court, discharges his attorney and announces he will conduct his own case, and the court agreed he had the right so to do, the action of court in appointing defendant's former attorney amici curiae to conduct examinations for him and protect his interest, was proper.
State v. Hillstrom, 46 U. 341; 150 P. 935.
The constitutional right of the defendant to be confronted by witnesses is not violated by permitting a transcript of the testimony, at a preliminary hearing, given in the presence of the defendant with opportunity of cross-examination, to be received at a trial, where the witness is absent from the state.
State v. Vance, 38 U. 1; 110 P. 434.
And it is not required to further prove that a special effort was made to find the witness within the state.
State v. De Pretto, 48 U. 249; 155 P. 336.
Where the defendant, at the solicitation of the sheriff, voluntarily places his foot in the tracks left by the criminal, or surrenders his shoes to the sheriff for comparison, he cannot object to testimony as to the comparison.
State v. Sirmay, 40 U. 525; 122 P. 748.

8554. (4514.) Defendant not compelled to advance fees. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed.

Constitutional provision, Con. art. 1, sec. 12.
Stenographer's fees on appeal paid by state for defendant in criminal case, when, § 1906.
Subpoena of witnesses for impecunious defendant in criminal case, § 2555.
Actions without payment of fees by impecunious suitors, §§ 2576-2578.

8555. (4515.) Defendant need not testify. Husband or wife as witness. Twice in jeopardy. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

Cal. Pen. C., §§ 687*, 688*.
Decisions on rights of defendant, note to § 8553.
Refusal of accused to testify not to prejudice him, § 9279.
Husband or wife not competent as witness for or against each other without consent, § 9278, in civil action, § 7124.
Defendant as a witness, examination, § 9279.
Constitutional provisions as to rights, Con. art. 1, sec. 12.
Acquittal or conviction a bar, §§ 8520, 8522, 8652, 8653, 8898, 8904, 8905.
What acquittal not a bar, § 8903.
Plea of once in jeopardy, § 8898, and note.
Decisions on conviction, acquittal, or once in jeopardy, note to § 8905.

8556. (4516.) No person convicted except on verdict or judgment. No person shall be convicted of a public offense unless by the verdict of a jury, accepted and recorded by the court, or upon a plea of guilty, or upon a judgment against him upon a demurrer when he refuses to plead, or upon a judgment of a court for a public offense not amounting to felony, a jury having been waived.

Cal. Pen. C., § 689*.
Waiver of jury in criminal case not amounting to felony, § 8925.
Due process of law, Con. art. 1, sec. 7, and note.

CHAPTER 2.

LAWFUL RESISTANCE.

8560. (4517.) Who may make lawful resistance. Lawful resistance to the commission of a public offense may be made:
1. By the party about to be injured;
2. By other parties.

Cal. Pen. C., § 692.
Justifiable homicide, §§ 8031, 8032.

8561. (4518.) Party may protect person, family, and property. Resistance sufficient to prevent the offense may be made by the party about to be injured:
1. To prevent an offense against his person, or his family, or some member thereof;
2. To prevent an illegal attempt by force to take or injure property in his lawful possession.

Cal. Pen. C., § 693.
Right to protect the person.
People v. Olsen, 4 U. 413; 11 P. 577.

8562. (4519.) When third party may assist. Any other person, in aid or defense of the person about to be injured, may make resistance sufficient to prevent the offense.

Cal. Pen. C., § 694.

CHAPTER 3.

INTERVENTION OF OFFICERS.

8563. (4520.) Officers may prevent public offenses, how. Public offenses may be prevented by the intervention of the officers of justice:

1. By requiring security to keep the peace;
2. By forming a police in cities, towns, or counties, and by requiring their attendance in exposed places;
3. By suppressing riots.

Cal. Pen. C., § 697*.

8564. (4521.) When person justified in assisting officers. When the officers of justice are authorized to act in the prevention of public offenses, other persons who, by their command, act in their aid, are justified in so doing.

Cal. Pen. C., § 698.
Justifiable homicide, §§ 8031, 8032.
Officer may command assistance, §§ 8004, 8591, 8693, 8717.
Arrest, by whom and how made, §§ 8712-8731.

CHAPTER 4.

SECURITY TO KEEP THE PEACE.

8567. (4522.) Complaint of threatened injury. A complaint may be made before any magistrate that a person has threatened to commit an offense against the person or property of another.

Cal. Pen. C., § 701*.
Complaint, form, etc., §§ 8680-8682.
Complaint for offense within justice's jurisdiction, § 9420.

8568. (4523.) Examination of complainant and witnesses. The magistrate must examine on oath the complainant and any witnesses he may produce, and may take their depositions in writing.

Cal. Pen. C., § 702*.

8569. (4524.) Complaint defined. A complaint within the meaning of this chapter is a statement in writing of the jurisdictional facts, clearly specifying the threatened offense, and subscribed and sworn to by the complainant.

N. Dak. (1895) § 7765*.

8570. (4525.) Warrant of arrest issued, when. Form. If it appears that there is just reason to fear the commission of the offense threatened, the magistrate may issue a warrant directed generally to any peace officer, reciting the substance of the complaint and commanding the officer forthwith to arrest the person complained of and bring him before such magistrate, or, in case of his absence or inability to act, before the nearest and most accessible magistrate of the county.

Cal. Pen. C., § 703*.
Warrant generally, §§ 8688-8707.

8571. (4526.) Procedure if defendant taken before different magistrate. When the person arrested is taken before a magistrate other than the one who issued the warrant, the peace officer who executed the warrant must deliver it to the magistrate with his return indorsed thereon. The complaint, and deposition, if any, on which the warrant was issued must be sent to the magistrate before whom the person arrested is taken.

Iowa, McClain's An. C., § 5498*.

8572. (4527.) Change of venue as in preliminary examinations. When the person complained of is brought before the magistrate, a change of venue may be had as in preliminary examinations.

Iowa, McClain's An. C., § 5499*. Change of venue, § 8740.

8573. (4528.) The hearing. Testimony reduced to writing, when. At the time set for the hearing of the charge, the magistrate must take the testimony in relation thereto, and the evidence, on demand of the person complained of, must be reduced to writing, and subscribed by the witnesses.

Cal. Pen. C., § 704*.

8574. (4529.) Discharge. When complainant to pay costs. If it appears that there is no just reason to fear the commission of the offense alleged to have been threatened, the person complained of must be discharged, and the complainant may be ordered to pay the costs of the proceedings if the magistrate regards the complaint as unfounded and frivolous, and judgment may be entered and execution issued therefor.

Cal. Pen. C., § 705*. Iowa, McClain's An. C., § 5500*.

8575. (4530.) Security to keep peace required, when. If, however, there is just reason to fear the commission of the offense, the person complained of may be required to enter into an undertaking in such sum, not exceeding $3,000, as the magistrate may direct, with one or more sufficient sureties, to keep the peace toward the people of this state, and particularly toward the complainant. The undertaking shall be valid and binding for six months and may, upon the renewal of the complaint, be extended for a longer period, or a new undertaking may be required.

Cal. Pen. C., § 706*.

One who unlawfully attempts to enter upon land in the lawful possession of another cannot ask to have the one in possession put under bonds. Johnston v. Meaghr, 14 U. 426; 47 P. 861.

8576. (4531.) Discharge on giving security. Commitment otherwise. If the undertaking required by the next preceding section is given, the party complained of must be discharged. If he does not give it, the magistrate must commit him to prison, specifying in the warrant of commitment the requirement to give security, the amount thereof, and the omission to give the same.

Cal. Pen. C., § 707.

8577. (4532.) Discharge after commitment, on giving security. If the person complained of is committed for not giving the undertaking required, he may be discharged by any magistrate upon giving the same.

Cal. Pen. C., § 708.

8578. (4533.) Undertaking to be filed in district court. The undertaking must be filed by the magistrate in the office of the clerk of the district court of the county.

Cal. Pen. C., § 709.

8579. (4534.) Assault in presence of magistrate. Security. A person who, in the presence of a court or magistrate, assaults or threatens to assault another or to commit an offense against his person or property, or who contends with another with angry words, may be ordered by the court or magistrate to give security, as in this chapter provided, and if he refuses to do so, may be committed as provided in § 8576.

Cal. Pen. C., § 710. Arrest by magistrate in such case, § 8716.
Contempts in justices' courts, §§ 7525-7529, 9465. Contempts generally, §§ 7058-7073.

8580. (4535.) Undertaking broken by conviction. Upon the conviction of the person complained against of a breach of the peace, the undertaking is broken.

Cal. Pen. C., § 711.

8581. (4536.) Undertaking prosecuted by county attorney. Upon the county attorney producing evidence of such conviction to the district court where the undertaking was filed, the court must order the undertaking to be prosecuted, and the county attorney must thereupon commence an action upon it in the name of the state.

Cal. Pen. C., § 712*.

8582. (4537.) Id. Record of conviction conclusive evidence. In such

action, the offense stated in the record of conviction must be alleged as a breach of the undertaking, and such record is conclusive evidence thereof.

Cal. Pen. C., § 713.

Judgment in case of security to keep the peace not conclusive.
Johnston v. Meaghr, 14 U. 426; 47 P. 861.

8583. (4538.) Security required only as herein prescribed. Security to keep the peace or to be of good behavior cannot be required except as prescribed in this chapter.

Cal. Pen. C., § 714.

CHAPTER 5.

POLICE AND THEIR ATTENDANCE.

8586. (4539.) Police governed by special statutes. The organization and regulation of the police in the cities, towns, and counties of this state are governed by special statutes.

Cal. Pen. C., § 719*

Police in cities, §§ 646, 665; in towns, § 786.

8587. (4540.) Ordering police to preserve peace at public meeting. The mayor or other officer having the direction of the police of a city, town, or county must order a sufficient force to preserve the peace to attend any public meeting, when he is satisfied that a breach of the peace is reasonably apprehended.

Cal. Pen. C., § 720*.

CHAPTER 6.

SUPPRESSION OF RIOTS.

8591. (4541.) Officer may command assistance to execute process. When a sheriff or other public officer authorized to execute process finds, or has reason to apprehend, that resistance will be made to the execution of the process, he may command as many male inhabitants of his county as he may think proper to assist him in overcoming the resistance, and, if necessary, in seizing, arresting, and confining the persons resisting and their aiders and abettors.

Cal. Pen. C., § 723.
Riot and unlawful assembly, §§ 8218-8224.
Refusing to assist officers, penalty, § 8004.

Authority of persons assisting officer, § 8564.
Mayor may order out the police, § 8587.

8592. (4542.) Persons resisting process to be reported to the court. The officer must certify to the court from which the process issued the names of the persons resisting, and their aiders and abetters, to the end that they may be proceeded against for their contempt of court.

Cal. Pen. C., § 724.
Contempt of court generally, §§ 7058-7072; in justices' courts, §§ 7525-7529, 9465.

8593. (4543.) Officer to command rioters to disperse. When any number of persons, whether armed or not, are unlawfully or riotously assembled, the sheriff of the county and his deputies, the officials governing the precinct or city, or the justices of the peace and constables thereof, or any of them, must go among the persons assembled, or as near to them as possible, and command them, in the name of the state, immediately to disperse.

Cal. Pen. C., § 726.

8594. (4544.) Id. Arrest on refusal to disperse. If the persons assembled do not immediately disperse, such magistrates and officers must arrest them, and to that end may command the aid of all persons present or within the county.

Cal. Pen. C., § 727.

8595. (4545.) Person refusing to assist officer, etc., deemed a rioter. If a person present, being commanded by any of the magistrates or officers men-

tioned in the preceding section to aid or assist in seizing and securing such rioters or persons so unlawfully assembled, or in suppressing such riot or unlawful assembly, refuses or neglects to obey such command, or, when required by such magistrate or officer to depart from the place, refuses, or neglects so to do, he shall be deemed one of the rioters or persons unlawfully assembled, and may be prosecuted and punished accordingly.

Mass., p. 1163, § 2.

CHAPTER 7.

IMPEACHMENTS.

8600. (4546.) Officers liable to impeachment. The governor and other state and judicial officers, except justices of the peace, shall be liable to impeachment for high crimes and misdemeanors, or malfeasance in office.

Mont. Pen. C., § 1500.
Provisions of constitution relating to impeachments, Con. art. 6, secs. 16-21.
Removal by judicial proceedings, §§ 8625-8640.
Power of impeachment, etc., not affected by penal code, § 7896.
Felonious misconduct in office, disqualification, §§ 7906, 7961, 8237.

8601. (4547.) Impeachment by house by two-thirds vote. Trial. The house of representatives shall have the sole power of impeachment, but, in order to impeach, two-thirds of all the members elected must vote therefor. All impeachments shall be tried by the senate sitting for that purpose, and the senators shall be upon oath or affirmation to do justice according to law and the evidence.

Mont. Pen. C., § 1501*.

8602. (4548.) Two-thirds of senators to convict. Chief justice to preside, when. When the governor is on trial, the chief justice of the supreme court shall preside, and, in case he is disqualified or unable to act, the senate shall select some other judge of that court. No person shall be convicted without a concurrence of two-thirds of the senators elected.

Mont. Pen. C., § 1501*.

8603. (4549.) House to elect managers to conduct proceedings. Articles. All impeachments must be by resolution adopted, originated in, and conducted by managers elected by, the house of representatives, who must prepare articles of impeachment, present them at the bar of the senate, and prosecute the same.

Cal. Pen. C., § 738*; Mont. Pen. C., § 1502.

8604. (4550.) Articles of impeachment delivered to senate. When an officer is impeached by the house of representatives, the articles of impeachment must be delivered to the president of the senate.

Cal. Pen C, § 739*; Mont Pen. C., § 1503.

8605. (4551.) House to have notice of hearing. Defendant served with articles. The senate must assign a day for the hearing of the impeachment, and inform the house of representatives thereof. The president of the senate must cause a copy of the articles of impeachment, with a notice to appear and answer the same at the time and place appointed, to be served on the defendant not less than ten days before the day fixed for the hearing.

Cal. Pen C., § 740; Mont. Pen. C., § 1504.

8606. (4552.) Service upon defendant, how made. The service must be made upon the defendant personally, or if he cannot, upon diligent inquiry, be found within the state, the senate, upon proof of that fact, may order publication to be made, in such manner as it may deem proper, of a notice requiring him to appear at a specified time and place and answer the articles of impeachment.

Cal. Pen. C., 741; Mont. Pen. C,, § 1505.

8607. (4553.) Proof of service if defendant does not appear. Trial. If the defendant does not appear, the senate, upon proof of service or publication, as provided in the next two preceding sections, may, of its own motion

or for cause shown, assign another day for hearing the impeachment, or may proceed, in the absence of the defendant, to trial and judgment.

Cal. Pen. C., § 742; Mont. Pen. C., § 1506.

8608. (4554.) Counsel for defendant appointed, when. If the defendant appears, and is unable to procure the assistance of counsel, it is the duty of the president of the senate to appoint some suitable person to assist him in his defense; if the defendant is served by publication and fails to appear, it is the duty of the president of the senate to appoint some person or counsel to appear in his behalf and make defense for him.

Mont Pen. C., § 1507.

8609. (4555.) Demurrer to be in writing. Plea of not guilty. When the defendant appears, he may in writing object to the sufficiency of the articles of impeachment, or he may answer the same by an oral plea of not guilty, which plea must be entered upon the journal, and which puts in issue every material allegation of the articles of impeachment.

Cal. Pen. C., § 743; Mont Pen. C., § 1508.

8610. (4556.) Procedure when demurrer overruled. If the objection to the sufficiency of the articles of impeachment is not sustained by a majority of the members of the senate elected, the defendant must be ordered forthwith to answer the articles of impeachment. If he then pleads guilty, the senate must render judgment of conviction against him. If he pleads not guilty, or refuses to plead, the senate must, at such time as it may appoint, proceed to try the impeachment.

Cal. Pen. C., § 744*; Mont. Pen. C., § 1509.

8611. (4557.) Trial. Senators to be sworn. At the time and place appointed, and before the senate proceeds to act on the impeachment, the secretary must administer to the president of the senate, and the president of the senate to each of the members of the senate then present, an oath or affirmation to do justice according to law and the evidence; and no member of the senate can act or vote upon the impeachment, or upon any question arising thereon, without having taken such oath or affirmation.

Cal. Pen. C., § 745*; Mont. Pen. C., § 1510*.

8612. (4558.) Two-thirds vote necessary to convict. The defendant shall not be convicted on impeachment without the concurrence of two-thirds of the members elected, voting by ayes and noes, and if two-thirds of the members elected do not concur in a conviction, he must be acquitted.

Cal. Pen. C., § 746; Mont. Pen. C., § 1511.

8613. (4559.) Judgment pronounced by resolution. Entry. After conviction the senate must, at such time as it may appoint, pronounce judgment, in the form of a resolution entered upon the journal of the senate.

Cal. Pen. C., § 747; Mont. Pen C., § 1512.

8614. (4560.) Majority may adopt resolution. On the adoption of the resolution by a majority of the members present who voted on the question of acquittal or conviction, it becomes the judgment of the senate.

Cal. Pen. C., § 748; Mont. Pen. C., § 1513.

8615. (4561.) Judgment may be of suspension or removal. The judgment may be that the defendant be suspended, or that he be removed from office and disqualified to hold any office of honor, trust, or profit in the state.

Cal. Pen. C., § 749; Mont. Pen. C., § 1514.

8616. (4562.) Judgment of suspension. Effect. If judgment of suspension is given, the defendant, during the continuance thereof, is disqualified from receiving the salary, fees, or emoluments of the office.

Cal. Pen. C., § 750; Mont. Pen. C., § 1515.

8617. (4563.) Suspension on filing articles. Vacancy, how filled. Whenever articles of impeachment against any officer subject to impeachment are presented to the senate, and such officer shall have been served a copy of the articles thereof, such officer shall be temporarily suspended from his office, and shall not act in his official capacity until he is acquitted. Upon such suspension of any officer, other than the governor, his office must be at

once temporarily filled by an appointment made by the governor, with the advice and consent of the senate, until the acquittal of the party impeached; or, in case of his removal, until the vacancy is filled at the next election as required by law.

Cal. Pen. C., § 751*; Mont. Pen. C., § 1516*.

8618. (4564.) Conviction or acquittal does not bar prosecution. The defendant, whether convicted or acquitted, shall nevertheless be liable to prosecution, trial, and punishment according to law.

Cal. Pen. C., § 753*; Mont. Pen. C., § 1518*.

CHAPTER 8.

REMOVAL BY JUDICIAL PROCEEDINGS.

8625. (4565.) Officers not liable to impeachment may be removed. All officers not liable to impeachment shall be subject to removal for high crimes, misdemeanors, or malfeasance in office, as in this chapter provided.

Mont. Pen. C., § 1530*.
Authorized by Con. art. 6, sec. 21.
Impeachments, §§ 8600-8618.
Removal not affected by Penal Code, § 7896.
Felonious misconduct in office, disqualification, § 7906.
Where an officer presents a bill to the state, and is paid for certain expenses, and thereafter presents a bill for the same expenses to the county, proof of his wrongful intent is essential for removal.
Law v. Smith, 34 U. 394; 98 P. 300.
Proof that a county officer proffered a fraudulent claim against the county and received payment therefor, with knowledge that he had no right to the money, shows his guilt of malfeasance under §§ 7896, 7929.
Id.
It is necessary that the act of which the officer is accused is positively unlawful or involves some evil or wrongdoing on his part which must be known to him to be such when he committed the act.
Id.

8626. (4566.) Accusation presented by grand jury or county attorney. An accusation in writing against any district, county, precinct, municipal, or school district officer, or officer of any board of education, for any high crime, misdemeanor, or malfeasance in office, may be presented by the grand jury or by the county attorney of the county in which the officer accused is elected or appointed.

Mont. Pen. C., § 1531*.
Accusation may be presented to court by taxpayer, § 8640.

8627. (4567.) Accusation must state the offense. The accusation must state the offense charged in ordinary and concise language.

Mont. Pen. C., § 1532*.
Action for removal from office begun by accusation, § 8774.

8628. (4568.) Accusation by grand jury. County attorney to prosecute. Notice. When found by the grand jury, the accusation must be delivered by the foreman to the county attorney, except when he is the officer accused. The county attorney must thereupon cause a copy of the accusation to be served upon the defendant, and require, by notice in writing of not less than ten days, that he appear before the district court of the county, at a time mentioned in the notice, and answer to the accusation. The original accusation must then be filed with the clerk of the court.

Mont. Pen. C., § 1533*.

8629. (4569.) Defendant must appear. Procedure on default. The defendant must appear at the time appointed, and answer the accusation, unless for some sufficient cause the court assign another for that purpose. If he does not appear, the court may proceed to hear and determine the accusation in his absence.

Mont. Pen. C., § 1534*.

8630. (4570.) Defendant's answer. The defendant may answer the accusation either by objecting to the sufficiency thereof, or of any article therein, or by denying the truth of the same.

Mont. Pen. C., § 1535.

8631. (4571.) Objections to accusation for insufficiency. If he objects to the legal sufficiency of the accusation, the objection must be in writing, but

need not be in any specific form, it being sufficient if it presents intelligently the grounds of the objection.

Mont. Pen .C., § 1536.

8632. (4572.) Denial may be oral. Entry. If he denies the truth of the accusation, the denial may be oral and without oath, and must be entered upon the minutes.

Mont. Pen. C., § 1537.

8633. (4573.) Objection overruled. Answer. If an objection to the sufficiency of the accusation is not sustained, the defendant must answer thereto forthwith.

Mont. Pen. C., § 1538.

8634. (4574.) Judgment on plea of guilty. Trial on denial. If the defendant pleads guilty, the court must render judgment of conviction against him. If he denies the matters charged or refuses to answer the accusation, the court must immediately, or at such time as it may appoint, proceed to try the accusation.

Mont. Pen. C., § 1539.

8635. (4575.) Trial by jury. Criminal procedure governs. The trial must be by jury, and shall be conducted in all respects in the same manner as the trial of an indictment or information for a felony.

Mont. Pen. C., § 1540*.

The accused is entitled to a jury trial, and the court cannot direct a verdict against him. Law v. Smith, 34 U. 394; 98 P. 300.

8636. (4576.) Process for witnesses. The county attorney and the defendant shall be respectively entitled to such process as may be necessary to enforce the attendance of witnesses as upon the trial of an indictment or information for a felony.

Mont. Pen. C., § 1541*.

8637. (4577.) Judgment on conviction. Removal. Upon a conviction, the court must, at such time as it may appoint, pronounce judgment that the defendant be removed from office; but, to warrant a removal, a judgment must be entered upon the minutes, and the causes of removal must be assigned therein.

Mont. Pen. C., § 1542.

Officer convicted of felony disqualified, § 7906.

8638. (4578.) Appeal allowed. Suspension from office. Vacancy. From a judgment of removal, an appeal may be taken to the supreme court, in the same manner as from a judgment in a civil action; but, until such judgment is reversed, the defendant shall be suspended from his office. Pending the appeal, the office must be filled as in case of a vacancy.

Mont. Pen. C., § 1543.

Where an accusation against a county attorney charged acts not prohibited by § 8639, under which it was brought, and the court had no jurisdiction, his remedy by appeal being inadequate, he could bring prohibition. Parker v. Morgan, 48 U. 405; 160 P. 764.

8639. (4579.) Procedure for removal of county attorney. The same proceedings may be had on like grounds for the removal of a county attorney, except that the accusation must be made by the grand jury or by the attorney general of the state, and must be delivered by the foreman of the grand jury or the attorney-general to the clerk, and by him to the judge of the district court of the county, who must thereupon appoint some one to act as prosecuting officer in the matter, or place the accusation in the hands of the county attorney of an adjoining county and require him to conduct the proceedings.

Mont. Pen. C., § 1544*.

8640. (4580.) Accusation of misconduct by public officer. Notice. Trial. When an accusation in writing, verified by the oath of any taxpayer, shall be presented to the district court, alleging that any officer within the jurisdiction of the court has been guilty of knowingly, wilfully, and corruptly charging and collecting illegal fees for service rendered or to be rendered in his office, or has knowingly, wilfully, and corruptly refused or neglected to perform the official duties pertaining to his office, the court must cite the party charged to appear before the court at a time not more than ten nor less than five days from the time the accusation was presented; and on that day, or

some subsequent day not more than twenty days from that on which the accusation was presented, must proceed to impanel a jury, and hear the accusation and evidence offered in support of the same, and the answer and evidence offered by the party accused; *provided,* that if said accusation is presented when a setting of the cases under the rules of the court has already been had, then the said twenty days shall begin to run from the date on which the last case is set; and if, on such hearing, it shall appear by the verdict of the jury that the charge is sustained, the court must enter a judgment that the party accused be deprived of his office, and taxed with such costs as are allowed in civil cases. Am'd '07, p. 5.

Mont. Pen. C., § 1545*.
Charging or receiving illegal fees, § 2589.
Fee book, fee table, statement, §§ 2583-2589.
Accusation, information, or indictment against an officer must be presented to or filed or found in the district court, § 8775.

While there is no provision for taxing costs where defendant is successful, that does not invalidate the statute.
Skeen v. Chambers, 31 U. 36; 86 P. 493.

Word "knowingly" defined in prosecution for receiving illegal fees.
Id.

Under Con. art. 6, sec. 21, providing that removals of officers for misconduct might be made "in such manner as may be provided by law," the legislature was authorized to pass this section, providing for removal proceedings at the instance of a private person, notwithstanding Con. art. 8, sec. 18, providing that prosecutions shall be in the name of "the State of Utah."
Skeen v. Paine, 31 U. 295; 90 P. 440.

A proceeding under this section is civil, not criminal, and the accusation need not be in name of state of Utah, as provided by Con. art. 8, sec. 18.
Skeen v. Craig, 31 U. 20; 86 P. 487.

Officer receiving salary unlawfully may be proceeded against the same as one paid in fees.
Id.

The proceedings specified by this section for the removal of public officers for misconduct are civil and not criminal, so that, where the facts are not in dispute, the trial court may direct a verdict of guilty on the law applicable to the facts.
Skeen v. Paine, 31 U. 295; 90 P. 440.

In proceedings to remove a city councilman for receiving illegal fees as provided by this section, it was no defense that, after the fees had been declared illegal, he had made restitution thereof to the city.
Id.

Provisions of this section have no application to heads of fire and police departments.
Skeen v. Browning, 31 U. 164; 89 P. 642.

Presentation of a claim to the county for money paid out in discharge of an official duty, for which the law provided no compensation other than salary, does not subject the one presenting such claim to the charge of collecting illegal fees.
Law v. Smith, 34 U. 394; 98 P. 300.

A county attorney charging more for stenographic work than he pays is not covered by this section.
Parker v. Morgan, 48 U. 405; 160 P. 764.

The county commissioners may direct prosecutions for officer's delinquencies, in the name of a taxpayer.
Carbon County v. Hamilton, 48 U. 503; 160 P. 765.

CHAPTER 9.

LOCAL JURISDICTION OF PUBLIC OFFENSES.

8645. (4581.) Jurisdiction of offense consummated within the state. Every person shall be liable to punishment, by the laws of this state, for any public offense committed by him therein. When the commission of a public offense, commenced without the state, shall have been consummated within its boundaries, the defendant shall be liable to punishment therefor in this state, though he was out of the state at the time of the commission of the offense charged. If he shall have consummated it in this state through the intervention of an innocent or a guilty agent, or by any other means proceeding directly from himself, in such case the jurisdiction shall be in the county in which the offense was consummated.

Cal. Pen. C., §§ 777, 778.
Persons liable to punishment, § 7916.
Criminal jurisdiction of district court, Con. art. 8, sec. 5; § 1667.
Place of trial, note to Con. art. 8, sec. 5.

8646. (4582.) Duel without state. Jurisdiction where death occurs. When an inhabitant or resident of this state, by previous appointment or engagement, fights a duel, or is concerned as a second or surgeon therein, out of the jurisdiction of this state, and, in the duel, a wound is inflicted upon a person whereof he dies in this state, the jurisdiction of the offense shall be in the county where the death happens.

Mont. Pen. C., § 1562.
Duels and challenges, §§ 8055-8060.

8647. (4583.) Leaving state to duel. Jurisdiction in county of residence. When an inhabitant or resident of this state leaves the same for the purpose of evading the operation of the law relating to dueling and challenges to fight, with the intent or for the purpose of doing any of the acts prohibited therein,

the jurisdiction shall be in the county of which the offender was an inhabitant or resident when the offense was committed.

Mont. Pen. C., § 1563.

8648. (4584.) Offense committed in more than one county or near boundary. When a public offense shall have been committed in part in one county and in part in another, or the acts or effects thereof constituting or requisite to the consummation of the offense shall have occurred in two or more counties, the jurisdiction shall be in any of such counties. When a public offense shall have been committed near the boundaries of two or more counties, the jurisdiction shall be in any of such counties.

Cal. Pen. C., § 781*.
Proceeding when, on trial, jurisdiction found to lie in another county, § 8996.
Jurisdiction in two or more counties, §§ 8653, 8656.
Place of trial, Con. art. 8, sec. 5, and note.
When warrant issued in county where accused is found, § 8703.

Offense committed near boundary line; instructions erroneous.

State v. Alexander, 20 U. 322; 62 P. 1119.

Before the provisions of this section can become operative in any criminal case, outside of those committed near the boundary line of two counties, the offense must be divisible and each part be unlawful in and of itself and committed at a different time and place; or, the offense must consist of more than one act, each of which acts or effect of such acts must constitute an unlawful element of the offense, without the presence of which an offense could not be consummated.

State v. Graham, 23 U. 278; 64 P. 557.

The mere existence in some county other than the county of the trial of acts or conditions of the defendant, lawful themselves, but necessary to be alleged under § 8830, and proven, in order to establish the crime charged, do not invoke the provisions of this section.

Id.

8649. (4585.) Injury in one county, death in another. The jurisdiction of a criminal action for murder or manslaughter, when the injury which caused the death shall have been inflicted in one county and the party injured shall have died in another, or out of the state, shall be in the county where the injury was inflicted.

Cal. Pen. C., § 790.

8650. (4586.) Jurisdiction over accessory. In the case of an accessory in the commission of a public offense, the jurisdiction shall be in the county where the offense of the accessory was committed, notwithstanding the principal offense was committed in another county.

Cal. Pen. C., § 791.
Principal and accessory, §§ 7918-7921, 8851, 8852.

8651. (4587.) Jurisdiction over absent principal. The jurisdiction of a criminal action against a principal in the commission of a public offense, when such principal shall not have been present at the commission thereof, shall be in the same county in which it would have been under this code if he were so present and aiding and abetting therein.

Cal. Pen. C., § 792.

8652. (4588.) Conviction or acquittal in another state is a bar. When an act charged as a public offense shall be within the jurisdiction of a territory or another state or country, as well as of this state, a conviction or acquittal thereof in the former shall be a bar to the prosecution therefor in this state.

Cal. Pen. C., 793.
Similar section, § 8522.
Decisions on twice in jeopardy, note to § 8905.

8653. (4589.) Id. Conviction or acquittal in another county a bar. When an offense shall be within the jurisdiction of two or more counties, a conviction or acquittal thereof in one county shall be a bar to a prosecution therefor in any other.

Cal. Pen. C., § 794.
Decisions on twice in jeopardy, note to § 8905.
Offense within jurisdiction of two or more counties, §§ 8648, 8656, 8996.

8654. (4590.) Jurisdiction of offense committed on vessel. When an offense shall have been committed in this state on board a vessel navigating a river, bay, slough, canal, or lake, or lying therein in the prosecution of her voyage, the jurisdiction shall be in any county through which the vessel is navigated in the course of her voyage, or in the county where the voyage shall terminate.

Cal. Pen. C., § 783*.
See note under § 8648.

8655. (4591.) Jurisdiction for kidnaping, etc. The jurisdiction of a criminal action:

1. For forcibly and without lawful authority seizing and confining another, or inveigling or kidnaping him with intent, against his will, to cause him to be secretly confined or imprisoned in this state, or to be sent out of the state, or from one county to another; or,

2. For decoying, taking, or enticing away a child under the age of twelve years, with intent to detain and conceal it from its parent, guardian, or other person having lawful charge of the child; or,

3. For inveigling, enticing, or taking away any female of previous chaste character, for the purpose of prostitution; or,

4. For taking away any female under the age of eighteen years, from her father, mother, guardian, or other person having the legal charge of her person, with or without their consent, for the purpose of prostitution,—shall be in the county in which the offense shall have been committed, or out of which the person upon whom the offense shall have been committed may, in the commission of the offense, have been brought, or in which an act shall have been done by the defendant in instigating, procuring, promoting, or aiding in the commission of the offense, or in abetting the parties concerned therein.

Cal. Pen. C., § 784*. Abduction for purposes of prostitution, § 8110; proof, § 8988.
Kidnaping, § 8040.

8656. (4592.) Property stolen in one county and taken to another. When property taken in one county by burglary, robbery, larceny, or embezzlement shall have been brought into another, the jurisdiction of the offense shall be in either county. But if at any time before the conviction of the defendant in the latter, he shall be indicted in the former county, the sheriff of the latter county must, upon demand, deliver him to the sheriff of the former.

Cal. Pen. C., § 786. Offense within jurisdiction of two or more counties, §§ 8648, 8653.
Warrant of arrest, §§ 8688-8707.

8657. (4593.) Jurisdiction of escape from state prison. The jurisdiction of a criminal action for escaping from or breaking the state prison with intent to escape therefrom, or for attempting by force or violence, or in any other manner, to escape from said prison, is in the county where the same is located.

N. Dak. (1895) § 7870. Escape from state prison, § 7967.

8658. (4594.) Jurisdiction of escape from city or county jail. The jurisdiction of a criminal action for breaking or escaping from the jail of any county, or of any city or town, is in the county where said jail is located.

N. Dak. (1895) § 7871. Escape from other than state prison, § 7968.

8659. (4595.) Jurisdiction of treason. Overt act committed out of state. The jurisdiction of a criminal action for treason, when the overt act is committed out of the state, shall be in any county of the state.

Cal. Pen. C., § 788. Treason, proof, Con. art. 1, sec. 19.

8660. (4596.) Jurisdiction when property stolen brought into state. The jurisdiction of a criminal action for stealing in any territory or other state the property of another, or receiving it, knowing it to have been stolen, and bringing the same into this state, shall be in any county into or through which such solen property shall have been brought.

Cal. Pen. C., § 789*.
Larceny without the state; property brought within, §§ 7916, 8298, 8656.

CHAPTER 10.

LIMITATIONS.

8665. (4597.) No limitation for murder, embezzlement of public money, or falsification of public records. There shall be no limitation of time within which a prosecution for murder, the embezzlement of public moneys, and the falsification of public records must be commenced. Prosecution for murder

may be commenced at any time after the death of the person killed, and for the embezzlement of public moneys or the falsification of public records, at any time after the discovery of the crime.

Cal. Pen. C., § 799; Cal. Sup. (1893) p. 1064. Limitations not affected by general repeal, § 5835. Limitations, civil procedure, §§ 6445-6492.

8666. (4598.) Felony other than murder, etc. Four years. For any felony other than murder, the embezzlement of public moneys, or the falsification of public records, an indictment must be found or an information filed within four years after its commission.

Cal .Pen. C., § 800; Cal. Sup. (1893) p. 1064.

8667. (4599.) Indictable misdemeanor. Three years. An indictment for any misdemeanor must be found or an information filed within three years after its commission.

Cal. Pen. C., § 801*. State v. Jensen, 34 U. 166; 96 P. 1085.

8668. (4600.) Time of defendant's absence no part of limitation. If, when the offense is committed, the defendant is out of the state, the indictment may be found or an information filed within the term herein limited after his coming within the state, and no time during which the defendant shall not be an inhabitant of, or usually resident within, the state, shall be part of the limitation.

Cal. Pen. C., § 802.

8669. (4601.) When indictment deemed found. An indictment is found, within the meaning of this chapter, when it is presented by the grand jury in open court, and there received and filed.

Cal. Pen. C., § 803.

8670. (4602.) Misdemeanor within justice's jurisdiction. Two years. A complaint for a misdemeanor, of which justices of the peace have jurisdiction, must be filed within two years after the commission of the offense.

8671. (4603.) Action begun when complaint filed. An action on a complaint is commenced when a verified complaint is filed with the magistrate.

Complaint defined, § 8674; form, §§ 8680, 9420.

CHAPTER 11.

DEFINITIONS.

8674. (4604.) Complaint defined. A complaint is a statement in writing, made to a court or magistrate, that a person has been guilty of some designated offense.

Cal. Pen. C., § 806; Mont. Pen. C., § 1370. What complaint must state, §§ 8680, 9420. Action begun when complaint filed, § 8671.

8675. (4605.) Indictment defined. An indictment is an accusation in writing, presented by a grand jury to a competent court, charging a person with a public offense.

Cal. Pen. C., § 917.

8676. (4606.) Information defined. An information is an accusation in writing in form and substance like an indictment for the same offense, charging a person with a public offense, presented and signed by the district attorney, or by the attorney pro tem. for the state, and filed in the office of the clerk of the district court. Am'd '01, p. 26.

Mont. Pen. C., § 1372*. Prosecution by information or indictment, except, Con. art 1, sec. 13; § 8549. Filing of information, §§ 8779-8782.

8677. (4607.) Magistrate defined. A magistrate is an officer having power to issue a warrant for the arrest of a person charged with a public offense.

Cal. Pen. C., § 807; Mont. Pen. C., § 1373.

8678. (4608.) Magistrates enumerated. The following persons are magistrates:

1. The justices of the supreme court;

2. The judges of the district courts;
3. Justices of the peace.

Cal. Pen. C., § 808*.

8679. (4609.) Peace officers enumerated. A peace officer is a sheriff of a county or his deputy, or a constable, or a marshal or policeman of any incorporated city or town.

Mont. Pen. C., § 1375*.

CHAPTER 12.

COMPLAINT.

8680. (4610.) What a complaint must state. The complaint must state:

1. The name of the person accused, if known, or if not known and it is so stated, he may be designated by any other name;
2. The county in which the offense was committed;
3. The general name of the crime or public offense;
4. The acts or omissions complained of as constituting the crime or public offense named;
5. The person against whom or against whose property the offense was committed, if known;
6. If the offense is against the property of any person, a general description of such property.

The complaint must be subscribed and sworn to by the complainant.

N. Dak. (1895) § 7886; Mont. Pen. C., § 1590*.
Complaint defined, § 8674.
Complaint for offense within justice's jurisdiction, § 9420.
Complaint of commission of crime in another county, § 8703.
Complaint in action to compel security to keep the peace, §§ 8567, 8569.
Proceeding against corporation, complaint, etc., §§ 9354-9361.

Information or complaint must show that a crime has been committed.

In re Catherine Wiseman, 1 U. 39.

Criminal complaint may be sworn to upon information and belief.

U. S. v. Eldredge, 5 U. 161; 13 P. 673.

A complaint which states the name of the crime charged, the time and place of its commission, the name of the accused, and which sets out in general terms the acts constituting the crime, is sufficient.

State v. Anderson, 35 U. 496; 101 P. 385.

It need not state the offense in technical language or in such specific terms as is required in the information.

State v. Pay, 45 U. 411; 146 P. 300.

Accused, failing to object to the complaint when arraigned before the committing magistrate, waived all objections that might have been urged against it.

State v. Anderson, 35 U. 496; 101 P. 385.

A verified complaint is essential to a preliminary examination.

State v. Sheffield, 45 U. 426; 146 P. 306.

Where it develops that a crime committed was different from that charged in the complaint, a magistrate may direct the county attorney to prepare a new complaint, and direct the rearrest of the accused, and give him an opportunity to either waive or insist on examination on the new charge.

State v. Pay, 45 U. 411; 146 P. 300.

8681. (4611.) Any person having knowledge must make complaint. Every person who has reason to believe that a crime or public offense has been committed must make complaint against such person before some magistrate having authority to make inquiry of the same.

N. Dak. (1895) § 7887; Mont. Pen. C., § 1591*
When person concealing crime an accessory, § 7920.

8682. (4612.) Magistrate must examine complainant. Witnesses. When a complaint is made before a magistrate, charging a person with the commission of a crime or public offense, such magistrate must examine the complainant, under oath, as to his knowledge of the commission of the offense charged, and he may also examine any other persons, and may take their depositions.

N. Dak. (1895) § 7888; Mont. Pen. C., § 1592*.
complainant must name witnesses, § 8684.
Witnesses may be required to give bonds for appearance at preliminary, § 8766.
Depositions of witnesses unable to give bonds, §§ 8765, 8767.
Preliminary examination, §§ 8737-8768.

Under chap. 23, laws of 1896, a magistrate has authority to examine and commit a prisoner charged with commission on an offense to answer the charge in proper court.

State v. Pierpont, 16 U. 476; 52 P. 992.

A writ of prohibition will not issue to restrain criminal proceedings on the ground that § 8682, providing that when a complaint is made before a magistrate, charging a crime, the magistrate must examine the complainant under oath and may also examine other persons and take their depositions, and § 8688, providing that where a complaint is made by a person other than the county attorney, the complaint and other evidence taken by the magistrate must be submitted to the county attorney before a warrant issues—were not complied with;

the decision of the question being within the jurisdiction of the trial court, and the accused's remedy for an erroneous ruling being by appeal.

State, ex rel Brown v. Third District Court, 27 U. 336; 75 P. 739.

8683. (4613.) When arrest made without warrant, complaint to be filed. When any officer or other person shall bring any person he has arrested without a warrant before a magistrate, it is the duty of such officer or person to specify the charge upon which he has made the arrest. It is then the duty of the magistrate or the county attorney to make a complaint of the offense charged, and cause the officer or person, or some other person, to subscribe and make oath to such complaint, and file it.

N. Dak. (1895) § 7889; Mont. Pen. C., § 1593*.

8684. (4614.) Complainant must name witnesses. Subpœna. Every person making complaint charging the commission of a crime or public offense must inform the magistrate of all persons whom he believes to have any knowledge of its commission, and the magistrate, at the time of issuing the warrant, may issue subpœnas for such persons. requiring them to attend at a specified time and place as witnesses.

N. Dak. (1895) § 7890; Mont. Pen. C., § 1594.

CHAPTER 13.

WARRANT OF ARREST.

8688. (4615.) Issuance of warrant. Consent of county attorney. When a complaint, verified by oath or affirmation, is made before a magistrate, charging the commission of a crime or public offense, he must, if satisfied therefrom that the offense complained of has been committed, and that there is reasonable ground to believe that the accused committed it, issue a warrant for his arrest; but when the magistrate before whom the complaint is made is a justice of the peace, before issuing the warrant, the complaint, if made by any person other than the county attorney of the county, and other evidence taken by such magistrate relating to the offense charged, must be submitted to such county attorney, and he must examine into the charge and enter either his approval or disapproval of the issuance of a warrant upon such complaint. If the county attorney disapproves, no warrant shall be issued, but if he approves the issuance of a warrant, such magistrate shall proceed accordingly; *provided,* that in cases when it appears from statements of the complaint or other written evidence submitted to the magistrate that the accused is likely to escape from the county before the approval of the county attorney can be had, as hereinbefore prescribed, a warrant may issue without the approval of the county attorney. No justice of the peace shall receive any fees or allowances whatever for any act done or services rendered in a criminal action or proceeding commenced or prosecuted in disregard of the provisions of this section.

N. Dak. (1895) § 7891*.
Form of complaint, § 8680.
Magistrate defined, § 8677; magistrates enumerated, § 8678.
Cited in : State v. Pay, 45 U. 411; 146 P. 300.
A writ of prohibition will not issue to restrain criminal proceedings upon the ground that the provisions of this section and § 8682 were not complied with, the accused's remedy being by appeal.
State, ex rel. Brown v. Third District Court, 27 U. 336; 75 P. 739.

8689. (4616.) Warrant defined. Form. A warrant of arrest is an order in writing in the name of the state, signed by a magistrate, commanding the arrest of the defendant, and may be substantially in the following form:

State of Utah, county of .....

The state of Utah to any sheriff, constable, marshal, or policeman of said state, or of the county of .....

Complaint on oath having been this day made before me, by A B, that the crime of (designating it) has been committed, and accusing C D thereof, you are therefore commanded forthwith to arrest the above named C D, and bring

him before me at (naming the place), or in case of my absence or inability to act, before the nearest or most accessible magistrate in this county.

Dated at ..... this ..... day of ....., 19.....

When necessary, the magistrate may insert therein a clause to the effect that, if the accused has fled from justice, the peace officer pursue him into any other county of this state and there arrest him.

Cal. Pen. C., § 814*.

8690. (4617.) Id. Requisites. The warrant must specify the name of the defendant, or, if it is unknown to the magistrate, the defendant may be designated therein by any name. It must also state the time of issuing it, and the county, city, or precinct where issued, and be signed by the magistrate with his name of office.

Cal. Pen. C., § 815.

8691. (4618.) Warrant directed to and executed by peace officer. The warrant must be directed to and executed by a peace officer.

Cal. Pen. C., § 816. Peace officers enumerated, § 8679.

8692. (4619.) Id. Issued by supreme or district judge. If a warrant is issued by a justice of the supreme court, or judge of a district court, it may be directed generally to any sheriff, constable, marshal, or policeman in the state, and may be executed by any of those officers to whom it may be delivered in any part of the state.

Mont. Pen. C., § 1603; N. Dak. (1895) § 7896. Magistrates enumerated, § 8678.

8693. (4620.) Id. Issued by justice of the peace. If a warrant is issued by any other magistrate, it may be directed generally to any sheriff, constable, marshal, or policeman in the county in which it is issued, and may be executed by such officer in any part of the state.

Mont. Pen. C., § 1604; N. Dak. (1895) § 7897.

8694. (4621.) Officer may call for aid in any county. An officer pursuing a person for whom he has a warrant, into another county than the one in which he holds office, may, in the county where he finds such person, call for assistance, and command aid, and exercise authority as if in his own county.

Mont. Pen. C., § 1605; N. Dak. (1895) § 7898. Authority of person assisting, § 8564. Officer may command assistance, §§ 8004, 8564, 8591. Arrest, by whom and how made, §§ 8712-8731.

8695. (4622.) Return of prisoner if offense a felony. If the offense charged is a felony, the officer making the arrest must take the defendant before the magistrate who issued the warrant, or some other magistrate of the same county.

Mont. Pen. C., § 1606; N. Dak. (1895) § 7899; Cal. Pen. C., § 821. Arrest, general provisions, §§ 8712-8731, and notes.

8696. (4623.) Id. If offense a misdemeanor not triable by justice. If the offense charged in the warrant is a misdemeanor not within the jurisdiction of the magistrate who issued it to try and punish upon conviction, and the defendant is arrested in another county, the officer must, upon being required by the defendant, take him before a magistrate in that county, who must admit the defendant to bail and take bail from him accordingly.

Cal. Pen. C., § 822*. Rights to admission to bail, Con. art. 1, secs. 8, 9. Bail, qualifications of sureties, etc., §§ 9243-9270.

8697. (4624.) Procedure when bail taken. On taking the bail, the magistrate must certify that fact on the warrant, and deliver the warrant and undertaking of bail to the officer having charge of the defendant. The officer must then discharge the defendant from arrest, and must, without delay, deliver the warrant and undertaking to the clerk of the court at which the defendant shall be required to appear.

Cal. Pen. C., § 823.

8698. (4625.) Return and bail if offense triable by justice. If the offense charged in the warrant be within the jurisdiction of the magistrate who issued it to try and punish upon conviction, and the defendant be arrested in another county, the officer must, upon being required so to do by the defendant, take him before the most convenient magistrate in that or any adjoining

county, who must admit the defendant to bail, and take bail from him accordingly, naming therein a time, not exceeding twenty days nor less than one day for each twenty miles from the place of taking it to the place of the magistrate's office who issued the warrant, for the defendant to appear.

Bail, §§ 9247-9266.
Complaint, arrest, and trial before justice, §§ 9419, 9454.

8699. (4626.) Id. Procedure by magistrate. On taking the bail, the magistrate and officer must proceed as directed in § 8697, except that the warrant and undertaking must be delivered by the latter to the magistrate before whom the defendant shall be required to appear.

Cal. Pen. C., § 823*.

8700. (4627.) Disposition of defendant if bail not given. If, on the admission of the defendant to bail, the bail is not forthwith given, the officer must take the defendant before the magistrate who issued the warrant, or, in case of his absence or inability to act, before the nearest or most accessible magistrate in the same county, and must, at the same time, deliver to the magistrate the warrant with his return thereon indorsed and subscribed by him.

Cal. Pen. C., § 824.

8701. (4628.) Defendant to be taken before magistrate without delay. The defendant must in all cases be taken before the magistrate without unnecessary delay.

Cal. Pen. C., § 825*. Failure to take arrested person before magistrate a misdemeanor, § 7999.
Accused entitled to a speedy and public trial, Con. art. 1, sec. 12.

8702. (4629.) Papers to be sent to magistrate acting. If the defendant is brought before a magistrate other than the one who issued the warrant, the complaint, and depositions, if any, on which the warrant shall have been issued, must be sent to that magistrate.

Cal. Pen. C., § 826*.

8703. (4630.) When warrant issued in county where defendant found. When a complaint is made before a magistrate of the commission of a public offense triable in another county of this state, but showing that the defendant is in the county where the complaint is made, the same proceedings must be had as prescribed in this chapter, except that the warrant must require the defendant to be taken before the nearest or most accessible magistrate of the county in which the offense is triable, and the complaint, with the depositions, if any, of the witnesses who may have been produced, must be delivered by the magistrate to the officer to whom the warrant is delivered.

Cal. Pen. C., § 827*.
Offense committed in more than one county or near boundary, § 8648.

8704. (4631.) Id. Delivery of defendant and papers. Bail. The officer who executes the warrant must take the defendant before the nearest or most accessible magistrate of the county in which the offense shall be triable, and must deliver to him the complaint, and the depositions, if any, and the warrant with his return indorsed thereon, and the magistrate must then proceed in the same manner as upon a warrant issued by himself.

Cal. Pen. C., § 828*.
Bail, qualifications of sureties, etc., §§ 9243-9270.

8705. (4632.) Id. Bail. Procedure. If the offense charged in the warrant, issued pursuant to § 8703, is a misdemeanor, the officer must, upon being required by the defendant, take him before a magistrate of the county in which the warrant was issued, who, unless he have jurisdiction to try the defendant, must proceed as provided in chap. 16 of this title.

Cal. Pen. C., § 829*.

8706. (4633.) Conveyance through other counties not an escape. An officer who has arrested a defendant on a criminal charge in any county may carry such prisoner through such parts of any county or counties as shall be in the ordinary route of travel, from the place where the prisoner shall have been arrested to the place where he is to be conveyed and delivered, under the

process by which the arrest shall have been made, and such conveyance shall not be deemed an escape.

Mont. Pen. C., § 1616; N. Dak. (1895) § 7909.

8707. (4634.) Officer in charge of prisoner not liable to civil arrest. Assistance. While passing through such other county or counties, the officers having the prisoner in their charge shall not be liable to arrest on civil process; and they have like power to require any citizen to aid in securing such prisoner and to retake him if he escapes, as if they were within their own county; and a refusal or neglect to render such aid shall be an offense in the same manner as if they were officers of the county where such aid shall be required.

Mont. Pen. C., § 1617; N. Dak. (1895) § 7910.

CHAPTER 14.

ARREST, BY WHOM AND HOW MADE.

8712. (4635.) Arrest defined. May be made by any person. An arrest is taking a person into custody in a case and in the manner authorized by law. An arrest may be made by a peace officer or by a private person.

Cal. Pen. C., § 834.

Peace officers enumerated, § 8679.

8713. (4636.) Arrest, how made. No unnecessary restraint. An arrest is made by an actual restraint of the person of the defendant, or by his submission to the custody of an officer. The defendant must not be subjected to any more restraint than is necessary for his arrest and detention.

Cal. Pen. C., § 835.
Warrant of arrest, §§ 8688-8707.

Persons arrested not to be treated with unnecessary rigor, Con. art. 1, sec. 9.

8714. (4637.) When officer may arrest with or without warrant. A peace officer may make an arrest in obedience to a warrant delivered to him, or may, without a warrant, arrest a person:

1. For a public offense committed or attempted in his presence;
2. When a person arrested has committed a felony, although not in his presence;
3. When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it;
4. On a charge, made upon a reasonable cause, of the commission of a felony by the party arrested;
5. At night, when there is reasonable cause to believe that he has committed a felony.

Cal. Pen. C., § 836.

To prove that a constable had reasonable cause for believing defendant guilty, evidence of the contents of a telegram known to have been placed in the vest pocket of the constable, but not searched for in his clothing after his decease, was properly admitted.

People v. Coughlin, 13 U. 58; 44 P. 94.

Whether an officer was authorized to make an arrest, and the arrest was lawful or unlawful, is a question of law for the court, though the facts are in dispute; in which case the court should charge the jury in specific terms under what particular state of facts the arrest was lawful or otherwise.

State v. Anselmo, 46 U. 137; 148 P. 1071.

Where accused's assailant claimed that he was cut in the shoulder by the accused in a brawl, and later pointed out accused to an officer; and while attempting to escape from the officer, accused killed the officer; held, where accused assailant did not testify at the trial, it cannot be inferred in support of the legality of the arrest, that accused had committed felony in cutting his assailant, or that the officer was arresting him for violating a municipal ordinance for carrying concealed weapons.

Id.

That accused was illegally arrested will not justify him in taking the life of the arresting officer, unless it reasonably appears that he was in actual danger of life or peril, other than mere danger from illegal arrest.

Id.

Where officers who had reasonable grounds to believe that a felony was being committed in a cabin broke open the door in the night to arrest defendant, defendant was not justified in attempting to kill one of the officers, even though the arrest was unlawful, because they did not first demand admittance and explain their purpose.

State v. Williams, 49 U. 320; 163 P. 1104.

8715. (4638.) When private person may arrest. Railroad conductor. A private person may arrest another:

1. For a public offense committed or attempted in his presence;
2. When the person arrested has committed a felony, although not in his presence;

3. When a felony has been in fact committed and he has reasonable cause for believing the person arrested to have committed it;

4. A conductor or other person having charge of any railway train in this state shall have power to arrest without a warrant any person disturbing the peace of a traveler, or committing any offense against the laws of the state while traveling with or upon the train of which he is in charge.

Cal. Pen. C., § 837*.

A felony having been committed, it was lawful for an officer out of his state, an officer out of his county, and two private citizens to attempt the arrest of the defendant.

People v. Coughlin, 13 U. 58; 44 P. 94.

The provisions of this section and § 8043 are sufficient warrant for the members of a sheriff's posse, although citizens and non-residents of the county, to follow and capture the persons who committed the crime using sufficient force to accomplish the capture.

State v. Morgan, 22 U. 162; 61 P. 527.

Where defendant entered street car for the purpose of robbery and covered deceased and another with a gun, and defendant was told to put up his hands, he was in effect placed under arrest.

State v. Shockley, 29 U. 25; 80 P. 865.

8716. (4639.) Magistrate may orally order arrest. A magistrate may orally order a peace officer or private person to arrest any one committing or attempting to commit a public offense in the presence of such magistrate.

Cal. Pen. C., § 838.

Assault in presence of magistrate, § 8579.

8717. (4640.) Person arresting may summon assistance. Any person making an arrest may orally summon as many persons as he deems necessary to aid him therein.

Cal. Pen. C., § 839.

Officer may command assistance, §§ 8004, 8564, 8718, 8694.

8718. (4641.) Arrest by day or by night. If the offense charged is a felony, the arrest may be made on any day, and at any time of the day or night. If it is a misdemeanor, the arrest cannot be made at night, unless upon the direction of the magistrate indorsed upon the warrant, or unless the offense is committed in the presence of the person making the arrest.

Cal. Pen. C., § 840*.

8719. (4642.) Manner of making arrest. The person making the arrest must inform the person to be arrested of the intention to arrest him, of the cause of the arrest, and the authority to make it, except when the person to be arrested is actually engaged in the commission of or an attempt to commit an offense, or is pursued immediately after its commission, or after an escape.

Cal. Pen. C., § 841.

It was not necessary that intention of arrest should be conveyed to defendant, since he was first seen in the act of committing a crime.

People v. Coughlin, 13 U. 58; 44 P. 94.

See State v. Shockley, 29 U. 25; 80 P. 865.

8720. (4643.) Warrant must be shown if required. If the person making the arrest is acting under the authority of a warrant, he must show the warrant, if required.

Cal. Pen. C., § 842.

8721. (4644.) Force, when arresting under warrant. When the arrest is being made by an officer under the authority of a warrant, after information of the intention to make the arrest, if the person to be arrested either flees or forcibly resists, the officer may use all necessary means to effect the arrest.

Cal. Pen. C., § 843.

8722. (4645.) Door or window may be broken, when. To make an arrest, a private person, if the offense is a felony, and in all cases a peace officer, may break open the door or window of the building in which the person to be arrested is, or in which they have reasonable grounds for believing him to be, after having demanded admittance and explained the purpose for which admittance is desired.

Cal. Pen. C., § 844.

Door or window may be broken in retaking an escape, § 8733.

The private household goods of a criminal cannot be deemed to be affected by the crimes and misconduct of the owner, and such property cannot be destroyed or taken, except by due process of law.

Conway v. Clinton, 1 U. 215.

One is not justified in attempting to kill an officer, even though he did not make demand or explain his purpose.

State v. Williams, 49 U. 320; 163 P. 1104.

8723. (4646.) Id. For purpose of exit. Any person who shall have lawfully entered a house for the purpose of making an arrest may break open

the door or window thereof if detained therein, when necessary for the purpose of liberating himself, and an officer may do the same, when necessary for the purpose of liberating a person who, acting in his aid, lawfully entered for the purpose of making an arrest, and is detained therein.

Cal. Pen. C., § 845.

8724. (4647.) Weapons to be taken from person. Delivery. Any person making an arrest may take from the person arrested all offensive weapons which he may have about his person, and must deliver them to the magistrate before whom he shall be taken.

Cal. Pen. C., § 846.
Person may be searched, § 9387.
Receipt for property taken from person arrested, § 9414, and note.

8725. (4648.) Private person must deliver prisoner immediately. A private person who shall have arrested another for the commission of a public offense must, without unnecessary delay, take the person arrested before a magistrate, or deliver him to a peace officer.

Cal. Pen. C., § 847.

8726. (4649.) Officer arresting with warrant must proceed lawfully. An officer making an arrest in obedience to a warrant must proceed with the person arrested as commanded by the warrant, or as provided by law.

Cal. Pen. C., § 848.

8727. (4650.) Arrest without warrant. Delivery of prisoner. Complaint. When an arrest shall be made without a warrant by a peace officer or private person, the person arrested must, without unnecessary delay, be taken to the nearest or most accessible magistrate in the county in which the arrest is made, and a complaint, stating the charge against the person, must be made before such magistrate. A conductor or other person who shall have made an arrest as provided in sub. 4 of § 8715 shall, without unnecessary delay, take the person so arrested before any accessible magistrate or deliver him to a peace officer; and a complaint, stating the charge against the person, must be made before such magistrate; and the magistrate before whom such charge shall be made, if the offense is triable by him, shall have full jurisdiction over said offense and the defendant, to try and determine said offense. If he have not jurisdiction to try the defendant for the offense charged, he must proceed as provided in chap. 16 of this title.

Cal. Pen. C., § 849*.
Taken before magistrate, §§ 8695-8701.
Failure to take person arrested before magistrate without delay a misdemeanor, § 7999.

8728. (4651.) Service of warrant by telegraph or telephone. Procedure. Any magistrate may, by an indorsement upon a warrant of arrest, authorize the service thereof by telegraph or telephone, and thereafter a telegraphic or telephonic copy of such warrant may be sent by telegraph or telephone to one or more peace officers, and such copy is as effectual in the hands of any officer, and he must proceed in the same manner under it, as though he held an original warrant issued by the magistrate making the indorsement.

Am'd '07, p. 29.

Cal. Pen. C., § 850*.
Notices, checks, etc., may be sent by telegraph or telephone, §§ 6117-6119.
Summons, writs, etc., may be sent by telegraph or telephone, § 7009.
False or forged message, etc., §§ 8274, 8403-8405.

8729. (4652.) Id. Certification and return. Every officer causing telegraphic or telephonic copies of warrants to be sent must certify as correct, and file in the telegraph or telephone office from which such copies are sent, a copy of the warrant and indorsement thereon, and must return the original with a statement of his action thereunder. Am'd '07, p. 29.

Cal. Pen. C., § 851*.

8730. (4653.) Officer may direct arrest by telegraph or telephone. In all cases when by law a peace officer may arrest a person without a warrant, or having a warrant for the arrest of a person accused of a public offense, and such person may otherwise escape from the state, such officer may by telegraph or telephone direct any sheriff, constable, marshal, or policeman in this state to arrest such person, and designate the accused in said order by name or description, or both. Am'd '07, p. 29.

N. Dak. (1895) § 7939*.

8731. (4654.) Id. Arrest and detention of prisoner. The order may be directed generally to any of such officers, and executed by the officer receiving it. The officer executing any such order shall take into his custody the person designated therein, and detain him upon such order for such length of time as shall be necessary for the officer directing the arrest to reach the place of detention by the ordinary means and course of travel, or until sooner demanded by an officer having a warrant for the arrest of such person, but in no case shall the officer arresting such person upon such order detain him longer than the time hereinbefore mentioned.

N. Dak. (1895) § 7940. Disposition of person arrested, §§ 8695-8707.

CHAPTER 15.

RETAKING AFTER ESCAPE OR RESCUE.

8732. (4655.) Pursuit and rearrest. If a person arrested escapes or is rescued, the person from whose custody he shall have escaped or shall have been rescued may immediately pursue and retake him at any time and in any place within the state.

Cal. Pen. C., § 854.
Escapes, §§ 7967-7971.
Rescues, §§ 7964, 7965.
Justifiable homicide in retaking felon, § 8031.

8733. (4656.) Id. May break door or window. To retake the person escaping or rescued, the person pursuing may break open an outer or inner door or window of a dwelling-house or other building, if, after notice of his intention, he is refused admittance.

Cal. Pen. C., § 855.
Door or window may be broken in making arrest, when, § 8722.

CHAPTER 16.

PRELIMINARY EXAMINATION.

8737. (4657.) Magistrate to inform prisoner of his rights. When the defendant shall be brought before the magistrate upon an arrest, either with or without a warrant, on a charge of having committed a public offense, the magistrate must immediately inform him of the charge against him, and of his right to the aid of counsel in every stage of the proceedings.

Cal. Pen. C., § 858.
Rights of accused person, Con. art. 1, secs. 7-12, and notes; § 8553, and note.
District attorney may attend, § 5762.
Preliminary examination may be waived, Con. art. 1, sec. 13; § 8549, and note.
What complaint must state, § 8680.
Preliminary examination of corporation, § 9357.
Information to be filed, § 8779, and note.
The right of the accused to a preliminary examination on the charge stated in the complaint is a substantial one.
State v. Pay, 45 U. 411; 146 P. 300.
Where the information charged an offense different from that stated in the complaint on which accused had a preliminary examination, the accused may, before pleading to the merits, move to quash the information on that ground.
Id.
A verified complaint is essential to a preliminary examination, and the preliminary examination, unless waived, is a prerequisite to prosecution by information.
State v. Sheffield, 45 U. 426; 146 P. 306.

8738. (4658.) Time to procure counsel allowed. Message to counsel. The magistrate must also allow the defendant a reasonable time to send for counsel, and postpone the examination for that purpose, and must, upon the request of the defendant, require a peace officer to take a message to any counsel in the precinct or the city the defendant may name. The officer must, without delay and without fee, perform that duty.

Cal. Pen. C., § 859. Right to counsel, Con. art. 1, sec. 12.

8739. (4659.) Examination to be proceeded with. At the time set for the hearing, the magistrate before whom the accused is brought must, unless a change of place of trial is had under the provisions of the next succeeding section, immediately after the appearance of counsel, or, if none appears, af-

ter waiting a reasonable time therefor, if the accused requires the aid of counsel, proceed to examine the case.

N. Dak. (1895) § 7952.
Waiver of preliminary examination with consent of state, Con. art. 1, sec. 13; § 8549.

8740. (4660.) Change of place of trial. Affidavit. Transfer. Whenever a person accused of a public offense is brought before a justice of the peace for examination and, at any time before such examination is commenced, he files with such justice his affidavit stating that by reason of the bias or prejudice of said justice he believes he cannot have a fair and impartial examination before him, such justice must transfer said action, and all the papers therein, including a certified copy of his docket entries, to another justice of the same county; *provided,* that unless the parties agree upon the justice to whom said action shall be transferred, it shall be sent to the nearest justice of the county, but no more than one change of the place of examination under this section shall be had in an action.

N. Dak. (1895) § 7953.
Change of place of trial in justices' courts, §§ 9427-9429.

8741. (4661.) Limitation on postponement, unless by consent. The examination must be completed at one session, unless the magistrate, for good cause shown, postpone it. The postponement shall be for not more than four days at each time, nor more than twelve days in all, unless by consent or on motion of the defendant.

Cal. Pen. C., § 861*.

8742. (4662.) Id. Defendant to give bail or be committed. If a postponement is had, the magistrate must commit the defendant for examination, admit him to bail, or discharge him from custody upon the deposit of money, as provided in this code, as security for his appearance at the time to which the examination is postponed.

Cal. Pen. C., § 862. Bail, §§ 8704, 8705, 9243-9270.

8743. (4663.) Form of commitment for examination. The commitment for examination shall be made by an indorsement, signed by the magistrate on the warrant of arrest, to the following effect: "The within named A B, having been brought before me under this warrant, is committed for examination to the sheriff of ....." If the sheriff be not present, the defendant may be committed to the custody of any peace officer.

Cal. Pen. C., § 863.
County attorney to report to district attorney, § 5768.

8744. (4664.) Magistrate must issue subpœnas. The magistrate must issue subpœnas, subscribed by him, for witnesses within the state, required either by the prosecution or the defense.

Cal. Pen. C., § 864*.
Accused entitled to compulsory process for witnesses, Con. art. 1, sec. 12.

8745. (4665.) Procedure on preliminary examination. At the examination, the magistrate must first read to the defendant the complaint and the depositions of the witnesses examined or making the complaint, if depositions were taken.

Cal. Pen. C., § 864*.
A criminal prosecution must be begun by a complaint, and accused can only be held for trial after preliminary examination for the crime charged in the complaint, or one included therein.
State v. Pay, 45 U. 411; 146 P. 300.

8746. (4666.) Id. Examination of witnesses in presence of defendant. The witnesses must be examined in the presence of the defendant, and may be cross-examined in his behalf.

Cal. Pen. C., § 865.
Accused entitled to be confronted by witnesses, Con. art. 1, sec. 12; § 8553.

8747. (4667.) Id. Examination of defendant's witnesses. When the examination of witnesses on the part of the state shall have closed, any witnesses the defendant may produce may be sworn and examined.

Cal. Pen. C., § 866.

8748. (4668.) Id. Exclusion of witnesses. Keeping separate. While a witness shall be under examination, the magistrate may exclude all witnesses who have not been examined. He may also cause the witnesses to be

kept separate, and to be prevented from conversing with each other until they shall have all been examined.

Cal. Pen. C., § 867. Exclusion of witnesses and others, § 1801.

8749. (4669.) Id. Exclusion of spectators, etc., on request. The magistrate must also, upon the request of the defendant, exclude from the examination every person except his clerk, the prosecutor and his counsel, the attorney-general, the county attorney, the defendant and his counsel, and the officer having the defendant in custody.

Cal. Pen. C., § 868.

Exclusion of spectators, etc., in certain cases, § 1801.

8750. (4670.) When testimony reduced to writing. Form of deposition. The testimony of each witness in cases of homicide must be reduced to writing as a deposition, by the magistrate, or under his direction; and in other cases upon the demand of the prosecuting attorney. The magistrate before whom the examination shall be had may, with the consent of the county attorney, order the testimony and proceedings to be taken down in shorthand, in all examinations herein mentioned, and for that purpose he may appoint a stenographer. The deposition or testimony of the witness must be authenticated in the following form:

1. It must state the name of the witness, his place of residence, and his business or profession;

2. It must contain the questions put to the witness, and his answers thereto, each answer being distinctly read to him as it is taken down, and being corrected or added to until it conforms to what he declares is the truth; except that in cases where the testimony shall be taken down in shorthand, the answer or answers of the witness need not be read to him;

3. If a question put is objected to on either side and overruled, or the witness declines answering it, that fact, with the ground on which the question shall have been overruled or the answer declined, must be stated;

4. The deposition must be signed by the witness, or if he refuses to sign it, his reason for refusing must be stated in writing as he gives it, except that in cases where the deposition shall be taken down in shorthand, it need not be signed by the witness;

5. It must be signed and certified by the magistrate when reduced to writing by him, or under his direction, and when taken down in shorthand, the transcript of the stenographer appointed as aforesaid, when written out in longhand, and certified as being a correct statement of such testimony and proceedings in the case, shall be prima facie a correct statement of such testimony and proceedings. The stenographer shall, if the defendant is held to answer the charge, within ten days after the close of such examination, transcribe his said shorthand notes into longhand, and certify and file the same with the clerk of the district court of the county in which the defendant shall have been examined, and shall in all cases file his original notes with said clerk. The stenographer's fees shall be paid out of the treasury of the county.

Cal. Pen. C., § 869*.

Testimony upon preliminary examination may be used on trial, when, § 8553.

Testimony of witness taken in writing, § 8767.

Failure of reporter to file transcript does not prevent defendant from being brought to trial where defendant did not claim that he was prejudiced thereby, and did not ask for a continuance in order to secure same.

People v. Thiede, 11 U. 241; 39 P. 837; affirmed 159 U. S. 510.

The provisions of this section do not make the transcript evidence per se, or make the trial depend upon its having been filed.

State v. Morgan, 27 U. 103; 74 P. 526.

A certificate "that the above and foregoing is a full, true, and correct transcript of all the proceedings therein," is defective, but may be amended at the trial.

State v. Vance, 38 U. 1; 110 P. 434.

The provision fixing time of filing the notes is directory, in the absence of a claim of prejudice, and original notes may be filed at the time of the trial, and the transcript of the testimony of an absent witness admitted.

Id.

Where a magistrate, who holds a person to answer a complaint charging him with a felony, files a transcript of his proceedings in the district court, such court has jurisdiction until a motion to quash the information is sustained, although accused had no preliminary examination, or did not have one in compliance with the statute.

State v. Gustaldi, 41 U. 63; 123 P. 897.

Where accused, with consent of the state, waived the preliminary examination, he must be held to have waived the necessity of the magistrate's hearing any testimony.

State v. Mewhinney, 43 U. 135; 134 P. 632.

A transcript is admissible where the certificate was to the effect that it was transcribed in long hand while, in fact, it was transcribed in typewriting, and the testimony of a witness who, at the time of the trial, was out of the state, is admissible, as opportunity was given for cross-examination at the hearing.

State v. Hillstrom, 46 U. 341; 150 P. 935.

8751. (4671.) Custody and disposition of depositions, etc. The magistrate or his clerk must keep the depositions taken, and exhibits admitted as evidence on the examination, until they shall be returned to the proper court; and must not permit them to be examined or copied by any person except a judge of a court having jurisdiction of the offense, or authorized to issue writs of habeas corpus, the attorney-general, county attorney, or other prosecuting attorney, and the defendant and his counsel.

Cal. Pen. C., § 870.

8752. (4672.) Id. Violation of preceding section a crime. Every violation of the next preceding section is punishable as a misdemeanor.

N. Dak. (1895) § 7963.

8753. (4673.) Defendant discharged for want of probable cause. If, after hearing the proofs, it appears that either no public offense has been committed, or that there is not sufficient cause to believe the defendant guilty of a public offense, the magistrate must order the defendant to be discharged, by an indorsement on the warrant or the complaint, signed by him, to the following effect: "There being no sufficient cause to believe the within named A B guilty of the offense within mentioned, I order him discharged."

Cal. Pen. C., § 871.

8754. (4674.) Id. When costs taxed against complainant. If the defendant on a preliminary examination for a public offense is discharged as provided in the next preceding section, and if the magistrate finds that the prosecution was malicious or without probable cause, he shall enter such judgment on his docket and tax the costs against the complaining witness, which shall be enforced as judgments for costs in criminal cases, and execution may issue therefor.

N. Dak. (1895) § 7965.

8755. (4675.) When defendant held to answer. Order. If, however, it appear from the examination that a public offense has been committed, and that there is sufficient cause to believe the defendant guilty thereof, the magistrate must indorse on the complaint an order, signed by him, to the following effect: "It appearing to me that the offense in the within complaint mentioned (or any offense, according to the fact, stating generally the nature thereof) has been committed, and that there is sufficient cause to believe the within named A B guilty thereof, I order that he be held to answer to the same."

Cal. Pen. C., § 872*.
Form of commitment, § 8760.
Magistrate to return papers to district court, § 8768.
Magistrate to furnish list of witnesses, etc., § 8768.
Names of witnesses to be indorsed on information, § 8782; and on indictment, § 8820.

Sec. 4886, C. L. 1888, requiring the justice to indorse on the deposition an order, etc., is directory, and it is sufficiently complied with when the order specifying the offense for which accused is held is entered upon the magistrate's docket and certified to the court.
State v. Crook, 16 U. 212; 51 P. 1091.

An information will not be set aside because of mistakes of magistrate in describing the offense, or even in characterizing it, when it appears that the conduct, acts, and motives described in the information as the offense were investigated by the magistrate and commitment made thereon.
State v. McKee, 17 U. 370; 53 P. 733.

8756. (4676.) Id. Order when offense not bailable. If the offense is not bailable, the following words, or words to the same effect, must be added to the indorsement: "And that he is hereby committed to the sheriff of the county of ....."

Cal. Pen. C., § 873.

8757. (4677.) Id. Order when bail has been taken. If the offense is bailable, and bail is taken by the magistrate, the following words must be added to the aforementioned indorsement: "And I have admitted him to bail to answer by the undertaking hereto annexed."

8758. (4678.) Id. Order when offense bailable. If the offense is bailable, and the defendant is admitted to bail, but bail shall not have been given, the following words must be added to the order indorsed on the complaint: "And that he is admitted to bail in the sum of ..... dollars, and is committed to the sheriff of the county of ..... until he gives such bail, or is legally discharged."

Cal. Pen. C., § 875*.
Bail on arrest, §§ 8704, 8705.
Bail generally, §§ 9243-9270.

8759. (4679.) Commitment to be delivered with defendant. If the magistrate orders the defendant to be committed, he must make out a commitment, signed by himself, with his name of office, and deliver it, with the defendant, to the officer to whom he is committed, or, if that officer is not present, to the peace officer, who must immediately deliver the defendant into the proper custody, together with the commitment.

Cal. Pen. C., § 876.
Indorsement to be made on the complaint by the magistrate, § 8755.

8760. (4680.) Id. Form of. The commitment must be to the following effect:

State of Utah, county of .....
The state of Utah to the sheriff of the county of .....

An order having been this day made by me that A B be held to answer upon a charge of (stating briefly the nature of the offense, and giving as near as may be the time when and the place where the same was committed), you are commanded to receive him into your custody and detain him until he is legally discharged.

Dated at ....., this ..... day of ....., 19.....

Cal. Pen. C., § 877.

8761. (4681.) Witnesses may be required to give bonds. On holding the defendant to answer, the magistrate may take from each of the material witnesses examined before him on the part of the state a written undertaking, without surety, to the effect that he will appear and testify at the court to which the complaint and depositions are to be sent, or that he will forfeit the sum of $200.

Cal. Pen. C., § 878*
Witness may be required to give bond to appear at preliminary examination, § 8766.

8762. (4682.) Id. Sureties may be required. When the magistrate or a judge of the court in which the action is pending shall be satisfied, by proof on oath, that there is reason to believe that any such witness will not appear and testify unless security is required, he may order the witness to enter into a written undertaking, with sureties, in such sum as he may deem proper, for his appearance as specified in the next preceding section.

Cal. Pen. C., § 879.

8763. (4683.) Id. When witness is a minor. When a minor is a material witness, any other person may be allowed to give an undertaknig for the appearance of such witness; or the magistrate may, in his discretion, take the undertaking of such minor in a sum not exceeding $50, which shall be valid and binding in law, notwithstanding the disability of minority.

Mont. Pen. C., § 1690*.

8764. (4684.) Id. Commitment for failure to give. If a witness, required to enter into an undertaking to appear and testify, either with or without sureties, refuses compliance with the order for that purpose, the magistrate must commit him to prison until he complies or is legally discharged.

Cal. Pen. C., § 881.

8765. (4685.) Id. Examination of witness unable to give bond. When, however, it shall satisfactorily appear, by examination on oath of the witness, or any other person, that the witness is unable to procure sureties, he may be forthwith conditionally examined on behalf of the state. Such examination must be by question and answer, in the presence of the defendant, or after notice to him, if on bail, and conducted in the same manner as the examination before a committing magistrate is required by this code to be conducted, and the witness must thereupon be discharged; but this section shall not apply to an accomplice in the commission of the offense charged.

Cal. Pen. C., § 882.
Use of such testimony, § 8553.
Testimony of witness may be taken in writing in any case; use as evidence, § 8767.
Magistrate may take depositions of witnesses in the first instance, § 8682.
When testimony reduced to writing on preliminary examination, § 8750.

8766. (4685x.) May require witness to give bond to appear at preliminary examination. Whenever a crime has been committed, a magistrate having jurisdiction of the same may, on proof that there is reason to believe that

any of the material witnesses will not appear at the preliminary examination unless security is required, or on the recommendation of the county attorney or other attorney for the state, order said witness to enter into a written undertaking with sureties, in any sum he may deem proper, for their appearance at said preliminary examination. '07, p. 196.

8767. (4685x1.) Id. Testimony of witnesses taken in writing; use as evidence. Upon application from the county attorney or other attorney for the state, and upon notice to the defendant, the testimony of witnesses may be taken in writing before the magistrate having jurisdiction of said crime, and said testimony, when signed by the witness and certified by the magistrate, or a transcript of said testimony, if taken in shorthand, certified by the stenographer who took the testimony, shall be prima facie a correct statement of such testimony, and shall be used at the preliminary examination of said defendant or at the trial of said defendant, or both, with the same force and effect as though said witnesses were present in court and testifying; *provided, however,* that it be satisfactorily shown to the court that the witness is dead or insane, or cannot with due diligence be found within the state. '07, p. 196.

Magistrate may examine witnesses and take depositions at time complaint is made, § 8682.
Testimony of witnesses at preliminary hearing, § 8553, and note.
Where a deputy sheriff calls at a home of a witness several times, but does not find him, and the witness is out of the state at the time of the trial, the transcript of his evidence is admissible, even though the defendant does not have an opportunity to cross-examine the witness in the presence of the jury.
State vs. Hillstrom, 46 U. 341; 150 P. 935.
Where it is shown that the witness is out of the state, it is not necessary to show any special effort to find him in the state.
State v. De Pretto, 48 U. 249; 155 P. 336.

8768. (4686.) After preliminary examination, magistrate must make full return of proceedings to the district court. Penalty for failure. When the magistrate shall have discharged the defendant or shall have held him to answer, he must, within fifteen days from the date of his decision, return to the clerk of the court at which the defendant is required to appear, the warrant, if any; the complaint, the depositions, if any; a list of the names and the postoffice addresses of all witnesses for the state, if he can ascertain them; and all undertakings of bail and for the appearance of witnesses taken by him, together with a certified copy of the record of the proceedings, as it appears on his docket. Failure of the magistrate to make such return as herein provided, and within the time herein stated, shall be deemed a contempt of the court before which the defendant is required to appear, for which the magistrate shall be fined by said court not less than $10 and not more than $100. Am'd '15, p. 200.

Cal. Pen. C., § 883*

8769. (4687.) When defendant a convict. Examination in prison. When the defendant is a convict in the state prison, or a prisoner in a county jail, the examination may be held in the office of the prison or jail. In such cases the commitment shall be directed to the warden of the prison or to the keeper of the jail.

CHAPTER 17.

PROSECUTION BY INFORMATION, INDICTMENT, OR ACCUSATION.

8773. (4688.) Prosecution in district court to be by information, etc. All public offenses triable in the district courts, except cases appealed from justices' courts, must be prosecuted by information or indictment, except as provided in the next succeeding section.

Cal. Pen. C., § 888*.
Prosecution by information or indictment, Con. art. 1, sec. 13; § 8549.
Indictment defined, § 8675.
Information defined, § 8676.
The prosecution and conviction of a person by information filed by county attorney in accordance with the statutes, Con. art. 1, sec. 13, and art. 8, sec. 21, does not abridge the privileges or immunities of such person as a citizen of the U. S. under the fourteenth amendment.
In re Maxwell, 19 U. 495; 57 P. 412; affirmed 176 U. S. 181.
State v. Imlay, 22 U. 156; 61 P. 557.
A person charged with having committed an

offense prior to statehood had a constitutional right to be prosecuted upon an indictment by a grand jury; and he may not be prosecuted by way of information. (Following Thompson v. Utah, 170 U. S. 343, and overruling State v. Carrington, 15 U. 480; 50 P. 526; and State v. Bates, 14 U. 293; 47 P. 78.)
State v. Rock, 20 U. 38; 57 P. 532.

8774. (4689.) Action for removal from office begun by accusation. When the proceedings shall be for the removal of any district, county, precinct, municipal, or school officer, or officer of any board of education, or of a state officer not liable to impeachment, for any high crime, misdemeanor, or malfeasance in office, they may be commenced by an accusation in writing preceding section must be presented to, or filed, or found in, the district court. 8 of this title.

Cal. Pen. C., § 889*.
Accusation may be presented to court by taxpayer, § 8640.
Removal by judicial proceedings, Con. art. 6, sec. 21; §§ 8625-8640.

8775. (4690.) Id. Accusation, information, or indictment. All accusations, informations, or indictments against officers mentioned in the next preceding section must be presented to, or filed, or found in, the district court.

Cal. Pen. C., § 890*.

8776. (4691.) Officers mentioned may be prosecuted criminally. Nothing in this chapter shall be construed to prevent the officers mentioned from being proceeded against, by information or indictment, for a public offense in the same manner as now is or may hereafter be provided by law for so proceeding against other persons accused of a public offense.

N. Dak. (1895) § 7981*.

CHAPTER 18.

THE INFORMATION.

8779. (4692.) Information to be filed within thirty days. Failure to file is a contempt. When a defendant has been examined and committed as provided in this code, it shall be the duty of the district attorney, within thirty days thereafter, to file in the district court of the county in which the offense is triable an information charging the defendant with the offense for which he is held to answer, [or any other offense disclosed by the testimony, whether it be the offense charged in the complaint on which the examination was held or not.] If the district attorney fails to file the information within the time specified, he shall be deemed guilty of contempt, and may be prosecuted for neglect of duty, as in other cases. Am'd '01, p. 26.

Cal. Pen. C., § 809*; Mont. Pen. C., 1730*.
Information defined, § 8676.
Form and sufficiency of information, §§ 8828-8855.
Complaint, § 8680.
Preliminary examinations, § 8737.
Prosecution by information after examination and commitment or after waiver, Con. art. 1, sec. 13.
Dismissal for failure to file information, § 9345.
Waiver of examination, § 8549, and note.
Information for bastardy, § 3821.
Reasons for not filing; nolle prosequi, § 8780.
Statutory language need not be strictly pursued, § 8840.
Prosecution by information is constitutional, note to § 8773.
Duties of district attorney, §§ 5761-5772.

The clauses "or any other offense disclosed by the testimony, whether it be the offense charged in the complaint on which the examination was held or not," must, in order to harmonize with Con. art. 1, sec. 13, be limited to an offense included in that charged in the complaint.
State v. Pay, 45 U. 411; 146 P. 300.
State v. Hoben, 36 U. 186; 102 P. 1000.
State v. Sheffield, 45 U. 426; 146 P. 306.

The conviction and sentence of a person charged with a crime by an information not signed by the person designated by law, is void for want of jurisdiction in the trial court.
State v. Beddo, 22 U. 432; 63 P. 96.

Prior to amendment of 1901, district attorneys had no authority to sign information. Chap. 56, laws of 1899, so far as amendatory of this section and §§ 1610, 5091, and 8780, was void, and district attorneys whose offices were created by said act had no power to sign and file informations in criminal cases. (Doctrine as to amendments modified in Mill v. Brown, 31 U. 473; 88 P. 609, and in Marioneaux v. Cutler, 32 U. 475; 91 P. 355.)
State v. Beddo, 22 U. 432; 63 P. 96.

Sec. 9345 does not provide that a prosecution shall be dismissed for failure to file an information as required by this section, and the fact that an information was not filed within thirty days after commitment does not entitle defendant to a discharge, where good cause is shown for delay in the prosecution.
State v. Reynolds, 24 U. 29; 66 P. 614.

The dismissal of a criminal action, and the discharge of accused from custody after the filing by the district attorney of an information as herein provided, terminates the action.
Barnes v. Second Dist. Court, 36 U. 396; 104 P. 282.

Under Con. art. 1, sec. 13, offenses shall be prosecuted by information after examination and commitment by a magistrate, unless waived. The information must be for the offense charged in the complaint, or one included therein; it cannot be for a different one; and the right to a preliminary hearing on the

crime charged in the complaint, or one included therein, is essential.
State v. Pay, 45 U. 411; 146 P. 300.
State v. Jensen, 34 U. 166; 96 P. 1085.
State v. Hoben, 36 U. 186; 102 P. 1000.
State v. Sheffield, 45 U. 426; 146 P. 306.

Cannot dismiss an information defective in susbtance, and then file a new information without a preliminary examination.
Barnes v. Second Dist. Court, 36 U. 396; 104 P. 282.

The preliminary examination, charging accused with rape on April 1 on a female under the age of consent, was confined to evidence of rape on that date, and the information charged the offense on that date; but the proof showed that prosecutrix was then over eighteen years of age, and the state introduced evidence of an offense prior to the time she became eighteen; held, that conviction could not be sustained because accused did not have a preliminary examination relating to the offense committed before the prosecutrix became eighteen.
State v. Hoben, 36 U. 186; 102 P. 1000.

Where the defendant on a preliminary examination is bound over on a charge of fornication, the information based thereon being quashed because of statute of limitations, and the state without any preliminary examination filed a second information charging the offense as of another date; held, the court could not authorize the filing of the second information and try defendant for a distinct offense for which he had never been committed before a magistrate.
State v. Jensen, 34 U. 166; 96 P. 1085.

8780. (4693.) When information is not filed. Nolle prosequi. If the district attorney determines that an information ought not to be filed in any such case, he must make, subscribe, and file with the clerk of the district court of the county a statement in writing setting forth his reasons in fact and in law for not filing such information, and such statement must be filed during the term of court at which the defendant is held to appear for trial. The court must thereupon examine such statement, together with the evidence filed in the case, and if, upon such examination, the court is not satisfied with such statement, the district attorney must be directed and required by the court to file the proper information and bring the case to trial. But if the court does not require that information to be filed, and the defendant is not held or wanted to answer for any other public offense, he shall be discharged, his bail exonerated, and his money refunded to him. Am'd '01, p. 26.

Mont. Pen. C., § 1732*; N. Dak. (1895) § 7984*.
Dismissal of action for failure to prosecute, §§ 9345-9350.
When information set aside and resubmission ordered, § 8882.
Dismissal generally, §§ 9345-9350.
Failure of grand jury to find indictment, resubmission, § 8821.
Mistake in charging the offense, discharge or new prosecution, § 8993.
Holding defendant to answer to another or a higher offense, §§ 8903, 9038.

8781. (4694.) Information may be amended. Delay. An information may be amended without leave of court in any matter of form or substance at any time before the defendant pleads thereto. It may also be amended in any matter of form or substance by leave of court at any time after the defendant has pleaded to the merits, or during the trial. In case an amendment is allowed after a plea, or during the trial, the court shall give the defendant such reasonable time as may be necessary to meet the new matter set up in the amendment. No amendment shall cause any delay of the trial, except for good cause, which shall be made to appear to the satisfaction of the court, and shall be made a part of the record; and unless the defendant shall cause any reason he may have, why the trial shall not forthwith proceed, to be presented to the trial court and ask that the same shall be made a matter of record, he shall not be permitted to review the ruling of the court on the amendment in the supreme court. In case the trial court after judgment, on motion of the defendant, or the supreme court on his appeal, shall hold the information insufficient either in form or substance to sustain the judgment, the defendant shall not, for that reason, be discharged, but the court shall order a new information to be filed if the defects can be avoided in the new information, and the case shall proceed in the same manner as though a new trial had been granted to the defendant. Am'd '13, p. 54.

Mont. Pen. C., § 1733.
Filing new information, § 8882.
Amendment when defendant charged by wrong name, § 8833.

Not error to allow amendment to information before trial by insertion of certain words, when the amendment was immaterial and the legal meaning and effect were the same without as with the amendment.
State v. McKee, 17 U. 370; 53 P. 733.

Amendment by alleging value of money taken. Under § 8043, providing that robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accompanied by means of force or fear, and indictment not alleging the value of the money taken "in current United States silver coin" was sufficient, and an amendment inserting these words was not prejudicial to defendant.
State v. LaChall, 28 U. 80; 77 P. 3.

Before the amendment of 1913, the information could not be amended as to a matter of substance after defendant had pleaded.
Barnes v. Second Dist. Court, 36 U. 396; 104 P. 282.
State v. Topham, 41 U. 39; 123 P. 88.
State v. Potello, 42 U. 396; 122 P. 14.
As amended: The information may be amended by changing the date so as to make

it conform to the date charged in the complaint.

State v. Hay, 51 U. —; 172 P. —.

The state may obtain leave to file a new or amended information, and set forth with particularity the nature of the instrument with which the assault was committed, and its failure to specify particularly such instrument is not fatal.

State v. Jukanovich, 45 U. 372; 146 P. 289.

8782. (4695.) Information to recite commitment. Names of witnesses. An information must recite the fact of the commitment or binding over of the defendant by a magistrate, and the names of the witnesses testifying for the state on such examination must be indorsed thereon.

Mont. Pen. C., § 1734*.

Magistrate to furnish list of names of witnesses, § 8768.

Must be signed by district attorney or deputy, or by attorney pro tem., §§ 8676, 8878.

Waiver of examination, § 8549, and note.

Names of witnesses placed on indictment, § 8822.

Set aside for failure to place names of witnesses on information, § 8878; or on indictment, § 8879.

Set aside for failure to recite commitment, § 8878.

Cited in: State v. Sheffield, 45 U. 426; 146 P. 306.

CHAPTER 19.

FORMATION OF THE GRAND JURY.

8786. (4696.) Drawing of grand jury discretionary with judge. A grand jury shall be drawn or summoned only when, in the opinion of the judge of the district court of the county, public interest demands it.

Mont. Pen. C., § 1750*.

Authorized by Con. art. 1, sec. 13.

How drawn, § 3610.

8787. (4697.) To consist of seven male citizens. Five a quorum. A grand jury must consist of seven eligible male citizens of the United States, selected, summoned, and impaneled as provided by law, five of whom may constitute a quorum to do business.

Concurrence of at least five grand jurors necessary, § 8820.

Selecting, summoning, and drawing, §§ 3591-3619.

Five must concur to find an indictment, Con. art. 1, sec. 13; § 8820.

Fees of grand jurors, §§ 2542-2548.

Powers and duties, §§ 8806-8823.

A conviction upon an indictment returned by a grand jury not summoned and impaneled as required by law, or consisting of a different number from that required, will be reversed.

U. S. v. Reynolds, 1 U. 226.

Brannigan v. People, 3 U. 488; 24 P. 767.

Thorp v. People, 3 U. 441; 24 P. 908.

Where members of grand jury were not duly qualified or sworn, conviction on indictment found by them will be reversed.

Territory v. Woolsey,, 3 U. 470; 24 P. 765.

The laws of the territory of Utah, with reference to grand jurors, are still in force in this state as to offenses committed prior to its admission.

State v. Rock, 20 U. 38; 57 P. 532.

8788. (4698.) State or defendant may challenge. The state, or a person whose case will come before a grand jury, may challenge the panel of a grand jury or an individual juror.

Cal. Pen. C., § 894*.

8789. (4699.) Challenge to panel. Grounds. A challenge to the panel may be interposed for one or more of the following causes only: That the grand jurors were not selected, drawn, or summoned according to law.

Cal. Pen. C., § 895*.

Challenge to the panel, civil procedure, § 6796, and note.

8790. (4700.) Id. To individual juror. Grounds. A challenge to an individual grand juror may be interposed for one or more of the following causes only:

1. That he is not an eligible juror as provided by law;
2. That he is prosecutor upon a charge against the defendant;
3. That he is a witness on the part of the prosecution, and has been served with process or bound by an undertaking as such;
4. That he has formed or expressed an unqualified opinion or belief that the defendant is guilty or not guilty of the offense charged; but a hypothetical opinion, founded on hearsay or information supposed to be true, unaccompanied with malice or ill-will, shall not disqualify a juror or be a cause of challenge.

Cal. Pen. C., § 896*.

Challenge for cause, civil procedure, § 6799, and note.

A person having conscientious scruples against indicting a person for polygamy, or who believes it right for a man to have more than one living and undivorced wife at the same time, is wholly incompetent to serve

as a grand juror in the investigation of such a charge.
U. S. v. Reynolds, 1 U. 226.
U. S. v. Clawson, 4 U. 34; 5 P. 689; confirmed 114 U. S. 477.

8791. (4701.) Challenge may be oral or written. The challenges mentioned in the three next preceding sections may be oral or in writing and must be tried by the court.

Cal. Pen. C., § 897.

8792. (4702.) Court to allow or disallow challenge. Entry. The court must allow or disallow the challenge, and the clerk must enter its decisions upon the minutes.

Cal. Pen. C., § 898.

8793. (4703.) Allowance of challenge to panel. New grand jury. If a challenge to the panel is allowed, such grand jury shall be prohibited from inquiring into the charge against the defendant by whom the challenge shall have been interposed. If, notwithstanding, they do so, and find an indictment against him, the court must direct that it be set aside. The court may, however, in such case order a new grand jury to be summoned according to law.

Cal. Pen. C., § 899*.
Accused not held to answer before impaneling of grand jury, not deprived of objection to grand juror, § 8879.

8794. (4704.) Allowance of challenge to individual. Juror excused. If the challenge is allowed to an individual juror for the first cause, such person must be excused from the jury, and if there be not enough jurors left to complete the panel, the court must complete the same.

Mont. Pen. C., § 1758*.

8795. (4705.) Juror excused temporarily. If a challenge to an individual grand juror, for the second, third, or fourth causes is allowed, he must not be present at, nor take part in, the consideration of the charge against the defendant who interposed the challenge, nor the deliberations of the grand jury thereon. The grand jury must inform the court of a violation of this section, and it shall be punishable by the court as a contempt.

Cal. Pen. C., § 900*.
Challenge to individual juror, § 8790.
Acting after challenge allowed a misdemeanor, § 8010.

8796. (4706.) Objection to jury or juror must be by challenge. The state, or a person whose case will come before a grand jury, may take advantage of any objection to the panel or to an individual grand juror in no other mode than by challenge.

Cal. Pen. C., § 901*.
Challenge, §§ 8789, 8790.

8797. (4707.) Court to appoint foreman of grand jury. From the persons summoned to serve as grand jurors and appearing, the court must appoint a foreman. The court must also appoint a foreman when the person already appointed shall have been excused or discharged before the grand jury is dismissed.

Cal. Pen. C., § 902.

8798. (4708.) Oath of foreman of grand jury. The following oath must be administered to the foreman of the grand jury:

You, as foreman of the grand jury, do solemnly swear that you will diligently inquire into and true presentment make of all public offenses against the laws of this state, committed or triable within this county, of which you shall have or can obtain legal evidence. You will keep your own counsel and that of your fellows and that of the state, and will not, except when required in the due course of judicial proceedings, disclose the testimony of any witness examined before you, nor anything which you or any other grand juror may have said, nor the manner in which you or any other grand juoror may have voted on the matter before you. That you will present no person through malice, hatred, or ill will, nor leave any unpresented through fear, favor, or affection, or for any reward or the promise or hope thereof; but in all your presentments you will state the truth, the whole truth, and nothing but the truth, according to the best of your skill and understanding, so help you God.

N. Dak. (1895) § 8004*; Cal. Pen. C., § 903*.

8799. (4709.) Oath of grand jurors, other than foreman. The follow-

ing oath must be immediately thereupon administered to the other grand jurors present:

The same oath which your foreman has now taken before you on his part, you and each of you will well and truly observe on your part, so help you God.

Cal. Pen. C., § 904.

8800. (4710.) Charge to grand jury. The grand jury, having been impaneled and sworn, must be charged by the court. In doing so, the court must give them such information as shall be required by law as to their duties, and as to any charges for public offenses returned to the court or likely to come before the grand jury.

Cal. Pen. C., § 905*.

8801. (4711.) Duties of grand jury. Clerk. Final discharge. The grand jury must then retire to a private room and inquire into the offenses cognizable by them. They must appoint one of their number as clerk, who must preserve minutes of the evidence given before them and of their proceedings except of the votes of the individual members. On the completion of the business before them, they must be discharged by the court; but whether the business is completed or not, they shall be discharged by the final adjournment of the court.

N. Dak. (1895) §§ 8008, 8009*; Cal. Pen. C., § 906*.

CHAPTER 20.

POWERS AND DUTIES OF GRAND JURY.

8806. (4712.) To inquire into offenses, present indictments, etc. The grand jury must inquire into all public offenses committed or triable within the county, and present them to the court by indictment, or by an accusation in writing.

Cal. Pen. C., § 915*. Formation of grand jury, §§ 8786-8801.

8807. (4713.) Foreman to administer oaths to witnesses. The foreman may administer an oath to any witness appearing before the grand jury.

Cal. Pen. C., § 918.

8808. (4714.) Evidence receivable by grand jury. In the investigation of a charge for the purpose of indictment, the grand jury must receive no other evidence than such as shall be given by witnesses produced and sworn before them, or furnished by legal documentary evidence, or the deposition of a witness in cases, mentioned in sub. 4 of § 8553. The grand jury must receive none but legal evidence, and the best evidence in degree, to the exclusion of hearsay or secondary evidence.

Cal. Pen. C., § 919*.

8809. (4715.) Not bound to hear evidence for defendant. Process. The grand jury shall not be bound to hear evidence for the defendant; but it is their duty to weigh all the evidence submitted to them, and when they have reason to believe that other evidence within their reach will explain away the charge, they should order such evidence to be produced, and for that purpose may require the county attorney to issue process for the witnesses.

Cal. Pen. C., § 920.

8810. (4716.) When jury should find indictment. The grand jury ought to find an indictment when all the evidence before them, taken together, if unexplained, or uncontradicted, would, in their judgment, warrant a conviction by a trial jury.

Cal. Pen. C., § 921. Dismissal, resubmission, § 8821.

8811. (4717.) Juror having knowledge of crime must declare it. If a member of a grand jury knows, or has reason to believe, that a public offense triable within the county has been committed, he must declare the same to his fellow jurors, who must thereupon investigate the same.

Cal. Pen. C., § 922.

8812. (4718.) What the grand jury must inquire into. The grand jury must inquire into the case of every person imprisoned in the jails of the county on a criminal charge and not indicted; into the conditions and management of the public prisons within the county; and into the wilful and corrupt misconduct in office of public officers of every description within the county.

Cal. Pen. C., § 923.

8813. (4719.) Jury to have access to prisons and public records. They shall also be entitled to free access, at all reasonable times, to the public prisons, and to an examination without charge of all public records within the county.

Cal. Pen. C., § 924.

8814. (4720.) Court and district attorney to advise jury. Exclusion of persons. The grand jury may, at all reasonable times, ask the advice of the court or the judge thereof, or of the district attorney, but unless such advice is asked, the judge of the court must not be present during the sessions of the grand jury. The district attorney or attorneys for the state may at all times appear before the grand jury for the purpose of giving information or advice relative to any matter cognizable by them, and may interrogate witnesses before them whenever they or he shall think it necessary; but no other person shall be permitted to be present during the sessions of the grand jury, except the members, interpreters, and witnesses actually under examination, and no person must be permitted to be present during the expression of their opinion or the giving of their votes upon any matter before them.

Am'd '01, p. 8.

Cal. Pen. C., § 925*; Mont. Pen. C., § 1788.

Under provisions of this section (prior to amendment), an indictment would not be set aside on the ground that the district attorney instead of the county attorney was present during the session of the grand jury.

State v. Mickel, 23 U. 507; 65 P. 484.

8815. (4721.) Juror must maintain secrecy. Disclosure on order of court. Every member of the grand jury must keep secret whatever he himself or any other grand juror may have said, or in what manner he or any other grand juror may have voted on a matter before them; but may, however, be required by any court to disclose the testimony of a witness examined before the grand jury, for the purpose of ascertaining whether it is consistent with that given by the witness before the court; or to disclose the testimony given before them by any person upon a charge against such person for perjury in giving his testimony, or upon his trial therefor.

Cal. Pen. C., § 926.

Disclosure by grand juror, penalty, §§ 8011, 8012, 8854.

The power herein granted to the court to require the grand juror to disclose testimony for the two purposes specified does not deprive it of the power to require disclosure for any other purpose, and a grand juror may testify to a confession of defendant before the grand jury.

U. S. v. Kirkwood, 5 U. 123; 13 P. 234.

Grand jurors may testify to admissions made before them by witness testifying to offense of another person.

People v. Reggel, 8 U. 21; 28 P. 955.

8816. (4722.) Grand juror cannot be questioned for vote, etc. Exception. A grand juror shall not be questioned for anything he may say, or any vote he may give in the grand jury relative to a matter legally pending before the jury, except for a perjury of which he may have been guilty, in making an accusation or giving testimony to his fellow jurors.

Cal. Pen. C., § 927.

CHAPTER 21.

INDICTMENT.

8820. (4723.) Five jurors must concur to find. Indorsing and signing. An indictment cannot be found without the concurrence of at least five grand jurors. When so found it must be indorsed "a true bill," and the indorsement must be signed by the foreman of the grand jury.

Cal. Pen. C., § 940*.

Indictment defined, § 8675.

Form and sufficiency of indictment, §§ 8828-8855.

Five must concur to find an indictment, Con. art. 1, sec. 13; § 8787.
In the absence of a statutory requirement, an indictment need not be signed by the U. S. district attorney, and, if signed by a deputy U. S. district attorney, the signing is surplusage.
People v. Lyman, 2 U. 30.

8821. (4724.) Failure to find indictment. Dismissal. Resubmission. If five grand jurors do not concur in finding an indictment against a defendant held to answer, the complaint, and depositions and statement, if any, that shall have been transmitted to them must be returned to the court, with an indorsement theron, signed by the foreman, to the effect that the charge is dismissed. Such dismissal of the charge shall not prevent its resubmission to a grand jury at the next ensuing term, by order of the court, but it must not, after such ensuing term, be resubmitted.

Cal. Pen. C., §§ 941*, 942*.
When new information or resubmission ordered, § 8882.
When grand jury should find indictment, § 8810.
Nolle Prosequi, § 8780.

8822. (4725.) Names of witnesses placed on indictment. When an indictment shall be found, the names of the witnesses examined before the grand jury, or whose depositions may have been read before them, must be inserted at the foot of the indictment or indorsed thereon, before it is presented to the court.

Cal. Pen. C., § 943.
Names of witnesses placed on information, § 8782.
Set aside for failure to indorse names of witnesses, § 8879.
Non-compliance with this section as to some witnesses does not render them incompetent, and is waived by pleading to the indictment.
People v. Thiede, 11 U. 241; 39 P. 837; affirmed 159 U. S. 510.
Prosecution need not call all witnesses named on the indictment.
People v. Robinson, 6 U. 101; 21 P. 403.
The fact that witness was out of the territory and out of the jurisdiction of the court was sufficient reason for not calling her.
People v. Oliver, 4 U. 460; 11 P. 612.

8823. (4726.) Indictment presented by foreman in open court. An indictment, when found by the grand jury, must be presented by their foreman in their presence to the court, and must be filed with the clerk.

Cal. Pen. C., § 944.
An indictment will be presumed to have been presented to the court by the foreman of the grand jury, and in their presence, if the record of the court shows nothing to the contrary.
People v. Lee, 2 U. 441.
When an indictment is exhibited in open court and indorsed "a true bill," it is evidence that it was duly found by a legal grand jury.
Thorp v. People, 3 U. 441; 24 P. 908.

8824. (4727.) Bench warrant for defendant not in custody. When an indictment shall have been found against a defendant not in custody, a bench warrant shall be issued against him in the same manner as is provided in chap. 23 of this title.

Cal. Pen. C., § 945*.
Bench warrant, §§ 8863-8870.

CHAPTER 22.

RULES OF PLEADING AND FORMS OF INFORMATION AND INDICTMENT.

8828. (4728.) Rules of pleading are those prescribed herein. All forms of pleadings in criminal actions, and the rules by which the sufficiency of such pleadings is to be determined, shall be those prescribed by this code.

Cal. Pen. C., § 948.
Statutes to be liberally construed, §§ 5839, 7892, 8842.
Rules for testing sufficiency of an indictment are those of the Code of Criminal Procedure and not of the common law.
People v. Kerm, 8 U. 268; 30 P. 988.
Informations are governed and tested by the same rules of pleading as are provided for indictments.
State v. Crook, 16 U. 212; 51 P. 1091.

8829. (4729.) Information or indictment is the first pleading. The first pleading on the part of the state shall be the information or the indictment.

Cal. Pen. C., § 949.
Information generally, §§ 8779-8782.
Indictment generally, §§ 8820-8824.

8830. (4730.) Id. What it must contain. The information or indictment must contain:

1. The title of the action, specifying the name of the court to which the same is presented, and the names of the parties;

2. A statement of the acts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended.

Cal. Pen. C., § 950.
Information, §§ 8779-8782.
Indictment, §§ 8820-8824.
Grounds for setting aside information, § 8878; indictment, § 8879.
Prosecution by information or indictment, and other prosecutions, § 8549.
Information or indictment sufficient, when, § 8841.
Use of statutory language, § 8840, and notes.
Information and indictments tested by same rules of pleading, note to § 8828.
Information or indictment sufficient, when, § 8841.
Non-prejudicial errors of form disregarded, §§ 8842, 9231, 9365; civil procedure, § 6622.
Names of witnesses placed on indictment, § 8822; on information, § 8782.
Amendment, § 8781.

Where an offense is so defined by statute that a felonious intent constitutes no part of the crime, it is not necessary that the indictment should charge the act as having been done feloniously.

People v. Colton, 2 U. 457.
Intent necessary to crime, § 7908, and note.

An information should, in all cases, employ so many of the substantial words of the statute as will enable the court to see on what statute it is founded, and all other words which are essential to a complete description of the offense, or such words which are equivalent to those used in the statute, provided they include the full signification of the statutory words, but not otherwise.

State v. Williamson, 22 U. 248; 62 P. 1022.
State v. McDonald, 14 U. 173; 46 P. 872.

The mere existence in some other county of acts or conditions of the defendant, lawful themselves, but necessary to be alleged under provisions of this section, in order to establish the crime charged, do not invoke the provisions of § 8648, providing that when a public offense shall have been committed in part in one county and in part in another, the jurisdiction shall be in any of such counties.

State v. Graham, 23 U. 278; 64 P. 557.

An information for practicing medicine without a license, in the language of § 4450, is sufficient.

State v. Erickson, 47 U. 452; 154 P. 948.

An information for an attempt of carnal knowledge under § 8109, which alleges that the defendant "did lay hold upon the person of said ——— and threw her to the ground," is not improper as embodying unnecessary allegations.

State v. Benson, 46 U. 74; 148 P. 445.

Binding defendant over for trial on the offense of assaulting a person named, with intent to do bodily harm, does not justify an information charging assault with intent to do bodily harm to another person.

State v. Potello, 42 U. 396; 132 P. 14.

A recital in the information that accused had been duly committed by a magistrate may be rebutted.

State v. Springer, 40 U. 71; 121 P. 976.

In order that an information charging a statutory offense may be sufficient by following the language of the statute, it must contain all of the elements constituting the offense.

State v. Topham, 41 U. 39; 123 P. 888.

Where the information charges defendant with fornication with Verda Mathews when her name was Beatea Mathews, it is harmless where the identity is established.

State v. Chipman, 40 U. 549; 123 P. 89.

8831. (4731.) Form of information or indictment. It may be substantially in the following form:

The state of Utah against A B.

In the district court of the ..... district, in and for the county of ....., the ..... day of ....., A. D. 19.....

A B is accused by the grand jury of the county of ..... by this indictment (or by the district attorney by this information) of the crime of (giving its legal appellation, such as murder, arson, or the like, or designating it as a felony or misdemeanor), committed as follows: Said A B, on the ..... day of ....., A. D. 19....., at the county of ..... (here set forth the act or omission charged as an offense), contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Utah.

Am'd '01, p. 26.

Information to recite commitment, § 8782.

8832. (4732.) Id. Must be direct and certain in what. The information or indictment must be direct and certain as it regards:

1. The party charged.
2. The offense charged;
3. The particular circumstances of the offense, when they are necessary to constitute a complete offense.

Cal. Pen. C., § 952.
Amendment as to name of party, § 8820.
But one offense to be charged, counts, § 8834, and note.
Sufficiency of information charging robbery, note of § 8043; assault with deadly weapon, note to § 8070; murder in first degree, note to § 8291; receiving stolen property, note to § 8297; embezzlement, note to § 8304; larceny, note to § 8285; obstructing railroad, etc., note to § 8383.

The indictment is sufficient if it can be understood therefrom that the act or omission charged as the offense is clearly and distinctly set forth, without repitition, and in such manner as to enable the court to understand what is intended and to pronounce judgment according to the right of the cause.

People v. Kerm, 8 U. 268; 30 P. 988.

Under this section and § 4730, the information in a criminal proceeding must be direct and certain as regards the offense charged.

State v. Hillberg, 22 U. 27; 61 P. 215.

An indictment charging defendants with having stolen twenty mares and three horses, the property of different owners, with the names of the several owners, and specifying the number of animals belonging to each

owner, states the facts with sufficient certainty.

State v. Mickel, 23 U. 507; 65 P. 484.

State v. McKee, 17 U. 370; 53 P. 733.

An information in a prosecution for incest, which alleges that the accused had sexual intercourse with his niece, knowing her to be of such relationship, is sufficient under this section, which provides that the information must be direct and certain as it regards (1) the person charged; (2) the offense charged.

State v. James, 32 U. 152; 89 P. 460.

Where an information charging a statutory offense fairly apprises the accused of the charge preferred against him, so that he can meet it, it is sufficient, and a mere technicality should be ignored, except when it affects a substantial right.

State v. Swan, 31 U. 336; 88 P. 12.

Under the provisions of this section, the particular circumstances of an offense charged in an information need be set forth only when they are necessary to complete the offense.

Id.

An indictment charging a married woman with adultery by then and there feloniously permitting M. to have carnal knowledge of her body, is not fatally defective, in that it did not charge her with having done anything, but only with permitting an act by another.

State v. Moore, 36 U. 521; 105 P. 293.

An information charging accused with having operated a motor vehicle upon a public street at a higher rate of speed than was safe, and so as to endanger life, without having it under immediate control, and driving it past and in close proximity to a street car when the same was standing still for the purpose of letting off passengers, and while operating the vehicle in such unlawful manner, without due caution and circumspection, is insufficient to charge involuntary manslaughter.

State v. Gesas, 49 U. 181; 162 P. 366.

An information for pandering by threats, promises, etc., inducing a woman to remain in a house of prostitution in the language of the statute does not sufficiently set forth the facts.

State v. Topham. 41 U. 39; 123 P. 888.

8833. (4733.) Defendant charged by wrong name. Correction. When a defendant is charged by a fictitious or erroneous name, and in any stage of the proceedings his true name is discovered, it must be inserted in the subsequent proceedings, reference being made to the fact of his having been charged by the name mentioned in the information or indictment.

Cal. Pen. C., § 953.

Information may be amended, § 8781.

Defendant to declare true name on arraignment, § 8873.

8834. (4734.) But one offense to be charged. Different counts permitted. The information or indictment must charge but one offense, but the same offense may be set forth in different forms under different counts; and when the offense may be committed by the use of different means, the means may be alleged in the alternative in the same count; *provided,* that an information or indictment for larceny may contain also a count for obtaining money by false pretenses, a count for embezzlement, and a count for receiving or buying stolen property, knowing it to be stolen; that an information or indictment for forgery may contain a count for uttering a forged instrument, knowing it to be a forgery; that an information or indictment for robbery may contain a count for larceny; that an information or indictment for burglary may contain a count for house-breaking and one for larceny, and an information or indictment for house-breaking may contain a count for larceny; that an information or indictment for rape, or assault with intent to commit rape, or carnal knowledge of a female under eighteen years of age, or attempt to commit the crime of carnal knowledge of a female under eighteen years of age, or crime against nature upon any person, or attempt to commit the crime against nature upon any person, may contain also a count for indecent assault. Am'd '99, p. 51; '09, p. 23.

Cal. Pen. C., § 954*.

See citations under § 8088.

Information or indictment sufficient, when, § 8841.

Must be direct and certain in what, § 8832, and note.

Indictment charging several criminal acts, all, however, as a part of same transaction, and as constituting one crime, charges but one offense.

People v. Hill, 3 U. 334; 3 P. 75.

Conviction under an indictment charging cohabitation with seven women between certain dates is not a bar to prosecution for cohabitation with the same women at the same place, at an earlier date. (Revised, 120 U. S. 274, on the ground that same was one continuous offense).

U. S. v. Snow, 4 U. 295; 9 P. 686.

Where bigamy and adultery are committed on the same day, with the same person, the two offenses may be charged in separate counts in the same indictment.

U. S. v. West, 7 U. 437; 27 P. 84.

An indictment charging bigamy in one count and adultery in another is good at common law, since the prosecutor might elect or the court could compel him to elect which count he should proceed under.

Id.

Where an indictment for murder contains allegations concerning an abortion and miscarriage, and the instruments and drugs used to produce the miscarriage, which merely show the manner of and the means used in perpetrating the offense, it is not bad for duplicity.

State v. Carrington, 15 U. 480; 50 P. 526.

Information charging embezzlement, etc., in two counts, held to charge but one offense.

State v. Blue, 17 U. 175; 53 P. 978.

Complaint for adultery charging continuous offense not bad for duplicity.

State v. Thompson, 31 U. 228; 87 P. 709.

An information alleging that on a certain day defendant beat, and the next day administered poison to, deceased, and that by means of all of this she died, charges death as a result of the combined effect of the two transactions, so that no election is required; there can be no conviction on evidence that death was caused by one cause singly.

State v. Vance, 38 U. 1; 110 P. 434.

Where, to prevent a variance, the state charges the transaction in different counts, it cannot be required to elect upon which count it will ask for conviction before the evidence is introduced.

State v. Harcombe, 48 U. 89; 158 P. 1096.

8835. (4735.) Id. Conviction may be had on any count. The defendant or defendants, or any of them, may be convicted of any offense charged in any of the counts joined as prescribed in the next preceding section; *provided,* that no person shall be convicted of more than one crime upon the same facts constituting such crime.

8836. (4736.) Conviction or acquittal of one or more defendants. Upon an information or indictment against several defendants, any one or more may be convicted or acquitted.

Cal. Pen. C., § 970.
Conviction of one or more, § 9026.
Defendants charged jointly, separate or joint trial, § 8980.

8837. (4737.) Precise time need not be alleged or proved. Exception. The precise time at which the offense shall have been committed need not be stated in the information or indictment, but it may be alleged to have been committed at any time before the filing thereof, if an information; or, if an indictment, before the finding thereof, except where the time is a material ingredient in the offense.

Cal. Pen. C., § 955*.
What allegation as to time is sufficient, § 8841.
Where an indictment alleges that property was stolen on the fourth day of the month, and there is evidence that it was stolen on the third day, it is proper to charge that the exact time of the offense is not material; and defendant cannot claim that this is, in effect, a direction to disregard his proof of an alibi on the third day of the month.
People v. Wright, 11 U. 41; 39 P. 477.
Under this section and § 8842, it is not necessary that the information state the precise time at which the offense is alleged to have been committed.
State v. Woolsey, 19 U. 486; 57 P. 426.
Where the information charges crime of rape on April 1, on a female under the age of consent, and evidence was introduced substantiating the charge, and also showing that prosecutrix was over eighteen years of age on that date, held that where the state had elected to rely on the offense committed on April 1, a conviction could not be sustained on the evidence of the prior offenses.
State v. Hoben, 36 U. 186; 102 P. 1000.
The date stated in information is immaterial, and the prosecution, before evidence is introduced, may select any such act occurring within the statute of limitations and the jurisdiction of the court, as the offense for which it would ask conviction, and in the absence of such election, the law makes the election of the act charged by considering the act which the prosecution first introduced testimony to support, and no subsequent election can be made.
State v. Hilberg, 22 U. 27; 61 P. 215.
State v. Hansen, 40 U. 418; 122 P. 375.
State v. Greene, 38 U. 389; 115 P. 181.
Where, in the preliminary examination, evidence was offered of an adulterous act on a certain date, or where the information charges it on a certain date, the state may at the trial abandon the offense committed on that date and convict for an offense with the same woman committed on another date.
State v. Thompson, 31 U. 228; 87 P. 709.
State v. Sheffield, 45 U. 426; 146 P. 306.
State v. Kimball, 45 U. 443; 146 P. 313.

8838. (4738.) Erroneous allegation as to person injured not material, when. When an offense shall involve the commission of, or an attempt to commit, a private injury, and shall have been described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured, or intended to be injured, shall not be material.

Cal. Pen. C., § 956.
Variance, § 8903.
Attempts to commit crimes, §§ 8045-8050, 8527, 8528.
There is no fatal variance between allegations that the bank defrauded was the Commercial National Bank, and proof that the bank's corporate name was Commercial National Bank of Salt Lake City.
State v. Brown, 39 U. 140; 115 P. 994.
An information charging fornication with Verda Mathews, her true name being Beatea Mathews is not defective when the identity is established.
State v. Chipman, 40 U. 549; 123 P. 89.

8839. (4739.) Construction of words in information or indictment. The words used in an information or indictment shall be construed in their usual acceptance in common language, except such words and phrases as shall be defined by law, which are to be construed according to their legal meaning.

Cal. Pen. C., § 957.
Terms and construction, §§ 5848, 7893.

8840. (4740.) Id. Statutory words need not be strictly pursued. Words used in a statute to define a public offense need not be strictly pursued in the information or indictment, but other words conveying the same meaning may be used.

Cal. Pen. C., § 958.
Non-prejudicial errors of form disregarded, §§ 8842, 231, 365.
Must be direct and certain as to what, § 8832, and note.
Penal statutes not strictly construed, § 7892.
It is not necessary that the precise words of the statute should be used in an indictment.
People v. Colton, 2 U. 457.
Indictment charging embezzlement, framed in the language of the statute, without setting forth the facts and circumstances of bailment, is sufficient.
People v. Hill, 3 U. 334; 3 P. 75.
To charge a statutory offense in the language of the statute, or in terms equivalent thereto, is generally sufficient.
State v. Williamson, 22 U. 248; 62 P. 1022.
State v. Evans, 27 U. 12; 73 P. 1047.
State v. Swan, 31 U. 336; 88 P. 12.
People v. Gough, 2 U. 70.
People v. Hill, 3 U. 334; 3 P. 75.

It is sufficient to charge the offense in the words of the statute in an indictment for a misdemeanor, unless they fail to cover element of the offense charged.
Cannon v. U. S., 116 U. S. 55.
Same case, 4 U. 122; 7 P. 369.
Where a statute defining an offense contains an exception in the enacting clause of the statute, which is so incorporated with the language defining the offense that the ingredients of the offense cannot be accurately and clearly described if the exception is omitted, an indictment founded upon the statute must allege enough to show that the accused is not within the exception.
State v. Williamson, 22 U. 248; 62 P. 1022.

An information should employ so many of the substantial words of the statute as will enable the court to see on what statute it is founded, and all other words which are essential to a complete description of the offense, or such words which are equivalent to those used in the statute, provided they include the full signification of the statutory words, but not otherwise.
State v. Williamson, 22 U. 248; 62 P. 1022.
State v. McDonald, 14 U. 173; 46 P. 872.
It is better practice to charge an offense in the language of the statute. Information charging rape sustained.
State v. Delvecchio, 25 U. 18; 69 P. 58.

8841. (4741.) When information or indictment sufficient. The information or indictment is sufficient if it can be understood therefrom:

1. That it is entitled in a court having authority to receive it though the name of the court be not stated;

2. If an information, that it was subscribed and presented by a person authorized by law so to do; or, if an indictment, that it was found by a grand jury of the county in which the court was held;

3. That the defendant is named, or, if his name cannot be discovered, that he is described by a fictitious name, with a statement that his true name is to the informant, or, as the case may be, to the grand jury, unknown;

4. That the offense committed was within the jurisdiction of the court and is triable therein;

5. That the offense was committed at some time prior to the time of the presenting of the information or the finding of the indictment;

6. That the act or omission charged as the offense is clearly and distinctly set forth in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended, and the court to pronounce judgment upon a conviction, according to the right of the case.

Cal. Pen. C., § 959*.
Grounds for setting aside information, § 8878; indictment, § 8879.
Information may be amended, § 8781.
Information or indictment must contain what, § 8830.
Indictments and information charging homicide, note to § 8025.
Use of statutory language, § 8840, and notes.
Name of court should be stated, § 8830.

Precise time need not be alleged or proved, § 8837, and note.
Must be direct and certain in what, § 8832.
The indictment alleged that the crime was committed "in the county of Weber in this territory and district;" held, that the naming of the county was surplusage and that it was sufficient if the offense had been committed anywhere in the district.
U. S. v. Kershaw, 5 U. 618; 19 P. 194.

8842. (4742.) Non-prejudicial errors of form disregarded. No information or indictment is insufficient, nor can the trial, judgment, or other proceeding thereon be affected by reason of a defect or imperfection in matter of form which does not tend to the prejudice of a substantial right of the defendant upon the merits.

Cal. Pen. C., § 960; N. Dak., § 8048.
Statutes to be liberally construed, §§ 5839, 7892.
Similar section, civil procedure, § 6622.
Non-prejudicial errors of form disregarded, §§ 9231, 9365.

8843. (4743.) Presumptions of law, etc., need not be stated. Neither presumptions of law nor matters of which judicial notice is taken need be stated in an information or an indictment.

Cal. Pen. C., § 961.

8844. (4744.) In pleading judgment, facts not alleged. Proof. In pleading a judgment or other determination of, or proceeding before, a court or officer of special jurisdiction, it shall not be necessary to state the facts constituting jurisdiction; but the judgment or determination may be stated as given or made, or the proceedings had. The facts constituting jurisdiction, however, must be established on the trial.

Cal. Pen. C., § 962.

8845. (4745.) Private statute pleaded by reference to title and date. In pleading a private statute, or a right derived therefrom, it shall be sufficient to refer to the statute by its title and the day of its passage, and the court must thereupon take judicial notice thereof.

Cal. Pen. C., § 963.

8846. (4746.) Criminal libel, how pleaded. Proof. An information or indictment for libel need not set forth any intrinsic facts for the purpose of showing the application to the party libeled of the defamatory matter on which the information or indictment is founded; but it shall be sufficient to state generally that the same was published concerning him, and the fact that it shall have been so published must be established on the trial.

Cal. Pen. C., § 964.
Criminal libel, general provisions, §§ 8072-8083.

Applied.
People v. Ritchie, 12 U. 180; 42 P. 209.

8847. (4747.) Pleading forgery when instrument destroyed, etc. Misdescription. When an instrument which is the subject of an information or indictment for forgery has been destroyed or withheld by the act or the procurement of the defendant, and the fact of such destruction or withholding shall have been alleged in the information or indictment and established on the trial, the misdescription of the instrument shall be immaterial.

Cal. Pen. C., § 965.
Forgery, § 8270.

8848. (4748.) Perjury pleaded. Proof necessary. In an information or indictment for perjury or subornation of perjury, it shall be sufficient to set forth the substance of the controversy or matter in respect to which the offense was committed, and in what court or before whom the oath alleged to be false was taken, and that the court, or the person before whom it was taken, had authority to administer it, with proper allegations of the falsity of the matter on which the perjury is assigned; but the information or indictment need not set forth the pleadings, record, or proceedings with which the oath is connected, nor the commission or authority of the court or person before whom the perjury was committed. Perjury must be proved by the testimony of two witnesses, or one witness and corroborating circumstances.

Cal. Pen. C., § 966*.
Perjury, §§ 7900, 7980.

Indictment for perjury set out and held sufficient hereunder.
People v. Greenwell, 5 U. 112; 13 P. 89.

8849. (4749.) Larceny or embezzlement. Sufficient allegations. In an information or indictment for the larceny or embezzlement of money, bank notes, certificates of stock, or valuable securities, or for a conspiracy to cheat or defraud a person of any such property, it shall be sufficient to allege the larceny or embezzlement, or the conspiracy to cheat and defraud, to be of money, bank notes, certificates of stock, or valuable securities, without specifying the coin, number, denomination, or kind thereof.

Cal. Pen. C., § 967.
Larceny of securities, etc., §§ 8293-8295.

Indictment charging embezzlement held sufficient.
People v. Hill, 3 U. 334; 3 P. 75.

8850. (4750.) Obscene literature, etc. Sufficient allegations. An information or indictment for exhibiting, publishing, passing, selling or offering to sell, or having in possession with such intent, any lewd or obscene book, pamphlet, picture, print, card, paper, or writing need not set forth any portion of the language used, or figures shown upon such book, pamphlet, picture, print, card, paper, or writing; but it is sufficient to state generally the fact of the lewdness or obscenity thereof.

Cal. Pen. C., § 968.
Obscene literature, § 8144.

8851. (4751.) Principal and accessory. Certain distinctions abrogated. The distinction between an accessory before the fact and a principal, and between principals in the first and second degree, in cases of felony, is abrogated; and all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, shall hereafter be prosecuted, tried, and punished as principals, and no other facts need be alleged in any information or indictment against such an accessory than are required in an information or indictment against his principal.

Cal. Pen. C., § 971.
Principals and accessories defined, §§ 7919, 7920.

Jurisdiction of prosecutions against principal and accessory, §§ 6650, 6651.

8852. (4752.) Accessory punished though principal not. An accessory to the commission of a felony may be prosecuted, tried, and punished, though

the principal may be neither prosecuted nor tried, and though the principal may have been acquitted.

Cal. Pen. C., § 972. Punishment of accessory, § 7921.

8853. (4753.) Indictment or information to be recorded. Certified copy. Every indictment or information must be recorded by the clerk within five days after the same is filed, in a book to be kept for that purpose. The judge must compare the record with the original indictment or information, and certify the correctness thereof. In case the original indictment or information is lost or destroyed, the defendant may be tried upon a copy taken from the record and certified by the clerk.

Mont. Pen. C., § 1855.

8854. (4754.) Officials not to disclose indictment, etc., until arrest. No grand juror, county attorney, clerk, judge, or other officer must disclose the fact that an indictment is found or an information filed until the defendant has been arrested, except any disclosure that may be necessarily incident to the issue and service of a warrant to arrest the defendant. A violation of this section may be punished as a misdemeanor by fine or imprisonment, or both.

Mont. Pen. C., § 1856. Disclosure by grand juror, §§ 8011, 8815.

8855. (4755.) Joint ownership of personal property, how pleaded. When any offense is committed upon, or in relation to, any personal property belonging to several partners or owners, the indictment or information for such offense is sufficient if it allege such property to belong to any one or more of such partners or owners, without naming them all.

Mont. Pen. C., § 1858.
Where indictment charged defendant with having stolen horses belonging to different owners.
State v. Mickel, 23 U. 507; 65 P. 484.
See State v. McKee, 17 U. 370; 53 P. 733.

CHAPTER 23.

ARRAIGNMENT OF DEFENDANT.

8860. (4756.) Arraignment of defendant, when and where. When the information or indictment shall have been filed, the defendant must be arraigned thereon before the court in which it shall be filed, unless the cause is transferred to some other county for trial. Such arraignment must be within ten days from the date of filing the information or indictment, if court be then in session in such county, otherwise on the first day of the next succeeding session of court. Am'd '15, p. 200.

Cal. Pen. C., § 976.
Rights of accused, Con. art. 1, secs. 7-13; § 8553.
In the absence of an objection at the time, an arraignment on a holiday is harmless error, as an arraignment may be waived.
State vs. Estes, 52 U. —; 175 P. —.

8861. (4757.) Presence of defendant at arraignment necessary, when. If the information or indictment is for a felony, the defendant must be personally present; but if for a misdemeanor, he may appear upon the arraignment by counsel.

Cal. Pen. C., § 977. Presence of defendant at trial, § 8926.

8862. (4758.) Defendant in custody brought in. When his personal appearance shall be necessary, if he is in custody, the court may direct that he be brought, and the officer in whose custody he shall be must thereupon bring him, before it to be arraigned.

Cal. Pen. C., § 978.

8863. (4759.) Id. Bench warrant for defendant on bail. If the defendant shall have been discharged on bail, or shall have deposited money instead thereof, and does not appear to be arraigned when his personal attendance shall be necessary, the court, in addition to the forfeiture of the undertaking of bail, or the money deposited, may direct the clerk to issue a bench warrant for his arrest.

Cal. Pen. C., § 979

8864. (4760.) Id. Issuance of bench warrant. The clerk, on the appli-

cation of the prosecuting attorney, may, at any time after the order shall have been made, whether the court is sitting or not, issue a bench warrant to one or more counties.

Cal. Pen. C., § 980.

8865. (4761.) Form of bench warrant, if offense a felony. The bench warrant upon the information or indictment, if the offense is a felony, must be substantially in the following form:

State of Utah, county of .....

The state of Utah to any sheriff, constable, marshal, or policeman in this state:

An information having been filed (or an indictment having been found), on the ..... day of ....., A. D. 19....., in the district court of the county of ....., charging C D with the crime of (designating it generally); you are therefore commanded forthwith to arrest the above named C D, and bring him before that court (or before the court to which the information or indictment may have been removed, naming it), to answer said information or indictment; or if the court has adjourned for the term, that you deliver him into the custody of the sheriff of the county of .....

Given under my hand, with the seal of said court affixed, this ..... day of ....., A. D. 19.....

[Seal] By order of said court. E F, Clerk.

Cal Pen. C., § 981*.

8866. (4762.) Arrest under bench warrant. Bail. The defendant, when arrested under a warrant for an offense not bailable must be held in custody by the sheriff of the county in which the information is filed or the indictment is found, unless admitted to bail after an examination upon a writ of habeas corpus; but if the offense is bailable, there must be added to the body of the bench warrant a direction to the following effect: "Or, if he requires it, that you take him before any magistrate in that county, or in the county in which you arrest him, that he may give bail to answer to the information or indictment;" and the court, upon directing it to issue, must fix the amount of bail, and an indorsement must be made thereon and signed by the clerk, to the following effect: "The defendant is to be admitted to bail in the sum of .....dollars."

Cal. Pen. C., § 982.

8867. (4763.) Bench warrant served as a warrant of arrest. The bench warrant may be served in any county in the same manner as a warrant of arrest.

Cal. Pen. C., § 983*.

8868. (4764.) Bail after arrest on bench warrant. If the defendant is brought before a magistrate of another county for the purpose of giving bail, the magistrate must proceed in respect thereto in the same manner as if the defendant had been brought before him upon a warrant of arrest, and the same proceedings must be had thereon.

Cal. Pen. C., § 984. Bail generally, §§ 9243-9270.

8869. (4765.) Bail may be increased. Imprisonment until given. When the information or indictment is for a felony, and the defendant, before the filing or finding thereof, shall have given bail for his appearance to answer the charge, the court to which the information or indictment shall be presented may order the defendant to be committed to actual custody, unless he gives bail in an increased amount, to be specified in the order.

Cal. Pen. C., § 985*.

8870. (4766.) Id. Bench warrant for absent defendant. If the defendant is present when the order is made, he must be forthwith committed. If he is not present, a bench warrant must be issued and proceeded upon in the manner provided in this chapter.

Cal. Pen. C., § 986.

8871. (4767.) On arraignment, defendant entitled to counsel. Appointment. If the defendant appears for arraignment without counsel, he must be

informed by the court that it is his right to have counsel before being arraigned, and must be asked if he desires the aid of counsel. If he desires and is unable to employ counsel, the court must assign counsel to defend him.

Cal. Pen. C., § 987.
Rights of accused persons, Con. art. 1, secs. 7-13; § 8553.
The transcript of the proceedings before an examining magistrate, affirmatively showing that the defendant "waived the service of an attorney," shows that defendant was apprised of his right to such services, and in absence of showing to contrary it will be presumed that the examining magistrate informed accused of his right to an attorney.
State v. Mewhinney, 43 U. 135; 134 P. 632.
An attorney appointed under this section is not entitled to compensation from the county.
Pardee v. S. L. County, 39 U. 482; 118 P. 122.

8872. (4768.) Id. Information or indictment to be read. Plea. The arraignment must be made by the court, or by the clerk or county attorney under its direction, and shall consist in reading the information or indictment to the defendant and delivering to him a copy thereof, including the list of witnesses, and asking him whether he pleads guilty or not guilty to the information or indictment.

Cal. Pen. C., § 988*.

8873. (4769.) Defendant to declare his true name. When the defendant is arraigned, he must be informed that, if the name by which he is prosecuted is not his true name, he must then declare his true name, or be proceeded against by the name in the information or indictment. If he gives no other name, the court may proceed accordingly; but if he alleges that another name is his true name, the court must direct an entry thereof in the minutes of the arraignment, and the subsequent proceedings on the information or indictment may be had against him by that name, referring also to the name by which he is informed against or indicted.

Cal. Pen. C., § 989*.
Defendant charged in wrong name, correction, § 8833.

8874. (4770.) Time allowed for answer. Motion to set aside. Demurrer. Plea. Proviso. If, on the arraignment, the defendant requires it, he must be allowed a reasonable time, not less than one day, to answer the information or indictment. He may, in answer to the arraignment, move to set aside, demur, or plead to the information or indictment; *provided,* that the defendant must be required to answer within ten days from the date of arraignment if court be then in session in such county, otherwise on the first day of next succeeding session of court. Am'd '15, p. 200.

Cal. Pen. C., § 900.

CHAPTER 24.

SETTING ASIDE INFORMATION OR INDICTMENT.

8878. (4771.) When information must be set aside. The information must be set aside by the court in which defendant is arraigned, upon his motion, in any of the following cases:

1. When it fails to recite that the defendant had theretofore been duly committed by a magistrate;

2. When the names of the witnesses testifying on the part of the state in such examination are not indorsed thereon;

3. When it is not signed by the district attorney or by the attorney pro tem. for the state. Am'd '01, p. 27.

Cal. Pen. C., § 995*.
Information, rules of pleading, form, etc., §§ 8779-8782, 8828-8855.
Granting or refusing of motion deemed excepted to, § 9189.
Waiver of preliminary examination, § 8549, and note.
Time of filing and necessity of preliminary hearing, § 8779.
Names of witnesses, etc., to be placed on information, § 8782.
When indictment or information sufficient, § 8841.
Indictment and information tested by same rules of pleading.
State v. Crook, 16 U. 212; 51 P. 1091.
A variation of the date of an adulterous act is not ground for motion to quash.
State v. Sheffield, 45 U. 426; 146 P. 306.
An objection that accused has not had a preliminary examination may be raised by a motion to quash the information, and such motion cannot be considered as a demurrer under § 8893.
State v. Springer, 40 U. 471; 121 P. 976.

8879. (4772.) When the indictment must be set aside. The indictment

must be set aside by the court in which the defendant is arraigned, upon his motion, in any of the following cases:

1. Where it is not found, indorsed, and presented as prescribed in this code;

2. When the names of the witnesses examined before the grand jury, or whose depositions may have been read before them, are not inserted at the foot of the indictment, or indorsed thereon;

3. When a person has been permitted to be present during the session of the grand jury while the charge embraced in the indictment has been under consideration, except as provided in § 8814;

4. When the defendant had not been held to answer before the finding of the indictment, on any ground which would have been good for challenge either to the panel or to any individual grand juror.

Cal. Pen. C., § 995*.
Indictment, rules of pleading, form, etc., §§ 8820-8855.
Granting or refusing of motion deemed excepted to, § 9189.
Names of witnesses to be placed on indictment, § 8829.
Fact that indictment was found solely on testimony of incompetent witness is no ground for setting aside.
U. S. v. Cutler, 5 U. 608; 19 P. 145.
Indictment returned by grand jury not summoned and impaneled as required by law, or consisting of an illegal number, should be set aside.
U. S. v. Reynolds, 1 U. 226.
Brannigan v. People, 3 U. 488; 24 P. 767.

8880. (4773.) Motion to set aside. Form. When to be made. Motion to set aside the information or indictment, must be in writing, subscribed by the defendant or his attorney, and it must specify clearly the ground of objection to the information or indictment, and such motion must be made and filed contemporaneously with the filing of a demurrer and plea, or the defendant will be deemed to have waived any objection which could be raised by such motion. Am'd '15, p. 201.

Mont. Pen. C., § 1911; N. Dak. (1895) § 8083.

8881. (4774.) Id. Hearing. Procedure. Postponement. The motion must be heard at the time it is made, unless for cause the court postpones the hearing to another time. If the motion is denied, the defendant must immediately answer the information or indictment, either by demurring or pleading thereto. If the motion is granted, the court must order that the defendant, if in custody, be discharged therefrom; or, if admitted to bail, that his bail be exonerated; or, if he has deposited money instead of bail, that the same be refunded to him, unless it directs that an information be filed or that the case be submitted to the same or to another grand jury. But the court shall not postpone the hearing for any longer time than may be imperative. Am'd '15, p. 201.

Cal. Pen. C., § 997*.

8882. (4775.) Id. When new information or resubmission ordered. If the court directs that an information be filed, or that the case be resubmitted, the defendant, if already in custody, must so remain unless he shall be admitted to bail; or, if already admitted to bail, or money has been deposited instead thereof, the bail or money shall be answerable for the appearance of the defendant to answer a new information or indictment; and, unless a new information is filed or a new indictment is found at the same or the next term of court, the court must make the order prescribed by the next preceding section.

Cal. Pen. C., § 9984.
Amendment of information, § 8781.
Proceedings on sustaining demurrer to information or indictment, §§ 8893-8895.
Nolle Prosequi, §§ 8780, 9348.
Dismissal for failure to bring action to trial, §§ 9345-9347.
Resubmission to grand jury, § 8821.
Mistake in charging the offense, discharge or new prosecution, § 8993.

8883. (4776.) Order setting aside not a bar. An order to set aside an information or indictment, as provided in this chapter, shall be no bar to a future prosecution for the same offense.

Cal. Pen. C., § 999.
Bar on judgment of acquittal, § 8903.
Decisions on once in jeopardy, etc., note to § 8905.
Whether such an order bars a future prosecution is a question of law for the court.
State v. Springer, 40 U. 471; 121 P. 976.

CHAPTER 25.

DEMURRER.

8887. (4777.) Defendant's pleading, a demurrer or a plea. The only pleading on the part of the defendant shall be either a demurrer or a plea.

Cal. Pen. C., § 1002.

8888. (4778.) Demurrer, when made. Plea. Both the demurrer and plea must be put in open court at the time of the arraignment.

Am'd '15, p. 201.

Cal. Pen. C., § 1003.

8889. (4779.) Grounds of demurrer. The defendant may demur to the information or indictment when it appears upon the face thereof:

1. That the grand jury by which it was found had no legal authority to inquire into the offense charged, by reason of its not being within the legal jurisdiction of the county, if an indictment, or, if an information, that the court has no jurisdiction of the offense charged therein; or,

2. That it does not substantially conform to the requirements of §§ 8830-8832;

3. That more than one offense is charged, except as provided in § 8834; or,

4. That the facts stated do not constitute a public offense; or,

5. That it contains matter which, if true, would constitute a legal justification or excuse of the offense charged, or other legal bar to the prosecution.

Cal. Pen. C., § 1004*.

Order sustaining or overruling demurrer deemed excepted to, § 9189.

Demurrer that the indictment "does not substantially conform to the requirements of §§ 150, 151, of the code of procedure in criminal cases as to the offense charged and the particular circumstances" sufficiently specifies the grounds of objection hereunder.

People v. Hill, 3 U. 334; 8 P. 75.

8890. (4780.) Demurrer to be in writing and to specify grounds. The demurrer must be in writing, signed either by the defendant or his counsel, and filed. It must distinctly specify the grounds of objection to the information or indictment, or it must be disregarded.

Cal. Pen. C., § 1005.

8891. (4781.) Id. Time of hearing argument. Postponement. The argument upon the objections presented by the demurrer must be heard at the time it is filed, unless for cause the court postpone the hearing to another time, but the court shall not postpone the hearing for any longer time than may be imperative. If the defendant files a motion to set aside the information or indictment, the argument upon such motion and the argument upon the demurrer must be heard at the same time. Am'd '15, p. 201.

Cal. Pen. C., § 1006.

8892. (4782.) Judgment on demurrer. Entry. Upon considering the demurrer, the court must give judgment, either allowing or disallowing it, and an order accordingly must be entered upon the minutes.

Cal. Pen. C., § 1007.

8893. (4783.) Effect of sustaining demurrer. Further prosecution. If the demurrer is allowed, the judgment shall be final upon the information or indictment demurred to, and shall be a bar to another prosecution for the same offense, unless the court, being of the opinion that the objection on which the demurrer is allowed may be avoided in a new information or indictment, directs that a new information be filed, or that the case be resubmitted to the same or to another grand jury.

Cal. Pen. C., § 1008*.

When jurisdiction found to be in another county or state, procedure, §§ 8994-8997.

New information or resubmission of charge when facts charged do not constitute an offense, §§ 8994, 8998.

New information or indictment when motion to set aside granted, § 8882.

Decisions on once in jeopardy, etc., note to § 8905.

Dismissal for failure to prosecute, §§ 9345-9350.

Amendment of information, § 8781.

The words "next succeeding grand jury" refer to the first grand jury that meets after the allowance of the demurrer.

People v. Hill, 3 U. 334; 3 P. 75.

This section, nor § 8903, does not permit the filing of a new information on the dismissal

of an action and the discharge of the accused after plea.

Barnes v. Second Dist. Court, 36 U. 396; 104 P. 282.

While an appeal may be taken from a judgment sustaining a demurrer, the supreme court is without authority to reinstate the case and remand for further pleading.

Tooele City v. Hoffman, 42 U. 596; 134 P. 558.

Where accused filed written objections to the information which recited that it appeared by the justice's record, which was made a part of the motion, that accused had not, prior to the filing of the information, had a right of a preliminary examination for the offense charged in the information, and prayed that the information be set aside and quashed, held it was not a demurrer to the information, but a motion under § 8878, and, if sustained, is not a bar to another prosecution for the same offense, and the question whether or not it is a bar is for the court, and not the jury, to determine.

State v. Springer, 40 U. 471; 121 P. 976.

8894. (4784.) Id. When defendant discharged. If the court does not permit the information to be amended, nor direct that a new information be filed, nor direct that the case be resubmitted, the defendant, if in custody, must be discharged, or if admitted to bail, his bail shall be exonerated, or if he shall have deposited money instead of bail, the money must be refunded to him.

Cal. Pen. C., § 1009*. Amendment of information, § 8781.

8895. (4785.) Id. If case resubmitted. If the court directs that the case be resubmitted, the same proceedings must be had thereon as are prescribed in § 8882.

Cal. Pen. C., § 1010.

8896. (4787.) What objections must be taken by demurrer. What at any time. When the objections mentioned in § 8889 appear upon the face of the information or indictment, they shall be taken only by demurrer, except that the objection to the jurisdiction of the court over the subject of the information or indictment, or that the facts stated do not constitute a public offense, may be taken at the trial, under the plea of not guilty, or after the trial, in arrest of judgment.

Cal. Pen. C., § 1012.

(The title and enacting clause of chap. 113, Laws '15, recite that this section is amended but the act contains no amendment.)

Objections, except the two specified, not taken by demurrer are waived.

U. S. v. West, 7 U. 437; 27 P. 84.

A question of want of jurisdiction in the trial court in a criminal case may be raised for the first time in the supreme court.

State v. Morrey, 23 U. 273; 64 P. 764.

CHAPTER 26.

PLEA.

8898. (4788.) Pleas of four kinds. There are four kinds of pleas to an information or indictment. A plea of:

1. Guilty;
2. Not guilty;
3. A former judgment of conviction or acquittal of the offense charged, which may be pleaded either with or without the plea of not guilty;
4. Once in jeopardy, which may be pleaded with or without the plea of not guilty.

Cal. Pen. C., § 1016*.

When put in, § 8888.

"Not guilty" entered when defendant refuses to plead, § 8906.

Decisions on former conviction, acquittal, or once in jeopardy, note to § 8905.

Former conviction, or acquittal, or once in jeopardy a bar, Con. art. 1, sec. 12; §§ 8904, 8905, 8555, 8652, 8653.

Where an arraignment is had and a plea entered on a holiday, no objection being entered, the error, if any, is waived inasmuch as the defendant may waive the arraignment and plea. The case of People v. Heller, 2 U. 133 is overruled.

State v. Estes, 52 U. —; 175 P. —.

Plea of former conviction not made is waived.

In re Maughan, 6 U. 167; 21 P. 1088.

In re Barton, 6 U. 264; 21 P. 998.

Where an issue of former acquittal is raised, it must be passed upon by the jury.

State v. Creechley, 27 U. 142; 75 P. 384.

8899. (4789.) Plea must be oral. Form of entry. Every plea must be oral, and entered upon the minutes of the court substantially in the following form:

1. If the defendant pleads guilty: "The defendant pleads that he is guilty of the offense charged;"

2. If he pleads not guilty: "The defendant pleads that he is not guilty of the offense charged;"

3. If he pleads a former conviction or acquittal: "The defendant pleads that he has already been convicted (or acquitted) of the offense charged by the judgment of the court of (naming it), rendered at (naming the place), on the ..... day of .....;"

4. If he pleads once in jeopardy: "The defendant pleads that he has been once in jeopardy for the offense charged (specifying the time, place, and court)."

Cal. Pen. C., § 1017.

8900. (4790.) Plea of guilty put in only by defendant. Withdrawal. A plea of guilty can be put in only by the defendant himself, in open court, unless upon information or indictment against a corporation, in which case it may be put in by counsel. The court may at any time before judgment upon a plea of guilty permit it to be withdrawn and a plea of not guilty substituted.

Cal. Pen. C., § 1018.
Where defendant refuses to plead, § 8906.
Rights of defendant, Con. art. 1, sec. 12, and notes; § 8553, and notes.

8901. (4791.) Issue on plea of not guilty. The plea of not guilty puts in issue every material allegation of the information or indictment.

Cal. Pen. C., § 1019.

8902. (4792.) Evidence under plea of not guilty. All matters of fact tending to establish a defense other than those specified in subs. 3, 4, § 8898, may be given in evidence under the plea of not guilty.

Cal. Pen. C., § 1020*.

8903. (4793.) Former acquittal on ground of variance not a bar. If the defendant shall have been formerly acquitted on the ground of variance between the information or indictment and the proof, or the information or indictment shall have been dismissed upon an objection to its form or substance, or in order to hold the defendant for a higher offense, without a judgment of acquittal, it shall not be an acquittal of the same offense.

Cal. Pen. C., § 1021.
Mistake in charging proper offense, discharge or new prosecution, § 8993.
Dismissal to hold defendant for another offense not a bar, §§ 8993, 9038.
After the dismissal of an action and the discharge of the accused after plea, a new information cannot be filed, since § 8781 forbids an amendment of an information in matters of substance after plea.
Barnes v. Second Dist. Court, 36 U. 396; 104 P. 282.

8904. (4794.) Id. Acquittal on merits a bar, notwithstanding defects. Whenever the defendant shall be acquitted on the merits, he shall be acquitted of the same offense, notwithstanding any defect in form or substance in the information or indictment on which the trial shall have been had.

Cal. Pen. C., § 1022.

8905. (4795.) Id. Conviction, acquittal, or once in jeopardy a bar. When the defendant shall have been convicted or acquitted or been once placed in jeopardy upon an information or indictment, the conviction, acquittal, or jeopardy shall be a bar to another information or indictment for the offense charged in the former, or for an attempt to commit the same, or for an offense necessarily included therein, of which he might have been convicted under that information or indictment.

Cal. Pen. C., § 1023.
Acquittal or conviction a bar, §§ 8520, 8522.
Persons not to be put twice in jeopardy, Con. art. I, sec. 12; § 8555, and note.
Order setting aside indictment or information for informality is not a bar, § 8883.
Foreign conviction or acquittal a bar, § 8522, 8652
Conviction or acquittal in another county a bar, § 8653.
Dismissal for failure to prosecute a bar, when, §§ 9345-9350.
Nolle prosequi, §§ 8780, 9348.
Plea of once in jeopardy, with or without plea of not guilty, § 8898.

When the offense charged is part and incident of an offense of which defendant has been convicted, the plea of former conviction should be sustained.

In re Snow, 120 U. 274. (Not reported in Utah reports).

Ex parte Neilsen, 131 U. S. 176. (Not reported in Utah reports).

Plea of former conviction not made is waived.

In re Barton, 6 U. 264; 21 P. 998.
In re Maughan, 6 U. 167; 21 P. 1088.

Waiver by consent to discharge of jury. A defendant pleaded not guilty and once in jeopardy. The jury was discharged after trial with the consent of the defendant, when he was placed on trial again; held, that the defendant could not plead a failure of the jury to find upon the issues of once in jeopardy, he having consented to the discharge of the jury.

People v. Kerm, 8 U. 268; 30 P. 988.

Former conviction under complaint charging offense of gambling committed on Jan. 1, and on divers days thereafter up to and including Sept. 19, does not bar indictment for gambling

on a day between the two days particularly mentioned.

People v. Sullivan, 9 U. 195; 33 P. 701.

Defendant could be tried again for murder in the first degree, after verdict of guilty of murder in second degree had been set aside on his motion.

State v. Kessler, 15 U. 142; 49 P. 293.

Where an information was filed against the accused for procuring a miscarriage, a demurrer thereto sustained, and the court made no order requiring the case to be submitted to another grand jury, or that another information be filed, but ordered the accused discharged, and another information was filed against the accused for the same offense, a plea of former acquittal was a bar, and the court should have so instructed the jury.

State v. Crook, 16 U. 212; 51 P. 1091.

An unlawful trial and conviction therein because jury was unlawful, followed by an absolutely void judgment on such conviction, does not have the effect of putting the defendant once in jeopardy.

State v. Bates, 22 U. 65; 61 P. 905.

Where issue of former acquittal is raised, it must be passed upon by the jury.

State v. Creechley, 27 U. 142; 75 P. 384.

Where a jury was impaneled and sworn and the cause dismissed after the evidence was all introduced, defendant was thereby placed in jeopardy, and cannot be tried again for the crime charged in the information, or any other offense included therein.

State v. Hows, 31 U. 168; 87 P. 163.

8906. (4796.) Refusal to plead. If the defendant refuses to answer the information or indictment by demurrer or plea, a plea of not guilty must be entered.

Cal. Pen. C., § 1024.

Refusal to plead after demurrer overruled, § 8856.

8907. (4797.) Preparation for trial. Time allowed defendant. After his plea, the defendant shall be entitled to at least two days to prepare for trial, but the time of trial shall not be postponed for a longer time than the court may deem imperative. Am'd '15, p. 201.

CHAPTER 27.

INFORMATION OR INDICTMENT AGAINST A JUDGE.

8908. (4798.) Governor to designate another judge to preside. When an information is filed or an indictment is found in a district court against a judge thereof, a certificate of that fact must be transmitted by the clerk to the governor, who shall thereupon designate and direct a judge of the district court of another district to preside at the trial of such information or indictment, and hear and determine all pleas and motions affecting the defendant thereunder before and after judgment.

Mont. Pen. C., § 1960.

CHAPTER 28.

REMOVAL OF ACTION BEFORE TRIAL.

8911. (4799.) Removal when impartial trial cannot be had. A criminal action may be removed from the court in which it is pending, on the application of the defendant, upon the ground that a fair and impartial trial cannot be had in the county where the action is pending.

Cal. Pen. C., § 1033. Cal. Sup. (1889) § 1033*, p. 474.

Change of venue as may be provided by law, Con. art. 8, sec. 5, and note.

Change of place of trial on preliminary examination, § 8740.

8912. (4800.) Application for removal. Notice. Time allowed for making application. The application must be made in open court, and in writing, supported by an affidavit or affidavits, and may be made at any time before trial upon a reasonable notice and the service of copies of the application and affidavit or affidavits upon the attorney for the state. If a new trial is necessary, either by reason of the discharge of a jury without verdict or the granting of a new trial, the removal may be allowed at any time before the new trial. The written application, together with the affidavit or affidavits, must be served upon the attorney for the state and filed with the clerk of the court at least fifteen days before the day of trial, or the defendant shall be deemed to have waived his right of removal. Am'd '15, p. 201.

Cal. Pen. C., § 1034*. Cal. Sup. (1889) § 1034*, p. 475.

8913. (4801.) When application to be heard in absence of accused. Whenever an affidavit by the defendant shall show that he cannot safely appear in person to make the application because the popular excitement against him is so great as to endanger his personal safety, and such statement is sustained by other testimony, the application may be heard and determined in the absence of the defendant, though he is prosecuted for felony, and shall not, at the time of such application, have been arrested, or given bail, or been arraigned, or demurred, or pleaded to the information or indictment.

Cal. Pen. C., § 1034*. Cal. Sup. (1889) § 1034*, p. 475.

Presence of defendant required, when, § 8926, and notes.

Under the circumstances, the affidavits of the state being merely in rebuttal, case will not be reversed because state failed to serve copies on defendant who had had no chance to examine them.

State v. Haworth, 24 U. 398; 68 P. 155.

8914. (4802.) When granted. If the court is satisfied that the representations of the applicant are true, an order must be made for the removal of the action to the district court of a county free from such objection.

Cal. Pen. C., § 1035*. Cal. Sup. (1889) § 1035*, p. 475.

Order refusing to grant change of venue deemed excepted to, § 9189.

Where a trial court has jurisdiction of a cause, the matter of a change of venue is within its sound discretion, subject to review and reversal only for an abuse of the discretion.

State v. Carrington, 15 U. 480; 50 P. 526.

Under provisions of this section and § 8956, where defendant in a homicide case filed twenty-three affidavits in support of change of venue, to the effect that there was great popular feeling against him and that he could not receive a fair trial, and the state filed fifty-two counter affidavits, the denial of the motion was not erroneous.

State v. Haworth, 24 U. 398; 68 P. 155.

8915. (4803.) Entry of order. Transmission of papers. The order of removal must be entered upon the minutes, and the clerk must immediately make out and transmit to the court to which the action shall be removed a certified copy of the order of removal, record, pleadings, and proceedings in the action, including the undertakings for the appearance of the defendant and of the witnesses.

Cal. Pen. C., § 1036.

8916. (4804.) Id. Removal of defendant in custody. If the defendant is in custody, the order must direct his removal, and he must be forthwith removed by the sheriff of the county where he is imprisoned to the custody of the sheriff of the county to which the action is removed.

Cal. Pen. C., § 1037.

8917. (4805.) Order of removal is notice to certain witnesses. Exceptions. If the order of removal is made at a term of the court, it is notice, to every person who has entered into an undertaking to appear at such term, to appear at the trial of the action before the court to which the same is removed. In other cases the witnesses must be subpœnaed as provided by this code, or the court may require the witnesses on the part of the state to give security for their appearance before the court in which the defendant is to be tried, as provided by law in other cases.

Mont. Pen. C., § 1979*; N. Dak. (1895) § 8116.

8918. (4806.) Costs of removal paid by county. The costs accruing from a change of the place of trial and the costs of the trial shall be paid by the county where the offense was committed.

When costs of removal a county charge, § 1435.

8919. (4807.) State may have change of place of trial. Petition. The state may have a change of place of trial for any of the causes for which the defendant may obtain the same. The petition therefor must be made by the county attorney, supported by affidavit or affidavits.

Mont. Pen. C., § 1974*; N. Dak. (1895) § 8122*.

8920. (4808.) Procedure after removal. Pleadings. The court to which the action shall be removed must proceed to trial and judgment therein as if the action had been commenced in such court. If it is necessary to have any of the original pleadings or other papers before such court, the court from which the action shall have been removed must at any time, upon application of the county attorney or of the defendant, order such papers or pleadings to be transmitted by the clerk, a certified copy thereof being retained.

Cal. Pen. C., § 1038.

CHAPTER 29.

MODE OF TRIAL.

8924. (4809.) Issue of fact arises, how. An issue of fact arises:

1. Upon a plea of not guilty; or,
2. Upon a plea of a former conviction or acquittal of the same offense; or,
3. Upon a plea of once in jeopardy.

Cal. Pen. C., § 1041.

Once in jeopardy, etc., note to § 8905.

8925. (4810.) Issues of fact tried by jury. Waiver in certain cases. Issues of fact must be tried by a jury unless a trial by jury be waived in criminal cases not amounting to felony by the consent of both parties expressed in open court and entered on its minutes.

Cal. Pen. C., § 1042*.

Waiver in misdemeanors, § 8556.

8926. (4811.) Presence of defendant required, when. If the prosecution is for a felony, the defendant must be personally present at the trial, but if for a misdemeanor, the trial may be had in the absence of the defendant; if, however, his presence is necessary for the purpose of identification, the court may, upon application of the county attorney, by an order or warrant, require the personal attendance of the defendant at the trial.

Cal. Pen. C., § 1043.

Presence of defendant on arraignment, § 8861, when verdict rendered, § 9021; not requried on motion for change of venue, when, § 8913.

Under this section, it is not necessary that the accused should be present at the filing and trial of motion and pleas not involving the question of guilt or innocence on the merits.
State v. Woolsey, 19 U. 486; 57 P. 426.

Defendant need not be with jury which goes to view premises in connection with homicide.
State v. Mortensen, 26 U. 312; 73 P. 562, 633.

CHAPTER 30.

FORMATION OF JURY AND CALENDAR.

8927. (4812.) Trial juries. Formation. Judges to conduct examination. Trial juries for criminal cases are formed in the same manner as trial juries in civil cases, except that the examination of the jurors shall be conducted by the judge. The judge may permit counsel for either side to examine the jurors, but such examination by counsel shall be limited by the court. No action of the court under this section shall constitute error except in cases of clear abuse of discretion. Am'd '15, p. 202.

Cal. Pen. C., § 1046.

Number of jurors, Con. art. 1, sec. 10; § 3595.

Selecting, drawing, and summoning jury, §§ 3606-3620.

Civil procedure, clerk to draw names from box, § 6790.

Jury in criminal case should be impaneled as follows: Clerk must first draw from box twelve names, and both prosecution and defense be required to exhaust all their challenges to those drawn, and those unchallenged be sworn to try the case; then a sufficient number of additional names to complete the twelve be drawn, and this process be repeated till a jury obtained.
People v. Callaghan, 4 U. 49; 6 P. 49.

8928. (4813.) Calendar to be prepared by clerk. The clerk must prepare a calendar of all criminal actions pending in the court, enumerating them according to the date of the filing of the information or indictment, specifying, opposite the title of each action, whether it is for a felony or a misdemeanor, and whether the defendant is in custody or on bail.

Cal. Pen. C., § 1047*.

8929. (4814.) Id. Order of disposition of cases. The issues on the calendar must be disposed of in the following order, unless for good cause the court shall direct an action to be tried out of its order:

1. Prosecutions for felony, when the defendant is in custody;
2. Prosecutions for misdemeanor, when the defendant is in custody;
3. Prosecutions for felony, when the defendant is on bail;
4. Prosecutions for misdemeanor, when the defendant is on bail.

Cal. Pen. C., § 1048.

CHAPTER 31.

POSTPONEMENT OF TRIAL.

8931. (4815.) Postponement of trial. Cause to be shown by affidavit. When an action shall be called for trial, or at any time previous thereto, the court may, upon sufficient cause shown by either party by affidavit, direct the trial to be postponed to another day of the same or of the next term. But the court shall not postpone the trial for a longer time than may be imperative. Am'd '15, p. 202.

Cal. Pen. C., § 1052*.
Order refusing to postpone deemed excepted to by defendant, § 9189.
Dismissal for failure to bring action to trial, § 9345.
Continuance and discharge of defendant from custody, § 9346.
Grounds for continuance, affidavits, etc., civil procedure, §§ 6786 and notes.
Discretion of court, civil procedure, note to § 6786.

Affidavit sufficient for continuance.
People v. Wiggins, 1 U. 324.
People v. Garns, 2 U. 260.
State v. Freshwater, 30 U. 442; 85 P. 447.
State v. Williams, 49 U. 320; 163 P. 1104.

The granting of a continuance in a criminal case is a discretionary matter, and refusal thereof is reversible error only when prejudice therefrom is clearly shown.
State v. Morgan, 27 U. 103; 74 P. 526.
There must be a showing of prejudice and of diligence.
Id.
The granting of a continuance upon the grounds of excitement or bias in the community rests largely in the discretion of the trial court, and, where the accused's showing was controverted, will not be reviewed.
State v. Anselmo, 46 U. 137; 148 P. 1071.
Denial of accused's request for continuance in order to secure a witness is not error if no diligence on his part is shown, and is without prejudice where he testifies he had not communicated with the witness and did not know where she was.
State v. Brewer, 48 U. 252; 158 P. 1094.

CHAPTER 32.

CHALLENGING THE JURY.

8936. (4816.) Challenge defined. Two kinds. A challenge is an objection made to the trial jurors, and is of two kinds:

1. To the panel;
2. To an individual juror.

Cal. Pen. C., § 1055.

8937. (4817.) Joint defendants to join in challenges. When several defendants are tried together, they cannot sever their challenges, but must join therein.

Cal. Pen. C., § 1056.

Applied.
People v. O'Laughlin, 3 U. 133; 1 P. 653.

8938. (4818.) Panel defined. The panel is a list of jurors returned to serve at a particular court, or for the trial of a particular action.

Cal. Pen. C., § 1057*.

8939. (4819.) Challenge to the panel. A challenge to the panel is an objection made to all the jurors returned, and may be taken by either party.

Cal. Pen. C., § 1058.
Where the impaneling of the jury exhausted the panel and the defendant accepted the jury without having exhausted his peremptory challenges, he waived any right to object to the manner of drawing and return of the jury.
State v. White, 40 U. 342; 121 P. 579.

8940. (4820.) Id. Grounds. A challenge to the panel can be founded only on a material departure from the forms prescribed in respect to the drawing and return of the jury, or on the intentional omission of the proper officer to summon one or more of the jurors drawn.

Cal. Pen. C., § 1059*.
Exception on disallowance of challenge to panel, § 9189.
Decisions on challenge to panel, civil procedure, note to § 6795.

8941. (4821.) Id. Taken before juror sworn. In writing. A challenge to the panel must be taken before a juror is sworn, and must be in writing or be noted by the stenographer, and must plainly and distinctly state the facts constituting the ground of challenge.

Cal. Pen. C., § 1060.

8942. (4822.) Id. Exception to challenge. Trial of sufficiency of challenge. If the sufficiency of the facts alleged as ground of the challenge is denied, the adverse party may except to the challenge. The exception need

not be in writing, but must be entered on the minutes of the court or of the stenographer, and thereupon the court must proceed to try the sufficiency of the challenge, assuming the facts alleged therein to be true.

Cal. Pen. C., § 1061.

8943. (4823.) Id. If challenge found sufficient. Amendment to challenge. If, on the exception, the court finds the challenge sufficient, it may, if justice requires it, permit the party excepting to withdraw his exception and to deny the facts alleged in the challenge. If the exception is allowed, the court may, in like manner, permit an amendment to the challenge.

Cal. Pen. C., § 1062.

8944. (4824.) Id. Denial of challenge, how entered. Trial of challenge. If the challenge is denied, the denial may be oral and must be entered on the minutes of the court or be noted by the stenographer, and the court must proceed to try the question of fact, and upon such trial the officers, whether judicial or ministerial, whose irregularity is complained of, as well as any other person, may be examined to prove or disprove the facts alleged as the ground of the challenge.

Cal. Pen. C., § 1063.

8945. (4825.) Id. Procedure, if allowed; if disallowed. If, either upon exception to the challenge or a denial of the facts, the challenge is allowed, the court must discharge the jury, so far as the trial in question is concerned. If disallowed, the court must direct the jury to be impaneled.

Cal. Pen. C., § 1065.

8946. (4826.) Defendant to be informed of right to challenge. Before a juror is called, the defendant must be informed by the court, or under its direction, that if he intends to challenge an individual juror, he must do so when the juror appears and before he is sworn.

Cal. Pen. C., § 1066.

8947. (4827.) Challenges to individual jurors. A challenge to an individual juror is either:

1. Peremptory; or,
2. For cause.

Cal. Pen. C., § 1067.

8948. (4828.) Id. When taken. It must be taken when the juror appears and before he is sworn to try the cause; but the court may for cause permit it to be taken after the juror is sworn and before the jury is completed.

Cal. Pen. C., § 1068.

After challenges for cause to the first twelve jurors are passed on, and before others are called to take the places of those excused for cause, right to peremptorily challenge those remaining in the box must be exercised or waived by the state and defendant.

State v. Riley, 41 225; 126 P. 294.

State v. Mewhinney, 43 U. 135; 134 P. 632.

8949. (4829.) Peremptory challenge defined. A peremptory challenge can be taken by either party, and may be oral. It is an objection to a juror for which no reason need be given, but upon which the court must exclude him.

Cal. Pen. C., § 1069.

Peremptory challenges, order of, § 8964.

8950. (4830.) Id. Number allowed. The defendant and the state shall each be entitled to peremptory challenges as follows:

1. If the offense charged is punishable with death or by imprisonment for life, to the number of ten;
2. If the offense charged is a felony other than those above mentioned, to the number of four;
3. If the offense charged is a misdemeanor, to the number of three.

Am'd '15, p. 202.

Cal. Pen. C., § 1070*; Mont. Pen. C., § 2044*.

8951. (4831.) Challenge for cause. General or particular. A challenge for cause may be taken by either party. It is an objection to a particular juror, and is either:

1. General, that the juror is disqualified from serving in any case; or,
2. Particular, that he is disqualified from serving in the action on trial.

Cal. Pen. C., § 1071.

8952. (4832.) General causes of challenge. General causes of challenge are:

1. A conviction for felony;

2. A want of any of the qualifications prescribed by law to render a person a competent juror;

3. Unsoundness of mind, or such defect in the faculties of mind or organs of the body as render him incapable of performing the duties of a juror.

Cal. Pen. C., § 1072.
Decisions on challenge for cause, civil procedure, note to § 6799.
Qualifications of jurors, §§ 3597-3599.

A jury was sworn in a case March 2. On March 3, a statute prescribing an additional qualification went into effect; held, it did not apply to a jury already sworn.
People v. Chalmers, 5 U. 201; 14 P. 131.

8953. (4833.) Particular cause of challenge for bias. A particular cause of challenge is:

1. For such bias as, when the existence of the facts is ascertained, in judgment of law, disqualifies the juror, and which is known in this code as implied bias;

2. For the existence of a state of mind on the part of the juror which leads to a just inference, in reference to the case, that he will not act with entire impartiality, which is known in this code as actual bias.

Cal. Pen. C., § 1073*.
Challenge for cause, civil procedure, note to § 6799.

Grounds of challenge specifically stated, note to § 8956.
Decisions on bias of juror, note to §§ 8964, 8975.

8954. (4834.) Challenge for implied bias. Grounds. A challenge for implied bias may be taken for all or any of the following causes, and for no other:

1. Consanguinity or affinity within the fourth degree to the person alleged to be injured by the offense charged, or on whose complaint the prosecution shall have been instituted, or to the defendant;

2. Standing in the relation of guardian and ward, attorney and client, master and servant, landlord and tenant, or debtor and creditor; or being a member of the family of the defendant, or of the person alleged to be injured by the offense charged, or on whose complaint the prosecution shall have been instituted, or in the employment of any of such parties;

3. Being the party adverse to the defendant in a civil action, or having complaint against or being accused by him in a criminal prosecution;

4. Having served on the grand jury which found the indictment, or on a jury of inquest which inquired into the death of a person whose death is the subject of the information or indictment;

5. Having served on a trial jury which has tried another person for the offense charged;

6. Having been one of a jury formerly sworn to try the same charge, and whose verdict was set aside, or which was discharged without a verdict, after the case was submitted to it;

7. Having served as a juror in a civil action brought against the defendant for the act charged as an offense;

8. Having formed or expressed an unqualified opinion or belief that the prisoner is guilty or not guilty of the offense charged;

9. If the offense charged is punishable with death, the entertaining of such conscientious opinions as would preclude his finding the defendant guilty; in which case he must neither be permitted nor compelled to serve as a juror;

10. Because he is or, within a year preceding, has been engaged or interested in carrying on any business, calling, or employment, the carrying on of which is a violation of law, where the defendant is indicted for a like offense;

11. Because he has been a witness, either for or against the defendant, on the preliminary trial or before the grand jury;

12. Having a belief that the punishment fixed by law is too severe for the offense charged.

Iowa, McClain's An. C. (1888) § 5790*; Mont. Pen. C., § 2049*; Cal. Pen. C., § 1074*.

Challenge for cause, civil procedure, § 6799, and note.

Opinion founded on rumor, newspapers, etc., does not disqualify if juror says he will act impartially, § 8956, and note.

Exception on disallowance of challenge, § 9189.

Grounds of challenge specifically stated, note to § 9956.

Where juror falsely claims to be a citizen, or where he conceals material facts on his examination, new trial will be granted, civil procedure, note to § 6978; and note to § 9199, criminal procedure.

Challenge stated as for "implied bias," without more, is insufficient.

People v. Hopt, 3 U. 396; 4 P. 250.

Same case, 4 U. 247; 9 P. 407; 120 U. S. 430.

People v. Thiede, 11 U. 241; 39 P. 837; affirmed 159 U. S. 510.

On a trial for bigamy in Utah, it is sufficient objection to a juror that he was or had been living in polygamy.

U. S. v. Reynolds, 1 U. 319; affirmed 98 U. S. 145.

Also, that a juror declines to answer whether he was living in polygamy.

Id.

Also, that a juror has conscientious scruples against indicting persons for polygamy.

U. S. v. Reynolds, 1 U. 319; affirmed 98 U. S. 145.

U. S. v. Clawson, 4 U. 34; 5 P. 689; affirmed 114 U. S. 477.

Also that a juror believes that polygamy is a direct revelation.

U. S. v. Miles, 2 U. 19; 103 U. S. 304.

A challenge may be properly sustained when a juror entertains conscientious scruples against the death penalty.

State v. Kessler, 15 U. 142; 49 P. 293.

A juror who has formed an opinion as to the guilt or innocence of the defendant, but says that such opinion would not influence his verdict, is a competent juror, no other facts being shown.

U. S. v. Reynolds, 1 U. 319; affirmed 98 U. S. 145.

Juror who has formed an "impression" as to defendant's guilt is not disqualified.

People v. Thiede, 11 U. 241; 39 P. 837; affirmed 159 U. S. 510

On the trial of a saloon keeper for murder, a juror is not disqualified by the fact that he is prejudiced against the business of saloon keeping, the matter at issue having no reference to such business.

Id.

Where a juror admits that he has formed an opinion which it will take evidence to remove, and that he has counseled with defendant in regard to the case, and that he has stated to the prosecuting attorney that it is against the interest of the prosecutrix to prosecute the case, he may be properly excused on the challenge of the state.

State v. Neel, 23 U. 541; 65 P. 494.

An opinion by a venireman in a homicide case that deceased had been unlawfully killed, without an opinion as to who is guilty of the crime, does not disqualify the juror on the ground of actual bias.

State v. Haworth, 24 U. 398; 68 P. 155.

Where a venireman's answer shows a proper understanding of the juror's duty, the action of the court in sustaining objections to questions as to whether venireman understood he was partly interested in the defendant's side of the case on account of the presumption of innocence, and whether he understood that the jury was under no obligations to take the opinion of any witness, was not erroneous, since the matter had been covered.

State v. Hillstrom, 46 U. 341; 150 P. 935.

A juror is not disqualified in a prosecution for adultery because his daughter is married to a brother of the female with whom it was charged the adulterous act was committed.

State v. Cluff, 48 U. 102, 158 P. 701.

Where it is not shown that accused exhausted his peremptory challenges before the jury was completed, error in overruling a challenge for cause is not prejudicial.

Id.

Error in not overruling challenges for cause will not be presumed prejudicial, though the peremptory challenges are exhausted before the last juror is obtained, unless it is shown that an objectionable juror was forced upon defendant after his peremptory challenges were exhausted, whom he would have removed, but for such exhaustion, and such showing is not made unless objection to a juror is thereafter made.

State v. Thorne, 41 U. 414; 126 P. 286.

It is not ground for challenge for cause that the juror believes that, in case of guilt, the full measure of punishment allowed should be given without recommendation.

Id.

8955. (4835.) Exemption is a privilege, not a cause of challenge. An exemption from service on a jury is not a cause of challenge, but the privilege of the person exempted.

Cal. Pen. C., § 1075.

8956. (4836.) Cause must be stated in challenge for actual bias. When opinion a disqualification. In a challenge for implied bias, one or more of the causes stated in § 8954 must be alleged. In a challenge for actual bias, the cause stated in sub. 2 of § 8953 must be alleged; but no person shall be disqualified as a juror by reason of having formed or expressed an opinion upon the matter or cause to be submitted to such jury, founded upon public rumor, statements in public journals, or common notoriety, provided it appears to the court, upon his declaration, under oath or otherwise, that he can and will, notwithstanding such an opinion, act impartially and fairly upon the matters submitted to him. The challenge may be oral, but must be entered in the minutes of the court or of the stenographer.

Cal. Pen. C., § 1076.

Challenge stated as "for actual bias," or "implied bias," without specifying the cause from which bias is to be inferred is insufficient

People v. Hopt, 3 U. 396; 4 P. 250.

Same case, 4 U. 247; 9 P. 407; 120 U. S. 430.

If the challenge is for actual bias, the cause must be alleged.

People v. Thiede, 11 U. 241; 39 P. 837; affirmed 159 U. S. 510.

A challenge that "defendant challenges for cause" is properly denied as being too general.

Id.

Impressions or qualified and conditional opinions formed upon reports, which easily yield to the evidence of witnesses having personal knowledge of the facts and testifying under oath, constitute no valid objection to a juror. But if the juror's mind is closed against and is in opposition to the truth as it may be related by the witnesses, resists its force and perverts the judgment, then such juror is disqualified for having "formed an unqualified opinion."

People v. O'Loughlin, 3 U. 133; 1 P. 653.

Evidence in a criminal case printed in a

newspaper is a statement in a public journal within the meaning of the statute.
Hopt v. Utah, 120 U. S. 430.
Same case, 4 U. 247; 9 P. 407.

A juror testified that he had read a newspaper account of the homicide; that he had never formed or expressed an opinion; that he had formed an impression as to the defendant's guilt from the newspaper account read, which it would take evidence to remove, but he could try the case fairly and impartially. Another juror stated that he had read newspaper accounts of the homicide, had a strong impression as to the guilt of the defendant arising therefrom which it would take evidence to remove, but that his mind was entirely free from opinions or conclusions; that he could accord defendant the full presumption of innocence, and would enter the jury box unbiased; held, that said jurors were not disqualified for implied bias, not having formed nor expressed an unqualified opinion or belief.
People v. Thiede, 11 U. 241; 30 P. 837; affirmed 159 U. S. 510.

This section is not unconstitutional.
Id.

It is not error, in a homicide case, to accept a juror who states that he has an opinion, from what he has heard and read, as to the guilt of defendant, but that he will act fairly and impartially and will not be influenced except by the evidence and the charge.
State v. Haworth, 24 U. 398; 68 P. 155.
U. S. v. Reynolds, 1 U. 319; 98 U. S. 145.

But one who has an unqualified opinion which it would take evidence to remove should, upon challenge, be excluded from the jury.
State v. Neel, 23 U. 541; 65 P. 494.
U. S. v. Reynolds, 1 U. 319; affirmed 98 U. S. 145.
Conway v. Clinton, 1 U. 215.
People v. O'Loughlin, 3 U. 133; 1 P. 653.

The ruling on an objection because venireman had an opinion, based on public rumor, etc., will not be interfered with unless there is an abuse of discretion.
State v. Thorne, 41 U. 414; 126 P. 286.

Where one being examined as to his qualification to sit as a juror makes a harmful statement, it is not prejudicial, where no objection was made to the question or to the answer.
State v. De Weese, 51 U. —; 172 P. 290.

8957. (4837.) Exception to challenge. Denial. The adverse party may except to the challenge in the same manner as to a challenge to the panel, and the same proceedings must be had thereon as are prescribed in § 8942, except that if the challenge be allowed the juror must be excluded. The adverse party may also orally deny the facts alleged as the ground of challenge.

Cal. Pen. C., § 1077.

8958. (4838.) Trial of challenge. If the facts are denied, the challenge must be tried.

Cal. Pen. C., § 1078.

Trial by triers, presence of defendant.
Hopt v. People, 110 U. S. 574.

Decision of triers is final.
U. S. v. Miles, 2 U. 19; 103 U. S. 304.

The finding of the trial court upon the competency of a juror ought not to be set aside unless the error is manifest.
People v. Reynolds, 1 U. 319; affirmed 98 U. S. 145.

If all the evidence touching the qualifications of a juror is not contained in the record, it will be conclusively presumed on appeal that the evidence justified the finding of the court.
U. S. v. Groesbeck, 4 U. 487; 11 P. 542.

Where a juror is challenged for actual bias, an issue of fact is raised, and if no exception is taken to the admission or rejection of evidence upon the voir dire examination, the action of the trial court is conclusive and cannot be reviewed on appeal.
People v. Thiede, 11 U. 241; 39 P. 837.

Where a challenge for actual bias is made by the accused, and the fact upon which the challenge is made is denied by the state, under this section and §§ 8959, 8960, the accused is entitled to have the issue tried, and witnesses on either side may be examined under the same rules of evidence applicable in the trial of other issues.
State v. Morgan, 23 U. 212; 64 P. 356.

8959. (4839.) Id. Juror as witness. Upon the trial of a challenge to an individual juror, the juror challenged may be examined as a witness to prove or disprove the challenge, and must answer every question pertinent to the inquiry.

Cal. Pen. C., § 1081.

8960. (4840.) Other witnesses. Rules of evidence. Other witnesses may also be examined on either side, and the rules of evidence applicable to the trial of other issues govern the admission or exclusion of evidence on the trial of the challenge.

Cal. Pen. C., § 1082.

Rules of evidence govern.
State v. Morgan, 23 U. 212; 64 P. 356.

8961. (4841.) Id. Court must allow or disallow challenge. The court must allow or disallow the challenge, and its decision must be entered in the minutes of the court.

Cal. Pen. C., § 1083.

8962. (4842.) Order of taking challenges for cause. All challenges to an individual juror, except peremptory, must be taken, first by the defendant, and then by the state, and each party must exhaust all his challenges before the other begins.

Cal. Pen C., § 1086.

8963. (4843.) Id. The challenges of either party for cause need not all be taken at once, but they must be taken separately, in the following order, including in each challenge all the causes of challenge belonging to the same class:

1. To the panel;

2. To an individual juror, for a general disqualification;
3. To an individual juror, for an implied bias;
4. To an individual juror, for an actual bias.

Cal. Pen. C., § 1087.

8964. (4844.) Id. Exercise. Order. Alteration. Whenever a challenge for cause is allowed, another juror must be called, and no peremptory challenges need be taken until there is a complete panel of jurors against whom all challenges for cause have been waived or denied. Thereupon peremptory challenges shall be exercised by the parties alternately, beginning with the state, and each vacancy thus occurring shall be filled before another challenge need be exercised. Am'd '15, p. 202.

Cal. Pen. C., § 1088.
Peremptory challenge defined, § 8949.
Defendant who does not exhaust his peremptory challenges cannot complain on appeal of disallowance of a challenge for cause.
People v. Hopt, 4 U. 247; 9 P. 407; affirmed 120 U. S. 430.

Cured by peremptory challenge after challenge for implied bias has been improperly denied.
People v. Thiede, 11 U. 241; 39 P. 837; affirmed 159 U. S. 510.
Conway v. Clinton, 1 U. 215.

CHAPTER 33.

THE TRIAL.

8975. (4845.) Order of trial. The jury having been impaneled and sworn, the trial must proceed in the following order:

1. If the information or indictment is for a felony, the clerk must read it and state the plea of the defendant to the jury. In all other cases this formality may be dispensed with;

2. The county attorney or other counsel for the state must open the case and offer evidence in support of the charge;

3. The defendant or his counsel may then open the defense, and offer evidence in support thereof;

4. The parties may then respectively offer rebutting testimony only, unless the court for good reason, in furtherance of justice, permit them to offer evidence upon their original case;

5. When the evidence shall have been concluded, unless the case is submitted to the jury on either side, or on both sides without argument, the county attorney or other counsel for the state must open, the counsel for the defendant or defendants must follow, and the county attorney or other counsel for the state may conclude the argument;

6. The court must then charge the jury as provided in sub. 4 of § 6802, and in §§ 6803-6805.

Cal. Pen. C., § 1093*.
Owing to the fact that this section was improperly amended, it is not in harmony with § 6804, relating to civil procedure.
Judge conducts and limits examination of jury, § 8927.
Rules for determining competency of witnesses the same as in civil trials, exception, § 9275.
Rules of evidence, unless herein otherwise provided, the same as in civil trials, § 9276.
Witness must answer in corrupt practice prosecution, §§ 2373, 2401; in liquor prosecution, §§ 3369, 3371.
Defendant as a witness, § 9279, and note.
Defendant not prejudiced by refusal or failure to testify, § 9279.
Husband and wife as witnesses for or against each other, § 9278; in pandering prosecution, § 8101; in prosecution of delinquent husband or father, § 8113.
Report of testimony of witness taken on previous trial admissible, when, §§ 8553, 9277.
Jury may take with them the written instructions, § 9011.
Discretion of court as to examination of witnesses and conduct of trial, civil procedure, note to § 6804.
If prosecution is for felony, defendant must be present, § 8926.
Charge to jury, civil procedure, § 6804, and note.
Exceptions to charge, when and how taken, criminal procedure, §§ 9189-9193; civil procedure, § 6806, and note.
Reasonable doubt; presumption of innocence, §§ 8978, and note.

ARGUMENT OF COUNSEL, ETC.:

See civil trial, § 6802.
Argument may be restricted to one on each side, § 8977.
Provision that prosecuting attorney or other counsel for the people must make opening statement is not mandatory.
U. S. v. Sprague, 8 U. 378; 31 P. 1049.
It is proper for a prosecuting attorney, in opening a case,—to mention any admissible fact of which he expects to offer evidence.
People v. Chalmers, 5 U. 201; 14 P. 131.
It was not error in the counsel for the prosecution in his opening statement to the jury to inform them that he expected to show the killing of two other young men besides the one

with which the prisoner was charged, under the facts and circumstances of this case.
State v. Hayes, 14 U. 118; 46 P. 952.

Statements of counsel in his argument to the jury of facts not in evidence, which are immediately checked by the court, who instructs the jury not to consider facts not in evidence, that they should consider only evidence and consider it fairly, not ground for reversal.
U. S. v. Musser, 4 U. 153; 7 P. 389.
People v. Hopt, 4 U. 247; 9 P. 407; affirmed 120 U. S. 430.

Private counsel may assist prosecuting attorney and make closing argument to jury.
People v. Calton, 5 U. 451; 16 P. 902.
People v. Tidwell, 4 U. 506; 12 P. 61.

Counsel in arguing the cause to the jury are justified in referring to the evidence and in making from it such deductions as they think are justified by the evidence.
People v. Hite, 8 U. 461; 33 P. 254.
It is improper, but not grounds for reversal, where prosecuting attorney states of defendant, "After investigating this case, I have become convinced of his guilt and that he ought to be prosecuted and brought to justice."
State v. Spencer, 15 U. 149; 49 P. 302.
Improper argument of counsel cannot be reviewed where objection was not made at the time.
State v. Sirmay, 40 U. 525, 122 P. 748.
State v. De Weese, 51 U. —; 172 P. 290.
Or unless there is a ruling thereon.
State v. Tidwell, 44 U. 248; 139 P. 863.
Where an officer, in identifying a pistol taken from the accused, stated that he had a warrant for accused's arrest for threatening to kill in another case, it was improper to argue that the accused was arrested for threatening to kill.
State v. Kakarikos, 45 U. 470; 146 P. 750.
Where the court has forgotten the remarks of counsel which are objected to, and the reporter was not present, he should ascertain what the statement was, by evidence.
State v. Baum, 47 U. 7; 151 P. 518.
A statement not truthfully made by counsel that accused was sneaking around and trying to get away was improper, and the court should have admonished the jury to have disregarded it.
State v. Coyle, 41 U. 320; 126 P. 305.
In a prosecution for adultery, argument of counsel that "wife of defendant gave birth to a child in seven months after lawful wedlock," based on improper cross-examination, held improper, but not so prejudicial, as to require reversal where evidence of guilt is strong.
State v. Cluff, 48 U. 102; 158 P. 701.
Misconduct of prosecuting attorney in arguing that the defendant should have produced certain evidence is harmless, where the court admonished the jury that their verdict must be based upon the evidence, and not upon statements of counsel.
State v. Inlow, 44 U. 485; 141 P. 530.
In the absence of abuse of discretion in the latitude allowed an attorney in comment, the court on appeal cannot interfere.
State v. Burns, 50 U. —; 168 P. 955.

ORDER OF EVIDENCE, ETC.:

Decisions on order of evidence, etc., civil procedure, note to § 6804.
Non-prejudicial errors as to evidence, note to § 9199.

The order in which testimony shall be admitted is largely within the discretion of the trial court.
People v. Thiede, 11 U. 241; 39 P. 837; affirmed 159 U. S. 510.
People v. Tidwell, 4 U. 506; 12 P. 61.
State v. Webb, 18 U. 441; 56 P. 159.

The rules governing the admission of expert testimony are the same as in civil cases.
State v. Webb, 18 U. 441; 56 P. 159.
Where preliminary evidence of an alleged confession has been offered, it is not error to exclude defendant's evidence of his mental condition at the time of the alleged confession, offered before the confession itself is introduced, but proof of defendant's mental condition may be shown only by cross-examination and in rebuttal.
State v. Haworth, 24 U. 398; 68 P. 155.

EVIDENCE, WEIGHT, OBJECTION, ETC.:

An objection to evidence or remarks of counsel cannot be reviewed unless there is a ruling thereon.
State v. Tidwell, 44 U. 248; 139 P. 863.
Counsel, in forming a hypothetical question, may adopt a theory of his own and base his question on it, provided he embodies sufficient evidence to enable the expert to give a practical opinion.
State v. Loechner, 45 U. 621; 148 P. 363.
Though accused did not object to improper questions, the court should, where the questions themselves might influence the jury, withdraw them at accused's request if they tend to prejudice him.
State v. Kakarikos, 45 U. 470; 146 P. 750.
Where police officers testified that they purchased intoxicants from accused, there was no abuse of discretion in refusing a request to charge that the testimony of witnesses who were interested in, or employed to find evidence against accused, should be received with the greatest caution or mistrust.
Salt Lake City v. Robinson, 40 U. 448; 125 P. 657.
After accused was arrested, and while being taken to the station, he wrote on a sheet of paper offering money to the officer if he would release him, the officer by force took the paper from him, held, the paper was properly admitted.
State v. Reese, 44 U. 256; 140 P. 126.
Where experts described to the jury conditions as they observed them on an autopsy, and the effects attributable to such conditions, and there was no internal evidence of the beating of deceased, and that the death was caused by the combined effect of the beating and poisoning, and such evidence stands unimpeached, the jury cannot ignore it, and find that death resulted from the beating alone.
State v. Vance, 38 U. 1; 110 P. 434.
Where, in a prosecution for larceny, the court admitted in evidence the ear of the heifer and the owner's tag attached thereto, and stated that he would prefer the exhibit be not inspected by the jury at this time, "so that later I might change my ruling in regard to it if I see fit," but did not change the ruling, and the exhibit was submitted to the jury, and counsel did not request any further information regarding the ruling before arguing the case, the defendant was not prejudiced in any substantial right.
State v. Frisby, 49 U. 227; 162 P. 616.
Any error in admitting evidence is cured by the court's action striking it out and directing the jury to disregard it.
State v. Hammond, 46 U. 249; 148 P. 420.
A doctor may testify to the date of birth of a child after having refreshed his memory from a memorandum book just before he was called instead of while he was giving his testimony.
Id.
Where accused testifies as to special acts and conduct of the deceased, indicating that he was a quarrelsome and dangerous man, evidence as to the general reputation of the deceased as a peaceful, quiet, and law-abiding citizen is admissible.
State v. Vacos, 40 U. 169; 120 P. 497.
Where a judge refused to acquiesce in a twenty-five-year sentence on a proposed plea of guilty of murder, on the ground that it was inadequate, the remarks he made in respect thereto are not prejudicial to the accused, where the rulings of the court were properly prepared and the defendant on trial was found guilty of murder.
Id.

CROSS-EXAMINATION, REBUTTAL, ETC.:

Discretion of court in admission of evidence, cross-examination, etc., civil procedure, note to § 6804.
A witness having testified on direct examination that he had a motive for watching deceased and defendant, was permitted to state on direct examination what that motive was; held, error.
People v. Biddlecome, 3 U. 208; 2 P. 194.
On a trial for murder, the defense of an attempted arrest of deceased for larceny of certain cattle was made; held, that it was

proper in rebuttal to offer evidence showing property in the cattle in a third person.
People v. Tidwell, 4 U. 506; 12 P. 61.
A witness may be asked on cross-examination whether he has ever been arrested or indicted or charged with a crime, but cannot be contradicted upon such matters.
People v. Hite, 8 U. 461; 33 P. 254.
The cross-examination of a witness concerning his past life and actions may take a wide latitude, and should be permitted, even if it is attended with humiliation and disgrace to the witness.
Id.
A witness asked on his direct examination the reputation of the defendant as a peaceable, orderly, law-abiding man, may be asked on cross-examination if he has ever heard of particular acts of lawlessness of the defendant.
Id.
When new subject matter is called up for the first time on cross-examination by defendant's attorney, the prosecution may go into the matter upon re-examination.
State v. McCoy, 15 U. 136; 49 P. 420.
Where defendant testified that he was not familiar with the action of the gun with which the murder was committed, it is improper to ask him under what circumstances he got the gun.
State v. Thorne, 39 U. 208; 117 P. 58.
Where the state was allowed to cross-examine accused as to wholly collateral matters not referred to in his direct examination, and was later permitted to call witness to disprove statements made by him on such cross-examination, it was an abuse of discretion, and prejudicial error.
State v. Coyle, 41 U. 320; 126 P. 305.
In a prosecution for larceny, where accused had not taken the stand, a question by the prosecutor as to how many times accused had been convicted of felony is prejudicial error, warranting a new trial, though the court rebuked the prosecutor and admonished the jury not to regard such question, and accused did not at that time ask that the jury be discharged.
State v. Baum, 47 U. 7; 151 P. 518.

BURDEN OF PROOF:

Burden of proving justification for homicide, note to § 8986.
In no criminal case is the burden of proof ever shifted from the prosecution to the defense; it rests upon the prosecution throughout the entire trial, and the rule of a reasonable doubt applies in every such case.
People v. Tracy, 1 U. 343.
The accused, relying upon self-defense, should be acquitted if on the whole evidence the jury has a reasonable doubt whether he acted in self-defense.
State v. Kakarikos, 45 U. 470; 146 P. 750.
In prosecution for homicide, the state must prove the defendant's guilt beyond a reasonable doubt, and the evidence in a case of identity of defendant, held sufficient to sustain a verdict of guilty.
State v. Hillstrom, 46 U. 341; 150 P. 935.
Burden is on defendant to show defense of insanity, it not appearing from evidence of the prosecution.
People v. Dillon, 8 U. 92; 30 P. 150.
People v. Colton, 5 U. 451; 16 P. 902.
The burden of overcoming the presumption that the accused is sane rests primarily on the defendant, and he is required to overthrow it by a preponderance of the evidence offered in the case on the subject, but when he has overcome it, the state must establish his sanity beyond a reasonable doubt, as bearing on the question of intent, and in this case the evidence shows conclusively that the defendant was insane.
State v. Brown, 36 U. 46; 102 P. 641.

CHARGE CONSIDERED AS A WHOLE:

Instructions to be considered together, civil procedure, note to § 6804.
Where instructions are made separately, the court should remind the jury that they are all to be considered together.
People v. Wiggins, 1 U. 324.
Instructions should always be given in reference to the evidence in the case, and the whole charge of the court should be construed together.
People v. Lyman, 2 U. 30.
Charge should be considered as a whole, each part as qualified by the others, and if, when so considered, it is not misleading, it is not erroneous.
U. S. v. Snow, 4 U. 280; 9 P. 501.
U. S. v. Bassett, 5 U. 131; 13 P. 237.
People v. Olsen, 4 U. 413; 11 P. 577.
State v. McCoy, 15 U. 136; 49 P. 420.
Request containing several propositions, one or more of which are erroneous, should be refused.
People v. Biddlecome, 3 U. 208; 2 P. 194.
U. S. v. Musser, 4 U. 153; 7 P. 389.
Instruction given in substance need not be repeated in language of counsel.
People v. Biddlecome, 3 U. 208; 2 P. 194.
People v. Olsen, 4 U. 413; 11 P. 577.
The court, having charged properly on the entire case, may refuse to instruct further.
U. S. v. Musser, 4 U. 153; 7 P. 389.
People v. Hampton, 4 U. 258; 9 P. 508.
People v. Chadwick, 7 U. 134; 25 P. 737.
People v. Thiede, 11 U. 241; 39 P. 837.
State v. Haworth, 24 U. 398; 68 P. 155.
State v. Bates, 25 U. 1; 69 P. 70.
State v. Hillstrom, 46 U. 341; 150 P. 935.

MISCELLANEOUS INSTRUCTIONS:

Instructions generally, civil procedure, note to § 6804.
Charge as to degree of murder, etc., note to § 8025.
Offense may be defined in language of statute without addition or explanation.
People v. Biddlecome, 3 U. 208; 2 P. 194.
Charge that jury are "sole judges of the facts," etc., need not be in exact language of statute.
People v. Chadwick, 7 U. 134; 25 P. 737.
Evidence received which is admissible for one purpose but not for all purposes of the trial should be restricted by instruction to the purpose for which it is admissible.
People v. Biddlecome, 3 U. 208; 2 P. 194.
State v. Greene, 33 U. 497; 94 P. 987.
Defendant cannot complain of instruction given at his request, nor of refusal not excepted to, to charge as requested.
People v. Berlin, 9 U. 383; 35 P. 498.
People v. Gough, 2 U. 70.
Where inconsistent charges were given, one of which is erroneous, the jury is presumed to have followed that which is erroneous.
People v. Hancock, 7 U. 170; 25 P. 1093.
People v. Berlin, 10 U. 39; 36 P. 199.
See People v. Kessler, 13 U. 59; 44 P. 97.
The judge, in charging the jury, has the right to review the facts and state his opinions and conclusions therefrom to them. They are, however, the sole judges of the weight of the evidence and the credibility of the witnesses. (Decision rendered under C. L. 1876, § 2242.)
People v. Lee, 2 U. 441.
Requests for instructions which pass upon the evidence and in effect direct acquittal are never proper except on points entirely unsupported by proof.
People v. Biddlecome, 3 U. 208; 2 P. 194.
Declarations of the court in the presence of the jury and instructions in effect stating that defendants are guilty are erroneous as invading province of the jury.
People v. Glasmann, 12 U. 238; 42 P. 956.
On the separate trial of a defendant indicted jointly with the owner of a building for burning the same, testimony was allowed over defendant's objection that the building was insured, and that the owner had made certain statements, with none of which defendant was shown to be connected. The court refused to strike out this testimony or to instruct the jury that there was no connection between the defendant and the owner; held, error.
People v. Scott, 10 U. 217; 37 P. 335.
The court in its charge, without applying the language of defendant, characterized drunkenness as a vice and misconduct; held, not error.
People v. Calton, 5 U. 451; 16 P. 902.
See Calton v. Utah, 130 U. S. 83.
It is not error for a trial court to charge that the jury should weigh with caution the testi-

mony of a witness who appeared to be a weak-minded person with little intelligence.
Lowe v. Herald Co., 6 U. 175; 21 P. 991.

In a criminal trial, in instructing that the jury are sole judges of the credibility of the witnesses, etc., and that it is their right to determine from the appearance of the witnesses, their manner of testifying, their apparent candor or frankness or the lack thereof, their apparent intelligence, etc., which are most worthy of credit, it is not error to add that in determining the weight to be given to their testimony the jury are authorized to consider their relationship to the parties when the same is proved.
State v. Morgan, 27 U. 103; 74 P. 526.

When the defendant testifies in his own behalf, it is proper for the court to call the attention of the jury to his interest in the result of the case, provided his credibility as a witness and the weight of his evidence be left to the exclusive judgment of the jury.
People v. Callaghan, 4 U. 49; 6 P. 49.

Instruction limiting consideration of evidence as to defendant's good character; held, error.
State v. VanKuran, 25 U. 8; 69 P. 60.
State v. Hancock, 7 U. 170; 25 P. 1093.

Accused is entitled to an instruction to consider all the evidence, including evidence of good character, and to acquit if the evidence of good character alone, or with other evidence, creates a reasonable doubt as to accused's guilt.
State v. Brown, 39 U. 140; 115 P. 994.

Where evidence is wholly circumstantial, it is the duty of the court to charge upon the law of that subject even though the request asked was erroneous.
People v. Scott, 10 U. 217; 37 P. 335.

Where the only evidence of larceny is the recent possession of stolen property, which defendant claims to have purchased from a stranger, it is not error to refuse an instruction upon the law of circumstantial evidence. (Straup, J., dissenting.)
State v. Overson, 30 U. 22; 83 P. 557.

The theft of cattle being made grand larceny by laws of 1899, p. 50, without regard to the value of the animal stolen, it is not error to instruct that the value of the stolen animal is immaterial.
State v. Bates, 25 U. 1; 69 P. 70.

Where one is charged and the evidence so far as it has bearing, is that accused participated in the offense a charge on his guilt, if he only aided and abetted, is improper.
State v. Baum, 47 U. 7; 151 P. 518.

An instruction that if the jury believes witness wilfully testified falsely as to material facts his testimony might be disregarded in whole or in part, except where he may have been corroborated by a creditable witness or the evidence, was not erroneous.
State v. Hillstrom, 46 U. 341; 150 P. 935.
State v. Morris, 40 U. 431; 122 P. 580.
State v. Dye, 44 U. 190; 138 P. 1193.

Nor is such instruction erroneous where it omits the "exception" clause.
State v. Hammond, 46 U. 349; 148 P. 420.
State v. Reese, 44 U. 447; 135 P. 270.

Refusal to instruct that if any witness had made statements material to the issues conflicting with his testimony, such testimony might be disregarded, except as corroborated by other credible evidence, is prejudicial error, where the conflicting witness had denied accused's guilt previous to the trial.
State v. Brown, 48 U. 279; 159 P. 545.

In a prosecution for homicide, an instruction that circumstances of suspicion, if it amounts to more than suspicion, are not sufficient proof of guilt, was not erroneous.
State v. Hillstrom, 46 U. 341; 150 P. 935.

Accused is entitled to concrete instructions if they are requested, though abstract ones have been given.
State v. Dewey, 41 U. 538; 127 P. 275.

The court should, as much as possible, avoid abstract instructions, and should simply direct the jury in plain terms what the result should be in case they found the facts on any issue as indicated by the court.
State v. Anselmo, 46 U. 137; 148 P. 1071.

The court need not instruct as to the punishment imposed for the various degrees of homicide.
State v. Inlow, 44 U. 485; 141 P. 530.

In a prosecution for homicide committed by an epileptic, who at the time of the killing was under the influence of liquor, an instruction which practically did not require any premeditation is prejudicial, for it is the province of the jury to determine whether accused's mental condition was such as to relieve him of the extreme penalty for his acts.
State v. Anselmo, 46 U. 137; 148 P. 1071.

Where the defendant objects to certain evidence which may be admissible for a certain purpose only, the court overrules the objection and states that it will instruct fully thereon, and counsel excepted to the ruling, and relying on the court's promise to instruct, failed to submit a request thereon, and the court does not instruct thereon, it is erroneous.
State v. McCurtain, 51 U. —; 172 P. 481.

CHARGE TO BE IN WRITING:

Failure of reporter to take down oral charge is waived if not objected to.
U. S. v. Gough, 8 U. 428; 32 P. 695.

Error not to reduce charge to writing. Under a statute which requires the instructions of the judge to the jury to be reduced to writing before they are given, and provides that they shall form part of the record and be subjects of appeal, it is error to give instructions not reduced to writing otherwise than by a reference to a certain page of a law magazine.
Hopt v. People, 104 U. S. 631; 114 U. S. 488.
See People v. Hopt, 3 U. 396; 4 P. 250.
Same case, 3 U. 404; 5 P. 565.
Same case, 4 U. 247; 9 U. 407.

The record, which stated that the court charged the jury, did not contain the charge in writing, nor show that with the defendant's consent it was given orally; held, error.
Id.

When an oral charge has been given, the presumption, in the absence of any statement to the contrary in the record, is that the reporter took it down as required by statute.
State v. Kessler, 15 U. 142; 49 P. 293.

8976. (4846.) Order of argument may be changed. When the state of the pleadings requires it, or in any other case, for good reasons, and in the sound discretion of the court, the order of argument prescribed in the next preceding section may be departed from.

Cal. Pen. C., § 1094*.

Argument, note to § 7639.

8977. (4847.) Argument may be restricted. If the information or indictment is for an offense punishable with death, two counsel on each side may argue the case to the jury. If it is for any other offense, the court may, in its discretion, restrict the argument to one counsel on each side.

Cal. Pen. C., § 1095.

8978. (4848.) Defendant presumed innocent. Reasonable doubt. A defendant in a criminal action shall be presumed to be innocent, until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he shall be entitled to an acquittal.

Cal. Pen. C., § 1096.
New information or resubmission of charge, §§ 8882, 8893.

A charge to the jury that if, after an impartial comparison and consideration of all the evidence, they can truthfully say that they have an abiding conviction of the defendant's guilt, such as they would be willing to act upon in the more weighty and important matters relating to their own affairs, they have no reasonable doubt, is not erroneous.
People v. Hopt, 4 U. 247; 9 P. 407; affirmed 120 U. S. 430.

Instructions as to what constitutes a reasonable doubt, not aptly expressed, but which could not have misled the jury, is not reversible error.
People v. Kerm, 8 U. 268; 30 P. 988.

A charge to a jury that proof beyond a reasonable doubt is such as will produce an abiding conviction in the mind to a moral certainty that the fact exists that is claimed to exist; held, not erroneous.
People v. Miles, 2 U. 19; affirmed 103 U. S. 304.

An instruction that "a man has to commit his first crime * * * he has to break over the rules of good conduct and good life for the first time some time in his life" is erroneous, and is not cured by a subsequent instruction as to the effect of good character.
People v. Hancock, 7 U. 170; 25 P. 1093.

Where the state seeks to convict a defendant upon circumstantial evidence, it must show by a preponderance of the evidence that the alleged facts and circumstances which complete the chain are true, and it must also show that such facts and circumstances are not incompatible upon any reasonable hypothesis with the innocence of the accused, and incapable of explanation upon any reasonable hypothesis other than that of the defendant's guilt. The chain of evidence must be complete and unbroken and established beyond a reasonable doubt.
State v. Hayes, 14 U. 118; 46 P. 752.

Where there is evidence sufficient to establish the defendant's guilt, it is for the jury to pass upon its weight and determine whether or not the defendant is guilty beyond a reasonable doubt.
Id.

A reasonable doubt is not a mere imaginary, captious, or possible doubt, but a fair doubt, based upon reason and common sense, and growing out of the testimony in the case. It is such a doubt as will leave the juror's mind, after a careful examination of all the evidence, in such a condition that he cannot say that he has an abiding conviction, to a moral certainty, of the defendant's guilt.
State v. McCune, 16 U. 170; 51 P. 818.
State v. Williamson, 22 U. 248; 62 P. 1022.

An instruction that by a reasonable doubt is meant a real, substantial doubt, based on reason, and reasonable in view of an impartial consideration of all the evidence, and if the jury is not satisfied therefrom of defendant's guilt there is a reasonable doubt, but if they have an abiding conviction of defendant's guilt, arising spontaneously from the evidence, which they would act on in more weighty matters relating to their own affairs, there is no reasonable doubt, is not erroneous.
State v. Neel, 23 U. 541; 65 P. 494.

On a criminal prosecution, where the evidence was circumstantial, and testimony as to the defendant's good character had been introduced, the court should have charged that such evidence should be considered and weighed the same as other evidence, and that it in itself might not only create a reasonable doubt of guilt, but might carry conviction of innocence.
State v. Van Kuran, 25 U. 8; 69 P. 60.
State v. Blue, 17 U. 175; 53 P. 978.
People v. Hancock, 7 U. 170; 25 P. 1093.

It was incumbent on the jury to acquit the defendant, if the evidence relied on could be reconciled on any reasonable hypothesis consistent with the innocence of the defendant, especially where the evidence is wholly circumstantial and there is no direct proof of the corpus delicti.
State v. Hutchings, 30 U. 319; 84 P. 893.

An instruction in a prosecution for embezzlement, that, if it appeared beyond a reasonable doubt that accused had the property in his possession at the time and place set forth in the information, and that he converted it openly under claim of title preferred in good faith, he should be acquitted, though the claim of title was untenable, does not sufficiently submit the defense of conversion under claim of title, the burden being erroneously placed.
State v. Coyle, 41 U. 320; 126 P. 305.

Evidence for a prosecution for murder occurring during an attack in a saloon in which one of the robbers was killed and one escaped, held insufficient to identify accused as the escaped man.
State v. Hill, 44 U. 79; 138 P. 1149.

An instruction that if, after due consideration of the whole case and a discussion thereof by the jurors, any juror entertains a reasonable doubt of guilt, it is the duty of such juror not to vote for a verdict of guilty, or to be influenced in so voting for the sole reason that the other jurors would be in favor of the verdict of guilty, is proper.
State v. Wells, 35 U. 400; 100 P. 681.
Salt Lake City v. Robinson, 40 U. 448; 125 P. 657.

It is improper to instruct that the presumption of innocence is not intended to aid one who is in fact guilty to escape.
State v. Romeo, 42 U. 46; 128 P. 530.

But such instruction is harmless where the court correctly charged on the presumption of innocence and burden of proof.
Id.

Evidence sufficient to sustain a case of murder in first degree.
State v. De Weese, 51 U. —; 172 P. 290.

8979. (4849.) When doubt as to degree, conviction to be of lowest. When it shall appear that the defendant has committed a public offense, and there is reasonable ground of doubt in which of two or more degrees he is guilty, he must be convicted of the lowest of such degrees only.

Cal. Pen. C., § 1097.
Jury must find the degree, § 9024, and note.
On plea of guilty, court determines degree, § 9042.
Defendant may be found guilty of any offense included in the one charged, § 9025, and note.

8980. (4850.) Defendants charged jointly. Separate or joint trial. When two or more defendants shall be jointly charged with a felony, any defendant requiring it must be tried separately. In other cases the defendants jointly charged may be tried separately or jointly, in the discretion of the court.

Cal. Pen. C., § 1098.
Conviction or acquittal of one or more, §§ 8836, 9026.

The indictment charged that three defendants held a pistol, and that with the pistol so held killed deceased; evidence proving that one of the three held the pistol and fired the shot, and that the others aided and abetted therein; held, to sufficiently support such charge.
People v. Callaghan, 4 U. 49; 6 P. 49.

Persons jointly indicted under section 5451, R. S. U. S., are entitled to separate trial under § 262, Code of Criminal Procedure, and § 1845 of the compiled laws of 1876.
U. S. v. Jones, 5 U. 552; 18 P. 233.

Error to admit acts of one after the offense. On the separate trial of one of two indicted together for larceny, it is fatal error to admit the acts and statements of the other made after the crime had been committed.
People v. Farrell, 11 U. 414; 40 P. 703.

8981. (4851.) Defendant discharged to testify for the state. When two or more persons shall be included in the same charge, the court may, at any time before the defendants have gone into their defense, on the application of the county attorney or other counsel for the state, direct any defendant to be discharged, that he may be a witness for the state.

Cal. Pen. C., § 1099*.

Testimony of accomplice not sufficient to convict unless corroborated, § 8992.

8982. (4852.) Id. To testify for co-defendant. When two or more persons shall be included in the same charge, and the court shall be of the opinion that in regard to a particular defendant there is not sufficient evidence to put him on his defense, it must order him to be discharged before the evidence is closed, that he may be a witness for his co-defendant.

Cal. Pen. C., § 1100.

8983. (4853.) Id. Such discharge a bar. The order mentioned in §§ 8981, 8982, shall be an acquittal of the defendant discharged, and shall be a bar to another prosecution for the same offense.

Cal. Pen. C., § 1101.
Bar generally, §§ 8520, 8522, 8555.

Decisions on former conviction, or acquittal, or once in jeopardy, note to § 8905.

8984. (4854.) Treason. Proof necessary. Upon a trial for treason, the defendant cannot be convicted unless upon the testimony of two witnesses to the same overt act, or upon confession in open court; nor can evidence be admitted on an overt act not expressly charged in the information or indictment; nor can the defendant be convicted unless one or more overt acts be expressly alleged therein.

Cal. Pen. C., § 1103.

Treason defined, proof, Con. art. 1, sec. 19.

8985. (4855.) Conspiracy. Pleading and proof. Upon a trial for conspiracy, in a case where an overt act shall be necessary to constitute the offense, the defendant shall not be convicted unless one or more overt acts shall be expressly alleged in the information or indictment, nor unless one of the acts alleged shall have been proved; but other overt acts not alleged may be given in evidence.

Cal. Pen. C., § 1104.

Conspiracy defined, §§ 8018-8020.

8986. (4856.) Murder. Burden of proof. Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, shall devolve upon him, unless the proof on the part of the prosecution tends to show that the crime committed amounts only to manslaughter, or that the defendant was justifiable or excusable.

Cal. Pen. C., § 1105.
Homicide, §§ 8023-8034.

If the killing is proved beyond a reasonable doubt, and no evidence of justification or excuse appears, the burden is on the defendant of showing the circumstances of justification or excuse by a preponderance of the evidence, and where an instruction to the jury embodying the above principle is given, and in another portion of the charge the jury are instructed that malice as well as other facts essential to the crime must be proved beyond a reasonable doubt, there was no error. (Powers, J., dissenting.)
People v. Tidwell, 4 U. 506; 12 P. 61.
People v. Callaghan, 4 U. 49; 6 P. 49.

The court having charged that if, from all of the evidence, including that as to an alibi, the jury had a reasonable doubt of defendant's guilt, they should acquit him, it was not erroneous to charge that, "if the prosecution made out such a case by its proof as would sustain a verdict of guilty, then the burden is upon the defendant to establish an alibi by a preponderance of the evidence."
People v. Kessler, 13 U. 69; 44 P. 97.
But see People v. Tracy, 1 U. 343.

Defense of insanity must be proved by a preponderance of the evidence. It is not enough to raise a reasonable doubt as to defendant's sanity.
People v. Dillon, 8 U. 92; 30 P. 150.

The burden is upon the defendant to prove justification or excuse, but he is not required to establish either by a preponderance of the evidence, it being sufficient to create a reasonable doubt in the minds of the jury whether the homicide in question was justifiable or not.
State v. Vacos, 40 U. 169; 120 P. 497.

It is not error to instruct that "presumptively every killing is murder."
State v. Dewey, 41 U. 538; 127 P. 275.

Where, in a murder trial, there was no evidence warranting an instruction that it was in self-defense, or tending to reduce the grade of the crime, or to justify or excuse it, the defendant was not prejudiced by an instruction that the defendant had admitted the killing, and the testimony not showing clearly that the crime was only manslaughter, if anything, the burden of proving justification rested upon him, though perhaps abstractedly erroneous, is harmless, being favorable to defendant.
State v. White, 40 U. 342; 121 P. 579.

8987. (4857.) Forgery. Proof of corporate existence. Expert testimony. Upon a trial for forging any bill or note purporting to be the bill or

note of an incorporated company or bank, or for passing, or attempting to pass, or having in possession with intent to pass, any such forged bill or note, it shall not be necessary to prove the incorporation of such bank or company by the charter or act of incorporation, but it may be proved by general reputation, and persons of skill shall be competent witnesses to prove that such bill or note shall have been forged or counterfeited.

Cal. Pen. C., § 1107. Forgery and counterfeiting, §§ 8270-8281.

8988. (4858.) Abortion, etc. Testimony of the woman not sufficient. Upon a trial for procuring or attempting to procure an abortion, or aiding or assisting therein, or for inveigling, enticing, or taking away any female of previous chaste character, for the purpose of prostitution, or aiding or assisting therein, the defendant shall not be convicted upon the testimony of the woman upon or with whom the offense shall have been committed, unless she is corroborated by other evidence.

Cal. Pen. C., § 1108*. Abduction, etc., for purposes of prostitution, §§ 8110, 8655.
Abortion, §§ 8118, 8119.

8989. (4859.) Proof of corporate existence, etc., generally. If, upon a trial or proceeding in a criminal case, the existence, constitution, or powers of any corporation shall become material, or be in any way drawn in question, it is not necessary to produce a certified copy of the articles or acts of incorporation, but the same may be proved by general reputation, or by the printed statutes of the state, or government, or country by which such corporation was created.

Mont. Pen. C., § 2086.
Allegation and proof of coporate existence, civil procedure, §§ 6594, 6610, 6611.
In a prosecution for larceny, evidence held sufficient to show corporate existence of a railroad company by general reputation.
State v. Reese, 44 U. 256; 140 P. 126.

Oral testimony that a company was incorporated and organized under the laws of a certain state is incompetent, not being proof by reputation.
State v. Brown, 33 U. 109; 93 P. 52.

8990. (4860.) Lottery tickets, etc. Proof. Upon a trial for violation of any of the provisions of chap. 32 of the Penal Code, it shall not be necessary to prove the existence of any lottery in which any lottery ticket shall purport to have been issued, nor to prove the actual signing of any such ticket or share, or pretended ticket or share of any pretended lottery, nor that any lottery ticket, share, or interest was signed or issued by the authority of any manager, or of any person assuming to have authority as manager; but in all cases proof of the sale, furnishing, bartering, or procuring of any ticket, share, or interest therein, or of any instrument purporting to be a ticket, or part or share of any such ticket, shall be evidence that such share or interest was signed and issued according to the purport thereof.

Cal. Pen. C., § 1109. Lotteries, §§ 8153-8160.

8991. (4861.) False pretenses. Evidence in writing or proof by two witnesses. Upon a trial for having, with an intent to cheat or defraud another designedly, by any false pretense, obtained the signature of any person to a written instrument, or having obtained from any person any money, personal property, or valuable thing, the defendant shall not be convicted if the false pretense shall have been expressed in language, unaccompanied by a false token or writing, unless the pretense or some note or memorandum thereof be in writing, subscribed by or in the handwriting of the defendant, or unless the pretense be proved by the testimony of two witnesses, or that of one witness and corroborating circumstances; but this section shall not apply to a prosecution for falsely representing or personating another, and in such assumed character, marrying, or receiving any money or property.

Cal. Pen. C., § 1110. False pretenses and cheats, §§ 8340-8350.

8992. (4862.) Conviction on testimony of accomplice. Corroboration. A conviction shall not be had on the testimony of an accomplice, unless he is corroborated by other evidence which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense; and the corroboration shall not be sufficient if it merely shows the commission of the offense or the circumstances thereof.

Cal. Pen. C., § 1111.

Accessory after the fact is not an accomplice hereunder, and therefore his testimony need not be corroborated as that of an accomplice.

People v. Chadwick, 7 U. 134; 25 P. 737.

In bigamy or polygamy there is no such thing as an accomplice, and the defendant can be convicted on the testimony of the alleged second wife alone.

U. S. v. Miles, 2 U. 19.

Same case, 103 U. S. 304.

It is not error for the court to charge the jury, in respect to the testimony of accomplices, that "were such parties unworthy of belief, the law would not allow them to go upon the witness stand."

People v. Lee, 2 U. 441.

Corroboration in adultery case held sufficient.

U. S. v. Kershaw, 5 U. 618; 19 P. 194.

The female, although consenting, is not liable to indictment for the offense charged. She is therefore not an accomplice, and her evidence does not need corroboration.

State v. Hillberg, 22 U. 27; 61 P. 215.

State v. Hoben, 36 U. 186; 102 P. 1000.

It is not necessary that the testimony of an accomplice should be corroborated in every circumstance that he details in evidence.

People v. Lee, 2 U. 441.

But only as to such material facts as constitute a necessary element in the crime charged, and the corroborating evidence must of itself, without the aid of the testimony of the accomplice, tend in some degree to connect the defendant with the commission of the offense.

State v. Spencer, 15 U. 149; 49 P. 302.

State v. Collett, 20 U. 290; 58 P. 684.

State v. Lay, 38 U. 143; 110 P. 986.

The confession by accused of an act of adultery other than that in issue does not corroborate the testimony of the woman, although admitted in evidence without objection.

State v. Hansen, 40 U. 418; 122 P. 375.

In a prosecution for adultery, the testimony of prosecutrix must be corroborated, but her own testimony as to prior acts are not corroborative, nor is the testimony that on the date alleged the accused and prosecutrix were together in a room.

State v. Kimball, 45 U. 443; 146 P. 313.

An instruction, in a prosecution for adultery, that the jury should consider the fact of prosecutrix's pregnancy as tending to connect defendant with the crime or corroborate her testimony, was erroneous.

State v. Thompson, 31 U. 228; 87 P. 709.

Evidence that accused, a married man, was alone with a nineteen-year-old girl, a ward of the state industrial school, in a room in a hotel in the city at 2:30 o'clock at night, and quite early next morning, in connection with false and contradictory statements as to his whereabouts that night, sufficiently corroborated her testimony.

State v. Park, 44 U. 360; 140 P. 768.

An instruction defining corroboration necessary must not invade province of jury.

State v. James, 32 U. 152; 89 P. 461.

An instruction which fails to define an accomplice, when the only testimony is by an accomplice, is erroneous.

State v. Powell, 45 U. 193; 143 P. 588.

Evidence held insufficient to corroborate the testimony of the accomplice and connect the accused with offense of robbery.

State v. Bridewell, 48 U. 97; 158 P. 710.

Where many circumstances directly pointed to defendant's guilt, in prosecution for larceny, independent of a accomplice's testimony, held sufficient to corroborate the accomplice's testimony and sustain conviction.

State v. Frisby, 49 U. 327; 162 P. 616.

Evidence that stolen property was found in the brush near accused's ranch, and that he and one of his confessed accomplices were seen to have been driving near that vicinity, coupled with the accused's statements that he would not be mixed up with kids again, is insufficient corroboration.

State v. Baum, 47 U. 7; 151 P. 518.

Evidence that accused rode an unshod horse, whose tracks were like those leading from the place where the steer was killed to a point not far from the accused's house, where they were lost in other tracks, and that accused thereafter got beef from one who admitted he participated in the theft, is not sufficient corroboration.

State v. Powell, 45 U. 193; 143 P. 588.

Where the only evidence was that of an employe who claimed to have gotten cattle under the direction of the defendant, and who apparently was an accomplice, the defendant could not be convicted without corroborative evidence.

State v. Elmer, 49 U. 6; 161 P. 167.

Even though the accomplice is corroborated, the court must instruct that, if they find that a certain witness was an accomplice, his testimony must be corroborated.

State v. McCurtain, 51 U. —; 172 P. 481.

8993. (4863.) Mistake in charging offense. Discharge or new prosecution. When it appears, at any time before verdict or judgment, that a mistake has been made in charging the proper offense, the defendant must not be discharged, if there appears good cause to detain him in custody; but the court must commit him, or require him to give bail for his appearance to answer to the offense; and may also require the witnesses to give bail for their appearance.

Mont. Pen. C., § 2090; N. Dak. (1895) § 8198.

New information or resubmission when facts charged do not constitute an offense, § 8998.

Decisions on once in jeopardy, note to § 8905.

Holding defendant to answer to another or a higher offense, §§ 8903, 9038.

Former acquittal on grounds of variance not a bar, § 8903.

8994. (4864.) Want of jurisdiction. Discharge of jury. The court may direct the jury to be discharged where it appears that it has no jurisdiction of the offense, or that the facts charged do not constitute an offense punishable by law.

Cal. Pen. C., § 1113.

These objections not waived by failure to demur, § 8896.

Where the state has failed to make out a prima facie case against defendant, and it appears from the record that there is no probability that it will be able to produce other or different testimony from that produced at the trial, the case should be dismissed, and defendant discharged from custody.

State v. Gordon, 28 U. 15; 76 P. 882.

Where there is no evidence to sustain a verdict in a criminal case, it is error to submit the case to the jury.

State v. Gordon, 28 U. 15; 76 P. 882.

State v. Hutchings, 30 U. 319; 84 P. 893.

8995. (4865.) Id. Defendant discharged. Exception. If the jury is discharged because the court has not jurisdiction of the offense charged, and it appears that it was committed out of the jurisdiction of this state, the defendant must be discharged, unless the court orders that he be detained for a

reasonable time, to be specified in the order, to enable the county attorney to communicate with the chief executive officer of the county, state, territory, or district where the offense was committed.

N. Dak. (1895) § 8202.

8996. (4866.) Id. When jurisdiction lies in another county, defendant held. If the offense was committed within the jurisdiction of another county of this state, the court may direct the defendant to be committed for such time as it deems reasonable, to await a warrant from the proper county for his arrest; or if the offense is a misdemeanor only, it may admit him to bail on an undertaking, with sufficient sureties, that he will, within such time as the court may appoint, render himself amenable to a warrant for his arrest from the proper county; and, if not sooner arrested thereon, will attend at the office of the sheriff of the county where the trial was had, at a certain time particularly specified in the undertaking, to surrender himself upon the warrant, if issued, or that his bail will forfeit such sum as the court may fix, to be mentioned in the undertaking; and the clerk must forthwith transmit a certified copy of the indictment or information, and of all the papers filed in the action, to the county attorney of the proper county, the expense of which transmission is chargeable to that county.

Cal. Pen. C., § 1115; Mont. Pen. C., § 2093; N. Dak. (1895) §§ 8203, 8209.

When jurisdiction lies in more than one county, §§ 8648, 8653, 8656.

8997. (4867.) Id. Arrest on warrant from proper county, or discharge. If the defendant is not arrested on a warrant from the proper county, as provided in the next preceding section, he must be discharged from custody, or his bail in the action is exonerated, or money deposited instead of bail must be refunded as the case may be, and the sureties in the undertaking, as mentioned in that section, must be discharged. If he is arrested, the same proceedings must be had thereon as upon the arrest of a defendant in another county on a warrant issued by a magistrate.

Cal. Pen. C., § 1116; Mont. Pen. C., § 2094.

8998. (4868.) Facts not constituting an offense. Discharge or resubmission. If the jury be discharged because the facts as charged do not constitute an offense punishable by law, the court must order that the defendant, if in custody, be discharged; or, if admitted to bail, that his bail be exonerated; or, if he has deposited money instead of bail, that the money be refunded to him, unless in its opinion a new indictment or information can be framed, upon which the defendant can be legally convicted, in which case it may direct the county attorney to file a new information, or direct that the case be submitted to the same or another grand jury; and the same proceedings must be had thereon as are prescribed in § 8882.

Cal. Pen. C., § 1117*; Mont. Pen. C., § 2095*; N. Dak. (1895) § 8207*.

When mistake made in charging offense, § 8993.

Action of court when evidence shows the commission of a different crime, § 9038.

Jury discharged when facts do not constitute an offense, § 8994.

8999. (4869.) Juror knowing fact must testify. If a juror has any personal knowledge respecting a fact in controversy in a cause, he must declare it in open court during the trial. If, during the retirement of a jury, a juror declares a fact which could be evidence in a cause as of his own knowledge, the jury must return into court. In either of these cases, the juror making the statement must be sworn as a witness and examined in the presence of the parties.

Cal. Pen. C., § 1120; Mont. Pen. C., § 2096; N. Dak. (1895) § 8210.

9000. (4870.) View by jury. Oath of officer attending. When, in the opinion of the court, it is proper that the jury should view the place in which the offense is charged to have been committed, or in which any other material fact occurred, it may order the jury to be conducted in a body, in the custody of the officer, to the place, which must be shown to them by a person appointed by the court for that purpose; and the officer must be sworn to suffer no person to speak or communicate with the jury, nor do so himself on any subject connected with the trial, and to return them into court without unnecessary delay, or at a specified time.

Cal. Pen. C., § 1119.
Decisions on interpretation of statutes, note to § 5839.
Defendant need not be with jury which goes to view premises in connection with homicide.
State v. Mortensen, 26 U. 312; 73 P. 562, 633.
That officer in charge of jury pointed out various places in connection with the crime, and explained how the body was carried and buried; held, not prejudicial.
Id.
The rule that where the legislature adopts a statute from a sister state, it also adopts the interpretation which such state has placed upon it, is not absolutely conclusive on the courts of the state adopting the statute, and does not prevent them from refusing to follow such interpretation.
Id.
A request by the jury, made after they had retired to deliberate, that they be permitted to view the place where the homicide was committed, was properly denied.
State v. Sirmay, 40 U. 525; 122 P. 748.

9001. (4871.) Jurors permitted to separate, when. Oath of officer. The jurors sworn to try a criminal action may, at any time before the submission of the case to the jury, in the discretion of the court, be permitted to separate or be kept in charge of a proper officer. The officer must be sworn to keep the jurors together until the next meeting of the court, to suffer no person to speak to them or communicate with them, nor to do so himself, on any subject connected with the trial, and to return them into court at the next meeting thereof.

Cal. Pen. C., § 1121.
Allowing jury in capital case to separate is discretionary with the court.
People v. Callaghan, 4 U. 49; 6 P. 49.
Contra, under different statute.
People v. Shafer, 1 U. 260.

9002. (4872.) Court to admonish jury about conversing, etc. The jury must also at each adjournment of the court, whether permitted to separate or kept in charge of officers, be admonished by the court that it is their duty not to converse among themselves nor with any one else on any subject connected with the trial, nor to form or express any opinion thereon until the case is finally submitted to them.

Cal. Pen. C., § 1122.

9003. (4873.) Sickness of judge or juror. Procedure. If, before the conclusion of a trial, a juror becomes sick, so as to be unable to perform his duty, the court may order him to be discharged. In that case a new juror may be sworn and the trial begin anew, or the jury may be discharged and a new jury then or afterward impaneled. If the judge becomes sick he may discharge the jury.

Cal. Pen. C., § 1123*; Mont. Pen. C., § 2101.
Sickness of juror after retirement of jury, § 9013.
After jury had been qualified, and a substantial part of the evidence introduced, and one of the jurors dies, and the parties consent that a new juror may be sworn, and the trial begins anew, defendant if he had exhausted his peremptory challenges, has not the right to any additional peremptory challenges.
State v. De Weese, 51 U. —; 172 P. 290.

9004. (4874.) Court to decide law. The court must decide all questions of law which arise in the course of a trial.

Cal. Pen. C., § 1124.

9005. (4875.) In libel, jury to determine law and fact. On a trial for libel, the jury shall have the right to determine the law and the fact.

Cal. Pen. C., § 1125.
General provisions as to libel, Con. art. 1, sec. 15; §§ 8072-8083.

9006. (4876.) Court to determine the law; the jury, the facts. On a trial for any other offense than libel, questions of law are to be decided by the court, questions of fact by the jury; and, although the jury shall have the power to find a general verdict, which includes questions of law as well as of fact, they shall be bound, nevertheless, to receive as law what is laid down as such by the court.

Cal. Pen. C., § 1126.

9007. (4877.) Jury to decide in court or retire. Officers sworn. After hearing the charge, the jury may either decide in court or may retire for deliberation. If they do not agree without retiring, an officer must be sworn to keep them together in some private and convenient place, and not permit any person to speak to or communicate with them, nor to do so himself, unless by order of the court, or to ask them whether they have agreed upon a verdict, and to return them into court when they shall have so agreed, or when ordered by the court.

Cal. Pen. C., § 1128.
Where the jury in a murder case were at lunch in a hotel in charge of two officers after the case had been finally submitted to them, and one of the jurors and one of the officers went into another part of the building, where

the juror talked to someone over the telephone, inasmuch as it was a violation of the court's direction and is misconduct, it was not necessary for accused to show the nature of the communication or to show he was prejudiced thereby; the burden was on the state to show that the communication was harmless.
State v. Thorne, 39 U. 208; 117 P. 58.

9008. (4878.) Defendant may be committed though on bail, when. When a defendant who shall have given bail shall appear for trial, the court may, in its discretion, at any time after his appearance for trial, order him to be committed to the custody of the proper officer, to abide the judgment or further order of the court, and he must be committed and held in custody accordingly.

Cal. Pen. C., § 1129. Bail, §§ 9243-9270.

CHAPTER 34.

CONDUCT OF JURY.

9010. (4880.) Jury to have food and lodging at expense of county. While the jury are kept together, either during the progress of the trial or after their retirement for deliberation, they must be provided by the sheriff, upon the order of the court, at the expense of the county, with suitable and sufficient food and lodging.

N. Dak. (1895) § 8223; Cal. Pen. C., § 1136*.

9011. (4881.) Jury may take written instructions, etc., with them. Upon retiring for deliberation, the jury may take with them all papers, except depositions which shall have been received as evidence in the case, or copies of such public records or private documents given in evidence as ought not, in the opinion of the court, to be taken from the person having them in possession. They may also take with them the written instructions given, and notes of the testimony or other proceedings on the trial, taken by themselves or any of them, but none taken by any other person.

Cal. Pen. C., § 1137.
The jury may, with permission of the court, take with them an exhibit other than papers, and where a revolver and overalls were taken to the jury room without permission or knowledge of the court, it is not prejudicial.
State v. Riley, 41 U. 225; 126 P. 294.

Where maps used at the trial to illustrate testimony, but not formally introduced, were given to the jury by bailiff and consulted by them in the jury room to gain a better understanding of the testimony, etc., irregularity does not affect the legality of the verdict.
State v. Benson, 46 U. 74; 148 P. 443.

9012. (4882.) Jury may return for further instructions. Notice. After the jury shall have retired for deliberation, if there is any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the county attorney and the defendant or his counsel.

Cal. Pen. C., § 1138*.
After retiring, the jurors may return and ask to be instructed as to the punishment for voluntary and involuntary manslaughter, and the court may read them the law on the subject.
State v. Kessler, 15 U. 142; 49 P. 293.

9013. (4883.) Sickness of juror. Jury discharged. If, after the retirement of the jury, one of them is taken so sick as to prevent the continuance of his duty, or any other accident or cause occurs to prevent their being kept for deliberation, the jury may be discharged.

Cal. Pen. C., § 1139. Case may be subsequently tried. § 9015.
Sickness of judge or of juror, § 9003.

9014. (4884.) Jury not discharged until verdict rendered. Exception. Except as provided in the next preceding section, the jury shall not be discharged after the case shall have been submitted to them until they shall have agreed upon their verdict, and rendered it in open court, unless by consent of both parties, entered upon the minutes; or unless, at the expiration of such time as the court may deem proper, it shall satisfactorily appear that there is no reasonable probability that the jury can agree.

Cal. Pen. C., § 1140.

9015. (4885.) Retrial when verdict prevented. In all cases where a

jury shall be discharged or prevented from giving a verdict by reason of an accident or other cause, except where the defendant shall have been discharged during the progress of the trial or after the case shall have been submitted to them, the case may be again tried at the same or another term.

Cal. Pen. C., § 1141*.

9016. (4886.) Adjournment during absence of jury. While the jury are absent, court may adjourn from time to time, as to other business, but it must nevertheless be open for every purpose connected with the case submitted to the jury, until a verdict is rendered or the jury discharged.

Cal. Pen. C., § 1142.
Instructions may be given, verdict received, or jury discharged on a legal holiday, § 1806.

9017. (4887.) Final adjournment discharges jury. A final adjournment of the court shall discharge the jury.

Cal. Pen. C., § 1143.

CHAPTER 35.

THE VERDICT.

9020. (4888.) Return of jury. Failure of part to appear. Retrial. When the jury shall have agreed upon their verdict, they must be conducted into court by the officer having them in charge. Their names must then be called, and if all do not appear, the rest must be discharged without giving their verdict. In that case the action may be again tried at the same or another term.

Cal. Pen. C., § 1147.
In criminal cases, the verdict shall be unanimous, Con. art. 1, sec. 10.

9021. (4889.) When defendant to be present at verdict. If charged with a felony, the defendant must, before the verdict is received, appear in person. If with a misdemeanor, the verdict may be rendered in his absence.

Cal. Pen. C., § 1148.
Like provisions as to presence on arraignment, trial, and judgment, §§ 8861, 8926, 9043.

9022. (4890.) Jury to declare the verdict. When the jury shall appear, they must be asked by the court or clerk whether they have agreed upon their verdict, and if the foreman answers in the affirmative, they must, on being required, declare the same.

Cal. Pen. C., § 1149.
Verdict against defendant deemed excepted to by him, § 9189.

9023. (4891.) Forms of verdicts. A verdict upon a plea of not guilty shall be either "guilty" or "not guilty," which imports a conviction or acquittal of the offense charged in the information or indictment. Upon a plea of a former conviction or acquittal of the same offense, it shall be either "for the state" or "for the defendant." When the defendant is acquitted on the ground that he was insane at the time of the commission of the act charged, the verdict must be, "not guilty by reason of insanity." When the defendant is acquitted on the ground of variance between the indictment or information and the proof, the verdict must be, "not guilty by reason of variance between indictment or information and proof."

Cal. Pen. C., 1151.

Where an issue of former acquittal is raised, it must be passed upon by the jury.
State v. Creechley, 27 U. 142; 75 P. 384.

9024. (4892.) Degree of crime to be found by jury. Whenever a crime is distinguished into degrees, the jury, if they convict the defendant, must find the degree of the crime of which he is guilty.

Cal. Pen. C., § 1157.
Degrees of larceny, § 8288.
On reasonable doubt as to degree, defendant must be convicted of lowest, § 8979.
On plea of guilty, court to determine degree, § 9042.
May be found guilty of any crime included within the one charged, § 9025.
Verdict for murder finding defendant "guilty as charged in indictment;" held, improper, in that the verdict must declare whether the defendant is guilty of murder in the first or in the second degree.
People v. Shafer, 1 U. 260.
No degrees in larceny cases.
People v. Gough, 2 U. 70.
Under § 5076, C. L. 1888, it is sufficient to allege facts showing a murder without indicat-

ing any terms and degree of the crime, leaving that to be determined by the jury or by the judge in case of conviction.

People v. Davis, 8 U. 412; 32 P. 670; affirmed 151 U. S. 262.

Whenever a crime is divided into degrees, it is left to the jury, if they convict defendant, to find the degree of crime of which he is guilty.

State v. Campbell, 24 U. 103; 66 P. 771.

People v. Callaghan, 4 U. 49; 6 P. 49.

A jury in any homicide case has the power, though not the legal or moral right, to find one who is clearly guilty of first degree murder, guilty of manslaughter or acquit him.

State v. Mewhinney, 43 U. 135; 134 P. 632.

9025. (4893.) Verdict for any crime included in the charge. The jury may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged in the indictment, or of an attempt to commit the offense.

Cal. Pen. C., § 1159.

When a minor offense is included in a greater, the defendant may be acquitted of the latter and convicted of the former, unless the allegation is in a form not charging the lesser offense.

People v. Chalmers, 5 U. 201; 14 P. 131.

Where the indictment charged assault with intent to commit murder, it is not error for the court to fail to include in the instruction that he may be found guilty of a lesser offense, defendant not having asked for such instruction.

People v. Robinson, 6 U. 101; 21 P. 403.

A defendant indicted for assault with intent to murder may be found guilty of assault with a deadly weapon with intent to do bodily harm.

State v. McDonald, 14 U. 173; 46 P. 872.

Where defendant is charged with rape, it was competent for the jury to find him guilty of that specific offense, or of an assault with intent to commit rape.

State v. Blythe, 20 U. 378; 58 P. 1108.

A person indicted for incest may properly be convicted of an attempt to commit that crime.

State v. Winslow, 30 U. 403; 85 P. 433.

An information for assault with intent to murder does not include a charge of assault with deadly weapon under § 8070, unless it specifically contains the requirements of § 8070, and a verdict of guilty of assault with deadly weapon, as charged in the information, is not sufficient to cover assault with deadly weapon.

State v. Jukanovich, 45 U. 372; 146 P. 289.

Where a defendant in one count is charged with assault, and in another count with assault with deadly weapon, and the verdict is guilty of the crime of assault with deadly weapon as charged; held, the verdict authorized a sentence for assault with deadly weapon.

State v. Kakarikos, 45 U. 570; 146 P. 750.

One charged with murder by the combined effect of kicking, beating, and bruising decedent, and from the administration of poison, may be convicted of assault with intent to murder.

State v. Vance, 39 U. 602; 119 P. 309.

9026. (4894.) Joint defendants. Verdict against one or more. Retrial. On an information or indictment against several, if the jury cannot agree upon a verdict as to all, they may render a verdict as to those in regard to whom they do agree, on which a judgment must be entered accordingly, and the case as to others may be tried by another jury.

Cal. Pen. C., § 1160.

Joint defendants, trial, §§ 8836, 8980.

9027. (4895.) Reconsideration of verdict directed, when. When there shall be a verdict of conviction, in which it appears to the court that the jury have mistaken the law, the court may explain the reason for that opinion and direct the jury to reconsider their verdict, and if, after the reconsideration, they return the same verdict, it must be entered; but when there shall be a verdict of acquittal, the court shall not require the jury to reconsider it. If the jury render an informal verdict, the court may direct them to reconsider it, and it shall not be recorded until it is rendered in some form from which it can be clearly understood what the intent of the jury is.

Cal. Pen. C., § 1161*.

The evidence showing conclusively that the defendant was insane at the time of the offense, the court, before receiving the verdict, should have directed the jurors' attention to the fact that they had misconstrued the instructions or had wholly disregarded the evidence, and should have required them to reconsider their verdict; if they refused, the court should have set the verdict aside.

State v. Brown, 36 U. 46; 102 P. 641.

9028. (4896.) Informal verdict. No conviction unless verdict express. If the jury persist in finding an informal verdict, from which, however, it can be clearly understood that their intention is to find in favor of the defendant upon the issue, it must be entered in the terms in which it is found, and the court must give judgment of acquittal. But no judgment of conviction can be given unless the jury expressly find against the defendant upon the issue.

Cal. Pen. C., § 1162*.

9029. (4897.) Polling of jury. When a verdict shall be rendered, and before it is recorded, the jury may be polled at the request of either party, in which case they must be severally asked whether it is their verdict, and if any one answers in the negative, the jury must be sent out for further deliberation.

Cal. Pen. C., § 1163.

9030. (4898.) Verdict read to jury and recorded. Disagreement. When

the verdict given shall be such as the court may receive, the clerk must immediately read it to the jury, inquire of them whether it is their verdict, and record it in full upon the minutes. If any juror disagrees, the fact must be entered upon the minutes and the jury again sent out; but if no disagreement is expressed, the verdict shall be complete, and the jury must be discharged from the case.

Cal. Pen. C., § 1164.

9031. (4899.) Judgment of acquittal. Discharge. If judgment of acquittal is given on a verdict, and the defendant is not detained for any other legal cause, he must be discharged as soon as the judgment is given.

Cal. Pen. C., § 1165*.

9032. (4900.) Judgment of conviction. Commitment. If a verdict is rendered against the defendant, he must be remanded, if in custody; or if on bail, he may be committed to the proper officer to await the judgment of the court upon the verdict. When committed, his bail shall be exonerated; or if money is deposited instead of bail, it must be refunded to the defendant.

Cal. Pen. C., § 1166*.

CHAPTER 36.

ARREST OF JUDGMENT.

9035. (4901.) Motion in arrest of judgment defined. Grounds. When allowed. A motion in arrest of judgment is an application on the part of the defendant that no judgment be rendered on the plea or verdict of guilty, or on a verdict against the defendant on the plea of a former conviction, or acquittal, or once in jeopardy; it may be based upon the ground that the facts proved do not constitute a public offense, or upon the grounds stated in § 9050. The motion in arrest of judgment must be made before or at the time the defendant is called for judgment. Am'd '15, p. 203.

Cal. Pen. C., § 1185*.
Objections not waived by failure to demur, § 8896.
Showing cause why judgment should not be pronounced, § 9050.
A motion in arrest of judgment may not be based on defects in instructions.
State v. Mewhinney, 44 U. 231; 139 P. 862.

9036. (4902.) Id. By court of its own motion. The court may also, on its own view of any of these defects, arrest the judgment without motion.

Cal. Pen. C., § 1186.

9037. (4903.) Id. Effect. The effect of allowing a motion in arrest of judgment shall be to place the defendant in the same situation in which he shall have been before the information was filed or the indictment found.

Cal. Pen. C., § 1187.
Order granting or refusing motion in arrestof judgment deemed excepted to, § 9189.

9038. (4904.) Id. Further prosecution. Discharge operates as acquittal. If, from the evidence on the trial, there is reason to believe the defendant guilty, and a new information or indictment can be framed upon which he may be convicted, the court may order him to be recommitted to the officer of the proper county, or admitted to bail anew, to answer the new information or indictment. If the evidence shows him guilty of another offense, he must be committed or held thereon, and in neither case shall the verdict be a bar to another prosecution. But if no evidence appears sufficient to charge him with any offense, he must, if in custody, be discharged; or if admitted to bail, his bail shall be exonerated; or if money shall have been deposited instead of bail, it must be refunded to the defendant; and the arrest of judgment shall operate as an acquittal of the charge upon which the information or indictment shall have been founded.

Cal. Pen. C., § 1188.
Failure to file new information or indictment at same or succeeding term, § 8882.
Former acquittal on grounds of variance not a bar, § 8903.
Dismissal in order to hold defendant for higher offense not an acquittal, § 8903.
Decisions on once in jeopardy, note to § 8905.
Dismissal when facts charged do not constitute an offense, § 8998.

Dismissal for failure to prosecute, §§ 9345-9350.

Where the state has failed to make out a prima facie case against defendant, and it appears from the record that there is no probability that it will be able to produce other or different testimony from that produced at the first trial, the case should be dismissed and defendant discharged from custody.

State v. Gordon, 28 U. 15; 76 P. 882.

CHAPTER 37.

THE JUDGMENT.

9041. (4905.) Time for pronouncing judgment. Court to appoint. After a plea or verdict of guilty, or after a verdict against the defendant on a plea of a former conviction or acquittal or once in jeopardy, if the judgment is not arrested or a new trial granted, the court must appoint a time for pronouncing judgment, which must be at least two days and not more than ten days after verdict. Am'd '15, p. 203.

Cal. Pen. C., § 1191*.

Effect upon civil rights, §§ 8533, 8534.

Judgment rendered within six hours after verdict is merely irregular, not void.

In re Barton, 6 U. 264; 21 P. 998.

Court does not find on the facts. There is nothing in the Utah statutes which requires the court itself to find the defendant guilty.

People v. Davis, 8 U. 412; 37 P. 670; affirmed 151 U. S. 262.

The court by indefinitely suspending sentence and permitting defendant to go on his own recognizance loses jurisdiction of him, so that it cannot afterwards have him rearrested and sentence him.

In re Flint, 25 U. 338; 71 U. 531.

See People v. Blackburn, 6 U. 647; 23 P. 759.

The court has no power to indefinitely suspend execution of judgment during good behavior, but if the court suspends the judgment of imprisonment during good behavior, the invalidity of this part does not affect the judgment imposing imprisonment and fine, as they are severable.

Reese v. Olsen, 44 U. 318; 139 P. 941.

9042. (4906.) Upon plea of guilty, court to determine degrees. Upon a plea of guilty of a crime distinguished or divided into degrees, the court must, before passing sentence, determine the degree.

Cal. Pen. C., § 1192.

On trial, jury to find degree, § 9024, and note.

9043. (4907.) Judgment in defendant's presence, if felony. For the purpose of judgment, if the conviction is for felony, the defendant must be personally present; if for a misdemeanor, the judgment may be pronounced in his absence.

Cal. Pen. C., § 1193.

Like provisions as to presence on arraignment, trial, and verdict, §§ 8861, 8926, 9021.

9044. (4908.) Bench warrant for absent defendant. Bail forfeited. If the defendant shall have been discharged on bail or shall have deposited money instead thereof, and does not appear for judgment when his personal appearance shall be necessary, the court, in addition to the forfeiture of the undertaking of bail or of money deposited, may direct the clerk to issue a bench warrant for his arrest.

Cal. Pen. C., § 1195.

9045. (4909.) Bench warrant. On application of district attorney. The clerk, on the application of the district attorney, may, at any time after the order, whether the court is sitting or not, issue a bench warrant into one or more counties. Am'd '01, p. 9.

Cal. Pen. C., § 1196*.

9046. (4910.) Form of bench warrant. The bench warrant must be substantially in the following form:

State of Utah, county of .....

The state of Utah to any sheriff, constable, marshal, or policeman in this state:

A B having been, on the ..... day of ....., A. D. 19....., duly convicted, in the ..... district court of the county of ....., of the crime of (designating it generally), you are therefore commanded forthwith to arrest the above named A B and bring him before that court for judgment; or if the court has adjourned for the term, that you deliver him into the custody of the sheriff of the county of ..... Given under my hand with the seal of said county affixed, this ..... day of ....., A. D. 19.....

[Seal] By order of the court. E F, Clerk.

Cal. Pen. C., § 1197*.

9047. (4911.) Bench warrant served as warrant of arrest. The bench warrant may be served in any county in the same manner as a warrant of arrest.

Cal. Pen. C., § 1198*.

9048. (4912.) Id. Arrest and disposition of defendant. Whether the bench warrant shall be served in the county in which it shall have been issued or in another county, the officer must arrest the defendant and bring him before the court or commit him to the officer mentioned in the warrant, according to the command thereof.

Cal. Pen. C., § 1199.

9049. (4913.) Appearance for judgment. Defendant asked to show cause. When the defendant shall appear for judgment, he must be informed by the court, or by the clerk under its direction, of the nature of the charge against him, and of his plea and the verdict, if any thereon, and must be asked whether he has any legal cause to show why judgment should not be pronounced against him.

Cal. Pen. C., § 1200.

9050. (4914.) Defendant may set up insanity for cause against judgment. Other grounds. He may show for cause against the judgment:

1. That he is insane; and if, in the opinion of the court, there is reasonable ground for believing him to be insane, the question of insanity must be tried, as provided in chap. 50 of this code (§§ 9327-9336). If, upon the trial of that question, the jury finds that he is sane, judgment must be pronounced; but if they find him insane, he must be committed to the state mental hospital until he becomes sane; and when notice shall have been given of that fact, as provided in § 9334, he must be brought before the court for judgment.

2. That he has good cause to offer in arrest of judgment, in which case the court may, in its discretion, order the judgment to be deferred, and proceed to decide upon the motion in arrest of judgment. Am'd '15, p. 203.

Cal. Pen. C., § 1201.
Insane not capable of crime, § 7915.
Arrest of judgment, §§ 9035-9038.
New trials, §§ 8980-8984.
Judgment of death not executed when defendant becomes insane, § 9175.
Inquiry into sanity of defendant, §§ 9327-9336.

9051. (4915.) Pronouncing judgment. If no sufficient cause is alleged or appears to the court why judgment should not be pronounced, it must thereupon be rendered.

Cal. Pen. C., § 1202.
Time for pronouncing judgment, § 8549.
Court to determine punishment, §§ 7898, 7899.
Indeterminate sentence, §§ 9162-9164.
When maximum penalty not fixed, § 8532.
A court has power to suspend sentence, after a defendant has been convicted, for stated periods from time to time, for good reasons, but should proceed to sentence within a reasonable time.
People v. Blackburn, 6 U. 347; 23 P. 759.
The court, by indefinitely suspending sentence and permitting defendant to go on his own regnizance, loses jurisdiction, so that it cannot afterwards have him rearrested and sentence him.
In re Flint, 25 U. 338; 71 P. 531.
The recital in a judgment that the accused, "having stated that they had no legal reason to give why judgment should not be pronounced against them," etc., does not show that they were given an opportunity to be heard.
Herald-Republican Pub. Co. v. Lewis, 42 U. 188; 129 P. 624.

9052. (4916.) Pronouncing judgment. Court may exercise discretion, when. When discretion is conferred upon the court as to the extent of punishment, the court, at the time of pronouncing judgment, may take into consideration any circumstances, either in aggravation or mitigation of the punishment, which may then be presented to it by either party. Am'd '15, p. 203.

Cal. Pen. C., § 1203.
Indeterminate sentence, §§ 9162-9164.
Judgment of juvenile court, § 1823.
The facts considered by the trial judge in determining what sentence he will impose cannot be reviewed by the supreme court, though the judge's preliminary remarks indicated that he was influenced by facts brought out in another prosecution against the same defendant tried before him.
State v. Martin, 49 U. 346; 164 P. 500.

9053. (4917.) Id. How presented. Limitation. The circumstances must be presented by the testimony of witnesses examined in open court, except that when a witness shall be so sick or infirm as to be unable to attend, his deposition may be taken by a magistrate of the county, out of court, upon such notice to the adverse party as the court may direct. No affidavit or testimony, or representation of any kind, verbal or written, shall be offered to or

received by the court or a judge thereof, in aggravation or mitigation of the punishment, except as provided in this and the next preceding section.

Cal. Pen C., § 1204.
Penalty determined and imposed by the court, §§ 7898, 7899.
Penalty when maximum imprisonment not fixed by law, § 8532.

9054. (4918.) Conviction of two or more offenses. Terms begin when. If the defendant has been convicted of two or more offenses, before judgment on either, the judgment may be that the imprisonment upon any one may commence at the expiration of the imprisonment upon any other of the offenses.

N. Dak. (1895) § 8294.
Conviction of two or more crimes, when term begins, §§ 8530, 8531.
Indeterminate sentence, §§ 9162-9164.
Where there are several charges in different counts of an indictment against the same person for the same act or transaction, but one punishment can be imposed; but where the acts or transactions are different, constitute distinct offenses, and may properly be joined, separate punishments may be imposed on each count.
U. S. v. Groesbeck, 4 U. 487; 11 P. 542.
Where bigamy and adultery were alleged in two separate counts in one indictment, it is not error for judgment to be pronounced on both counts of the indictment in connection with both parts of the verdict.
U. S. v. West, 7 U. 437; 27 P. 84.
A judgment sentencing a prisoner for a specific term of years under each of several indictments, the sentence in each case after the first to commence after the expiration of the sentence in the case preceding, authorizes his detention for the aggregate period of all the sentences.
Ex parte Wilson, 11 U. 114; 39 P. 498.

9055. (4919.) One dollar a day on imprisonment to satisfy fine. A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine is satisfied, specifying the extent of the imprisonment, which cannot exceed one day for every one dollar of the fine.

Cal. Pen. C., § 1205. Cal. Sup. (1893) § 1205*, p. 1071.
At hard labor, whether so designated or not, § 9173.
This section applies to cases of conviction for criminal contempt.
Ex parte Whitmore, 9 U. 441; 35 P. 524.
Where there is a judgment of imprisonment and a judgment of fine, the fine is not enforcible by imprisonment, but only collectible upon execution as in civil cases; and such judgment is excessive and void so far as it attempts to imprison for non-payment of such fine.
Roberts v. Howells, 22 U. 389; 62 P. 892.
See In re Lewis, 10 U. 47; 41 P. 1077.
When a judgment in a misdemeanor case imposes imprisonment and a fine, it could not direct further imprisonment to satisfy the fine, if not paid.
Reese v. Olsen, 44 U. 318; 139 P. 941.

9056. (4920.) Judgment for fine constitutes a lien. A judgment that the defendant pay a fine constitutes a lien, in like manner as a judgment for money rendered in a civil action.

Cal. Pen. C., § 1206.
Execution on such judgment, § 9168.
Judgment liens, §§ 6868, 6869.

9057. (4921.) Fines of district court to go to state. Exception. Fines imposed by the district court shall be turned into the state treasury, except such fines as are imposed by the district court in cases appealed from a city or municipal court, which such fines, when collected, shall be by the county clerk covered, one-half into the city treasury, and one-half into the state treasury. Am'd '03, p. 27.

9058. (4922.) When complainant to pay costs. Judgment. Execution. In all cases of criminal prosecution where the defendant is not found guilty, the court may require the complainant, if it appears that the prosecution was malicious or without probable cause, to pay the costs of the action, or to give security to pay the same within thirty days. If the complainant does not comply with the order of the court, judgment may be entered against him for the amount thereof. Such judgments may be enforced and appealed from in the same manner as those rendered in civil actions.

Mont. Pen. C., §§ 2708*, 2709.

9059. (4923.) Entry of judgment Contents. What constitutes the judgment roll. When judgment upon a conviction shall be rendered, the clerk must enter the same upon the minutes, stating briefly the offense for which the conviction was had, and the fact of a prior conviction, if one, and must, within five days, attach together and file the following papers, which shall constitute the judgment roll or record of the action:

1. The information or indictment, all pleas, demurrers, motions, orders, and other papers filed in the case, and a copy of the judgment, and all other minute entries;
2. The verdict of the jury;
3. The bill of exceptions, if there is one;

4. The requests to charge, given or refused, with indorsements thereon, and the instructions of the court and transcript of exceptions taken thereto, signed by the judge. Am'd '15, p. 203.

Cal. Pen. C., § 1207*.
Written requests to charge with indorsements thereon form part of the record, § 9492.

INDETERMINATE SENTENCES IN CRIMINAL CASES.

9062. Sentence. Indefinite term of imprisonment, when imposed. Whenever any person is convicted of any felony or crime committed after the taking effect of §§ 9062-9064 punishable by imprisonment in the state prison, except treason or murder in any of the degrees thereof, the court, in imposing sentence, shall not fix a definite term of imprisonment but shall sentence every such person to the state prison, as the nature of the case may require, and every such sentence shall be without limit as to time, but imprisonment under such sentence shall not exceed the maximum term provided by law for the offense for which such person shall be convicted; *provided,* that if a person be sentenced for two or more such separate offenses, sentence shall be pronounced for each offense, and imprisonment thereunder may equal but shall not exceed the total of the maximum terms provided by law for such separate offenses, which total shall, for the purpose of §§ 9062-9064, be construed as one continuous term of imprisonment; and, *provided, further,* that where one is convicted of a felony or crime that is punishable by imprisonment in the state prison, or by fine, or by imprisonment in the county jail, or both, the court may impose the lighter sentence, if it shall so elect.
'13, p. 192.

The indeterminate sentence act is constitutional.
Mutart v. Pratt, 51 U. —; 170 P. 67.

9063. Id. When person has been sentenced for a definite period. If, through mistake or otherwise, any person shall be sentenced for a definite period of time for any offense other than treason or murder in any of the degrees thereof, such sentence shall not be void, but the prisoner shall be deemed to be sentenced, nevertheless, as provided and required by the terms of §§ 9062-9064, and he shall be entitled to all the benefits and subject to the liabilities of said sections in the same manner and to the same extent as if sentence had been pronounced in the terms and manner required thereby.
'13, p. 192.

9064. Court to advise board of pardons as to the facts. The court, within thirty days from the date of any sentence imposed, as provided in §§ 9062-9064, shall mail to the secretary of the board of pardons a statement in writing, in which statement the court shall set out the term, within the maximum term provided by law for the particular offense, for which, in the opinion of said court, the prisoner so sentenced should be imprisoned, and also any information the court may have which will be of aid to the board in passing upon any application for the parole, commutation of sentence, or pardon of the prisoner so sentenced. Such statement shall be presented to the board of pardons at the next regular meeting of the board following the receipt thereof, by the secretary, and shall be preserved in the files of the board.
'13, p. 192.

CHAPTER 38.

THE EXECUTION.

9167. (4924.) Warrant for execution of judgment other than death. When a judgment, other than of death, shall have been pronounced, a certified copy of the entry thereof upon the minutes must be forthwith furnished to the officer whose duty it is to execute the judgment, and no other warrant or authority shall be necessary to justify or require its execution.

Cal. Pen. C., § 1213.

9168. (4925.) Judgment for fine and costs. Execution. If the judgment is for a fine and costs, or either alone, execution may be issued thereon as on a judgment in a civil action.

Cal. Pen. C., § 1214*.
Judgment of fine constitutes a lien, § 9056.
Under this section, a fine imposed as a punishment in a criminal action may be collected upon execution, the same as a judgment in a civil case.
Roberts v. Howells, 22 U. 389; 62 P. 892.
Under this section and § 9169, a judgment of fine is only enforcible when it stands alone and not coupled with a distinct sentence of imprisonment, and when it provides for a definite rate per day of service to be applied on the amount of the fine.
Id.
Where a judgment in a misdemeanor case imposes imprisonment and a fine, it could not direct further imprisonment to satisfy the fine, if not paid.
Reese v. Olsen, 44 U. 318; 139 P. 941.

9169. (4926.) Judgment of imprisonment. Commitment. If the judgment is for imprisonment, or a fine and imprisonment until such fine is paid, the defendant must forthwith be committed to the custody of the proper officer, and by him detained until the judgment is complied with.

Cal. Pen. C., § 1215.
Term begins to run on delivery of defendant at place of imprisonment, § 8531.
Temporary release not counted as part of term, § 8531.
Conviction of two or more offenses, § 9054.

9170. (4927.) Id. Delivery to warden of prison. Return of officer. If the judgment is for imprisonment in the state prison, the sheriff of the county must, upon receipt of a certified copy thereof, take and deliver the defendant to the warden of the state prison. He must also deliver to the warden the certified copy of the judgment, and take from the warden a receipt for the defendant, and make return thereof to the court.

Cal. Pen. C., § 1216*.

9171. (4928.) Judgment of death. Form of warrant. Day of execution. When judgment of death is rendered, a warrant, signed by the judge and attested by the clerk, under the seal of the court, must be drawn and delivered to the sheriff. It must state the conviction and judgment, and appoint a day on which the judgment is to be executed, which must not be less than thirty nor more than sixty days from the time of the judgment.

Cal. Pen. C., § 1217. Cal. Sup. (1893) § 1217, p. 1072.
Clerical error in judgment in the use of the word "public" in sentencing defendant to be "publicly executed" is not ground for reversal.
People v. Calton, 5 U. 451; 16 P. 902.
See Calton v. Utah, 130 U. S. 83.

9172. (4929.) Id. Statement of judge to board of pardons. The judge of a court at which a conviction requiring judgment of death shall have been had must, immediately after the conviction, transmit to the president of the board of pardons, by mail or otherwise, a statement of the conviction and judgment and of the testimony given at the trial.

Cal. Pen. C., § 1218*.
Board of pardons, §§ 4330, 4337.

9173. (4930.) Imprisonment to be at hard labor in all cases. In all cases when by law a person is sentenced to imprisonment either in the state prison or in a county jail, it shall be at hard labor, whether so designated by the court or jury or not.

N. Dak. (1895) § 8304*.

9174. (4931.) Judgment of death suspended by whom. No judge, tribunal, nor officer, other than the governor or the board of pardons, can suspend the execution of a judgment of death, except the sheriff, as provided in the six succeeding sections, unless an appeal is taken.

Cal. Pen. C., § 1220*. Cal. Sup. (1893) § 1220*, p. 1072.
Governor and board of pardons, Con. art. 7, sec. 12.

9175. (4932.) Id. Insanity of defendant. Trial by jury. Notice. If, after judgment of death, there is good reason to suppose that the defendant has become insane, the sheriff of the county, with the concurrence of the judge of the court by which the judgment shall have been rendered, may summon from the list of the jurors selected by the proper officers for the year a jury of twelve persons to inquire into the supposed insanity, and must give immediate notice thereof to the county attorney or other counsel for the state.

Cal. Pen. C., § 1221*. Cal. Sup. (1893) § 1221*, p. 1072.
Inquiry into sanity of defendant, §§ 9327-9336.
Judgment not pronounced if defendant insane, § 9050.

9176. (4933.) Id. County attorney to attend. Witnesses. The county attorney must attend the inquisition, and may produce witnesses before the jury, for which purpose he may issue process in the same manner as for witnesses to attend before the grand jury, and disobedience thereto may be punished in like manner as disobedience to process issued by the court.

Cal. Pen. C., § 1222.

9177. (4934.) Id. Inquisition signed by jury and sheriff, and filed. A certificate of the inquisition must be signed by the jurors and the sheriff, and filed with the clerk of the court in which the conviction shall have been had.

Cal. Pen. C., § 1223. Cal. Sup. (1893) § 1223*, p. 1072.

9178. (4935.) Id. Procedure when defendant found sane; when insane. If it is found by the inquisition that the defendant is sane, the sheriff must execute the judgment; but if it is found that he is insane, the sheriff must suspend the execution of the judgment until he receives a warrant from the president of the board of pardons or from the judge of the court by which the judgment shall have been rendered, directing the execution of the judgment. If the inquisition finds that the defendant is insane, the sheriff must immediately transmit it to the board of pardons who may, when the defendant becomes sane, issue a warrant appointing a day for the execution of the judgment.

Cal. Pen. C., § 1224*. Cal. Sup. (1893) § 1224*, p 1072.

9179. (4936.) Female sentenced to death thought pregnant. Examination. If there is good reason to suppose that a female against whom a judgment of death shall have been rendered is pregnant, the sheriff, with the concurrence of the judge of the court by which the judgment shall have been rendered, may summon a jury of three physicians to inquire into the supposed pregnancy. Immediate notice thereof must be given to the county attorney of the county, and the provisions of §§ 9176, 9177, shall apply to the proceedings upon the inquisition.

Cal. Pen. C., § 1225. Cal. Sup. (1893) § 1225*, p. 1073.

9180. (4937.) Id. Execution suspended during pregnancy. If it is found by the inquisition that the female is not pregnant, the sheriff must execute the judgment; if it is found that she is pregnant, the officer must suspend the execution of judgment, and transmit the inquisition to the board of pardons. When the board of pardons shall be satisfied that the female is no longer pregnant, it may issue its warrant appointing a day for the execution of the judgment.

Cal. Pen. C., § 1226*. Cal. Sup. (1893) § 1226*, p. 1073.

9181. (4938.) Judgment of death remaining unexecuted. Order to enforce. If, for any reason, a judgment of death shall not have been executed, and it remains in force, the court in which the conviction shall have been had, on the application of the county attorney, must order the defendant to be brought before it, or if he is at large, a warrant for his apprehension may be issued. Upon the defendant being brought before the court, it must inquire into the facts, and if no legal reasons exist against the execution of the judgment, must make an order that the sheriff execute the judgment at a specified time. The officer must execute the judgment accordingly.

Cal. Pen. C., § 1227. Cal. Sup. (1893) § 1227*, p. 1073.

9182. (4939.) Death penalty inflicted by hanging or shooting, at defendant's election. The punishment of death must be inflicted by hanging the defendant by the neck until he is dead, or by shooting him, at his election. If the defendant neglect or refuse to make election, the court at the time of rendering the sentence must declare the mode and enter the same as a part of its judgment.

Cal. Pen. C., § 1228*.

Shooting not "cruel and unusual," punishment.

People v. Wilkinson, 2 U. 158; affirmed 99 U. S. 130.

9183. (4940.) Id. Executed by a sheriff at state prison. Appliances. A judgment of death must be executed by the sheriff of the county in which

the judgment was rendered or by his deputy or deputies, within the exterior walls of the state prison. The board of corrections of the state prison shall provide the necessary appliances for the execution.

Iowa, McClain's An. C. (1888) §§ 5139, 5140*. Cal. Pen. C., 1229*. Cal. Sup. (1893) § 1229*, p. 1074.

9184. (4941.) Id. Who may be present. The sheriff must invite the presence of a physician and the county attorney of the county; and he shall, at the request of the defendant, permit such ministers of the gospel, not exceeding two, as the defendant may name, and any persons, relatives, or friends, not to exceed five, to be present at the execution, together with such peace officers as he may think expedient to witness the execution. But no other person than those mentioned in this section shall be present at the execution, nor shall any person under age be permitted to witness the same.

Cal. Pen. C., § 1229*.

9185. (4942.) Id. Return of sheriff. After the execution the sheriff must make a return upon the death warrant, showing the time, place, and manner in which it shall have been executed.

Cal. Pen. C., § 1230*. Cal. Sup. (1893) § 12 30*, p. 1074.

CHAPTER 39.

EXCEPTIONS.

9189. (4943.) Exceptions. Definition. How taken and noted. The verdict of the jury, and all orders, decisions, and rulings made by the district court, including rulings on objections to, or motions to strike out, evidence, from the inception of the case, shall be deemed excepted to. Exceptions to instructions to the jury shall be taken and preserved as in civil cases.

Am'd '15, p. 204.

Cal. Pen. C., § 1170*.

Exceptions to charge, when and how taken, civil procedure, § 6806, and note.

Objections to instructions should be specific, note to § 6806.

General exception to charge as a whole is insufficient, if any part of it is correct.

People v. Berlin, 9 U. 383; 35 P. 498.

People v. Hart, 10 U. 204; 37 P. 330.

An exception "to the refusal of the court to give the instructions requested by the defendant" will not be sustained if any one of such instructions is erroneous.

People v. Thiede, 11 U. 241; 39 P. 837; affirmed 159 U. S. 510.

General exceptions to the instructions of the court, or exceptions to whole paragraphs thereof, are insufficient to raise questions on appeal.

State v. King, 24 U. 482; 68 P. 418.

An exception that the court erred in defining malice without pointing out the error is too general.

People v. Thiede, 11 U. 241; 39 P. 837; 159 U. S. 510.

Exceptions to the instructions of the court sufficient to raise any question on appeal must specifically point out to the court the matter objected to before the retiring of the jury.

State v. Campbell, 25 U. 342; 71 P. 529.

Failure to except to refusal of instructions requested prevents error being assigned therein.

People v. Berlin, 9 U. 383; 35 P. 498.

Court cannot consider objections not passed upon by the trial court; nor remarks of counsel objected to and not properly in the record.

State v. Haworth, 24 U. 398; 68 P. 155.

Under this section and §§ 9190, 9192, where, on appeal, in a criminal case, camplaint is made of the giving and refusing of certain instructions and the admission and exclusion of certain evidence, but it does not appear that the instructions were written, and the stenographic notes of the trial proceedings, purporting to be a bill of exceptions, are not authenticated, save by the stenographer's certificate, the objections cannot be considered.

State v. Delvecchio, 25 U. 18; 69 P. 58.

Error in a charge in a criminal case cannot be considered where there was no exception and no assignment of error.

State v. Smith, 45 U. 381; 146 P. 286.

An exception to the whole of an instruction when part of it contains a correct statement of the law is not good.

State v. Haworth, 24 U. 398; 68 P. 55.

State v. Riley, 44 U. 225; 126 P. 294.

An assignment of error neither referred to in appellant's brief nor mentioned in his oral argument will be treated as waived.

State v. Riley, 41 U. 225; 126 P. 294.

9190. (4946.) Bills of exceptions settled, etc., as in civil cases. Bills of exceptions shall be settled, signed, and filed as provided by law in civil cases.

Cal. Pen. C., § 1174*.

In civil cases, §§ 6969-6973, and notes.

Decisions on sufficiency of bill of exceptions, note to § 9216.

9191. (4947.) Id. What evidence may be included. A bill of exceptions must contain only so much of the evidence as shall be necessary to present the questions of law upon which the exceptions were taken; and the judge must, upon the settlement of the bill, whether agreed to by the parties or not, strike out all other maters contained therein.

Cal. Pen. C., § 1175.

9192. (4948.) Written requests to charge form part of the record. When written requests to charge have been presented, given, or refused, the questions presented in such requests need not be excepted to or embodied in the bill of exceptions, but such written requests to charge, with the indorsements thereon showing the action of the court, form part of the record, and any error in the decision of the court thereon may be taken advantage of on appeal in like manner as if presented in a bill of exceptions.

Cal. Pen. C., § 1176*. Record of the action, § 9059.

9193. (4949.) Bill need not contain matters deemed excepted to. The decision of the court upon any matters of law declared to be deemed excepted to need not be embodied in a bill of exceptions.

Mont. Pen. C., § 2176*. Decisions on record on appeal, note to § 9216.

CHAPTER 40.

NEW TRIALS.

9197. (4950.) New trial defined. A new trial is a re-examination of the issue in the same court before another jury, after a verdict has been given.

Cal. Pen. C., § 1179.

9198. (4951.) Effect of granting new trial. Evidence, etc. The granting of a new trial shall place the parties in the same position as if no trial shall have been had. All the testimony must be produced anew, and the former verdict shall not be used nor referred to either in evidence or in argument, nor be pleaded in bar of any conviction which might have been had under the information or indictment.

Cal. Pen. C., § 1180*.

When testimony officially reported may be used on subsequent trial, § 9277.

Defendant was tried on an indictment upon which he might have been convicted of murder in the first or second decree, or of voluntry or involuntry manslaughter, and found guilty of murder in the second degree; held, that he could be tried for murder in the first degree after the verdict had been set aside on his motion.

State v. Kessler, 15 U. 142; 49 P. 293.

After a judgment in a criminal case has been affirmed on appeal and the case remanded, a motion for new trial, based upon facts which were not passed upon by the appellate court or discovered before the appeal was taken, can be entertained by the trial court.

State v. Kessler, 15 U. 142; 49 P. 293.
State v. Morgan, 23 U. 212; 64 P. 536.

9199. (4952.) Grounds for new trial. Affidavits. Postponement. When a verdict shall have been rendered against the defendant, the court may, upon his application, grant a new trial in the following cases only:

1. When a trial shall have been had in his absence, if the information or indictment is for a felony;

2. When the jury shall have received out of court any evidence, other than that resulting from a view of the premises, or any communication, document, or paper referring to the case;

3. When the jury shall have separated without leave of the court, after retiring to deliberate upon their verdict, or have been guilty of any misconduct by which a fair and due consideration of the case may have been prevented;

4. When the verdict shall have been decided by lot, or by any means other than a fair expression of opinion on the part of all the jurors;

5. When the court shall have misdirected the jury in a matter of law, or shall have erred in the decision of any question of law arising during the course of the trial, or shall have done or allowed any act in the case prejudicial to the substantial rights of the defendant;

6. When the verdict is contrary to law or evidence;

7. When new evidence shall have been discovered, material to the defendant and which he could not, with reasonable diligence, have discovered and produced at the trial.

When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing, in support thereof, the affidavits of the witnesses by whom such evidence is expected

to be given, and if time is required by the defendant to procure such affidavits, the court may postpone the hearing of the motion for such length of time as, under all circumstances of the case, may seem reasonable.

Cal. Pen. C., § 1181*.

Grounds for new trial, civil procedure, § 6978, and note.

Charge to jury considered as a whole, note to § 8975.

Instructions, note to § 8975.

Conduct of trial, admission of evidence, etc., note to § 8975; see also note to § 6802 as to civil procedure.

The jury are the exclusive judges of the facts, and where there is any evidence to support a verdict, it will not be disturbed on appeal, note to Con. art. 8, sec. 9.

SUFFICIENCY OF EVIDENCE, ETC.:

Admission of incompetent testimony is ground for reversal where it is apparent that undue importance may have been given to it by jury.

People v. Biddlecome, 3 U. 208; 2 P. 194.

But otherwise where the evidence was ample to warrant the jury in returning a verdict in harmony with incompetent evidence; held, not to be prejudicial error.

People v. Burtleson, 14 U. 258; 47 P. 87.

Remarks of court in ruling on evidence not directed to jury, not objected to or no correction asked, are not error merely because they might tend to prejudice jury against defendant.

U. S. v. Peay, 5 U. 263; 14 P. 342.

Allusion which is immediately withdrawn by counsel in argument to the case having been tried before is not prejudicial error hereunder.

People v. Hopt, 4 U. 247; 9 P. 407; 120 U. S. 430.

Verdict of guilty will not be set aside if evidence substantially supports it. Must be an absence of evidence against defendant or substantial preponderance in his favor.

People v. Clawson, 2 U. 502.

People v. Swasey, 6 U. 93; 21 P. 400.

U. S. v. Brown, 6 U. 115; 21 P. 461.

Will not reverse on conflicting evidence, no mistake or improper motive of jury appearing.

People v. Chalmers, 5 U. 201; 14 P. 131.

People v. Peacock, 5 U. 237; 14 P. 332.

U. S. v. Harris, 5 U. 436; 17 P. 75.

A view is not the taking of testimony within the meaning of the constitution, but its sole purpose and object is to enable the jurors to more accurately understand and appreciate the testimony of witnesses given before them. Making of measurements, etc., by juror not prejudicial misconduct.

State v. Mortensen, 26 U. 312; 73 P. 562, 633.

Appellate court will not interfere with the verdict of a jury in a criminal case if there is any evidence to support it.

State v. Endsley, 19 U. 478; 57 P. 430.

State v. Clark, 27 U. 55; 74 P. 119.

State v. LaChall, 28 U. 80; 77 P. 3.

Where there is no evidence to sustain a verdict in a criminal case, it is error to submit the case to the jury.

State v. Gordon, 28 U. 15; 76 P. 882.

State v. Hutchins, 30 U. 319; 84 P. 893.

State v. Karas, 43 U. 506; 136 P. 788.

Accused cannot complain of insufficiency of the evidence to sustain a conviction, though the state failed to make a case if he himself proved one for it.

State v. Potello, 40 U. 56; 119 P. 1023.

IMPEACHING VERDICT:

The affidavit of a juror that, during the progress of the trial, he took certain measurements of a locality testified to on the trial, and communicated same to the other jurors, cannot be received to impeach the verdict.

People v. Ritchie, 12 U. 180; 42 P. 209.

Affidavits of jurors will not be received to impeach or question their verdict, nor to show the grounds upon which it was rendered, nor to show their misunderstanding of facts or of law, nor that they misunderstood the charge of the court, nor the effect of their verdict, nor their opinions, surmises, and processes of reasoning in arriving at their verdict.

People v. Flynn, 7 U. 378; 26 P. 1114.

MISCODUCT OF JURY:

Where the diligence used in interrogating the jury is slight and insufficient to discover the disqualification, the jurors not being examined individually, new trial will be denied.

People v. Lewis, 4 U. 42; 5 P. 543.

Where juror was not a citizen, new trial granted.

People v. Reece, 3 U. 72; 2 P. 61.

The misconduct of any juror, actual or implied, is misconduct of the jury, raises the presumption that the accused has been prejudiced thereby, and vitiates the verdict unless the prosecution shows beyond a reasonable doubt that the prisoner has received no injury by reason thereof. Where the admitted facts show both actual and implied bias of two of the jurors, there is sufficient ground for granting a new trial.

State v. Morgan, 23 U. 212; 64 P. 356.

When it appears after trial that a juror had beforehand prejudiced the case, but had improperly withheld this fact before acceptance, or when asked as to opinion, on voir dire had given false answers, and such formation of opinion was unknown to the party at the time, a new trial will be granted.

State v. Morgan, 23 U. 212; 64 P. 356.

Tarpey v. Madsen, 26 U. 294; 73 P. 411.

State v. Thompson, 24 U. 314; 67 P. 789.

But not unless the accused, by the evidence he introduces, in support of his motion for a new trial, clearly and satisfactorily shows that such statements were actually made.

State v. Mickel, 25 U. 179; 70 P. 856.

Where, in a murder trial, the case has been submitted to a jury, it is misconduct for one of the jury, accompanied by an officer, to go to a room and talk over the telephone—and the burden is on the state to show that it was harmless.

State v. Thorne, 39 U. 208; 117 P. 58.

The remark of one of the jurors relative to a revolver properly admitted in evidence, but taken to the jury room without permission, that it "was a murderous looking instrument and that it showed conclusive intent" of the defendant, did not constitute misconduct.

State v. Riley, 41 U. 225; 126 P. 294.

NEWLY DISCOVERED EVIDENCE:

Newly discovered evidence, affidavits, etc., civil procedure, note to § 6978.

Newly discovered evidence which is merely cumulative, there being no showing of proper diligence, will not justify granting new trial.

People v. Peacock, 5 U. 237; 14 P. 332.

State v. Haworth, 26 P. 310; 73 P. 413.

A new trial will be granted where defendant was surprised at testimony of prosecutrix and much of her testimony was untrue.

State v. Halford, 18 U. 3; 54 P. 819.

Where, on a prosecution for homicide, defendant admitted the killing, but pleaded self-defense, and the testimony of defendant and another, the only witnesses to the occurrence, was in sharp conflict, the refusal to grant a motion for a new trial, supported by affidavits showing newly discovered evidence which could not with reasonable diligence have been discovered before the trial, and which strongly tended to corroborate defendant, was erroneous.

State v. Campbell, 25 U. 342; 71 P. 529.

Where newly discovered evidence, alleged as a ground for a new trial, established that the witness who gave the strongest evidence against defendant was mistaken in a material matter, or that his testimony was untrue, and in a counter affidavit such witness acknowledged that he had been mistaken in the particular alleged, and the evidence of defendant's guilt was unsatisfactory, it was error to deny a new trial.

State v. Edmunds, 27 U. 1; 73 P. 886.

State v. King, 27 U. 6; 73 P. 1045.

Where it is not made to appear that the testimony of non-resident witnesses would be procurable for the second trial, denial of a motion for new trial is proper.

State v. Loechner, 45 U. 621; 148 P. 363.

Affidavit showing newly discovered evidence must contain specific statements of the evidence.

Id.

After two trials of a criminal case, a new trial for newly discovered evidence to establish an alibi was properly denied for lack of diligence.

State v. Moore, 41 U. 247; 126 P. 322.

In order to authorize a new trial on the ground of newly discovered evidence, it must be so conclusive in its character as to raise a reasonable presumption that the result of the second trial would be different from the first; in granting or refusing a new trial, discretion is vested in the trial court.

State v. Montgomery, 37 U. 515; 109 P. 815.

Where a crime was committed in broad daylight and testified to by eight or nine witnesses, the granting of a motion for new trial is not justified, on affidavits showing evidence which merely corroborates the defendant's version and to some extent contradicts or modifies the statements of some of the state's witnesses.

State v. Molitz, 40 U. 443; 122 P. 876.

Where the time in which defendant boarded a street car was material, evidence alleged to be newly discovered that the power was off during the trip of the car defendant claimed to have boarded, and defendant's affidavit that the power was off while he was on the car was not ground for a new trial, the defendant having omitted to testify as to the stoppage of the car at the trial.

State v. Sirmay, 40 U. 525; 122 P. 748.

Where the evidence barely sustained a conviction for larceny of horses, the trial court abused its discretion in denying a new trial motion, largely based on cumulative affidavits, showing there was nothing suspicious in accused's connection with the horses, and that the man from whom he had innocently secured them really existed, which the sheriff had testified was not a fact.

State v. Williams, 49 U. 336; 164 P. 253.

Evidence held to establish that accused was reasonably diligent in preparing for trial after his release on bail after seven months' confinement, where he was without funds, and important witnesses lived several hundred miles distant, and subpoenas were given the sheriff to serve them, but they did not appear.

Id.

9200. (4953.) Application for new trial, how and when made. Form. The application for a new trial must be made upon written notice of motion designating the grounds upon which it is made, and must be served and filed within five days after the rendition of the verdict. If based upon any of the grounds mentioned in subs. 2, 3, 4, and 7, § 9199, the affidavits in support thereof must be served and filed within thirty days after filing the notice of motion. Am'd '03, p. 47; '15, p. 204.

Mont. Pen. C., § 2193*; Cal. Pen. C., § 1182*.

After a judgment in a criminal case has been affirmed on appeal and the case remanded, a motion for new trial based upon facts which were not passed upon by the appellate court or discovered before the appeal was taken could be entertained by the trial court, within thirty days after discovery.

State v. Morgan, 23 U. 212; 64 P. 356.

Where alleged prejudicial statements of a juror are discovered before an appeal from the conviction is taken, the motion for new trial, based on subs. 3 or 4 of § 9199, should be made within thirty days, and the appeal delayed until after the denial of the motion.

State v. Mickle, 25 U. 179; 70 P. 856.

Where the record does not show that the motion was filed and served within the prescribed time after discovery, it is not error to deny the motion.

Id.

In a prosecution for homicide it is not error for the court to refuse to permit defendant to introduce oral evidence in support of his motion for new trial.

State v. Mortensen, 26 U. 312; 73 P. 562, 633.

Where a motion for new trial, supported by affidavits, is overruled, and an appeal is taken, the transcript filed, and a second motion for new trial, supported by affidavits is filed, the lower court is without jurisdiction to pass on such motion.

State v. Carter, 52 U. —; 173 P. 459.

9201. (4954.) Motion for new trial for certain causes to be based upon affidavits. Time of hearing. A motion for a new trial, if made for any of the causes mentioned in subs, 2, 3, 4, and 7, § 9199, must be based upon affidavits which must be served and filed as provided in the next preceding section. The motion must be heard as soon as practicable, and the hearing thereof shall not be delayed longer than may be imperative. Am'd '15, p. 204.

Mont. Pen. C., § 2194*.

CHAPTER 41.

APPEALS.

9205. (4955.) Either party may appeal. Method prescribed. Either party in a criminal action may, except in cases appealed from a justice's court, appeal to the supreme court, as prescribed in this chapter.

Cal. Pen. C., § 1235*.

Appeals from district court, Con. art. 8, sec. 9, and note.

9206. (4956.) Title of action not changed on appeal. The party appealing shall be known as the appellant, and the adverse party as the respondent, but the title of the action shall not be changed in consequence of the appeal.

Cal. Pen. C., § 1235. Title not changed, civil procedure, § 6993.

9207. (4957.) From what defendant may appeal. An appeal may be taken by the defendant:

1. From a final judgment of conviction;

2. From an order made after judgment, affecting the substantial rights of the party.

Cal. Pen. C., § 1237*.
Defendant shall have the right to appeal in all cases, Con. art. 1, sec. 12.
Appeal lies from final judgments, Con. art. 8, sec. 9, and note.
Power of supreme court on appeal, §§ 6995, 9233, and note.
Orders resubmitting a case to grand jury after demurrer to indictment sustained, and refusing to discharge defendant pending such resubmission, are not appealable.
People v. Hill, 3 U. 334; 3 P. 75.
A fugitive from justice has no right to be heard upon appeal.
People v. Tremayne, 3 U. 331; 3 P. 85.
Orders forfeiting a defendant's bail, refusing to set aside such forfeiture, and directing that money deposited in lieu of bail be paid into the territorial treasury, are not appealable.
Id.
Rulings on challenges for actual bias are conclusive, and not reviewable on appeal.
People v. Hopt, 4 U. 247; 9 P. 407; 120 U. S. 430.
Where a juror is challenged for actual bias, an issue of fact is raised, and if no exception is taken to the admission or rejection of evidence upon the voir dire examination, the action of the trial court is final and conclusive, and cannot be reviewed on appeal.
People v. Thiede, 11 U. 241; 39 P. 837; affirmed 159 U. S. 510.
See note to § 8958.
Under Con. art. 24, sec. 2, § 5136, C. L. of 1888 (this section), is still in force and effect, and not being inconsistent with art. 1, sec. 12, or art. 8, sec. 9, gave defendant the right to move for new trial upon facts discovered after judgment, and to appeal from an order refusing to set aside the judgment and grant a new trial.
State v. Morgan, 23 U. 212; 64 P. 356.
Order discharging one accused of crime for want of jurisdiction is a final judgment.
State v. Booth, 21 U. 88; 59 P. 553.
State v. McKenna, 24 U. 317; 67 P. 815.
A judgment of dismissal discharging a prisoner is final, after plea to the jurisdiction, and, under Con. art. 8, sec. 9, an appeal lies on behalf of the state to the supreme court.
State v. Booth, 21 U. 88; 59 P. 553.

9208. (4958.) From what the state may appeal. An appeal may be taken by the state:

1. From a judgment for the defendant on a demurrer to the information or indictment;

2. From an order arresting judgment;

3. From an order made after judgment affecting the substantial rights of the state;

4. From an order of the court directing the jury to find for the defendant.

N. Dak. (1895) § 8329*; Cal. Pen. C., § 1238*.
Appeal by the state does not stay judgment, § 9212.
A judgment of dismissal, discharging a prisoner, in a criminal case, and releasing his bail, entered after hearing arguments on a plea to the jurisdiction of the court, is a final judgment; and under provisions of Con. art. 8, sec. 9, an appeal lies, on behalf of the state, to the supreme court.
State v. Booth, 21 U. 88; 59 P. 553.
Where the district court erred in holding that it had no authority to impanel a jury of twelve men to try defendant for a crime committed before statehood, and as the state had no right of appeal, mandamus is a proper remedy.
State ex rel. v. Hart, 19 U. 438; 57 P. 415.
Where accused, after plea and entering on the trial, was discharged on the ground that no proper preliminary examination had been entered on appeal by the state, the court can only reverse the order and judgment, and cannot determine its legal effect or direct the district court to reinstate the case and proceed to try accused.
State v. Gustaldi, 41 U. 63; 123 P. 897.

9209. (4959.) Time for taking appeal. All appeals in criminal cases must be taken within two months after the entry of the judgment appealed from. Am'd '15, p. 204.

Cal. Pen. C., § 1239*.
Appeal be heard within ninety days from appeal, and decided within thirty days from submission, § 9225.

9210. (4960.) Id. Taken by filing and serving notice. An appeal shall be taken by filing, with the clerk of the court in which the judgment or order appealed from shall have been entered or filed, a notice stating the appeal from the same, and serving a copy thereof upon the attorney of the adverse party.

Cal. Pen. C., § 1240.
An appeal in a criminal case is taken by filing the notice of appeal with the clerk of the court, and serving a copy thereof on the adverse party or his attorney.
People v. Gough, 2 U. 69.
Where the record shows the filing of a notice of appeal, but is silent as to its service, affidavits will not be received in the supreme court to show that the notice of appeal was in fact served upon the adverse party.
People v. Gough, 2 U. 69.
People v. Fennel, 4 U. 112; 7 P. 525, 648.
Dismissal for failure to serve notice of appeal.
People v. Gough, 2 U. 69.
People v. Fennel, 4 U. 112, 7 P. 525, 648.
Dismissal for failure to serve notice of appeal, civil procedure, note, § 6996.
After an appeal is perfected, the case ceases to be pending in the lower court and thereafter is deemed pending in the appellate court, until finally disposed of there.
State v. Carter, 52 U. —; 173 P. 459.

9211. (4961.) Id. Service of notice by publication. If personal service of the notice cannot be made, the judge of the court in which the action was tried, upon proof thereof, may make an order for the publication of the notice in some newspaper for a period not exceeding thirty days. Such publication shall be equivalent to personal service.

Cal. Pen. C., § 1241.

9212. (4962.) Appeal by state. Effect. An appeal taken by the state

in no case shall stay or affect the operation of a judgment in favor of the defendant until judgment is reversed.

Cal. Pen. C., § 1242.

9213. (4963.) Appeal does not stay execution, unless certificate issued. An appeal to the supreme court from a judgment of conviction shall stay the execution of the judgment upon filing with the clerk of the court in which the conviction shall have been had a certificate of the judge of such court, or of a justice of the supreme court, that in his opinion there is probable cause for the appeal, but not otherwise.

Cal. Pen. C., § 1243*.
Bail on appeal, §§ 3247-9251, 9260.
Thes upreme court has no authority to order a stay in a capital case pending hearing of a writ of error from the supreme court of the United States, the sentence of the lower court having been affirmed by the supreme court of the territory.
People v. Hopt, 3 U. 404; 5 P. 565; 104 U. S. 631.

9214. (4964.) Id. Duty of sheriff if certificate filed. If the certificate provided for in the next preceding section is filed, the sheriff must, if the defendant be in his custody, upon being served with a copy thereof, keep the defendant in his custody without executing the judgment, and detain him to abide the judgment on appeal.

Cal. Pen. C., § 1244.

9215. (4965.) Id. Suspension of execution, if begun. If, before the granting of the certificate, the execution of the judgment shall have commenced, the further execution thereof shall be suspended, and upon service of a copy of such certificate the defendant must be restored, by the officer in whose custody he shall be, to his original custody.

Cal. Pen. C., § 1245*.

9216. (4966.) Clerk to transmit record on appeal. Filing. Costs. Upon the appeal being taken, the clerk with whom the notice of appeal shall have been filed must, within ten days thereafter in case the bill of exceptions has been settled before the giving of said notice, but if not, then within ten days from the settlement of the bill of exceptions if there be a bill of exceptions, without charge transmit to the clerk of the supreme court the notice of appeal, the record, and all bills of exceptions, instructions, and indorsements thereon, which shall constitute the record on appeal, and upon the receipt thereof, the clerk of the supreme court must file the same and perform the same service as in civil cases, without charge.

Cal. Pen. C., § 1246*. Cal. Sup. (1889) § 1246*, p. 482.
Papers constituting the record of the action, § 9059.
Decisions on record on appeal, civil procedure, note to § 6994.
Where the bill of exceptions does not state that it embodies all of the evidence in the case, the appellate court will presume that there was other and sufficient evidence to fully sustain the verdict.
People v. Lyman, 2 U. 30.
A bill of exceptions and statements on appeal, not certified or authenticated as required by the statute regulating appeals in criminal cases, will be stricken from the files.
People v. Idaho Bill, 2 U. 326.
Action of trial court on motion for new trial is not reviewable without a statement or bill of exceptions.
People v. Smith, 3 U. 425; 4 P. 242.
Rulings admitting and rejecting evidence and overruling motion for new trial on affidavit of newly discovered evidence cannot be reviewed on appeal unless embodied in bill of exceptions.
U. S. v. Duggins, 11 U. 430; 40 P. 707.
Where defendant's counsel waived objection made to evidence admitted, the appellate court will not consider the admissibility of such evidence.
People v. Farrell, 11 U. 414; 40 P. 703.
A defendant in a criminal prosecution is liable for costs of the printing of the brief on appeal, but not for fees payable to the clerk.
Salt Lake City v. Robinson, 39 U. 260; 116 P. 442.
Where transcript is filed nearly eight months after the settlement of the bill of exceptions, no application being made for time, the appeal will be dismissed.
State v. Grisolio, 49 U. 195; 162 P. 613.

9217. (4967.) Appeal by a defendant tried jointly. Effect. When several defendants are tried jointly, any one or more of them may take an appeal; but those who do not join in the appeal shall not be affected thereby.

Mont. Pen. C., § 2283.

CHAPTER 42.

DISMISSING APPEAL FOR IRREGULARITY.

9220. (4968.) Dismissal for substantial defect. Notice. If the appeal is irregular in any substantial particular, the supreme court may, on any day in the term, upon motion of the respondent, after five days' notice, accompanied with copies of the papers whereon the motion is founded, order it to be dismissed.

Cal. Pen. C., § 1248*.
Errors not affecting substantial rights to be disregarded, §§ 9231, 9365.
Dismissal of appeal generally, civil procedure, note to § 7009.

If record fails to show service of notice, appeal will be dismissed. Defect cannot be supplied by extrinsic evidence.
People v. Gough, 2 U. 69.
People v. Fennel, 4 U. 112; 7 P. 525, 648.

9221. (4969.) Dismissal affirms judgment. The dismissal of an appeal affirms the judgment.

N. Dak. (1895) § 8342.

9222. (4970.) Defect must be material. Irregularity corrected. New undertaking. An appeal must not be dismissed except for a material defect in the taking thereof. If an irregularity complained of is corrected in a reasonable time, the appeal shall be reinstated, and the supreme court must fix the time and direct the manner of correcting the irregularity. If an undertaking has been given which is defective in any respect, a new one may be filed on appeal in the supreme court.

N. Dak. (1895) §§ 8342, 8343*.
Harmless errors disregarded on appeal, civil procedure, note to § 6994.

CHAPTER 43.

HEARING ON APPEAL.

9225. (4971.) Appeals in criminal cases. Time for hearing. Continuance. All appeals in criminal cases must be heard within sixty days from the time of filing the record in the supreme court, and must be determined by the supreme court within ninety days from the time the case is submitted; *provided, however,* that the supreme court shall not be required to hear appeals during the months of July and August, but in all appeals in which the time for hearing expires within either of said last two named months, the same shall be heard in the month of September. Am'd '15, p. 204.

Cal. Pen. C., § 1252*.

9226. (4972.) Failure of parties to appear. Effect. The judgment may be affirmed if the appellant fails to appear, but shall be reversed only after argument, though the respondent fails to appear.

Cal. Pen. C., § 1253.

9227. (4973.) Argument may be restricted. Upon the argument of the appeal, if the offense is punishable with death, two counsel on each side must be heard, if they require it; in any other case the court may, in its discretion, restrict the argument to one counsel on each side.

Cal. Pen. C., § 1254.

9228. (4974.) Presence of defendant not necessary. The defendant need not personally appear in the supreme court.

Cal. Pen. C., § 1255.

CHAPTER 44.

JUDGMENT ON APPEAL.

9231. (4975.) Id. Hearing. Judgment to disregard errors not effecting a miscarriage of justice. After hearing an appeal, the court must give

judgment without regard to errors or defects which have not resulted in a miscarriage of justice. If error has been committed it shall not be presumed to have resulted in a miscarriage of justice. The court must be satisfied that it has that effect before it is warranted in reversing the judgment.

Am'd '15, p. 205.

Cal. Pen. C., § 1258.

Errors and mistakes not affecting substantial rights shall be disregarded, § 9365; on appeal in civil cases, note to § 6994, and §§ 6622 and 6968, and notes.

Miscarriage of justice, under the amendment of 1915, means no more than "substantial, rights," which was the test of prejudicial error prior to that time.

State v. Cluff, 48 U. 102; 158 P. 701.

Accused on appeal cannot complain that the witness's former statements were not wholly withdrawn from the jury, where his own requests on that point were substantially given.

State v. Inlow, 44 U. 485; 141 P. 530.

The erroneous admission of evidence is not prejudicial where it was stricken from the record and the jury admonished to disregard it.

Id.

Misconduct of state's attorney in arguing that the defendant should have produced certain evidence is harmless, where the court admonished the jury that their verdict must be based upon the evidence, and not upon statements of counsel.

Id.

Failure of the court in a homicide case, in giving forms of verdicts, to give a form recommending life imprisonment is harmless, where the court instructed and explained that the jury had the right to make such recommendation.

State v. Romeo, 42 U. 46, 128 P. 530.

Where, without controversy, the victim was killed by a 38 caliber revolver, the admission of the opinion in evidence to that effect of a medical witness not properly qualified on the subject, is harmless.

State v. Hillstrom, 46 U. 341; 150 P. 935.

The giving of an instruction on the credibility of a witness was harmless where the defendant was the only witness in his own behalf, and the only controversy was as to whether the shooting was intentional or accidental.

State v. Morris, 40 U. 431; 122 P. 380.

Where the evidence conclusively showed the defendant's guilt, the court's failure to define domestic family remedies, being error in defendant's favor, was harmless.

State v. Yee Foo Lun, 45 U. 531; 147 P. 488.

The fact that information alleged that the name of a woman with whom accused was convicted of having committed fornication was "Verda," when her name was "Beatea M.," is not prejudicial, where the identity of the woman was established.

State v. Chipman, 40 U. 549; 123 P. 89.

This section does not abolish the presumption that error depriving the accused of substantial rights is prejudicial.

State v. Cluff, 48 U. 102; 158 P. 701.

An instruction that when a person is charged with the commission of a crime the law presumes that he is a man of "average" character, the use of the word "average" in place of the usual adjective "good" was not prejudicial.

State v. Mewhinney, 43 U. 135; 134 P. 632.

In a prosecution for violating § 8162, denouncing the offense of conducting games of chance, the accused cannot complain that the court and prosecuting attorney treated the prosecution as one for conducting a regular gambling house and required proof to that effect, the error being harmless.

State v. Poulis, 45 U. 340; 145 P. 1044.

9232. (4976.) Intermediate orders, etc., reviewed on appeal from judgment. Upon an appeal taken by the defendant from a judgment, the court may review any intermediate order or ruling involving the merits or which may have affected the judgment.

Cal. Pen. C., § 1259.

9233. (4977.) Power of supreme court on appeal. The court may reverse, affirm, or modify the judgment or order appealed from, and may set aside, affirm, or modify any or all the proceedings, subsequent to or dependent upon such judgment or order, and may, if proper, order a new trial.

Cal. Pen. C., § 1260.

Power of supreme court on appeal, Con. art. 8, sec. 9, and note; § 6995, and note.

Supreme court may reduce excessive fine.

People v. Reggel, 8 U. 21; 28 P. 955.

Appellate court will not interfere with the verdict of a jury in a criminal case if there is any evidence to support it.

State v. Endlsey, 19 U. 478; 57 P. 430.

State v. Clark, 27 U. 55; 74 P. 119.

State v. LaChall, 28 U. 80; 77 P. 3.

State v. Montgomery, 37 U. 515; 109 P. 815.

Where there is no evidence to sustain a verdict in a criminal case, it is error to submit the case to the jury.

State v. Gordon, 28 U. 15; 76 P. 882.

State v. Hutchings, 30 U. 319; 84 P. 893.

Where a defendant was convicted and sentenced for a felony, whereas the offense was only a misdemeanor, the court could set aside the sentence and remand it for resentence.

State v. Carman, 44 U. 352; 140 P. 670.

9234. (4978.) New trial must be had in same court. Procedure. When a new trial is ordered, it must be directed that it be had in the district court of the county from which the appeal shall have been taken. All cases in which new trials are ordered shall take precedence over criminal cases in which no trial has been had. Am'd '15, p. 205.

Cal. Pen. C., § 1261.

All criminal business arising in a county must be tried there unless a change of venue be taken, Con. art. 8, sec. 5.

9235. (4979.) Reversal of judgment. Discharge of defendant. If a judgment against the defendant is reversed without ordering a new trial, the supreme court must, if he is in custody, direct that he be discharged therefrom; or if on bail, that his bail be exonerated; or if money shall have been deposited instead of bail, that it be refunded to the defendant.

Cal. Pen C., § 1262.

9236. (4980.) Affirmance of judgment. Enforcement. If a judgment against the defendant is affirmed, the original judgment must be enforced.

Cal. Pen. C., § 1263.

9237. (4981.) Entry of judgment. Papers remitted to court below. When the judgment of the supreme court shall have been given, it must be entered on the minutes, and a certified copy of the entry, together with the papers transmitted to the supreme court on appeal, forthwith remitted to the clerk of the court from which the appeal shall have been taken.

Cal. Pen. C., § 1264*.
Remittitur, civil procedure, § 7013, and note.
A decision of the supreme court on appeal in a criminal case is the law of the case on a subsequent trial.
State v. Vance, 39 U. 602; 119 P. 309.
Also, on a subsequent appeal.
State v. Mewhinney, 44 U. 231; 139 P. 862.

9238. (4982.) After remittitur, district court has jurisdiction. After the certificate of the judgment shall have been remitted to the court below, the supreme court shall have no further jurisdiction of the appeal or of the proceedings thereon, and all orders necessary to carry the judgment into effect must be made by the court to which the certificate shall have been remitted.

Cal. Pen. C., § 1265.

CHAPTER 45.

BAIL.

9243. (4983.) Admission to bail defined. Admission to bail shall be by an order of a competent court, magistrate, or legally authorized officer, that the defendant be discharged from actual custody upon bail.

Cal. Pen. C., § 1268*.

9244. (4984.) Bail, how taken. The taking of bail shall consist in the acceptance by a competent court, magistrate, or a legally authorized officer, of the undertaking with sufficient sureties for the appearance of the defendant according to the terms of the undertaking, or that the sureties will pay to the state a specified sum if he does not appear.

Cal. Pen. C., § 1269*.
Form of bond; qualifications of sureties, §§ 9255-9257.

9245. (4985.) Bail in capital cases taken by whom and when. A defendant charged with an offense punishable with death may be admitted to bail only by a judge of the supreme or district court. When, however, the proof of his guilt is evident or the presumption strong, bail shall not be taken. The filing of an information or the finding of an indictment shall not add to the strength of the proof or the presumption to be drawn therefrom.

Cal. Pen. C., § 1270*. Bail in capital cases, Con. art. 1, sec. 8.

9246. (4986.) Bail a matter of right in case other than capital. If the charge is for any other offense, he may be admitted to bail before conviction, as a matter of right.

Cal. Pen. C., § 1271.
Bail as a matter of right in other than capital cases, Con. art. 1, sec. 8.

9247. (4987.) Bail on appeal after conviction. Discretionary, when. After conviction of an offense not punishable with death, a defendant who shall have appealed may be admitted to bail:

1. As a matter of right, when the appeal is from a judgment imposing a fine only;

2. As a matter of discretion in all other cases.

Cal. Pen. C., § 1272.

9248. (4988.) Bail before conviction. Bail on appeal. If the offense is bailable, the defendant may be admitted to bail:

Before conviction—

1. For his appearance before the magistrate on the examination of the charge, before being held to answer;

2. To appear at the court to which the magistrate shall be required to return the complaint, upon the defendant being held to answer after examination;

3. After information filed or indictment found, either before warrant is issued for his arrest or upon any order of the court committing him or enlarging the amount of bail, or upon his being surrendered by his bail to answer the information or indictment in the court in which it is filed or found, or to which it may have been transferred for trial;

After conviction and upon an appeal—

1. If the appeal is from a judgment imposing a fine only, on an undertaking of bail that he will pay the same or such part thereof as the appellate court may direct, if the judgment is affirmed or modified, or the appeal is dismissed;

2. If judgment of imprisonment shall have been given, that he will surrender himself in execution of the judgment, upon its being affirmed or modified, or upon the appeal being dismissed, or that, in case the judgment is reversed and the cause remanded for a new trial, he will appear in the court to which said cause may be remanded, and submit himself to the orders and process thereof.

N. Dak. (1895) § 8448; Cal. Pen. C., § 1273*.
Who may admit to bail on appeal, § 9260.
Where a territorial statute provides that, in criminal actions, a defendant who has appealed from a judgment imposing a fine may be admitted to bail as a matter of right, and as a matter of discretion in all other cases on an appeal from a judgment inflicting both fine and imprisonment, he is not entitled to be admitted to bail as a matter of right, but only in the discretion of the court. A certificate of probable cause under a statute did not necessarily carry with it the right to bail nor deprive the court of all discretion in the premises.
Clawson v. U. S., 113 U. S. 143; 4 U. 34; 5 P. 689.
Where the defendant is in default for failing to appear for arraignment in the district court, the bondsmen are liable.
State v. Sorenson, 48 U. 663; 160 P. 1181.

9249. (4989.) Notice to district attorney of application for bail. When the admission to bail is a matter of discretion, the court or officer to whom the application shall be made must require reasonable notice thereof to be given to the district attorney. Am'd '01, p. 8.

9250. (4990.) Bail fixed when information or indictment filed. Entry. When the offense charged is not punishable with death, the court at the time the indictment is presented and filed, or information filed, must make an order, to be entered in the minutes, fixing the amount in which the defendant may be admitted to bail, unless the court indorse such order on the warrant.

Mont. Pen. C., § 2360.

9251. (4991.) Id. Indorsement on warrant. When the order fixing the amount of bail is entered in the minutes, the clerk must indorse the same on the warrant.

Mont. Pen. C., § 2361.

9252. (4992.) What magistrate to admit to bail. Except as otherwise provided in capital cases, a defendant held to answer upon an examination for a public offense may be admitted to bail by the magistrate by whom he is so held, or by any magistrate who has power to issue the writ of habeas corpus.

Cal. Pen. C., § 1277*.
Bail on preliminary examination, §§ 8755-8758.
Bail on arrest, taken before justice, §§ 8696-8705.

9253. (4993.) Bail in cases not capital. Duty of officer. When the offense charged in the information or indictment is not punishable with death, the officer serving the warrant must, if required, take the defendant before a magistrate in the county in which it shall have been issued, or in which he is arrested, for the purpose of giving bail.

Cal. Pen. C., § 1284*.
Bail as a matter of right in other than capital cases, Con. art. 1, sec. 8; § 9246.

9254. (4994.) Capital cases. Duty of arresting officer. If the offense charged in the information or indictment is punishable with death, the officer arresting the defendant must deliver him into custody, according to the command of the warrant; and when the defendant shall have been so delivered, he must be held by the sheriff, unless admitted to bail on examination upon a

writ of habeas corpus, or upon a motion to the court in which the action is pending, or the judge thereof.

Cal. Pen. C., §§ 1285, 1286*.
Bail in capital cases, Con. art. 1, sec. 8; § 9245.

9255. (4995.) Form of undertaking of bail. Bail must be put in by written undertaking, executed by at least two sufficient sureties (with or without the defendant, in the discretion of the magistrate), and duly acknowledged, in substantially the following form:

An order having been made on the ..... day of ....., 19....., by ..... justice of the peace of ..... county (or an information having been filed or an indictment having been found on the ..... day of ....., 19....., in the district court of the county of .....), that ..... be held to answer upon a charge of (stating briefly the nature of the offense), or (as the case may be), charging (name of defendant) with the crime of (designating it generally) and he having been admitted to bail in the sum of ..... dollars;

Now, therefore, we, ... and ..... (as the fact may be), of (stating their place of residence), jointly and severally hereby undertake that the above named (naming the defendant) will appear and answer the charge above mentioned (or the information or indictment above mentioned, as the case may be), in whatever court it may be presented, and will at all times hold (or surrender) himself amenable to the orders and process of the court, and, if convicted, will appear for judgment, and render himself in execution thereof, or, if he fails to perform either of these conditions, that he will pay to the state of Utah the sum of ..... dollars (inserting the sum in which the defendant shall be admitted to bail).

Cal. Pen. C., § 1278*.
Recognizance is sufficient as to description of the offense if the offense is described in language of the statute.
U. S. v. Eldredge, 5 U. 161; 13 P. 673.

9256. (4996.) Id. Qualifications of sureties. The qualifications of bail shall be as follows:

1. Each of them must be a resident householder or freeholder within this state; but the court or magistrate may refuse to accept any person as bail who shall not be a resident of the county where bail is offered;

2. They must each be worth the amount specified in the undertaking, exclusive of property exempt from execution; but the court or magistrate, on taking bail, may allow more than two sureties to justify severally in amounts less than that expressed in the undertaking, if the whole justification is equivalent to that of sufficient bail.

Cal. Pen. C., § 1279.

9257. (4997.) Id. Justification of sureties. The bail must in all cases justify by affidavit taken before the magistrate that they each possess the qualifications provided in the next preceding section. The magistrate may further examine the bail upon oath concerning their sufficiency, in such manner as he may deem proper.

Cal. Pen. C., § 1280.

9258. (4998.) Discharge of defendant on giving bail. Upon the allowance of bail and the execution of the undertaking, the magistrate must, if the defendant is in custody, make and sign an order for his discharge, upon the delivery of which to the proper officer the defendant must be discharged.

Cal. P., C., § 1281.

9259. (4999.) Increase or reduction of bail. Notice. After a defendant shall have been admitted to bail upon an information or indictment, the court in which the charge is pending may, upon good cause shown, either increase or reduce the amount of bail. If the amount is increased, the court may order the defendant to be committed to actual custody, unless he gives bail in such increased amount. If application is made by the defendant for a reduction of the amount, notice of the application must be served upon the county attorney.

Mont. Pen. C., § 2366.

BAIL ON APPEAL

9260. (5000.) Who may admit to bail on appeal. Qualifications of sureties. In cases in which the defendant may be admitted to bail upon an appeal, the order admitting him to bail may be made by any magistrate having the power to issue a writ of habeas corpus, or by the magistrate before whom the trial was had. The bail must possess the qualifications, and must be put in, in all respects as provided in other cases of bail, except that the undertaking must be conditioned as prescribed in § 9248 for undertakings of bail on appeal.

Cal. Pen. C., §§ 1291, 1292. Bail on appeal, § 9248.
Qualifications of bail, § 9256.

DEPOSIT INSTEAD OF BAIL.

9261. (5001.) Deposit may be made instead of bail. The defendant, at any time after an order admitting him to bail, instead of giving bail may deposit with the magistrate or with the clerk of the court in which he shall be held to answer the sum mentioned in the order, and upon delivering to the officer in whose custody he is a certificate of the deposit, he must be discharged from custody.

Cal. Pen. C., § 1295*.

9262. (5002.) Substitution of deposit for undertaking. If the defendant shall have given bail, he may, at any time before the forfeiture of the undertaking, in like manner deposit the sum mentioned therein, and upon the deposit being made, the bail shall be exonerated.

Cal. Pen. C., § 1296.

9263. (5003.) Disposition of forfeited deposit for fine. When money shall have been deposited, if it remains on deposit at the time of a judgment for the payment of a fine, the clerk must, under the direction of the court, apply the money in satisfaction thereof, and after satisfying the fine and costs, must refund the surplus, if any, to the defendant.

Cal. Pen. C., § 1297.

SURRENDER OF DEFENDANT.

9264. (5004.) Surrender, personal or by bail. Procedure. At any time before the forfeiture of their undertaking, the bail may surrender the defendant in their exoneration, or he may surrender himself to the officer to whose custody he shall have been committed at the time of giving bail, in the following manner:

1. A certified copy of the undertaking of bail must be delivered to the officer, who must detain the defendant in his custody thereon, as upon the commitment, and by a certificate in writing acknowledge the surrender;

2. Upon the undertaking and the certificate of the officer, the court in which the action or appeal is pending may, upon notice of five days to the county attorney, with a copy of the undertaking and certificate, order that the bail be exonerated, and on filing the order and the papers used on the application, they shall be exonerated accordingly.

Cal. Pen. C., § 1300.

9265. (5005.) Arrest of defendant by bail. For the purpose of surrendering the defendant, the bail, at any time before they shall be finally discharged, and at any place within the state, may themselves arrest him, or by written authority indorsed on a certified copy of the undertaking, may empower any person of suitable age and discretion to do so.

Cal. Pen. C., § 1301.

9266. (5006.) Surrender releases deposit. If money shall have been deposited instead of bail, and the defendant, at any time before the forfeiture thereof, surrenders himself to the officer to whom the commitment was directed, in the manner provided in the two next preceding sections, the court must order a return of the deposit to the defendant, upon producing the certificate of the officer showing the surrender, and upon a notice of five days to the county attorney, with a copy of the certificate.

Cal. Pen. C., § 1302.

FORFEITURE OF BAIL.

9267. (5007.) Forfeiture of bail by non-appearance. Satisfactory excuse. If, without sufficient excuse, the defendant neglects to appear for arraignment or for trial or judgment, or upon any other occasion when his presence in court may be lawfully required, or to surrender himself in execution of the judgment, the court must direct the fact to be entered upon its minutes, and the undertaking of bail, or the money deposited instead of bail, as the case may be, shall thereupon be declared forfeited. But if at any time before the final judgment of the court, the defendant or his bail appears and satisfactorily excuses his neglect, the court may direct the forfeiture of the undertaking or the deposit to be discharged upon such terms as may be just.

Cal. Pen. C., § 1305.

A defendant who has forfeited his bail and remains a fugitive from justice has no right to be heard on appeal.

People v. Tremayne, 3 U. 331; 3 P. 85.

Sureties on forfeited undertaking of bail who do not apply to have forfeiture set aside hereunder, thereby waive informalities of which they might have availed themselves in that manner.

U. S. v. Eldredge, 5 U. 161, 13 P. 673.

Denial of motion of sureties on a bail bond to set aside the judgment, or an order of forfeiture thereof, precludes them from attacking the validity of such order or judgment of forfeiture in an action to recover on their recognizance.

State v. Sorenson, 48 U. 663; 160 P. 1181.

The fact that such neglect was "without sufficient cause" need not be entered on the minutes.

Id.

9268. (5008.) Forfeiture. Action against bail. If the forfeiture is not discharged as provided in the next preceding section, the county attorney may, at any time after the adjournment of the court, proceed by action only against the bail upon their undertaking.

Cal. Pen. C., § 1306.

District attorney to examine into sufficiency of bonds and to bring actions to recover on same, §§ 5761, 5763.

A contention in an action on a bail bond given by one charged with abortion that no such crime was known to the law of the state was, under provisions of this section, without merit.

State v. Davis, 27 U. 368; 75 P. 857.

A complaint in an action on a bail bond was not insufficient because it failed to allege the filing of the bond.

Id.

An undertaking on appeal from a conviction, conditional that defendant will surrender himself in execution of the judgment on its being affirmed or modified, or the appeal being dismissed, or the judgment being reversed and the cause remanded for new trial, is not violated by defendant's failure to appear, after judgment was reversed, on the ground that the trial court did not have jurisdiction, and the cause was remanded to be disposed of according to law.

State v. Candland, 25 U. 172; 70 P. 403.

See People v. Tremayne, 3 U. 331; 3 P. 85.

9269. (5009.) Disposition of forfeited deposit. If, by reason of the neglect of the defendant to appear, money deposited instead of bail is forfeited, and the forfeiture is not discharged or remitted, the clerk with whom it is deposited must, immediately after the final adjournment of the court, pay over the money deposited to the state treasurer. If bail be given in a justice's court for the appearance of a defendant in a case triable therein, the same if forfeited shall be paid by such justice into the county treasury.

Cal. Pen. C., § 1307*.

9270. (5010.) Arrest when bail forfeited or insufficient. When bail, or money deposited instead thereof, has been forfeited, or the bail has become insufficient, the court may issue an order for the arrest of the defendant, setting forth the reasons therefor, and the provisions of this chapter as to the original taking of bail shall thereupon be applicable.

N. Dak. (1895) § 8458*.

CHAPTER 46.

WITNESSES AND EVIDENCE.

9275. (5011.) Competency of witnesses determined by rules in civil cases. Exception. The rules for determining the competency of witnesses in civil actions shall be applicable also to criminal actions and proceedings, except as otherwise provided in this code.

Cal. Pen. C., § 1321.

Witnesses, etc., civil procedure, §§ 7122-7125.

Subpoena, issuance, service, etc., §§ 9284-9293.

Competency, credibility, etc., of witnesses, §§ 7122, 7123, and notes.

A statute which simply enlarges the class of persons competent to testify is not ex post facto as to offenses previously committed; such alterations relate to procedure only, which the state may regulate at pleasure, and in which no one can be said to have a vested right.

Hopt v. People, 110 U. S. 574.

Same case, 4 U. 247; 9 P. 407.

9276. (5012.) Rules of evidence same as in civil cases. Exception. The rules of evidence in civil actions shall be applicable also to criminal actions, except as otherwise provided in this code.

Cal. Pen. C., § 1102.
Evidence, civil procedure, §§ 7076-7118.
Privileged communications, § 7124, and note.
Rights and duties of witnesses, §§ 7140, 7146.
Examination of witnesses, burden of proof, etc., note to § 8975.

9277. (5013.) Reported testimony used on subsequent trial, when. Whenever, in any court of record, the testimony of any witness in any criminal case shall be stenographically reported by an official court stenographer, and thereafter such witness shall die, or be beyond the jurisdiction of the court in which the cause is pending, either party to the record may read in evidence the testimony of said witness, when duly certified by the stenographer to be correct, in any subsequent trial of or proceeding had in the same cause, subject only to the same objection that might be made if said witness were upon the stand and testifying in open court.

Use on trial of testimony taken in preliminary examinations, § 8553, and note.

If a witness is wrongfully kept away by the prisoner, his testimony taken on a former trial **of the prisoner for the same offense, but under** another indictment, may be given in evidence. The finding of the trial court that the witness was thus wrongfully kept away should not be disturbed unless the error is manifest.

U. S. v. Reynolds, 1 U. 319; affirmed 98 U. S. 145.

Upon a prosecution before a district court on appeal from a justice's court, evidence of what a witness testified to before the justice, where the witness is not produced, and no attempt made to produce him, is inadmissible.

Provo City v. Shurtliff, 4 U. 15; 5 P. 302.

This section does not conflict with Con. art. 1, sec. 13, giving accused the right to be confronted by witnesses against him.

State v. Greene, 38 U. 389; 115 P. 181.

9278. (5014.) Husband and wife incompetent witnesses. Exception. Except with the consent of both, or in case of criminal violence upon one by the other, or in case of crimes defined in the chapter relating to pandering (§§ 8095-8101) and in §§ 8112-8115, making it a misdemeanor to abandon or wilfully neglect to provide for the support and maintenance by any person of his wife or his or her minor child or children in destitute or necessitous circumstances, neither husband nor wife shall be a competent witness for or against the other in a criminal action or proceeding to which one or both shall be parties. Am'd '09, p. 34; '11, p. 151.

Cal. Pen. C., § 1322.
Abandonment of wife and children, § 8112.
Pandering, §§ 8095-8101.
Charge, § 8101.

Husband not compelled to testify against wife or wife against husband, Con. art. 1, sec. 12; § 8555; in civil cases, § 7124, and note.

The alleged second wife can be admitted to testify as to the second marriage, notwithstanding the prior marriage of defendant with another woman, who has been shown only by the admissions of the defendant.

U. S. v. Miles, 2 U. 19; reversed 103 U. S. 304.

It is only in cases where the first marriage is not controverted or has been duly established by other evidence that the second wife is allowed to testify, and she can then be a witness to the second marriage and not to the first.

Id.

This section applies even where party under indictment married a woman before trial to render her incompetent.

U. S. v. White, 4 U. 499; 11 P. 570.

Under § 1156, Code of Civil Procedure (1884, p. 359), permitting a husband or wife to testify in a criminal action for a crime committed by the one against the other, the wife is a competent witness against her husband before a grand jury which indicted him for polygamy.

U. S. v. Cutler, 5 U. 608; 19 P. 145.

In a prosecution for polygamy, the wife is a competent witness against her husband, notwithstanding his objection, since polygamy is a crime against her.

U. S. v. Bassett, 5 U. 131; 13 P. 237; overruled, 137 U. S. 496.

Under section 1, Edmunds-Tucker law, 24 Stat. 635, providing that the lawful husband or wife of the person accused shall be a competent witness, but shall not be compelled to testify, the privilege is a personal one of such witness.

Ex parte Hendrickson, 6 U. 3; 21 P. 396.

But where the witness was asked whether the accused did not marry another woman on the same day; held, on habeas corpus, that the question was material in order to determine the validity of witness' claim of privilege, and that an answer might be enforced.

Id.

9279. (5015.) Defendant's failure to testify not to prejudice him. Cross-examination of defendant. If a defendant offers himself as a witness, he may be cross-examined by the counsel for the state the same as any other witness. His neglect or refusal to be a witness shall not in any manner prejudice him, nor be used against him on the trial or proceeding.

Cal. Pen. C., § 1323*.
Accused shall not be compelled to give evidence against himself, Con. art. 1, sec. 12; § 8555.
Witness' privilege in certain cases, civil procedure, § 7141, and note.
Recent possession of stolen property, note to § 8285.

Where defendant testifies, the court may call jury's attention to his interest in the result of the trial, provided his credibility and the weight of his evidence be left to the judgment of the jury.

People v. Callaghan, 4 U. 49; 6 P. 49.

Counsel for prosecution stated to jury that **certain testimony stood uncontradicted,** and that it was in defendant's power to explain it, but did not say how he could explain it; held, no error hereunder.

People v. McGrath, 5 U. 525; 17 P. 116.

Under this section, the fact that defendant makes no explanation of his possession of

stolen property six hours after its being taken raises no presumption against him.
People v. Hart, 10 U. 204; 37 P. 330.
On cross-examination a witness may be questioned concerning his past life, and much latitude of inquiry should be permitted, even if attended with humiliation and disgrace to the witness, to enable the jury to judge of his credibility.
People v. Hite, 8 U. 461; 33 P. 254.
A defendant, as a witness, is subject to the same cross-examination regarding his past life and actions as any other witness.
People v. Hite, 8 U. 461; 33 P. 254.
People v. Larsen, 10 U. 143; 37 P. 252.
State v. Thorne, 39 U. 208; 117 P. 58.
He may be required to answer as to whether he has been convicted of a crime, but the question as to whether he has committed a crime, is privileged.
State v. Shockley, 29 U. 25; 80 P. 865.
State v. Thorne, 39 U. 208; 117 P. 58.
Where he fails to deny some points, he is subject to the same rule as other witnesses.
State v. Mattivi, 39 U. 334; 117 P. 31.
Defendant, a witness, places his general character for truth and veracity in issue, but not his character for honesty and integrity, unless he voluntarily places these in issue.
State v. Marks, 16 U. 204; 51 P. 1089.
The defendant, without some proof tending to rebut proven facts within his knowledge, may not avoid the natural and usual inferences deducible from them, by merely declining to take the stand.
State v. Hillstrom, 46 U. 341; 150 P. 935.
Where the defendant in chief did not testify touching the charge of his beating the deceased, requiring him to answer questions on cross-examination relating to conversations and statements respecting the beating, and deceased's condition attributable thereto, is error.
State v. Vance, 38 U. 1; 110 P. 434.
After a defendant witness' claim of privilege is upheld by the court, it is error to allow the prosecuting attorney to further inquire into his reason for declining to answer and to compel him to state that, if he did answer, his answer would incriminate him in the commission of another crime.
State v. Thorne, 39 U. 208; 177 P. 58.
While it was proper cross-examination to require accused to take a gun to show how he used it on the occasion in question, compelling accused to put on a pair of everalls and a half handkerchief used as a mask in an act of homicide, is error.
Id.
In a prosecution for rape it is error in a cross-examination of the accused to compel him, over objection, to answer questions conveying the idea that he had permitted other children to call at his home in order that he might ravish them.
State v. Williams, 36 U. 273; 103 P. 250.
In a prosecution for assault with intent to murder an officer, where defendant testified that he thought the officer was the husband of the woman in whose cabin he was at the time, and that the husband had come to kill the woman and defendant, as he had threatened to do, the defendant may be cross-examined as to his previous relations with the woman to test his credibility, in the absence of any claim by him that the question tended to degrade him.
State v. Williams, 49 U. 320; 163 P. 1104.

9280. (5016.) Testimony of a witness for another not to be used against him. When two or more persons are jointly, or otherwise, concerned in the commission of an offense, any one of such persons may testify for or against the other in relation to the offense committed, but the testimony of such witness must not be used against him in any criminal action or proceeding.

Mont. Pen. C., § 2443.
Joint defendants, trial, etc., §§ 8836, 8980, 9026.

CHAPTER 47.

SUBPŒNAS.

9284. (5017.) Subpœna defined. Who may issue. The process by which the attendance of witnesses before a court or magistrate is required is a subpœna; it may be signed and issued by:

1. A magistrate before whom a complaint shall be made, for witnesses in the state, either on behalf of the state or of the defendant; or,

2. The county attorney or district attorney, for witnesses in the state, in support of the prosecution, or for such other witnesses as the grand jury, upon an investigation pending before them, may direct; or,

3. The county attorney or district attorney, for witnesses in the state, in support of an information or indictment, to appear before the court in which it is to be tried; or,

4. The clerk of the court in which an information or indictment is to be tried; and he must, at any time, upon application of the defendant and without charge, issue as many blank subpœnas, subscribed by him as clerk, for witnesses in the state, as the defendant may require. Am'd '01, p. 10.

Cal. Pen. C., § 1326*. Subpoenas and witnesses, civil procedure, §§ 7127-7151.
Fees of witnesses, certificates, etc., §§ 2543-2548.

9285. (5018.) Id. Form of direction when books, etc., required. A subpœna must be substantially in the following form:

The state of Utah to A B: You are commanded to appear before C D, a justice of the peace of ..... precinct, in ..... county (or as the case may be), at (naming the place) on (stating the day and hour), as a witness in a

criminal action prosecuted by the state of Utah against E F. Given under my hand this ..... day of ..... A. D. 19.....

G H, Justice of the Peace.

(or J K, county attorney, or by order of the court, L M, clerk, or as the case may be).

If books, papers, or documents are required, a direction to the following effect must be contained in the subpœna. "And you are required also to bring with you the following: (describing intelligently the books, papers, or documents required)."

Cal. Pen. C., § 1327*.

9286. (5019.) By whom served. Officer's duty. Service by mail. A subpœna may be served by any person over the age of twenty-one years. A peace officer must serve in his county any subpœna delivered to him for service for witnesses for the state or for witnesses for a defendant summoned at the expense of the state. Subpœnas shall be served by the sheriff by mail in the manner provided by law for the summoning of trial jurors, or by personal service of the same.

Cal. Pen. C., § 1328*.
When witnesses subpoenaed for defendant at the expense of the state, § 2555.
Service of subpoena, civil procedure, § 7129.
Serving jurors by mail, §§ 3615-3617.
Service of subpoena by telegraph or telephone, § 7032.

9287. (5020.) Personal service, how made. Personal service of a subpœna shall be made by showing the original to the witness personally, and notifying him of its contents.

Cal. Pen. C., § 1328*.
Similar provision, civil procedure, § 7129.

9288. (5021.) Return of subpœna. Written return of service of a subpœna must be made without delay, stating the time and place of service.

Cal. Pen. C., § 1328*.

9289. (5022.) Witness out of county obliged to attend, when. Procedure. No person shall be obliged to attend as a witness before a court or magistrate out of the county where the witness shall reside, or be served with the subpœna, unless the judge of the court in which the offense is triable, or a magistrate, upon an affidavit of the county attorney or prosecutor, or of the defendant or his counsel, showing the evidence of the witness to be material and his attendance at the examination or trial necessary, shall indorse on the subpœna an order for the attendance of the witness.

Cal. Pen. C., § 1330*.
Witness in civil case not required to attend out of county, unless, § 7131.

9290. (5023.) Subpœna for interpreter. Oath of. The court or magistrate may cause to be issued a subpœna requiring any competent person to appear before the court at or during a trial or proceeding and act as interpreter. Such interpreter must be sworn to the effect that he will well and truly, to the best of his ability, discharge the duties of interpreter, under the direction of the court. The manner of compelling compliance on the part of the interpreter shall be the same as that provided in the case of witnesses.

Fee of interpreter, § 2558.
Juror may act as interpreter.
People v. Thiede, 11 U. 241; 39 P. 837; affirmed 159 U. S. 510.

9291. (5024.) Disobedience of witness is a contempt. Excuse. Disobedience to a subpœna, or a refusal to be sworn or to testify as a witness, may be punished by the court or magistrate as a contempt, unless in case of disobedience to a subpœna he can show good cause for his non-attendance.

Cal. Pen. C., § 1331*.
Similar provision, civil procedure, § 7133.

9292. (5025.) Forfeiture of bond of witness. When a witness shall have entered into an undertaking to appear, upon his failure to do so, the undertaking shall be forfeited in the same manner as undertakings of bail.

Cal. Pen. C., § 1332.
Forfeiture of bail, § 9267.

9293. (5026.) When witness is a prisoner. Order. When a person required as a witness before a district court is imprisoned, the judge thereof may order the sheriff to bring the prisoner before such court at the expense of the state or of the defendant, as the case may be.

Mont. Pen. C., § 2467*.
Procedure on civil trial, § 7137.

CHAPTER 48.

EXAMINATION OF WITNESSES CONDITIONALLY.

9297. (5027.) Examination of witness for defense. Method prescribed. When a defendant has been held to answer a charge for a public offense, he may, either before or after an indictment or information, have witnesses examined conditionally, on his behalf, as prescribed in this chapter, and not otherwise.

Cal. Pen. C., § 1335. Testimony of witness on preliminary may be taken in writing, use as evidence, §§ 8765-8767. Examination of witness residing out of state, §§ 9310-9323.

9298. (5028.) Id. When application may be made. When a material witness for the defendant is about to leave the state, or is so sick or infirm as to afford reasonable grounds for apprehending that he will be unable to attend the trial, the defendant may apply for an order that the witness be examined conditionally.

Cal. Pen. C., § 1336.

9299. (5029.) Application upon affidavit. Contents. The application must be made upon affidavit, stating:

1. The nature of the offense charged;
2. The state of the proceedings in the action;
3. The name and residence of the witness, and that his testimony is material to the defense of the action;
4. That the witness is about to leave the state, or is so sick or infirm as to afford reasonable grounds for apprehending that he will be unable to at-attend the trial.

Cal. Pen. C., § 1337.

9300. (5030.) Application made at any time. Notice. The application may be made to the court during the term thereof, or to the judge in vacation, and must be upon three days' notice to the county attorney.

Cal. Pen. C., § 1338*.

9301. (5031.) When order granted. Service on district attorney. If the court or judge is satisfied that the examination of witnesses is necessary, an order must be made that the witness be examined conditionally, at a specified time and place, and that a copy of the order be served on the district attorney, within a specified time before that fixed for the examination. Am'd '01, p. 11.

Cal. Pen. C., § 1339*.

9302. (5032.) Examination of witness before magistrate. The order must direct that the examination be taken before a magistrate named therein, and on proof being furnished to such magistrate of service upon the county attorney of a copy of the order, if no counsel appear on the part of the state, the examination must proceed.

Cal. Pen. C., § 1340.

9303. (5033.) Id. May be stayed, when. If the county attorney, or other counsel appear on behalf of the state, and it is shown to the satisfaction of the magistrate, by affidavit or other proof, or on the examination of the witness, that he is not about to leave the state, or is not sick or infirm, or that the application was made to avoid the examination of the witness on the trial, the examination cannot take place; otherwise it must proceed.

Cal. Pen. C., § 1341.

9304. (5034.) Subpœna for witness. The attendance of the witness may be enforced by a subpœna, issued by the magistrate before whom the examination is to be taken.

Cal. Pen. C., § 1342.

9305. (5035.) Testimony reduced to writing and authenticated. The testimony given by the witness must be reduced to writing, and authenticated in the same manner as a deposition in a civil action.

Cal. Pen. C., § 1343*.

9306. (5036.) Id. Sealed and sent to district court. The deposition

taken must, by the magistrate, be sealed up and transmitted to the clerk of the court in which the action is pending, or may come for trial.

Cal. Pen. C., § 1344.

9307. (5037.) Id. Use on trial. Objections. The deposition, or a certified copy thereof, may be read in evidence by either party on the trial, upon its appearing that the witness is unable to attend, by reason of his death, insanity, sickness, or infirmity, or of his continued absence from the state. Upon reading the deposition in evidence, the same objections may be taken to a question or answer contained therein as if the witness had been examined orally in court.

Cal. Pen. C., § 1345.

CHAPTER 49.

EXAMINATION OF WITNESSES ON COMMISSION.

9310. (5038.) Non-resident witness examined for defense. Procedure. When an issue of fact is joined upon an information or indictment, or before, if the court so order, the defendant may have any material witness, residing out of the state, examined in his behalf, as prescribed in this chapter, and not otherwise.

Cal. Pen. C., § 1349*.
Testimony of witnesses on preliminary may be taken in writing, use as evidence, §§ 8765-8767.
Taking depositions, civil procedure, §§ 7163-7188.
Examination of witness residing in the state, §§ 9297-9307.

9311. (5039.) Id. Application for order. When a material witness for the defendant shall reside out of the state, the defendant may apply for an order that the witness be examined on a commission.

Cal. Pen. C., § 1350.

9312. (5040.) Commission defined. A commission is a process issued under the seal of the court, and the signature of the clerk, directed to some person designated as commissioner, authorizing him to examine the witness upon oath on interrogatories annexed thereto, to take and certify the deposition of the witness, and to return it according to the directions given with the commission.

Cal. Pen. C., § 1351.

9313. (5041.) Application must be made on affidavit. Contents. The application must be made upon affidavit, stating:

1. The nature of the offense charged;
2. The state of the proceedings in the action;
3. The name of the witness, and that his testimony is material to the defense of the action;
4. That the witness resides out of the state.

Cal. Pen. C., § 1352*.

9314. (5042.) Application may be made at any time. Notice. The application may be made to the court during the term, or to the judge in vacation, and must be upon three days' notice to the county attorney.

Cal. Pen. C., § 1353*.

9315. (5043.) When order for commission granted. Stay of trial. If the court or judge to whom the application is made is satisfied of the truth of the facts stated, and that the examination of the witness is necessary to the attainment of justice, an order must be made that a commission be issued to take his testimony; and the court or judge may insert in the order a direction that the trial be stayed for a specified time, reasonably sufficient for the execution and return of the commission.

Cal. Pen. C., § 1354.

9316. (5044.) Interrogatories and cross-interrogatories, settlement of. When the commission is ordered, the defendant must serve upon the county attorney without delay a copy of the interrogatories to be annexed thereto,

with two days' notice of the time at which they will be presented to the court or judge. The county attorney may in like manner serve upon the defendant or his counsel cross-interrogatories, to be annexed to the commission, with the like notice. In the interrogatories either party may insert any question pertinent to the issue. When the interrogatories and cross-interrogatories shall be presented to the court or judge according to the notice given, the court or judge must modify the questions so as to conform them to the rules of evidence, and must indorse upon them his allowance, and annex them to the commission.

Cal. Pen. C., § 1355.

9317. (5045.) Instructions for return of commission. Unless the parties otherwise consent, by an indorsement upon the commission, the court or judge must indorse thereon a direction as to the manner in which it must be returned, and may, in his discretion, direct that it be returned by mail or otherwise, addressed to the clerk of the court in which the action is pending, designating his name and the place where his office is kept.

Cal. Pen. C., § 1356.

9318. (5046.) Examination of witness. Form of deposition. Return. The commissioner, unless otherwise specifically directed, may execute the commission as follows:

1. He must publicly administer an oath to the witness that his answers given to the interrogatories shall be the truth, the whole truth, and nothing but the truth;

2. He must cause the examination of the witness to be reduced to writing, and subscribed by him;

3. He must write the answers of the witness as nearly as possible in the language in which he shall give them, and read to him each answer as it is taken down, and correct or add to it until it conforms to what he declares is the truth;

4. If the witness declines to answer a question, that fact, with the reason assigned by him for declining, must be stated;

5. If any papers or documents are produced before him and proved by the witness, the same, or copies thereof, must be annexed to the deposition, subscribed by the witness, and certified by the commissioner;

6. The commissioner must subscribe his name to each sheet of the deposition, and annex the deposition with the papers and documents proved by the witness, or copies thereof, to the commission, and must close it up under seal, and address it as directed by the indorsement thereon;

7. If there is a direction on the commission to return it by mail, the commissioner must immediately deposit it in the nearest postoffice.

If any other direction is made by the written consent of the parties, or by the court or judge, on the commission as to its return, he must comply with the direction. A copy of this section must be annexed to the commission.

Cal. Pen. C., § 1357.

9319. (5047.) Delivery of commission and return by agent. Affidavit. If the commission and return is delivered by the commissioner to an agent, he must deliver the same to the clerk to whom it is directed, or to the judge of the court in which the action is pending, by whom it may be received and opened, upon the agent making affidavit that he received it from the hands of the commissioner, and that it has not been opened nor altered since he received it.

Cal. Pen. C., § 1358.

9320. (5048.) Id. Procedure if agent dead, etc. If the agent is dead, or from sickness or other casualty unable personally to deliver the commission and return, as prescribed in the next preceding section, it may be received by the clerk or judge from any other person, upon his making an affidavit that he received it from the agent; that the agent is dead, or from sickness or other casualty unable to deliver it; that it has not been opened nor altered since the person making the affidavit received it; and that he believes

it has not been opened nor altered since it came from the hands of the commissioner.

Cal. Pen. C., § 1359.

9321. (5049.) Filing and opening of commission and return. The clerk or judge receiving and opening the commission and return must immediately file it with the affidavit mentioned in the two next preceding sections in the office of the clerk of the court in which the action is pending. If the commission with the return is transmitted by mail, the clerk to whom it is addressed must receive it from the postoffice, and open and file it in his office, where it must remain, unless otherwise directed by the court or judge.

Cal. Pen. C., § 1360.

9322. (5050.) Commission and return open to inspection. The commission and return must at all times be open to the inspection of the parties, who must be furnished by the clerk with copies of the same or of any part thereof, on payment of his fees.

Cal. Pen. C., § 1361.

9323. (5051.) Deposition may be read in evidence. Objections. The depositions taken under the commission may be read in evidence by either party on the trial, upon it being shown that the witness is unable to attend from any cause whatever; and the same objections may be taken to a question in the interrogatories, or to an answer in the deposition, as if the witness had been examined orally in court.

Cal. Pen. C., § 1362.

CHAPTER 50.

INQUIRY INTO SANITY OF DEFENDANT.

9327. (5052.) No person to be tried or punished while insane. No person while insane shall be tried, adjudged to punishment, or punished for a public offense.

Cal. Pen. C., § 1367.

Inquiry into the sanity of person sentenced to death, §§ 9174-9178.

Insane person incapable of committing crime, § 7915.

Who are of sound mind, § 7909.

"Insane person" includes what, § 5848.

Burden of proof of insanity on the defense.

People v. Dillon, 8 U. 92; 30 P. 150.

People v. Calton, 5 U. 451; 16 P. 902.

"The capacity of the defendant to distinguish between right and wrong at the time and with respect to the act which is the subject of inquiry;" held, to correctly state the law.

People v. Calton, 5 U. 451; 16 P. 902; 130 U. S. 83.

The test of insanity is whether defendant, at the time of the offense, had the mental capacity to know that in doing the act he was doing wrong.

State v. Brown, 36 U. 46; 102 P. 641.

9328. (5053.) Inquiry into sanity of accused or convicted person. Procedure. Whenever a person charged with crime shall have escaped information or indictment therefor, or shall have been acquitted thereof on trial, upon the ground of insanity; or whenever a person during trial, or when brought up for sentence, or while confined as a criminal in the state prison or a county jail, shall become insane, complaint under oath must be made setting forth the facts in the case, and the district court of the county must proceed as hereinafter in this chapter set out.

Cal. Pen. C., § 1368*.

District judges to commit insane person to state mental hospital, §§ 5388-5406.

Insanity as a cause why judgment should not be pronounced, § 9050.

9329. (5054.) Id. Trial by jury. Suspension of criminal proceedings. The question of such person's sanity may be submitted to a jury that must be drawn and selected as in other cases. All criminal proceedings against him must be suspended until such question is determined. The trial jury, if one has been impaneled, may in the meanwhile be discharged or retained, in the discretion of the court.

Cal. Pen. C., § 1368*.

9330. (5055.) Order of trial for insanity. The trial of the question of insanity must proceed in the following order:

1. The counsel for the defendant must open the case and produce evidence in support of the allegation of insanity;

2. The counsel for the state may then open its case and produce evidence in support thereof;

3. The parties may then respectively offer rebutting testimony only, unless the court, for good reason in furtherance of justice, permit them to offer testimony upon the original case;

4. When the evidence is concluded, unless the case is submitted to the jury on either or both sides without argument, the counsel for the state must commence, and the defendant or his counsel may conclude, the argument to the jury;

5. If there are pending proceedings for an offense punishable with death, two counsel on each side may argue the case to the jury, in which event they must do so alternately. In other instances, the argument may be restricted to one counsel on each side;

6. The court must then charge the jury, stating to them all matters of law necessary for their information in rendering a verdict.

Cal. Pen. C., § 1369*.

9331. (5056.) Procedure on finding of sanity. If the jury find the defendant sane, the trial must proceed, or judgment be pronounced, or he be returned to prison, or be discharged, as the case may be.

Cal. Pen. C. § 1370*. Similar provision, § 9050.

9332. (5057.) Procedure on finding of insanity. If the jury find the defendant insane, the judge shall order the sheriff to forthwith convey him, together with a copy of the complaint, the commitment, and the physicians' certificate, if any, to the state mental hospital; *provided,* the court deems his freedom a menace to public quietude. Proceedings against the defendant must be suspended until he becomes sane.

Cal. Pen. C., § 1370*.

9333. (5058.) Commitment to asylum exonerates bail. The commitment of the defendant to the state mental hospital shall exonerate his bail, or entitle a person authorized to receive the property of such defendant to a return of any money he may have deposited instead of bail.

Cal. Pen. C., § 1371.

9334. (5059.) Id. Detention until sanity restored. Subsequent proceedings. A person received into the state mental hospital in pursuance of the foregoing provisions must be detained there until he becomes sane. If then the sentence of such person shall have expired, he must be restored to liberty. But if he is not legally discharged, the superintendent must give notice of his recovery to the sheriff of the county from which he shall have been sent. The sheriff shall thereupon, without delay, bring the defendant from the state mental hospital, and either place him in proper custody until he is brought to trial or judgment, or return him to prison to serve out the remainder of his term. The defendant shall be entitled to have the time of his confinement in the state mental hospital deducted from his term.

Cal. Pen. C., § 1372*.

9335. (5060.) Expenses of examination of insane, how paid. The expenses of the examination and of the sending of such persons, save convicts in the state prison, to and from the state mental hospital, shall be in the first instance chargeable to the county from which they shall have been sent. But the county may recover them from the estates of any such persons, or from a relative legally bound to care for them, or from the county of which such persons may be resident. Expenses of the examination and of the sending of an insane convict to and from the state mental hospital must be borne by the state, if he is impecunious.

Cal. Pen. C., § 1373*. Support by relatives, § 5853.

9336. (5061.) Clerk to certify costs to state or to county. The clerk of the district court before which an examination shall have been conducted shall certify the costs to the state auditor, who is hereby authorized to issue his

warrants therefor, or to the board of county commissioners, as the case may be.

County charges, § 1434.

CHAPTER 51.

COMPROMISING PUBLIC OFFENSES.

9339. (5062.) What misdemeanors may be compromised. When a defendant is held to answer on a charge of misdemeanor, for which the person injured by the act constituting the offense has a remedy by a civil action, the offense may be compromised as provided in the next section, except when it is committed:

1. By or upon an officer of justice, while in the execution of the duties of his office;
2. Riotously;
3. With an intent to commit a felony.

Cal. Pen. C., § 1377.

9340. (5063.) Id. By permission of court. Bar. If the party injured appears before the court in which the trial is to be had at any time before trial, and acknowledges that he has received satisfaction for the injury, the court may, in its discretion, on payment of the costs incurred, order all proceedings to be stayed upon the prosecution, and the defendant to be discharged therefrom; but in such case the reasons for the order must be set forth therein and entered on the minutes. The order shall be a bar to another prosecution for the same offense.

Cal. Pen. C., § 1378.
Bar generally, §§ 8520, 8522, 8555, 8883, 8904.
Decisions on former conviction, acquittal, or once in jeopardy, note to § 8905.

9341. (5064.) No offense to be compromised except as herein provided. No public offense shall be compromised, nor shall any proceeding or prosecution for the punishment therof upon a compromise be stayed, except as provided in this chapter.

Cal. Pen. C., § 1379.
Compounding or concealing crimes, penalty, §§ 7920, 7985.

CHAPTER 52.

DISMISSAL OF ACTION.

9345. (5065.) Dismissal for failure to prosecute. The court, unless good cause to the contrary is shown, must order the prosecution to be dismissed in the following cases:

1. When a person has been held to answer for a public offense, if an information is not filed nor an indictment found against him at the next term of the court at which he is held to answer;
2. If the defendant whose trial has not been postponed upon his application is not brought to trial at the next term of the court in which the information or indictment is triable, after it is filed or found.

Cal. Pen. C., § 1382*.
Dismissal for failure to file new information or find new indictment after first has been set aside, § 8882.
Nolle prosequi, §§ 8780, 9348.
Decisions on once in jeopardy, note to § 8905.
Dismissal on sustaining demurrer, §§ 8893, 8894.
Where information was filed May 21st, defendant arraigned August 15th, May term, the case continued for the term and the trial occurred at the September term, the defendant was not entitled to be discharged under provisions of this section.
State v. Endsley, 19 U. 478; 57 U. 430.
This section does not provide that a prosecution shall be dismissed for failure to file information, as required by § 8779, and the fact that an information was not filed within thirty days after commitment does not entitle defendant to a discharge, where good cause is shown for delay in the prosecution.
State v. Reynolds, 24 U. 29; 66 P. 614.

9346. (5066.) Action continued from term to term. Discharge. If the defendant is not charged nor tried as provided in the next preceding section,

and sufficient reason therefor is shown, the court may order the action to be continued from term to term, and in the meantime may discharge the defendant from custody on his own undertaking of bail for his appearance to answer the charge at the time to which the action shall be continued.

Cal. Pen. C., § 1383*. This section not mandatory.
Continuance generally, § 8931. Ex parte Lowrie, 4 U. 177; 7 P. 493.

9347. (5067.) Dismissal discharges defendant. If the court directs the action to be dismissed, the defendant must, if in custody, be discharged therefrom; or if admitted to bail, his bail shall be exonerated, or money deposited instead of bail must be refunded to him.

Cal. Pen C., § 1384.

9348. (5068.) Dismissal on motion of court or district attorney. The court may, either of its own motion or upon the application of the district attorney, and in furtherance of justice, order an action, information, or indictment to be dismissed. The reasons for the dismissal must be set forth in an order entered upon the minutes. Am'd '01, p. 9.

Cal. Pen. C., § 1385*. Nolle prosequi, § 8780.
Discontinuance of prosecution after examination and commitment, § 8780. Dismissal for failure to prosecute, § 9345.

9349. (5069.) Id. District attorney not to abandon prosecution otherwise. No prosecuting attorney can discontinue or abandon a prosecution for a public offense, except as provided in the next preceding section.

Cal. Pen. C., § 1386*.

9350. (5070.) Dismissal a bar except in case of felony. An order for the dismissal of an action as provided in this chapter shall be a bar to any other prosecution for the same offense, if it is a misdemeanor; but shall not be a bar if the offense is a felony.

Cal. Pen. C., § 1387. Decisions on once in jeopardy, etc., note to § 8905.
Bar generally, §§ 8520, 8522, 8555, 8883, 8903, 8905.

CHAPTER 53.

PROCEEDINGS AGAINST CORPORATIONS.

9354. (5071.) Complaint against corporation. Requisites of summons. Upon a complaint against a corporation, the magistrate must issue a summons, signed by him, with his name of office, requiring the corporation to appear before him at a specified time and place to answer the charge, the time to be not less than ten days after the issuing of the summons.

Cal. Pen. C., § 1390*. For violations of live stock act, § 231.
For violation of city ordinance, §§ 590, 595.

9355. (5072.) Id. Form of summons. The summons must be substantially in the following form:

State of Utah, county of .....

The state of Utah to the (naming the corporation):

You are hereby summoned to appear before me at (naming the place) on (specifying the day and hour), to answer a charge made against you upon the complaint of A B for (designating the offense generally).

Dated at ..... this ..... day of ....., 19.....

G H, Justice of the Peace (or as the case may be).

Cal. Pen. C., § 1391*.

9356. (5073.) Id. Service of summons. The summons must be served at least five days before the day of appearance fixed therein, by delivering a copy thereof and showing the original to the president or other head of the corporation, or to the secretary, cashier, or managing agent thereof.

Cal. Pen. C., § 1392.

9357. (5074.) Preliminary examination of corporation. At the time appointed in the summons, the magistrate must proceed to investigate the

charge in the same manner as in the case of a natural person, so far as those proceedings are applicable.

Cal. Pen. C., § 1393. Preliminary examination, §§ 8737-8768.

9358. (5075.) Id. Certificate of discharge, or of probable cause. After hearing the evidence, the magistrate must certify upon the complaint either that there is or is not sufficient cause to believe the corporation guilty of the offense charged, and must return the complaint, the certificate, and the other documents, if any, as prescribed in § 8768.

Cal. Pen. C., § 1394*.

9359. (5076.) Id. Prosecution by information or indictment. If the magistrate's return shows that there is sufficient cause to believe the corporation guilty of the offense charged, the district attorney or grand jury must proceed thereon as in the case of a natural person held to answer.

Am'd '01, p. 7.

9360. (5077.) Id. Summons. Same proceedings as against a person. Whenever an information is filed or indictment found against a corporation, it must be summoned to appear as provided in the Code of Civil Procedure. The corporation may appear by counsel. If it does not appear, a plea of not guilty must be entered. In either case, proceedings thereupon must be had as if the defendant were a natural person.

Cal. Pen. C., § 1396*.

9361. (5078.) Execution against corporation for fine, etc. Whenever a fine and costs, or either, shall be imposed upon a corporation on conviction, judgment therefor may be executed by the sheriff of the county out of the real and personal property of such corporation in the same manner as a judgment in a civil action.

Cal. Pen. C., § 1397*.
Penalty for felony by corporation, § 7904; for misdemeanor, § 7904.

CHAPTER 54.

ENTITLING AFFIDAVITS.

9364. (5079.) Affidavit defectively entitled is valid, when. It shall not be necessary to entitle an affidavit or deposition in the action, whether taken before or after information or indictment, or upon an appeal; but if made without a title, or with an erroneous title, it shall be as valid and effectual for every purpose as if it were duly entitled, if it intelligibly refers to the proceeding, information, indictment, or appeal in which it is made.

Cal. Pen. C., § 1401.
Affidavits defectively entitled, when valid, civil procedure, §§ 6728, 7213.

CHAPTER 55.

ERRORS AND MISTAKES.

9365. (5080.) Departure from prescribed forms of procedure does not invalidate proceedings. Proviso. Neither a departure from the form or mode prescribed by this code in respect to any pleading or proceeding nor any error or mistake therein shall render it invalid unless it shall have actually resulted in a miscarriage of justice. Am'd '15, p. 205.

Cal. Pen. C., § 1404.
Similar sections, civil procedure, §§ 6622, 6968.
Supreme court shall disregard errors, etc., not affecting substantial rights, §§ 9222, 9231.
Statutes to be liberally construed, §§ 5839, 6596, 7892.
Non-prejudicial errors disregarded on appeal, civil procedure, note to § 6994, 6622, 6698.
Kolb v. Peterson, 51 U. —; 168 P. 97.

The fact that an information alleged that the name of the woman with whom accused was convicted of having committed fornication was "Verda" M., when her name was "Betea" M., was not fatal where the identiy of the woman was established.
State v. Chipman, 40 U. 549; 123 P. 89.

CHAPTER 56.

SEARCH WARRANTS.

9368. (5081.) Search warrant defined. A search warrant is an order in writing, in the name of the state, signed by a magistrate and directed to a peace officer, commanding him to search for personal property and bring it before the magistrate.

Cal. Pen. C., § 1523.

9369. (5082.) Id. Grounds for issuance. It may be issued upon any of the following grounds:

1. When the property was stolen or embezzled; in which case it may be taken on the warant from any place in which it is concealed, or from any person in whose possession it may be;

2. When it was used as the means of committing a felony; in which case it may be taken on the warrant from the place in which it is concealed, or from any person in whose possession it may be;

3. When it is in the possession of any person with the intent to use it as the means of committing a public offense, or in the possession of another to whom he may have delivered it for the purpose of concealing it or preventing its being discovered; in which case it may be taken on the warrant from such person, or from any place occupied by him or under his control, or from the possession of the person to whom he may have so delivered it.

Cal. Pen. C., § 1524*.
For adulterated food, etc., §§ 1949, 1950, 1951.
For opium, pipes, etc., § 4434.
For casks, barrels, etc., bearing name, § 8455.
Special grounds, see intoxicating liquors, prohibition of, §§ 3354-3358.
Under dairy and food products, §§ 1949-1951.

9370. (5083.) To issue but upon probable cause. Oath. Description. A search warrant shall not issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized.

Cal. Pen. C., § 1525*. This section follows Con. art. 1, sec. 14.

9371. (5084.) Examination of complainant and witnesses. Depositions. The magistrate must, before issuing the warrant, examine on oath the complainant, and any witnesses he may produce, and take their depositions in writing, and cause them to be subscribed by the parties making them.

Cal. Pen. C., § 1526.

9372. (5085.) Id. Requisites of depositions. The depositions must set forth the facts tending to establish the grounds of the application, or probable cause for believing that they exist.

Cal. Pen. C., § 1527.

9373. (5086.) Warrant issued if magistrate satisfied. Contents. If the magistrate is thereupon satisfied of the existence of the grounds of the application, or that there is probable cause to believe their existence, he must issue a search warrant, signed by him with his name of office, to a peace officer in his county, commanding him forthwith to search the person or place named, for the property specified, and to bring it before the magistrate.

Cal. Pen. C. 1528.

9374. (5087.) Form of search warrant. The warrant must be in substantially the following form:

State of Utah, county of .....

The state of Utah to any sheriff, constable, marshal, or policeman in the county of .....

Proof by affidavit, having this day been made before me by (naming every person whose affidavit has been taken) that (stating the grounds of the application, or, if the affidavit is not positive, that there is probable cause for believing) that (stating the ground of the application in the same manner), you are therefore commanded in the daytime (or at any time of the day or night, as the case may be), to make immediate search on the person of ..... or in the house situated ....., (describing it or any other place to be searched, with reasonable particularity, as the case may be), for the following prop-

erty: (describing it with reasonable particularity); and, if you find the same or any part thereof, to bring it forthwith before me at (stating the place).

Given under my hand and dated this ..... day of ....., A. D. 19.....

....., Justice of the Peace (or as the case may be).

Cal. Pen. C., § 1529*.

9375. (5088.) Warrant served by officer mentioned therein. A search warrant may in all cases be served by any of the officers mentioned in its directions, but by no other person, except in aid of the officer on his requiring it, he being present and acting in its execution.

Cal. Pen. C., § 1530.

9376. (5089.) Officer may break door, etc., to serve. The officer may break open any outer or inner door or window of a house, or any part of a house or anything therein, to execute the warrant, if, after notice of his authority and purpose, he is refused admittance.

Cal Pen. C., § 1531.
Breaking door or window to serve warrant of arrest, § 8722.

9377. (5090.) Id. To liberate self or assistant. He may break open any outer or inner door or window of a house, for the purpose of liberating a person who, having entered to aid him in the execution of a warrant, is detained therein, or when necessary for his own liberation.

Cal. Pen C., § 1532.

9378. (5091.) Direction to serve in daytime. At any time, when. The magistrate must insert a direction in the warrant that it be served in the daytime, unless the affidavits are positive that the property is on the person or in the place to be searched, in which case he may insert a direction that it be served at any time of the day or night.

Cal. Pen. C., § 1533. Arrest may be made, when, § 8718.

9379. (5092.) Warrant void after ten days. A search warrant must be executed and returned to the magistrate who issued it within ten days after its date; after the expiration of this time the warrant, unless executed, shall be void.

Cal. Pen. C., § 1534.

9380. (5093.) Officer to receipt for property taken. When the officer takes property under the warrant, he must give a receipt for the property taken, specifying it in detail, to the person from whom it was taken by him, or in whose possession it was found; or, in the absence of any person, he must leave it in the place where he found the property.

Cal. Pen. C., § 1535.
Receipt for property taken from person arrested, § 9414.

9381. (5094.) Disposal of property taken. When the property is delivered to the magistrate, he must, if it was stolen or embezzled, dispose of it or its proceeds, as provided for the disposal of stolen or embezzled property in chap. 58 (§§ 9410.9415) of this code. The magistrate may, if such stolen or embezzled property is a living animal or of a perishable nature, order a sale thereof. If it was taken on a warrant issued on the grounds stated in subs. 2, 3, of § 9369, he must retain it in his possession, subject to the order of the court to which he is required to return the proceedings before him, or of any other court in which the offense in respect to which the property taken is triable.

Cal. Pen. C., § 1536*.

9382. (5095.) Officer's return of warrant and inventory. The officer must forthwith return the warrant to the magistrate, and deliver to him a written inventory of the property taken, made publicly or in the presence of the person from whose possession it was taken and of the applicant for the warrant, if they are present, verified by the affidavit of the officer at the foot of the inventory, and taken before the magistrate at the time, to the following effect: "I, ..., the officer by whom this warrant was executed, do swear that the above inventory contains a true and detailed account of all the property taken by me on the warrant."

Cal. Pen. C., § 1537.

9383. (5096.) Who may obtain copy of inventory. The magistrate must thereupon, if required, deliver a copy of the inventory to the person from whose possession the property was taken, and to the applicant for the warrant.

Cal. Pen. C., § 1538.

9384. (5097.) Trial of title to property. Testimony in writing. If the grounds on which the warrant was issued are controverted, the magistrate must proceed to take testimony in relation thereto. The testimony of each witness must be reduced to writing and authenticated in the manner prescribed for taking the depositions of witnesses on preliminary examination.

Cal. Pen. C., § 1539*. Deposition of witness on preliminary examination, §§ 8750, 8766, 8767.

9385. (5098.) Id. When property to be restored. If it appears that the property taken is not the same as that described in the warrant, or that there is no probable cause for believing the existence of the grounds on which the warrant was issued, the magistrate must cause it to be restored to the person from whom it was taken.

Cal. Pen. C., § 1540.

9386. (5099.) Return of papers to district court, or trial. The magistrate must annex together the depositions, the search warrant, the return, and the inventory, and return them to the district court of the county before the first day of its next term, unless he has jurisdiction of the offense, in which case he must retain them and proceed to try the accused.

Cal. Pen. C., § 1541*.

9387. (5100.) Person charged with felony to be searched. When a person charged with a felony is supposed to have on his person a dangerous weapon, or anything which may be used as evidence of the commission of the offense, the officer making the arrest shall cause him to be searched, and the weapon or other thing to be retained, subject to the order of the court in which the defendant may be tried.

Cal. Pen. C., § 1542*.
Weapons taken from person arrested, § 8724. Receipt for property taken, § 9414.

9388. (5101.) Procuring search warrant without cause a crime. A person who maliciously and without probable cause shall procure a search warrant to be issued and executed shall be deemed guilty of a misdemeanor.

N. Dak. (1895) § 8479.

9389. (5102.) Misconduct in serving warrant a crime. A peace officer who, in executing a search warrant, shall wilfully exceed his authority or exercise it with unnecessary severity shall be deemed guilty of a misdemeanor.

N. Dak. (1895) § 8480.

CHAPTER 57.

FUGITIVES FROM JUSTICE.

9393. (5103.) Rewards for apprehension of fugitives. The governor may offer a reward, not exceeding $1000, payable out of the state treasury, for the apprehension:

1. Of any convict who shall have escaped from the state prison; or,
2. Of any person who shall have committed or shall be charged with the commission of a felony.

N. Dak. (1895) § 8482; Cal. Pen. C., § 1547*.

9394. (5104.) Delivery of fugitive upon requisition. A person charged in any state or territory of the United States with treason, felony, or other crime, who shall flee from justice and be found in this state, shall, on demand of the executive authority of the state or territory from which he shall have fled, be delivered over by the governor of this state, to be removed to the state or territory having jurisdiction of the crime.

Con. U. S. art. 4, sec. 2; Cal. Pen. C., § 1548.

Sec. 5278, R. S. U. S., embraces every offense known to the laws of the demanding state, including misdemeanors.

In re Louis Reggel, 114 U. S. 642.

Same case, 8 U. S. 21; 28 P. 955.

Each state has the right to prescribe forms of pleading and process, subject only to the restraints of the federal constitution; consequently, it may not be objected, in a case involving the surrender of a fuguitive from justice, that the indictment is not technically framed, if it substantially conforms to the laws of the demanding state.

Id.

The responsibility of determining whether he is a fugitive from justice rests upon the **government of the state** or territory in which the accused was found.

Id.

9395. (5105.) Magistrate may issue warrant. A magistrate may issue a warrant for the apprehension of a person so charged, who shall flee from justice and be found within this state.

N. Dak. (1895) § 8484; Cal. Pen. C., § 1549. Warrant generally, §§ 8688-8707.

9396. (5106.) Proceedings for arrest and commitment of fugitive. The proceedings for the arrest and commitment of a person charged are in all respects similar to those provided in this code for the arrest and commitment of a person charged with a public offense committed in this state, except that an exemplified copy of an indictment found, or other judicial proceedings had, against him in the state or territory in which he is charged to have committed the offense may be received as evidence before the magistrate.

Mont. Pen. C., § 2855; N. Dak. (1895) § 8485; Cal. Pen. C., § 1550.

9397. (5107.) Commitment of accused to await requisition. If from the examination it appears that the accused has cammitted the crime alleged, the magistrate, by warrant reciting the accusation, must commit him to the proper custody of his county for such time, to be specified in the warrant, as the magistrate may deem reasonable, to enable the arrest of the fugitive under the warrant of the executive of this state, on the requisition of the executive authority of the state or territory in which he committed the offense, unless he gives bail as provided in the next succeeding section, or until he is legally discharged.

Mont. Pen. C., § 2856; N. Dak. (1895) § 8486; Cal. Pen. C., § 1551.

9398. (5108.) Id. Bail. The magistrate may admit the person arrested to bail by an undertaking, with sufficient sureties, in such sum as he deems proper, for his appearance before him at a time specified in the undertaking, and for his surrender, to be arrested upon the warrant of the governor of this state.

Mont. Pen. C., § 2857; N. Dak. (1895) § 8487; Cal. Pen. C., § 1552. Bail generally, §§ 9243-9270.

9399. (5109.) Notice to district attorney of arrest. Immediately upon the arrest of the person charged, the magistrate must give notice to the district attorney. Am'd '01, p. 7.

Mont. Pen. C., § 2858; N. Dak. (1895) § 8488*.

9400. (5110.) Duty of district attorney. The district attorney must immediately thereafter give notice to the executive authority of the state or territory, or to the prosecuting attorney or presiding judge of the criminal court of the city or county therein having jurisdiction of the offense, to the end that a demand may be made for the arrest and surrender of the person charged. Am'd '01, p. 7.

Mont. Pen. C., § 2859*; N. Dak. (1895) § 8489*; Cal. Pen. C., § 1554*.

9401. (5111.) Discharge of accused for lack of prosecution. The person arrested must be discharged from custody or bail, unless before the expiration of the time designated in the warrant or undertaking he is arrested under the warrant of the governor of this state.

Mont. Pen. C., § 2860; N. Dak. (1895) § 8490; Cal. Pen. C., § 1555.

9402. (5112.) Return of magistrate. Procedure in district court. The magistrate must return his proceedings to the district court of the county, which must thereupon inquire into the cause of the arrest and detention of the person charged, and if he is in custody, or the time for his arrest has not elapsed, it may discharge him from detention, or may order his undertaking of bail to be canceled, or continue his detention for a longer time, or readmit him to bail to appear and surrender himself within a time specified in the undertaking.

Mont. Pen. C., § 2861; N. Dak. (1895) § 8491; Cal. Pen. C., § 1556.

9403. (5113.) Fugitive given twenty-four hours to demand counsel. Habeas corpus. Any person who is arrested within this state, by virtue of a warrant issued by the governor of this state upon a requisition of the governor of any other state or territory, as a fugitive from justice, under the laws of the United States, shall not be delivered to the agent of such state or territory until notified of the demand made for his surrender, and given twenty-four hours to make demand for counsel; and should such demand be made for the purpose of suing out a writ of habeas corpus, the prisoner shall be forthwith taken to the judge of the district court, and ample time given to sue out such writ, such time to be determined by the said judge of the district court.

N. Dak. (1895) § 8492. Right of counsel, Con. art. 1, sec. 12; § 8553.

9404. (5114.) Id. Penalty for violation. Any officer who shall deliver such person to such agent for extradition without first having complied with the provisions of the next preceding section shall be deemed guilty of a misdemeanor.

N. Dak. (1895) § 8493.

9405. (5115.) Fugitives from this state. Demand. Costs. The governor of this state may, in any case authorized by the constitution and laws of the United States, demand of the executive authority of any other state or territory within the United States any fugitive from justice or any person charged with the commission of treason, felony, or other crime in this state, and appoint agents to receive such persons for and on behalf of this state. The account of any such agent or agents employed for such purposes must be audited by the board of examiners, and be paid out of the state treasury.

N. Dak. (1895) § 8494*.

9406. (5116.) Id. No reward to public officer. No compensation, fee, or reward of any kind can be paid to or received by a public officer of this state, for a service rendered or expense incurred in procuring from the governor the demand mentioned in the next preceding section, or the surrender of the fugitive, or for conveying him to this state, or detaining him herein, except as provided in the next preceding section.

N. Dak. (1895) § 8495; Mont. Pen. C., § 2863; Cal. Pen. C., § 1558*.

9407. (5117.) Id. Violation a misdemeanor. A violation of the next preceding section is a misdemeanor.

N. Dak. (1895) § 8496.

CHAPTER 58.

DISPOSAL OF PROPERTY STOLEN OR EMBEZZLED.

9410. (5118.) Held subject to order of magistrate. When property alleged to have been stolen or embezzled comes into the custody of a peace officer, he must hold it subject to the order of the magistrate authorized by the next succeeding section to direct the disposal thereof.

Cal. Pen. C., § 1407.

9411. (5119.) Property delivered to owner. Order. Costs. On satisfactory proof of the ownership of the property, the magistrate before whom the complaint is laid, or who examines the charge against the person accused of stealing or embezzling it, must order it to be delivered to the owner, upon his paying the necessary expenses incurred in its preservation, to be certified by the magistrate. The order shall entitle the owner to demand and receive the property.

Cal. Pen. C., § 1408.

9412. (5120.) Id. If property stolen or embezzled comes into custody of the magistrate, it must be delivered to the owner on satisfactory proof of his title, and on his paying the necessary expenses incurred in its preservation, to be certified by the magistrate.

Cal. Pen. C., § 1409. Property taken on search warrant, § 9381.

9413. (5121.) Sale of unclaimed property. Proceeds. If the property stolen or embezzled is not claimed by the owner before the expiration of six months from the conviction of a person for stealing or embezzling it, the magistrate or other officer having it in custody must sell the same at public auction, as provided by law for the sale of personal property on execution, and with the proceeds pay:

1. The expenses necessary for its preservation and sale;
2. Any balance into the county treasury of the county in which the offense shall have been committed.

Cal. Pen. C., § 1411*.

9414. (5122.) Property taken from person arrested. Duplicate receipt. When money or other property is taken from a defendant, arrested upon a charge of a public offense, the officers taking it must at the time give duplicate receipts therefor, specifying particularly the amount of money or the kind of property taken; one of which receipts he must deliver to the defendant, and the other he must forthwith file with the clerk of the court to which the complaint and other papers in the case are required by law to be sent. When such property is taken by a police officer of any incorporated city, he must deliver one of the receipts to the defendant, and the other, with the property, at once to the person in charge of the police office in such city.

Cal. Pen. C., § 1412*.
Weapons taken from arrested person, §§ 8724, 9387.
Receipt for property taken on search warrant, § 9380.

Money taken from a prisoner at the time of his arrest is his property, subject to his order. Rickers v. Simcox, 1 U. 33.

9415. (5123.) Register to be kept at police station. The person having charge of the police office in any incorporated city must enter in a suitable book a description of every article of property alleged to be stolen or embezzled, and brought into the office or taken from the person of a prisoner, and must attach a number to each article, and make a corresponding entry thereof.

Cal. Pen. C., § 1413*.

CHAPTER 59.

JUSTICES' COURTS.

COMPLAINT, WARRANT, PLEA, AND CHANGE OF VENUE.

9419. (5124.) Jurisdiction extends to county limits. In criminal cases the jurisdiction of justices of the peace extends to the limits of their respective counties.

Criminal jurisdiction of justices of the peace, § 1794.
Process to any part of the county, § 1793.

In certain cities all cases brought before justice, § 1456.
Jurisdiction under liquor prohibition act, §§ 3348, 3354.

9420. (5125.) Requisites of complaint. Proceedings and actions before a justice's court for a public offense must be commenced by complaint under oath, setting forth the offense charged, with such particulars of time, place, person, and property as to enable the defendant to understand distinctly the character of the offense complained of, and to answer the complaint.

Cal. Pen. C., § 1426*.
Approval of county attorney as to issuance of warrant, §§ 2528, 8688.
Provisions concerning complaint, warrant, arrest, preliminary examinations, etc., in cases where a justice has no jurisdiction except as a committing magistrate, §§ 8680, 8769.
Magistrates enumerated, § 8678.

Justice may examine complainant and his witnesses, § 8682.
Pleadings before a justice of the peace must contain all the material qualities of a common law pleading, and an information or complaint must show affirmatively that a crime has been committed.
Ex parte Wiseman, 1 U. 39.

9421. (5126.) Warrant of arrest. Form. If the justice of the peace is satisfied that the offense complained of has been committed, he must issue a warrant of arrest, which must be substantially in the following form:

State of Utah, county of .....

The state of Utah to any sheriff, constable, marshal, or policeman in this state:

Complaint upon oath having been made this day before me ....., justice of the peace, by C D, that the offense of (designating it generally) has been committed, and accusing E F thereof; you are therefore commanded to arrest the above named E F and bring him before me forthwith at (naming the place).

Witness my hand at ....., this ..... day of ....., A. D. 19.....

A B, Justice of the Peace.

Cal. Pen. C., § 1427*.
Bail generally, §§ 9243-9270.
Arrest, §§ 8712-8731.
Form of warrant issued by magistrate, § 8689.

9422. (5127.) Justice to keep docket. Entries. A docket must be kept by the justice of the peace, in which must be entered each action, and the proceedings of the court therein.

Cal. Pen. C., § 1428*.
Docket of justice, civil procedure, § 7505.

9423. (5128.) Trial. Complaint to be read. Plea. Before the trial commences, the complaint must be distinctly read to the defendant, and he must be asked if he is designated therein by his right name, and be required to plead.

N. Dak. (1895) § 6752.
Right of accused persons, Con. art. 1, secs. 7-13; §§ 8553-8556.
In no instance shall any accused person before final judgment be compelled to advance money or fees to secure rights guaranteed, Con. art. 1, sec. 12.

9424. (5129.) Name of defendant. Four kinds of pleas. If the defendant objects that he is wrongly named in the complaint and gives his right name, the proceeding shall be amended accordingly. If he does not give his right name, he is thereafter precluded from making any objections on the ground that he is not designated by his right name. There are four kinds of pleas to a complaint; a plea of:

1. Guilty;
2. Not guilty;
3. A former judgment of conviction or acquittal of the offense charged, which may be pleaded either with or without the plea of not guilty;
4. Once in jeopardy, which may be pleaded with or without the plea of not guilty.

N. Dak. (1895) § 6753*; Cal. Pen. C., § 1429*.
District court practice, §§ 8898-8899.
Amendment as to name of accused, §§ 8833, 8873.

9425. (5130.) Pleas must be oral. Plea of guilty. Higher offense. Every plea must be oral and entered in the minutes. If the defendant pleads guilty, the court may, before entering such plea or pronouncing judgment, examine witnesses to ascertain the gravity of the offense committed; and if it appears to the court that a higher offense has been committed than the offense charged in the complaint, the court may order the defendant to be committed or admitted to bail, to answer any information that may be filed or any indictment that may be found against him.

Cal. Pen. C., § 1429*.

9426. (5131.) When trial to begin. Upon a plea other than a plea of guilty, unless a jury is demanded or an adjournment or change of venue is granted, the court may proceed to try the case. Am'd '13, p. 22.

Cal. Pen. C., § 1430*.
One hour in which to appear in justice's court, §§ 7445, 7474, 7476.

9427. (5132.) Change of place of trial. Grounds. Affidavit. A change of the place of trial may be had at any time before the trial commences:

1. When the defendant files an affidavit in writing, stating that he has reason to believe, and does believe, that he cannot have a fair and impartial trial of the action before the justice about to try the same, by reason of the bias or prejudice of such justice, the action must be transferred to a justice of the county agreed upon by the parties, or, if there is no agreement, to the nearest justice within the county to which such objection does not apply;
2. When it appears by affidavit that the defendant cannot have a fair and impartial trial, by reason of the prejudice of the citizens of the precinct

or city, the action must be transferred to a justice of a precinct in the same county where the same prejudice does not exist.

Cal. Pen. C., § 1431*.
Change of place of trial of preliminary examination, § 8740; in district court, § 8912.
The filing of an affidavit does not deprive the justice of jurisdiction, but his refusal of the change and proceeding with the trial is error, and the district court has jurisdiction on appeal.
State v. Morgan, 44 U. 224; 140 P. 218.
Filing the affidavit of prejudice with the city justice disqualifies him, but does not oust him of jurisdiction, and the defendant in a criminal action must proceed under § 633, not under this section.
State ex rel. Brooks v. First Dist. Court, 43 U. 499; 136 P. 786.

9428. (5133.) Id. But one change allowed. The place of trial shall not be changed more than once.

Cal. C. Civ. P., § 834*.

9429. (5134.) Procedure when change ordered. When a change of the place of trial is ordered, the justice must forthwith attach to the original papers a certified copy of his docket entries in the action, and deliver the same to an officer, who must execute the order without delay by taking the defendant, if in custody, before the justice named and delivering to such justice the papers so received. Upon receipt thereof, the justice to whom the action is transferred must proceed in the same manner as if the proceeding or action had been originally commenced in his court.

N. Dak. (1895) §§ 6750, 6751; Cal. Pen. C., § 1432*.

9430. (5135.) Postponement of trial for cause. Before the commencement of a trial in a justice's court, either party may, upon good cause shown, have a reasonable postponement thereof.

Cal. Pen. C., § 1433*.

9431. (5136.) Grounds of demurrer to complaint. The defendant may demur to the complaint when it appears upon the face thereof:

1. That it does not conform to the requirements of § 9420;
2. That the facts stated do not constitute a public offense.

9432. (5137.) Demurrer sustained. New complaint or discharge. If the demurrer be sustained, a new complaint must be filed within such time not exceeding one day as the justice may name; if such new complaint be not filed, the defendant must be discharged.

FORMATION OF THE JURY.

9433. (5138.) Trial in defendant's absence forbidden. Exception. The trial must not proceed in the absence of the defendant, unless he voluntarily absents himself with full knowledge that the trial is being had.

Cal. Pen. C., § 1434*.
Trial in absence of defendant, district court, § 8926.

9434. (5139.) Jury waived unless demanded. A trial by jury shall be deemed to be waived unless a jury is demanded by either party.

Cal. Pen. C., § 1435*.
When defendant not entitled to jury for offense against city ordinance, § 632.
Trial must be by jury unless the same is waived, §§ 8556, 8925.
Jury trial a right in criminal prosecutions, Con. art. 1, sec. 12.

9435. (5140.) Jurors: Summoning, qualifications, challenges. The qualifications of, and manner of summoning, jurors to serve in justices' courts are prescribed under the title of "Jurors." The provisions of chap. 32 of the Code of Criminal Procedure (§§ 8936-8964), relative to challenging jurors, shall govern, as far as the same shall be applicable.

Cal. Pen. C., § 1435*.
Jurors, §§ 3591-3623.
Challenging jurors, §§ 8936-8964.

THE TRIAL.

9436. (5141.) Oath administered to jury. The jury having been impaneled, the court must administer to them the following oath: "You do swear that you will well and truly try this issue between the state of Utah and A B, the defendant, and a true verdict render according to the evidence."

Cal. Pen. C., § 1437*.

9437. (5142.) Duty of jury. Public trial, etc. After the jury shall be sworn, they must sit together and hear the proofs and allegations of the parties, which must be delivered in public and in the presence of the defendant.

Cal. Pen. C., § 1438.
When sittings public, § 1800; when not, § 1801.

9438. (5143.) Court to decide questions of law. Cannot charge as to facts. The court must decide all questions of law which may arise in the course of the trial, but can give no charge with respect to matters of fact.

Cal. Pen. C., § 1439.
Court to decide questions of law, district court, §§ 9004, 9006.

9439. (5144.) Jury may decide in court or retire. Oath of officer. After hearing the proofs and allegations, the jury may decide in court, or may retire for consideration. If they do not immediately agree, an officer must be sworn to the following effect: "You do swear that you will keep this jury together in some quiet and convenient place, that you will not permit any person to speak to them, nor speak to them yourself, unless by order of the court, or to ask them whether they have agreed upon a verdict; and that you will return them into court when they shall have so agreed, or when ordered by the court."

Cal. Pen. C., § 1440. Conduct of jury, district court, §§ 9010-9017.

9440. (5145.) Verdict delivered in public. Entry of. When the jury shall have agreed on their verdict, they must deliver it publicly to the court, who must enter it, or cause it to be entered, upon the minutes.

Cal. Pen. C., § 1441*.
Verdict of jury must be unanimous, Con. art. 1, sec. 10.

9441. (5146.) Verdict as to one or more of defendants. Retrial of others. When several defendants shall be tried together, if the jury cannot agree upon a verdict as to all, they may render a verdict as to those in regard to whom they do agree, on which a judgment must be entered accordingly, and the case as to the rest may be tried by another jury.

Cal. Pen. C., § 1442. Verdict, district court, §§ 9020-9032.

9442. (5147.) Form of verdict. The verdict of the jury on a plea of not guilty must be to the effect that the jury find the defendant "guilty," or "not guilty," as the case may be. On any other plea, the verdict must be "for the state," or "for the defendant."

Cal. Pen. C., § 1151*.

9443. (5148.) Jury discharged after verdict. Exception. The jury cannot be discharged after the cause is submitted to them, until they have agreed upon and rendered their verdict, unless for good cause the court sooner discharges them.

Cal. Pen. C., § 1443.

9444. (5149.) Retrial when jury fail to agree. If the jury is discharged, as provided in the next preceding section, the court may proceed again to the trial, in the same manner as upon the first trial, and so on until a verdict is rendered.

Cal. Pen. C., § 1444.

9445. (5150.) Sickness of juror. Procedure. If a juror be incapacitated by sickness for attendance through the trial, another juror may be summoned and the trial commenced over again, or the jury discharged and a new jury impaneled.

Cal. Pen. C., § 1123*. Sickness of juror, district court, § 9003.

NEW TRIAL AND ARREST OF JUDGMENT.

9446. (5151.) Motion must be made before judgment. At any time before judgment, the defendant may move for a new trial or in arrest of judgment.

Cal. Pen. C., § 1450.

9447. (5152.) Grounds for new trial. A new trial may be granted in the following cases:

1. When the trial has been had in the absence of the defendant, unless he has voluntarily absented himself with full knowledge that a trial was being had;

2. When the jury shall have received any evidence out of court;

3. When the jury shall have separated without leave of court, after having retired to deliberate upon their verdict, or been guilty of any misconduct tending to prevent a fair and due consideration of the case;

4. When the verdict shall have been decided by lot, or by any means other than a fair expression of opinion on the part of all the jurors;

5. When there shall have been error in the decision of the court, given on any question of law during the course of the trial;

6. When the verdict is contrary to law or evidence;

7. When new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial; but when a motion for a new trial is made upon this ground, the defendant must produce at the hearing the affidavits of the witnesses by whom such newly discovered evidence is expected to be given.

Cal. Pen. C., § 1451. New trial, district court, §§ 9197-9201.

9448. (5153.) Grounds for motion in arrest of judgment. The motion in arrest of judgment may be founded on any substantial defect in the complaint, and the effect of an arrest of judgment shall be to place the defendant in the situation in which he was before the trial was had.

Cal. Pen. C., § 1452.
Arrest of judgment, district court, §§ 9035-9038.

JUDGMENT AND EXECUTION.

9449. (5154.) Time for pronouncing judgment. Postponement. After a plea or verdict of "guilty," or after a verdict against the defendant, the court must appoint a time for rendering judgment, which must not be more than two days nor less than six hours after the verdict is rendered, unless the defendant waives the postponement, or the judgment is arrested, or a new trial granted. If postponed, the court may hold the defendant to bail to appear for judgment. Unless such postponement is demanded, it shall be deemed to be waived.

Cal. Pen. C., § 1449*.

Judgment, district court, §§ 9041-9059.

Total term of imprisonment under sentence by justice of peace cannot be made to exceed six months.

Ex parte Lewis, 10 U. 47; 41 P. 1077.

In a prosecution in a municipal court for drunkenness, where sentence after a plea of guilty was rendered September 21, but not entered of record until September 27, the court did not lose jurisdiction of the case, and the sentence did not become illegal.

Kolb v. Peterson, 50 U. —; 168 P. 97.

9450. (5155.) Judgment on plea of guilty. Fine. Imprisonment at labor. When a defendant pleads guilty or is convicted, the court must render judgment that he be punished by a fine or imprisonment, or by both, with or without costs. A judgment for the payment of a fine, or of a fine and costs, may also direct that the defendant be imprisoned at hard labor until such fine, or such fine and costs, are paid, in the proportion of one day's imprisonment for every dollar of the fine and costs.

Cal. Pen. C., § 1445, 1446*.

Imprisonment at labor whether or not so designated, § 9173.

Fine and imprisonment, § 1794.

Fees of justices of the peace, §§ 2527, 2528.

The legislature of the territory could confer on justices of the peace no jurisdiction in criminal cases except that usually exercised by such justices at the date of the passage of the Organic Act, and authority to impose a fine in any sum less than $300, and an imprisonment for a term not exceeding six months, is in excess of the jurisdiction which the legislature could confer on justices of the peace under the Organic Act.

People, ex rel. Yearian v. Spiers, 4 U. 385; 10 P. 609; 11 P. 509.

Same case, 4 U. 482; 11 P. 618.

Overruled in People v. Douglass, 5 U. 283; 14 P. 801.

A justice of the peace exhausts his jurisdiction in sentencing the defendant to imprisonment for a period of six months, and has no valid authority to adjudge that he be further imprisoned in default of payment of the fine imposed.

In re Lewis, 10 U. 47; 41 P. 1077.

9451. (5156.) Acquittal. When complainant to pay costs. When the defendant is acquitted, he must be immediately discharged. If it appears to the court that the prosecution was malicious or without probable cause, it may render a judgment that the complainant pay the costs of the action, which judgment may be enforced in the same manner as a judgment in a civil action; and the complainant shall have the same right of appeal.

Cal. Pen. C., § 1447*.

9452. (5157.) Fine without imprisonment. Execution. A judgment which imposes a fine without directing that the defendant be imprisoned until the same is satisfied may be enforced in the same manner as a judgment in a civil action, and execution shall issue accordingly.

N. Dak (1895) § 6767*. Fines, how collected, § 9168.

9453. (5158.) Judgment of imprisonment, how executed. A judgment of imprisonment must be executed by delivering the defendant into the custody of the sheriff or other officer in charge of the county jail. A copy of the judgment, duly certified by the justice, is a sufficient warrant for the doing of every act necessary or proper in the due execution thereof. The officer shall, upon discharging the defendant, return such copy to the justice, with an account of his doings indorsed thereon, and must at the same time pay over to the justice all money which he may have received from the defendant in payment of the fine.

N. Dak. (1895) §§ 6768*, 6769*.
Judgment of imprisonment, district court, §§ 9169, 9170.

9454. (5159.) Fines, etc., to be paid into county treasury. When a fine is paid or bail is forfeited, the justice must pay the same to the county treasurer within thirty days thereafter.

Cal. Pen. C., § 1457*.

APPEAL.

9455. (5160.) Appeal must be taken within thirty days. Any defendant in a criminal action tried before a justice of the peace may appeal from the final judgment therein to the district court of the county where the court of such justice is held, at any time within thirty days from the time of the rendition of the judgment.

Cal. Pen. C., § 1466*.
Appeal from justice's court, finality, Con. art. 8, sec. 9; § 1668.

9456. (5161.) Appeal, how taken. Notice and undertaking. The appeal shall be taken by giving notice and by filing an undertaking by or on behalf of the appellant, in at least double the amount of the fine or of the fine and costs, as the case may be, with at least two good and sufficient sureties, and conditioned that the appellant will appear at the first term of the court thereafter to which the appeal is taken and answer the charge of which he shall have been convicted, or will appear in whatever court it may be prosecuted, and will at all times hold himself amenable to the orders and process of such court, and if convicted, will appear for judgment and surrender himself in execution thereof; or, if he fails to perform either of these conditions, that the sureties will pay to the state of Utah or to the municipal corporation, as the case may be, the sum specified in the undertaking.

Cal. Pen. C., § 1467*.
Undertaking on appeal, qualifications of bail, § 9260.
Appeals from justices' courts, civil procedure, §§ 7514-7521.
Decisions on appeals from justices' to supreme court, note to Con. art. 8, sec. 9.

9457. (5162.) Notice of appeal to be filed and served. Notice of appeal shall be filed with the justice, and a copy thereof shall be served on the county attorney.

N. Dak (1895) § 6782*.
Proof of service is not limited to proof by indorsement of acceptance of service, but may be by affidavit.
Chipman v. Fourth Dist. Court, 44 U. 201; 138 P. 1194.

9458. (5163.) Justice to transmit papers on appeal. Deposit. The justice must, within ten days after an appeal is perfected, transmit to the clerk of the district court all papers relating to the case and a certified copy of his docket. If money shall have been deposited in lieu of bond, it must accompany the return.

N. Dak. (1895) § 6786*.

9459. (5164.) Witness may be required to give bonds, or be conditionally examined. When an appeal is taken, the justice must, if application is made by the county attorney, cause all material witnesses on behalf of the prosecution to enter into an undertaking in like manner as in a case where a defendant is held to answer on a preliminary examination. And when it shall satisfactorily appear by examination on oath of the witness or any other person that the witness is unable to procure sureties, such witness may be forthwith conditionally examined on behalf of the state. Such examination must be by question and answer in the presence of the defendant or after notice to him, if on bail, and reduced to writing, and the witness must thereupon be

discharged. The testimony as given, subscribed by the witness and duly certified to by the justice, may be read in evidence by the state or municipality, or by the defendant, upon any subsequent trial of the same case in the district court on appeal, upon it being satisfactorily shown that such witness is either dead or out of the state. Am'd '99, p. 81.

N. Dak. (1895) § 6785*. Witness on preliminary may be required to give bonds, or testimony may be taken, §§ 8765-8766.

9460. (5165.) Trial anew in district court. Dismissal of appeal. An appeal duly perfected transfers the action to the district court for trial anew. The appeal may be dismissed on either of the following grounds:

1. For failure to take the same in time;
2. For failure to appear in the district court when required;
3. For failure to file a sufficient undertaking; *provided,* that no appeal shall be dismissed for any insufficiency or informality in the undertaking, if the defendant files a sufficient undertaking in pursuance of an order of court.

If the appeal is dismissed, a copy of the order of dismissal must be remitted to the justice, who may proceed to enforce the judgment.

Dismissal of appeal, civil procedure, § 7520. Where the justice refused to transfer the case, where an affidavit of prejudice is filed, his ruling is erroneous, but does not deprive the district court of jurisdiction on appeal. State v. Morgan, 44 U. 224; 140 P. 218.

9461. (5166.) Dismissal of complaint on appeal. Grounds. The complaint, on motion of defendant, may be dismissed upon the following grounds:

1. That the justice did not have jurisdiction of the offense;
2. That more than one offense is charged therein;
3. That the facts stated do not constitute a public offense.

N. Dak. (1895) § 6787*.

9462. (5167.) Id. Procedure. If the defendant objects to the complaint, and the objection be sustained upon any ground provided for in sub. 2 or 3 of § 9461, the court may permit the complaint to be amended so as to insure a fair trial upon the merits. If the defendant does not object to the complaint, or if the objection be overruled, or if the complaint be amended, the defendant must be required to plead as to an indictment or information, without regard to any plea entered before the justice. In other respects, the proceedings shall be he same as in criminal actions originally commenced in the district court, and judgment shall be rendered and carried into effect accordingly. Am'd '11, p. 69.

N. Dak. (1895) § 6787. A complaint on appeal to the district court from the city court may be amended in a matter of substance. S. L. City v. Larsen, 47 U. 1; 151 P. 353.

GENERAL PROVISIONS.

9463. (5168.) Subpœnas: Proceedings governing. A justice of the peace may issue subpœnas for witnesses or for interpreters, and punish disobedience thereof, as provided in chap. 47 (§§ 9284-9293) of this code. The names of all the witnesses desired by both parties may be included in the same subpœna.

Cal. Pen. C., § 1459*. Subpoenas, etc., §§ 9284-9293.

9464. (5169.) Bail: Provisions governing. The defendant, at any time after his arrest and before conviction, may be admitted to bail. The provisions of chap. 45 (§§ 9243-9270) of the Code of Criminal Procedure in district courts, relative to bail, shall be applicable to bail in justices' courts.

Bail, §§ 9243-9270.

9465. (5170.) Contempt: Provisions governing. The provisions of the Code of Civil Procedure in justices' courts, relative to contempts, shall be applicable to the criminal procedure in justices' courts.

Contempts, in justices' court, §§ 7525-7529.
Assault, etc., in presence of the court, § 8579.

9466. (5171.) Entitling affidavits: Provisions governing. The provisions of § 9364, in respect to entitling affidavits, are applicable to justices' courts.

9467. (5172.) Competency of witnesses: Provisions governing. The

provisions of chap. 46 (§§ 9275-9280) of this code, relative to the competency of witnesses, shall be applicable to the criminal procedure in justices' courts.

Witnesses and evidence, §§ 9275-9280.

9468. (5173.) When justice may depute a person to act as constable. A justice of the peace may depute in writing any suitable and discreet person to act as constable when no constable is at hand, and the nature of the business requires immediate action.

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